OOC BROWN BAG LUNCH SERIES
ADA REASONABLE ACCOMMODATION AND REASONABLE MODIFICATION
JULY 20, 2016

I. Introduction

The Congressional Accountability Act of 1995 ("CAA") applies the rights and protections established by sections 102 through 104 and 107(a) of the Americans with Disabilities Act of 1990 ("ADA") (42 U.S.C. §§ 12112 through 12114 and 12117(a)) related to disability discrimination. 2 U.S.C. § 1311. In general, the ADA, as applied by the CAA, provides employees who have mental or physical impairments the right to receive reasonable accommodations in the work place and allows them to bring claims against employing offices who discriminate against them on the basis of their accommodation requests. The ADA, as applied by the CAA, requires employing offices to make reasonable accommodations for employees with disabilities absent undue hardship for the employing office. The ADA, as applied by the CAA, requires both employing offices and employees to participate in an interactive process in which both parties are required to consult with each other in good faith to select and implement an appropriate accommodation for both the employing office and employee.

The CAA also applies sections 201 through 230, 302, 303, and 309 of the ADA related to public services and accommodations, by requiring that employing offices make their public services, programs, activities, and places of public accommodation accessible to all members of the public. In other words, the CAA requires that members of the public with disabilities have the same access as the non-disabled to public services, programs, activities, and places of public accommodation in the legislative branch and requires that employing offices provide a reasonable modification absent an undue hardship.

II. Disabilities that Require Accommodation

Unless it would be an undue burden, it is discriminatory to not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee or to deny 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. 42 U.S.C. § 12112.

1) Definition of Disability

The term "disability" means, with respect to an individual, a physical or mental impairment

that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102.

2) Physical or Mental Impairment

Physical or mental impairment means—1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or 2) any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h).

3) Major Life Activity

Major life activities include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and the operation of a major bodily function. 29 C.F.R. § 1630.2(i).

ADA Amendments Act of 2008

By passage of the ADA Amendments Act of 2008 ("ADAAA"), 122 Stat. 3553, Congress significantly expanded the definitions of "disability" and "major life activities." The effect of these changes was 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. The ADA as amended provides that the term "disability" is meant to be "construed in favor of broad coverage of individuals," 42 U.S.C. § 12102(4)(A), and the regulations state that "major life activity" should no longer be defined by reference to whether the activity is of "central importance to daily life," 29 CFR § 1630.2(i)(2), as previous court decisions had held. Therefore, case law predating the ADAAA may be less persuasive in determining what constitutes a disability or major life activity than case law interpreting the current statute and regulations.

a) *Martin v. District of Columbia*, 78 F. Supp. 3d 279 (D.D.C. 2015) – The term disability as described under the ADA is to be construed in favor of broad coverage of individuals. Thus, a jury could have found that carpal tunnel syndrome was a physical impairment because it substantially limited the plaintiff's major life activities including manual tasks, walking, standing, lifting, and communicating.

b) *Green v. Am. Univ.*, 647 F. Supp. 2d 21 (D.D.C. 2009) – An individual with "a condition similar to irritable bowel syndrome" sufficiently pleaded a disability because "the functioning of the bowels [is] a major life activity," and a jury could reasonably find that the plaintiff's condition substantially limited "the major life activity of waste elimination."
c) *Miller v. Hersman*, 759 F. Supp. 2d 1 (D.D.C. 2010) – Thinking and working are major life activities; therefore, the evidence that plaintiff's anxiety and depression interfered with his ability to concentrate created a genuine issue of fact about whether plaintiff was disabled within the meaning of the Rehabilitation Act, which adopts the definitions of the ADA.

4) Substantial Limitation

An impairment is a disability under the ADA if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. Indeed, an impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Additionally, the determination of whether an impairment substantially limits a major life activity requires an individualized assessment and the determination of whether an impairment substantially limits a major life activity is made without regard to ameliorative effects of mitigating circumstances, except in the case of eyeglasses or contact lenses. 29 C.F.R. § 1630.2(j).

a) *Kennedy v. Gray*, 83 F. Supp. 3d 385 (D.D.C. 2015) – The plaintiff was not substantially limited in the major life activity of working because his condition, which prevented him from shaving and therefore from wearing a respirator, precluded him only from his specialized job as a fire inspector, not from working in in fire prevention generally.
b) *Badwal v. Bd. of Trs. of Univ. of D.C.*, 139 F. Supp. 3d 295 (D.D.C. 2015) – To be considered "substantial," a limitation on a major life activity must be compared with the ability of most people in the general population, and in light of the ADAAA the analysis should be interpreted generously in favor of plaintiffs. An ailment preventing the normal use of an employee's arms, which affected four major life activities including lifting, sleeping, dressing, and eating, was considered severe compared to the general population.
c) *Hughes v. S. N.H. Servs., Inc.*, No. 11-cv-516-SM, 2012 WL 5904949 (D.N.H. Nov. 26, 2012) – Since the passage of the ADAAA, whether an impairment substantially limits a major life activity may not be determined by reference to whether the condition is controlled by medication or otherwise ameliorated by mitigating measures.

5) Essential Job Function

The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term does not include the marginal functions of the position. A job function may be considered essential because: (1) the reason the position exists is to perform that function; (2) there is a limited number of employees

available who can perform the job function; and (3) the function is highly specialized and the individual was hired for his or her expertise or ability to perform the particular function. Evidence of whether a particular job function is essential includes: (1) the employer's judgment; (2) written job descriptions; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; (5) the terms of a CBA; (6) the work experience of past incumbents in the job; and (7) the current work experience of incumbents in similar jobs. 29 C.F.R. § 1630.2(n).

