advancing workplace rights, safety & health, and accessibility in the legislative branch

Office of Congressional Workplace Rights

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MENTAL HEALTH ACCOMMODATIONS IN THE WORKPLACE
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I. Introduction

The Congressional Accountability Act of 1995 (CAA), 2 U.S.C. §§ 1301 *et seq.*, applies the rights and protections of over a dozen labor and employment laws to the legislative branch, including the Americans with Disabilities Act of 1990 (ADA) and the Family and Medical Leave Act of 1993 (FMLA). In recent years – and especially since the onset of the COVID-19 pandemic – there has been an increased focus on how these laws protect employees with mental or psychological conditions, including the issue of telework as a reasonable accommodation for such individuals.

Mental health concerns may be less obvious to employers, and may also carry more of a stigma than many physical disabilities, both of which can present challenges in the application of the ADA and FMLA. In this outline we present a selection of case law, primarily from the federal courts of appeals, to highlight some of the circumstances in which these issues may arise. We also briefly discuss a few other laws applied by the CAA that may have implications for employees with mental health conditions.

II. Background: the ADA and the FMLA

The two statutes applied through the CAA that are most often implicated in mental health-related workplace issues are the ADA and the FMLA. Below is some general background information on the rights and obligations established by these laws.

The ADA

The CAA prohibits employment discrimination based on disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791) and sections 102 through 104 of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12112–12114).[1] 2 U.S.C. § 1311. In general, the ADA provides employees who have disabilities the right to receive reasonable accommodations in the workplace and allows them to bring claims against employing offices that discriminate against them on the basis of their accommodation requests. The ADA requires employing offices to make reasonable accommodations for employees with disabilities absent undue hardship for the employing office. The ADA requires 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.

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

[1] The employment provisions of the Rehabilitation Act and the ADA are generally interpreted identically. Soon after the ADA's enactment, ADA causation standards relating to employment discrimination were incorporated into the Rehabilitation Act. 29 U.S.C. § 794(d). This outline's references to the ADA thus apply equally in the Rehabilitation Act context.

employee who is an otherwise qualified individual with a disability, if such denial is based on the need to make reasonable accommodation.

What is "Disability"?

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.

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).

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). Caring for oneself, sleeping, learning, reading, concentrating, thinking, and interacting with others are some examples from this list which may be particularly pertinent in regards to mental health disabilities.

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 they have 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 C.F.R. § 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.

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. 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. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment, and is made without regard to ameliorative effects of mitigating circumstances, except in the case of ordinary eyeglasses or contact lenses. 29 C.F.R. § 1630.2(j). The statute's list of examples of mitigating measures includes several that may be particularly relevant in the mental health context: medication, use of assistive technology, and "learned behavioral or adaptive neurological modifications." 42 U.S.C. § 12102.

Essential Job Functions – 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 for reasons including, but not limited to: (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/or (3) the function is highly specialized and the individual was hired for their expertise or ability to perform the particular function.

Evidence of whether a particular job function is essential includes, but is not limited to: (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 collective bargaining agreement; (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).

Reasonable Accommodation

Reasonable accommodations are modifications or adjustments to the work environment, or to the manner or circumstances under which the job is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or modifications or adjustments that enable a disabled employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities. In the case of job applicants, reasonable accommodations are modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the desired position. 29 C.F.R. § 1630.2(o)(1).

Reasonable accommodations may include making existing facilities used by employees readily accessible to and usable by individuals with disabilities. More often relevant in the mental health context is that reasonable accommodation may also include job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. 29 C.F.R. § 1630.2(o)(2).

The Interactive Process – To determine appropriate reasonable accommodations, it may be necessary for an employing office to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise

limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3).

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 written or formal request. 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.

However, an employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA (October 2002).

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.

Affirmative Defenses

Undue Hardship – It is unlawful for an employing office not to make a 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 factors including the nature and net cost of the accommodation needed; the overall financial resources of the covered entity and the facilities involved; the type of operation or operations of the covered entity; and the impact of the accommodation upon the operation of the facility. 29 C.F.R. § 1630.2(p).

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.

Direct Threat – An employer may require that an individual not pose a direct threat – a significant risk of substantial harm to the health or safety of themselves or others that cannot be eliminated or reduced by reasonable accommodation.

The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. The employer should consider factors including: 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).

Such consideration must rely on objective, factual evidence – not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes – about the nature or effect of a particular disability, or of disability generally. The employer should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. Appendix to Part 1630, Title 29.

Enforcement

Claims of employment discrimination based on disability in the legislative branch must initially be filed with the OCWR. A claimant may then file a civil action in a federal district court or continue with the OCWR administrative dispute resolution (ADR) process. If the claim passes preliminary review, a claimant may then request a hearing and proceed to an administrative hearing before a Merits Hearing Officer (MHO). If no hearing is requested or if the claim does not pass preliminary review, a civil action may be filed in federal district court within the time limits specified under the CAA. If, after an administrative hearing, any party is dissatisfied with the final decision of the MHO, that party may petition the OCWR's Board of Directors to review the MHO's decision. After review, the Board will issue a written decision on the case along with its reasoning for the decision. If the employee or the employing office is dissatisfied with the Board's ruling, the decision may be appealed to the U.S. Court of Appeals for the Federal Circuit for further review. The Board typically publishes its final decisions.

The FMLA

Section 202 of the CAA, 2 U.S.C. § 1312, applies the rights and protections established by sections 101 through 105 of the FMLA (29 U.S.C. §§ 2611–2615) to covered employees in the legislative branch who satisfy specified eligibility requirements. In general, the FMLA entitles eligible employees to take up to 12 weeks of job-protected