a) *Minnihan v. Mediacom Commc'ns Corp.*, 779 F.3d 803 (8th Cir. 2015) – Where telecom employee was provided with a company vehicle and was required to spend at least half of his time in the field, the parties disputed whether driving was an essential job function. The factors considered by the court included: the employer's judgment as to which functions were essential, which is considered highly probative; the written job description; the amount of time spent on the job performing this function; the current work experience of incumbents in similar jobs; and the consequences of not requiring the disabled employee to perform the function, which in this case imposed extra work hours on the employee's coworkers, who were required to drive him to work sites. In light of these factors, the court determined that driving was in fact an essential job function. Therefore, when employee's seizures resulted in a driving restriction, the employer was not required to remove driving from his job description in order to accommodate him under the ADA.
b) *Richardson v. Friendly Ice Cream Corp.*, 594 F.3d 69 (1st Cir. 2010) – A job function is not rendered non-essential simply because an employer has voluntarily reduced or shifted the burden of that job function in the past as a temporary accommodation. In this case, that fact that some of the employee's physical duties had been temporarily assigned to her coworkers after an injury had "minimal value" in determining whether those physical duties were essential functions of her position.
c) *Winfrey v. City of Chicago*, 259 F.3d 610 (7th Cir. 2001) – If an employer bends over backwards to make an accommodation that it was not obligated to make, it should not be punished for its generosity by being deemed to have conceded the reasonableness of that accommodation. Additionally, showing that not all employees perform all of the essential job functions at a particular time does not make those functions non-essential, because an employer may specify multiple duties that an employee in a given position may rotate through or be called upon to perform at any time.

III. Special Conditions

1) Obesity

Courts are divided as to whether morbid obesity can be considered a disability under the ADA in the absence of proof of an underlying physiological condition.

a) *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016) – Plaintiff's morbid obesity could not be considered a physical impairment under the ADA because it was not the

result of any underlying physiological disorder or condition, even taking into account the expanded definition of "disability" under the ADA Amendments Act of 2008.

b) *Anderson v. Macy's, Inc.*, 943 F. Supp. 2d 531 (W.D. Pa. 2013) – Obesity can be considered a physical impairment under the ADA if caused by an underlying physiological condition.

c) *EEOC v. Res. for Human Dev., Inc.*, 827 F. Supp. 2d 688 (E.D. La. 2011) – Severe obesity qualifies as a disability under the ADA and there is no requirement to prove an underlying physiological basis.

d) *Lowe v. Am. Eurocopter, LLC,* No. 1:10CV24-A-D, 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010) – Plaintiff may be able to establish that her obesity rises to the level of a disability if she can prove that it substantially limits a major life activity such as walking.

2) Alcoholism

a) *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162 (1st Cir. 2002) – Alcoholism is considered an impairment under the ADA, but a plaintiff must also demonstrate that this impairment substantially limits one or more major life activities. Plaintiff in this case did not produce sufficient evidence that he was substantially limited in the major life activity of working, and thus failed to establish that his alcoholism was a disability under the ADA.

b) *Young v. Town of Bar Harbor*, No. 1:14-cv-00146-GZS, 2016 WL 3561944 (D. Me. June 27, 2016) – Alcoholism is considered an impairment under the ADA, but impairment alone is not adequate to show a substantial limitation of one or more life activities. Plaintiff in this case failed to produce evidence that any major life activity was substantially limited, so he did not establish all of the required elements of a disability.

c) *Klaper v. Cypress Hills Cemetery*, No. 10-CV-1811 (NGG)(LB), 2014 WL 1343449 (E.D.N.Y. Mar. 31, 2014) – The employer's duty to reasonably accommodate an employee's alcoholism requires only that the employee be given unpaid time off to attend a treatment program, and does not require the employer to excuse the employee's misconduct.

d) *Lacayo v. Donahoe*, No. 14-cv-04077-JSC, 2015 WL 3866070 (N.D. Cal. June 22, 2015) – Alcoholism is a disability requiring a reasonable accommodation only if it substantially limits a major life activity, and driving is not a major life activity, so the employer did not violate the ADA when it failed provide a non-driving job as an accommodation for an employee with alcoholism.

3) Pregnancy

a) EEOC, Disability Law Compliance Manual § 1:7 (June 2016) – An impairment must be the result of a physical or mental disorder. Therefore, the following are not impairments for purposes of ADA coverage: simple physical characteristics such as eye color or height or weight within a normal range; <u>physical conditions, such as pregnancy, that are not the result of a disorder</u>; predispositions to certain diseases; personality traits such as

poor judgment or quick temper; environmental, cultural or economic disadvantages, such as lack of education or a prison record; the inability to get along with supervisors; color blindness; inability to work overtime; or claustrophobia. (emphasis supplied)

b) *Young v. United Parcel Serv., Inc.*, 135 S.Ct. 1338 (2015) – This case was ultimately decided under the Pregnancy Discrimination Act rather than the ADA. However, in dicta, the Supreme Court pointed out that the expanded definition of "disability" resulting from the ADA Amendments Act of 2008 includes substantial limitations on activities such as lifting, standing, or bending – all of which could be implicated during pregnancy – and that under the EEOC regulations, employers are required to accommodate employees whose temporary lifting restrictions originate off the job. *See* 42 U.S.C. §§ 12101(1)-(2), 29 CFR pt. 1630, App., § 1630.2(j)(1)(ix).

4) Disability Association

a) *Koshko v. U.S. Capitol Police*, Nos. 11-CP-136 (CV, DA, FM, RP), 12-CP-02 (RP), 12-CP-19 (CV, DA, FM, RP), 12-CP-27 (DA, FM, RP), 2014 WL 2169027 (OOC Board May 14, 2014) – Employers have no duty to accommodate for the disability of an employee's family members or associates.

b) *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500 (3d Cir. 2009) – The ADA prohibits employers from taking adverse actions against an employee because of a relative's disability, but does not require the employer to accommodate the employee's schedule to care for a relative with a disability.

IV. Knowing when to Provide Accommodation

1) Pre-Employment Inquiries

A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions. However, an employer may not ask about the existence or severity of any disabilities. 29 C.F.R. § 1630.14.

a) EEOC guidance regarding pre-employment inquiries – https://www.eeoc.gov /laws/types/disability.cfm (overview) and https://www.eeoc.gov/facts/jobapplicant.html (specific types of questions that cannot be asked of prospective employees, and differences between what can be discussed pre-offer and post-offer).

b) *Griffin v. Steeltek, Inc.*, 160 F.3d 591 (10th Cir. 1998) – An employer can be liable for improper pre-employment questions even if the plaintiff is not disabled within the meaning of the ADA.

2) Employee Notice Requirements

Generally, courts have recognized that to trigger the interactive process, an employee must request an accommodation, which can be done by simply informing the employer of the need

for some accommodation and does not require a formal request. The request may be oral or in writing. The ADA does not require employers to speculate about the accommodation needs of employees and applicants; rather, the individual requesting the accommodation has an obligation to provide the employer with enough information about the disability to determine a reasonable accommodation. Additionally, although an employee need not use any magic words, or even use the term "accommodation" in the request, an employee must be clear in indicating the need for an accommodation because of a medical condition.

a) *Chenari v. George Washington Univ*., No. 14-0929 (ABJ), 2016 WL 1170922 (D.D.C. Mar. 23, 2016) (appeal filed) – Employee bears the burden to provide either constructive or actual notice of his disability and possible need for accommodation. Constructive notice means that the employee's behavior was so obviously a manifestation of an underlying disability that it would be reasonable to infer that the employer actually knew of the disability. The employee must also show that he requested an accommodation at the time it was needed, not after the fact.
b) *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999) – A relative, friend, health professional, or other representative can make a request for reasonable accommodation on behalf of the employee, and the request does not have to be in writing or "invoke the magic words 'reasonable accommodation,' as long as it puts the employer on notice of the nature of the disability and the employee's desire for an accommodation.
c) *Miller v. Ill. Dep't of Corrs.*, 107 F.3d 483 (7th Cir. 1997) – There is no specific phrase or word that an employee has to say to request a reasonable accommodation. Something as simple as, "I want to keep working for you – do you have any suggestions?" from a recently disabled employee creates a duty for the employer.
d) *Edwards v. Gray*, 7 F. Supp. 3d 111 (D.D.C. 2013) – An employer need only provide an accommodation that is "responsive to and tailored to a specific disability." The plaintiff failed to allege how his type-2 diabetes was connected to his request to visit a private psychologist for a Department-ordered examination, and therefore he failed to state a claim for denial of a reasonable accommodation.
e) *Aldini v. Kroger Co. of Mich.*, 628 F. App'x 347 (6th Cir. 2015) – The employee failed to meet his burden to show that he requested a reasonable accommodation from his employer. Even though the plaintiff initially requested an accommodation along with a doctor's note, he retracted the request less than 24 hours later and presented his employer with a new doctor's note clearing him to work without restriction, and never again requested an accommodation. Employers are not required to speculate about an employee's need or desire for an accommodation.
f) *Leeds v. Potter*, 249 F. App'x 442 (6th Cir. 2007) – Plaintiff did not establish a prima facie case because he failed to show that his supervisors had knowledge of his disability. Although an employee need not use the magic words "accommodation" or "disability" in order to request a reasonable accommodation, in this case the employee's vague statement that the job was "kicking [his] ass" and evidence that a supervisor knew he had

a handicap placard in his car were insufficient to put the employer on notice that the employee desired a reasonable accommodation.

g) *Katsouros v. Office of the Architect of the Capitol*, Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2013 WL 5840233 (OOC Board Sept. 19, 2013) – Employee's representative asked for a postponement of disciplinary proceedings and testified about employee's limited cognitive ability, and employee's health care provider submitted FMLA certification forms. The Board affirmed the Hearing Officer's decision that this constituted a request for a reasonable accommodation, and that the AOC violated the ADA by moving forward with the disciplinary proceeding without engaging in an interactive process. However, on a separate claim, the Board reversed the Hearing Officer's decision that the request for postponement of the disciplinary proceedings in late 2007 also constituted a request for reasonable accommodation with respect to subsequent termination proceedings in May 2008. By then the employee had been cleared to return to work and actually did return to work before being suspended, and he never submitted any updated information regarding a medical disability that would not allow him participate in the termination proceedings, so he could not show that he requested a reasonable accommodation or that the employing office knew or should have known that he needed one, and thus the employing office was not obligated to engage in an interactive process. The Board's decision on the first claim was not appealed, and the Federal Circuit affirmed the Board's decision on the second claim, *see Katsouros v. Office of the Architect of the Capitol*, 594 F. App'x 683 (Fed. Cir. 2015).

3) Notice in Cases of Mental Illness

a) *Yarberry v. Gregg Appliances, Inc.*, 625 F. App'x 729 (6th Cir. 2015) – The onset of mental illness requires a different analysis regarding the sufficiency of notice, "as the illness itself may prevent the individual from directly communicating his disability to his employer." In this case, where a drug test was negative and the employer knew the plaintiff had been admitted to a psychiatric hospital, the employer had sufficient notice of plaintiff's mental illness.

b) *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999) – Employer was deemed to be on notice that employee had a mental illness and needed an accommodation, thus triggering the requirement to engage in an interactive process, where it knew that the employee had been admitted to a psychiatric hospital, that she was being treated with medication, and that her son had indicated his mother would need accommodations when she returned to work.

c) *Stewart v. St. Elizabeths Hosp.*, 589 F.3d 1305 (D.C. Cir. 2010) – Plaintiff's claim that her employer refused to reasonably accommodate her failed, because she did not notify her employer of her disability, nor did her employer have constructive notice of her mental illness, where she told the employer that her stress and crying stemmed from personal matters.

d) *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155 (5th Cir. 1996) – Employee did not provide sufficient notice where he merely told his employer that he had been diagnosed with bipolar disorder, without informing employer of any substantial limitation arising from the illness or a need for any specific accommodation, and in fact told the employer that he was "all right."
e) *Crandall v. Paralyzed Veterans of Am.*, 146 F.3d 894 (D.C. Cir. 1998) – The employer had no adequate prior knowledge of the plaintiff's disability status as a result of his bipolar disorder simply because the employee's behavior was extremely rude, because a layman cannot infer a psychiatric disorder merely from rudeness.

V. The Interactive Process – Determining an Appropriate Accommodation

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job (and the needed accommodation is not obvious), the employer, using a problem-solving approach, should:

1. analyze the particular job involved and determine its purpose and essential functions;
2. consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
3. in consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position;
4. consider the preference of the individual to be accommodated; and
5. select and implement the accommodation that is most appropriate for both the employee and the employer.

The above is known as the "interactive process" and requires an element of good faith on both sides. EEOC, Disability Law Compliance Manual § 2:20 (June 2016).

Because the interactive process imposes mutual obligations on employing offices and employees, an employing office cannot be held liable for a failure to accommodate if a breakdown in that process is attributable to the employee. Similarly, if the breakdown in the process is attributable to the employing office, and there exists a reasonable accommodation that was not granted, this would likely be an adverse employment action in the context of discrimination under the ADA.

a) *Porfiri v. Eraso*, 121 F. Supp. 3d 188 (D.D.C. 2015) – If the need for an accommodation is not obvious, the employer can require the employee to produce documentation of the disability and the need for accommodation as part of the interactive process.
b) *Ali v. McCarthy*, No. 14-cv-1674, 2016 WL 1446120 (D.D.C. Apr. 12, 2016) (appeal filed) – To establish that a request has been denied, a plaintiff must show that the employer either ended the interactive process or participated in the process in bad faith. The plaintiff in this case caused the interactive process to break down because he failed

to complete the employer's requested forms and medical documentation during the interactive process.

c) *Ward v. McDonald*, 762 F.3d 24 (D.C. Cir. 2014) – Although an employee need not provide medical documentation in every case – for instance, an employee confined to a wheelchair would not need a doctor's note to show that she could not access a workstation that could only be reached by taking the stairs – an employer may require an employee to provide documentation where the disability and need for accommodation are not obvious. In this case, the employee caused the interactive process to break down by abruptly resigning instead of responding to her employer's reasonable request for additional documentation, and thus she could not show that the employer denied her a reasonable accommodation.

d) *Porter v. Jackson*, 668 F. Supp. 2d 222 (D.D.C. 2009) – An employer need not provide the employee with her requested or preferred accommodation, as long as it provides her with a reasonable accommodation that allows her to perform the essential functions of her job.

e) *Feliberty v. Kemper Corp*., 98 F.3d 274 (7th Cir. 1996) – An employer's proffered accommodation is not necessarily reasonable simply because it fulfills the employee's request. The employer always has at least some responsibility for identifying a reasonable accommodation and must still engage in an interactive, cooperative process in which both parties make reasonable efforts and exercise good faith.

f) *Lenkiewicz v. Castro*, No. 13-0261, 2015 WL 7721203 (D.D.C. Nov. 30, 2015) – The employer failed to engage in good faith in the interactive process where it repeatedly ignored the employee's inquiries and doctor's note, flatly denied her request for a parking space without asking why she needed it or for how long, and otherwise failed to work with the employee to determine whether she needed an accommodation and, if so, what measures would reasonably and appropriately fit her needs.

VI. Types of Reasonable Accommodation – The term "reasonable accommodation" means modifications or adjustments: (1) to a job application process; (2) to the work environment; or (3) that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities. Reasonable accommodations may include, but are not limited to: (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; (2) job restructuring; (3) part-time or modified work schedules; (4) reassignment to a vacant position; (5) acquisition or modifications of equipment or devices; (6) appropriate adjustment or modifications of examinations, training materials, or policies; (7) the provision of qualified readers or interpreters; and (8) other similar accommodations for individuals with disabilities. 29 C.F.R. § 1630.2(o).

1) Making the Workplace Accessible

a) *Mobley v. Allstate Ins. Co.*, 531 F.3d 539 (7th Cir. 2008) – Although the employer did not provide all of the employee's requested accommodations, it met its obligation to "reasonably accommodate" her workplace limitations related to problems concentrating and staying awake at work due to essential tremor and nocturnal myoclonus by allowing her to use a private "huddle room" on a regular basis, permitting her to shift her schedule back, reassigning files and to another worker, and assigning her limited work.

b) *Bonnette v. Shinseki*, 907 F. Supp. 2d 54 (D.D.C. 2012) – The Department of Veterans Affairs reasonably accommodated a completely blind employee by providing her with a full-time reader, even if it was not the individual of her choice; by allowing her to be accompanied to work by her service dog, buying a special air filter to ensure the fur would not harm those allergic to it, and addressing mistreatment from her co-workers about the dog, despite asking her to use a unisex restroom rather than the ladies' room because some female coworkers were allergic to the dog and requiring her on a single occasion to take the dog farther away from the building to relieve itself.

c) *Edwards v. EPA*, 456 F. Supp. 2d 72 (D.D.C. 2006) – Plaintiff failed to show that his request to bring his untrained 10-week-old puppy to work was a reasonable accommodation for his stress-related disability, because he did not provide evidence that the puppy had specific training or that the dog would effectively reduce his stress. Simply saying that the puppy would comfort him was not enough to make the requested accommodation reasonable under the circumstances.

d) *Noll v. Int'l Bus. Machs. Corp.*, 787 F.3d 89 (2d Cir. 2015) – Providing deaf employee with transcripts upon request or access to American Sign Language interpreters after video or audio files had been posted to employer's corporate Intranet was found to reasonably accommodate his disability, because they allowed him to perform the essential functions of his job and were therefore effective accommodations, even if they were not necessarily the *most* effective possible accommodations. Although employee preference should be taken into account, the employer has the ultimate discretion to choose from among different effective accommodations. The court also found that there can be no liability for failing to engage in the interactive process if the employer actually provided a reasonable accommodation.

e) *Zivkovic v. S. Cal. Edison Co.*, 105 F. App'x 892 (9th Cir. 2004) – Employer fulfilled its duty under ADA to engage in the interactive process and to provide reasonable accommodations for hearing-impaired job applicant, in light of evidence that applicant said he read lips well and understood the interview questions being asked. The employer offered to provide a sign language interpreter and written interview questions for the applicant, but the applicant refused.

2) Job Restructuring

a) *Floyd v. Jackson Lee*, 85 F.Supp.3d 482 (D.D.C. 2015) – It is not a reasonable accommodation for an employer to hire an additional person to perform essential job functions of the disabled employee's position, or to reassign essential job functions to the disabled employee's coworkers.

b) *Theilig v. United Tech Corp.*, 415 F. App'x 331 (2d Cir. 2011) – There is a presumption that a request to change supervisors is unreasonable, and the burden of overcoming that presumption lies with the plaintiff. In this case, the employee's request to work from home without supervision and to have no contact with any coworker or supervisor was unreasonable.

c) *Minnihan v. Mediacom Commc'ns Corp.*, 779 F.3d 803 (8th Cir. 2015) – An employer does not concede that a job function is non-essential by relieving an injured employee of that function as a temporary accommodation. The ADA does not require employers to reallocate essential job functions or to force the disabled employee's coworkers to work harder, work longer, or be deprived of opportunities.

d) *Agee v. Mercedes-Benz U.S. Int'l, Inc.*, No. 15-11747, 2016 WL 1248507 (11th Cir. Mar. 30, 2016) – An employer is not required to eliminate an essential function of a job to accommodate an employee.

e) *Jones v. Univ. of D.C.*, 505 F. Supp. 2d 78 (D.D.C. 2007) – A series of injuries left a police officer unable to perform the essential functions of her position even if placed on light duty. The employer was not required to restructure her existing job to remove some of its essential functions just to accommodate the plaintiff, or to create a permanent light-duty position where none had existed before. The employer was also not required to transfer the plaintiff to a different position for which she was not qualified.

f) *Eastham v. U.S. Capitol Police Bd.*, No. 05-CP-55 (DA, RP), 2007 WL 5914213 (OOC Board May 30, 2007) – Despite denying two of the plaintiff's requested accommodations, including the use of a golf cart and participating in hydraulic lift training – the USCP reasonably accommodated the plaintiff by having other employees and supervisors do work that required climbing, kneeling, and other medically restricted activities for the plaintiff.

g) *Gaul v. Lucent Techs., Inc*., 134 F.3d 576 (3rd Cir. 1998) – An employee's request to be transferred away from individuals who caused him stress was not reasonable, because it "would impose a wholly impractical obligation" on the employer. An employee's stress level is subject to constant change and also to abuse, and is thus too amorphous a standard to impose on an employer. It would also require a great deal of oversight and thus constitute an unreasonable administrative burden.

3) Reassignment

a) *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) – Employers may be required to reassign employees as a reasonable accommodation under the ADA, but the courts

recognize several limits on that obligation. The ADA does not require employers to do any of the following: reassign a disabled employee to a position for which he is not otherwise qualified; reassign an employee if the reassignment would be an undue hardship on the operation of the employer's business; reassign a disabled employee if no vacant position exists, or if reassignment would require the employer to "bump" another employee or to create a new position; or reassign a disabled employee in circumstances when such a transfer would violate a legitimate, nondiscriminatory policy of the employer.

b) *McFadden v. Ballard Spahr Andrews & Ingersoll, LLP*, 611 F.3d 1 (D.C. Cir. 2010) – Reassignment from legal secretary to receptionist was not a reasonable accommodation for the plaintiff because, although the position was not filled at the time of the request, the position was not vacant because the long-time receptionist was on FMLA leave and was expected to return.

c) *Terrell v. USAir*, 132 F.3d 621 (11th Cir. 1998) – Employer had no duty under the ADA to create a part-time position for an employee where the employer had previously eliminated all part-time positions.

d) *Turner v. Eastconn Reg'l Educ. Serv. Ctr.*, 588 F. App'x 41 (2d Cir. 2014) – Plaintiff requested reassignment as an accommodation but failed to carry her burden to show that a vacant position existed.

4) Leave or Flexible Schedules

a) *Solomon v. Vilsack*, 763 F.3d 1 (D.C. Cir. 2014) – Flexible work schedules may be reasonable accommodations, depending on whether or not a case-specific factual inquiry establishes that a rigid schedule is essential to a given position. In this case, the court rejected the employer's argument that flexible schedules are unreasonable as a matter of law, and held that an employee who was suffering from depression raised a genuine issue of material fact as to whether a schedule with flexible hours would constitute a reasonable accommodation for her position.

b) *Breen v. Dep't of Transp*., 282 F.3d 839 (D.C. Cir. 2002) – Employee with obsessive-compulsive disorder raised a genuine issue of material fact as to whether a modified work schedule, which would provide her with uninterrupted filing time each day and a bi-weekly day off, would have allowed her to perform the essential functions of her job and therefore would have constituted a reasonable accommodation.

c) *Minter v. District of Columbia*, 62 F. Supp. 3d 149 (D.D.C. 2014) – Plaintiff failed to show how the flexible work schedule she requested would have addressed her symptoms or enabled her to perform her job duties, especially since her medical documentation indicated that she would be totally unable to work for an indefinite period of time, so the flexible work schedule was not a reasonable accommodation.

d) *Doak v. Johnson*, 798 F.3d 1096 (D.C. Cir. 2015) – The Rehabilitation Act expressly recognizes "job restructuring" and "part-time or modified work schedules" as reasonable accommodations, 42 U.S.C. § 12111(9)(B). However, the plaintiff in this case could not

show that her request for an 11:00 a.m. start time, optional weekend hours, and the ability to telecommute would have allowed her to perform an essential function of her job: being present in the office to participate in interactive on-site meetings during normal business hours and on a regular basis. Therefore she failed to show that the employer denied her a reasonable accommodation.

e) *Gardner v. Sch. Dist. of Philadelphia*, 636 F. App'x 79 (3d Cir. 2015) – Leave may be a reasonable accommodation if plaintiff can show that the leave would be temporary and would allow him to resume performing his essential job functions in the near future. However, indefinite leave is not a reasonable accommodation, and in this case the abundant leave provided by the employer did not allow the employee to return to work, so continuing to accommodate the employee with leave would have been unreasonable.

f) *Scarborough v. Natsios*, 190 F. Supp. 2d 5 (D.D.C. 2002) – Employee's request for leave on any given day when he felt too sick to work was unreasonable for two reasons. First, requests for indefinite leave are unreasonable as a matter of law. Second, the requested accommodation would have required the employer to grant the employee leave in an erratic and unpredictable manner, which the court deemed unreasonable, expressing favor for "specific and well-defined accommodations."

g) *Wood v. Green*, 323 F.3d 1309 (11th Cir. 2003) – Request for indefinite leave was not reasonable. Moreover, the fact that the employer had previously granted the employee a certain accommodation did not automatically make a subsequent request for the same accommodation reasonable.

h) *Jarrell v. Hosp. for Special Care*, 626 F. App'x 308 (2d Cir. 2015) – Employee's request for leave for "at least another 14 weeks" was open-ended and therefore unreasonable.

i) *Kauffman v. Petersen Health Care VII, LLC*, 769 F.3d 958 (7th Cir. 2014) – Employers are not permitted to require that employees be "100% healed" before returning from leave, as this would read the entire concept of a "reasonable accommodation" out of the ADA.

EEOC Guidance on Leave and the ADA

On May 9, 2016, the EEOC issued guidance regarding the use of employer-provided leave as a reasonable accommodation under the ADA and section 501 of the Rehabilitation Act. The guidance is available on the EEOC's web site at https://www.eeoc.gov/eeoc/publications/ada-leave.cfm.

5) Changing Policies

a) *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) – In the run of cases, and absent special circumstances, a request that a disabled individual be given a position as an accommodation in violation of the employer's seniority system is unreasonable as a

matter of law. The Court noted, however, that requests for accommodation that would require employers to deviate from other types of disability-neutral policies are not automatically unreasonable.

b) *Medrano v. City of San Antonio, Tex.*, 179 F. App'x 897 (5th Cir. 2006) – An employer cannot be required to take action to accommodate a disabled employee if that action would be inconsistent with the contractual rights of other workers under a collective bargaining agreement.

c) *EEOC v. Convergys Customer Mgmt. Grp., Inc.*, 491 F.3d 790 (8th Cir. 2004) – It was not unreasonable for the employer to relax its tardiness policy to account for the extra time it took for an employee in a wheelchair to return from his lunch break.

d) *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667 (7th Cir. 1998) – Employers are not required to reassign disabled employees to positions when such transfers would violate the employers' legitimate, nondiscriminatory policies. Otherwise, the ADA would be converted from a nondiscrimination statute into a mandatory preference statute, which would be inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees.

VII. Affirmative Defenses – Undue Hardship and Direct Threat

1) Undue Hardship

It is unlawful for an employing office not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the employing office can demonstrate that the accommodation would impose an undue hardship. An undue hardship means significant difficulty or expense incurred by an employing office, when considered in light of these factors:

1. The nature and net cost of the accommodation needed;
2. The overall financial resources of the covered entity and the facilities involved, the number of employees, and the number, type and location of facilities;
3. The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
4. The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business

29 C.F.R. § 1630.2.

a) *Barth v. Gelb*, 2 F.3d 1180 (D.C. Cir. 1993) – Undue hardship is an affirmative defense, and once an employee has established a prima facie case that he has been denied a reasonable accommodation, the burden shifts to the employer to show that the

accommodation – though reasonable – would constitute an undue burden on the employer's operations.

b) *Taylor v. Rice*, 451 F.3d 898 (D.C. Cir. 2006) – In order to determine whether an employee is exempt from providing a reasonable accommodation because it imposes undue hardship, the court looks at various case-specific factors including the nature and cost of the accommodation and the composition, structure, and function of the work force. In this case, a genuine issue of material fact existed as to whether the HIV-positive employee's request for accommodation for medical treatment would pose an undue hardship to the employer, in light of the fact that the employer had previously granted similar accommodations to employees with asthma.

c) *Morris v. Jackson*, 994 F. Supp. 2d 38 (D.D.C. 2013) – The employee requested permanent full-time telework as an accommodation for her "yeast sensitivity," which caused serious allergic reactions. The court held that an accommodation requiring the agency to send contractors and staff to the employee's house, where they would then be required to change their clothing and wash, would place an undue burden on the agency.

d) *Graffius v. Shinseki*, 672 F. Supp. 2d 119 (D.D.C. 2009) – The employer failed to show that it would suffer undue hardship from allowing the employee to telecommute, or from moving her to an office on a floor with a handicapped-accessible restroom.

e) *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999) – Determining whether a proposed accommodation of unpaid medical leave constitutes an undue hardship is a fact-specific, individualized inquiry. In this case, the employer's benefits policy that allowed up to one year of unpaid leave, combined with its regular practice as a large retailer of hiring temporary help during the holiday season, created a genuine issue of material fact as to whether the employee's seven-month absence was actually an undue hardship, and Wal-Mart therefore was not entitled to summary judgment.

> Documentation of Undue Hardship
>
> Employing offices should keep in mind that they bear the burden of proving that an accommodation would result in undue hardship. With respect to leave as an accommodation, it is incumbent on employing offices to document the effect of an employee's absence on the employing office's operations and the employee's coworkers, as well as other relevant factors. Indeed, in situations where an employee is on FMLA leave or is using paid sick leave but could foreseeably request additional leave as an ADA accommodation, employing offices may want to consider documenting these factors even before the request is made, to determine the effect that a possible extension of leave might have.

2) Direct Threat

Employees who pose a "direct threat" are those whose disabilities create "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." The regulations require an individualized assessment based on reasonable medical judgment. Factors to consider include the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. 29 C.F.R. § 1630.2(r).

a) *Clayborne v. Potter*, 448 F. Supp. 2d 185 (D.D.C. 2006) – An employee is not a "qualified individual" under the ADA or the Rehabilitation Act, and thus not subject to the protection of the statute, if she presents a "direct threat" – i.e., a significant risk of substantial harm to the safety or health of herself or others that cannot be eliminated or reduced by reasonable accommodation. In this case the employee's deteriorating eyesight led to several workplace accidents, and she thus was not considered qualified under the Rehabilitation Act.
b) *Darnell v. Thermafiber, Inc.*, 417 F.3d 657 (7th Cir. 2005) – The employee was not a qualified individual under the ADA because his unregulated diabetes made him a direct threat in the workplace. The plaintiff could suffer from unconsciousness, confusion and impaired judgment, which posed a substantial danger because the position would require him to climb high ladders and operate dangerous machinery at the manufacturing plant.
c) *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999) – "Direct threat" is an affirmative defense and the employer bears the burden of proving that an employee posed a direct threat to herself or others. The employer's direct threat analysis requires an individualized inquiry relying on the best current medical or other objective evidence, to protect disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear.

VIII. Reasonable Modification

With regard to reasonable modifications, Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. In general, an employing office must "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). The ADA further defines a "qualified individual" as an individual with a disability who, with or without reasonable modification meets the essential requirements for participation in the program or service. In this context reasonable modification means: "(1) modifications to rules, policies, or practices; (2) the removal of architectural, communication, or transportation barriers; or (3) the provision of auxiliary aids and services." 42 U.S.C. § 12131. The determination of compliance under this provision depends on whether, "taken as a whole, the [program] is readily accessible to persons with disabilities." *Equal Rights Ctr. v. District of Columbia*, 741 F. Supp. 2d 273, 284 (D.D.C. 2010).

1) Modification of Rules, Policies, or Practices

Employing offices are required to modify their rules, policies, or practices so as to allow equal access to persons with disabilities to participate in or receive the benefits of the services, programs, or activities of the entity unless such a modification would create an undue burden or fundamentally alter the nature of the program. 28 C.F.R. §35. 164.

a) *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996) – Without reasonable modification, a 120-day quarantine requirement under which all carnivorous animals including guide dogs were quarantined upon entry into Hawaii, discriminated against visually impaired individuals by denying them meaningful access to a variety of state services, including public transportation, public parks, government buildings and facilities, and tourist attractions, in violation of the ADA. The court held that there was a genuine issue of fact as to whether plaintiffs' proposed modification to the quarantine requirement, which consisted of a program to vaccinate and monitor guide dogs for rabies, constituted a reasonable accommodation, despite the state legislature already having considered and rejected such a proposal.

b) *Rose v. Springfield-Greene Cnty. Health Dep't*, 668 F. Supp. 2d 1206 (W.D. Mo. 2009) – Even accepting as true plaintiff's claim that she was disabled with agoraphobia and anxiety, the Bonnet Macaque monkey that accompanied her was not a service animal under the ADA. Most of the "tasks" performed by the monkey were related to providing comfort rather than services, and courts have held that an animal that simply provides comfort or reassurance is equivalent to a household pet, and does not qualify as a service animal under the ADA. Even with respect to those tasks that arguably assisted plaintiff with daily life, she failed to show how they related to her alleged disability. Therefore, the ADA was not violated when plaintiff was denied admission to any establishment with her monkey.

c) *Anderson v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015) – Courts have typically found that to qualify for a reasonable modification, an animal must be specially trained to perform tasks directly related to a disability, in contrast with animals that have received only general training, provide only emotional support, or otherwise perform tasks not directly related to a disability. However, it is not required that the animal be needed in all aspects of daily life or used outside the home in order to qualify for a reasonable accommodation. In this case, the plaintiff kept a miniature horse at her home to help her disabled daughter with mobility issues, and the court found that a genuine issue of material fact existed as to whether a modification to the city's ordinance prohibiting the keeping of horses on residential property would be reasonable under the circumstances.

d) *Long v. Howard Univ.*, 439 F. Supp. 2d 68 (D.D.C. 2006) – The determination of whether a modification is reasonable requires a "fact-specific, case-by-case inquiry." What is reasonable in one situation might not be reasonable in another, and a plaintiff must establish a causal link between his disability and the requested modification. In this case, the plaintiff requested a modification of the university's policies regarding time limits to complete his Ph.D. as an accommodation for his pulmonary fibrosis, which

limited his ability to walk and breathe. The court held that there was a genuine issue of fact as to whether the plaintiff's request to alter the university's policies was reasonable, in light of the "arguably tenuous relationship between Long's disability and his asserted need for additional time to complete his Ph.D."

2) Removal of Architectural, Communication, or Transportation Barriers

Employing offices may not prevent an individual with a disability from participating in a public program or service because the facility being used is inaccessible or unusable to the person with the disability. 28 C.F.R. § 35.149. In addition to providing barrier-free access, employing offices are required to ensure that their communications with persons covered under the ADA are as effective as their communications with other members of the community. 28 C.F.R. §35.160. This requirement is referred to as "effective communication" and means that whatever is written or spoken must be as clear and understandable to people with disabilities as it is to people who do not have disabilities. 28 C.F.R. §§ 35.104, 35.160.

a) *Kirola v. City and Cnty. of San Francisco*, 74 F. Supp. 3d 1187 (N.D. Cal. 2014) – Mobility-impaired pedestrian did not demonstrate that the city failed to meet its obligation under the ADA to maintain accessible facilities and equipment in operable working condition. The city's libraries and park facilities were subject to rigorous inspection and maintenance policies, including daily facility inspections and written policies that prioritized maintenance requests related to disabled access to parks and facilities. Although barriers existed at some locations, when viewed in its entirety the City's public right-of-way system afforded program access to mobility-impaired individuals.

b) *Disabled in Action v. Bd. of Elections*, 752 F.3d 189 (2d Cir. 2014) – City board of elections denied people with mobility or vision disabilities meaningful access to its voting program by designating inaccessible poll sites and failing to assure their accessibility through temporary equipment, procedures, or policies on election days. These barriers included dangerous ramps at entrances deemed "accessible," inadequate signage directing voters with disabilities to accessible entrances or voting areas, blocked entryways or pathways, and inaccessible interior spaces inside voting areas. The board argued that there were no alternative facilities that would offer accessible polling sites, but the court rejected this argument because "the inaccessibility of existing facilities is not an excuse, but rather, a circumstance that requires a public entity to take reasonable active steps to ensure compliance with its obligations under Section 504 [of the Rehabilitation Act] and Title II [of the ADA]." The board failed to show that the plaintiffs' proposed modifications – including providing accessibility equipment and ramps, assigning individuals to assist those with disabilities, and relocating services to accessible locations – would impose an undue burden or fundamentally alter the nature of its voting program.

c) *Pierce v. Cnty. of Orange*, 526 F.3d 1190 (9th Cir. 2008) – In ADA cases, the plaintiff bears the burden of proving a prima facie case, including the existence of a reasonable

accommodation, and the burden then shifts to the public entity to show that the requested accommodation would require a fundamental alteration or produce an undue burden. In this case, mobility-impaired and dexterity-impaired inmates showed that they were denied access to several of the services, programs, and activities in the county's jails due to structural barriers and unreasonable policies and practices. The inmates produced evidence of several structural and non-structural modifications that could reasonably be made to the facilities, and the county failed to posit legitimate reasons why those modifications would be unreasonable. The court held that "The vague assertion by the county's counsel that some accommodations might be costly cannot be construed as a legitimate basis for failing to comply with the ADA (whether through structural modifications or other reasonable methods)." The categorical exclusion of disabled detainees from certain vocational and recreational activities, due to their availability only in non-accessible facilities, was also deemed a violation of the ADA, requiring the county to modify those programs to make them available to detainees at the accessible jails.

3) Auxiliary Aids and Services

Employing offices are required to provide auxiliary aids and services that are necessary to guarantee that persons with disabilities have equal opportunities to use public services, programs, and activities. The term "auxiliary aids and services" includes: (1) all "effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing"; (2) all "effective methods of making visually delivered materials available to individuals who are blind or have low vision"; (3) "acquisition or modification of equipment or devices"; and (4) "other similar services and actions." 29 C.F.R. § 35.104. "In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities." 28 C.F.R. § 35.160(b)(2). However, effective communication does not entail always using the most advanced technology, nor does it require a covered entity to provide the specific auxiliary aid requested by the disabled person, as long as effective communication is provided. 28 C.F.R. Pt. 35 App. B, § 35.160. Although the requirement to provide auxiliary aids and services is flexible, the chosen aid must effectively enable the individual to experience "full and equal enjoyment" of the services. *Id*.

a) *Martin v. Halifax Healthcare Sys., Inc.*, 621 F. App'x 594 (11th Cir. 2015) – Deaf patient alleged that the hospital failed to provide him auxiliary aids to ensure effective communication when he was admitted on an emergency basis following a heart attack. The court held that although the hospital did not wait for an ASL interpreter to arrive before performing an emergency catheterization procedure, this was not a violation because any delay of the procedure would have jeopardized the patient's life. After the surgery, the hospital did not provide a round-the-clock ASL interpreter, but a hospital is not required to provide every auxiliary aid a patient demands, and the hospital was able to communicate effectively with the patient through other means such as providing detailed

written notes, employing graphic displays, and providing the patient with an ASL interpreter for a portion of his stay.

b) *Pierce v. District of Columbia*, 128 F. Supp. 3d 250 (D.D.C. 2015) – The District violated Title II of the ADA and section 504 of the Rehabilitation Act by knowingly failing to evaluate the prisoner's need for accommodation and failing to provide auxiliary aids that the inmate required, such as an American Sign Language interpreter, in order for the inmate to fully access prison services.

4) Affirmative Defenses – Undue Burden and Fundamental Alteration

In general, a public accommodation is not required to provide any auxiliary aid or service that would fundamentally alter the nature of the accommodation offered or that would result in an undue burden. 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. §§ 35.130(b)(7), 35.164. This determination is made on a case-by-case basis and the public entity has the burden of proving that compliance with Title II of the ADA would result in an alteration or burden. 28 C.F.R. § 35.164.

a) *Innes v. Bd. of Regents of the Univ. Sys. of Md.*, 121 F. Supp. 3d 504 (D. Md. 2015) – Deaf and hard-of-hearing college sports fans brought action against a state university, alleging lack of equal access to events and services in violation of the ADA and the Rehabilitation Act. The university argued that the purchase and installation of captioning boards to accommodate the deaf and hard-of-hearing fans cost $3.75 million plus additional charges at each game for the provision of captioning services, and thus constituted an undue burden. The court held that the university failed to prove the affirmative defense of undue burden, because without any additional information about the applicable budget and/or financial realities, the cost in isolation was insufficient to establish undue burden as a matter of law. The university therefore was not entitled to summary judgment.

b) *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144 (2d Cir. 2013) – A modification to an "essential aspect" of a program constitutes a fundamental alteration to the nature of the program and is not required under the ADA. Waiving an essential eligibility requirement – i.e., a requirement that determines an individual's eligibility for a service – would fundamentally alter that service. However, relatively minor eligibility requirements, even if they are set by state law, are not deemed essential because they are not necessary to prevent the fundamental alteration of the program's nature. Whether an eligibility requirement is essential is determined on a fact-specific, case-by-case basis by consulting the importance of the requirement to the program in question.

c) *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016) – State of Maryland failed to show that blind plaintiffs' proposed modification to the absentee voting process, which would allow the use of an online ballot marking tool that had not yet received the requisite certification by the state election board, would fundamentally alter the state's voting program. The mere fact of a state statutory requirement does not automatically insulate public entities from making otherwise reasonable modifications to prevent

disability discrimination, and the state failed to rebut the plaintiffs' evidence that the tool was reasonably secure, safeguarded disabled voters' privacy, and had been used in actual elections without apparent incident.

d) *Ruskai v. Pistole*, 775 F.3d 61 (1st Cir. 2014) – Even if plaintiff could show that the TSA's pat-down procedures for passengers with metallic joint replacements denied her meaningful access to government programs or services under the Rehabilitation Act, any proposed modification to those procedures would adversely affect the TSA's efforts to efficiently deploy its resources to maintain airport security and therefore implicate "extraordinary safety concerns," which would constitute a fundamental alteration to its security program. The court therefore found that the TSA did not violate section 504 of the Rehabilitation Act.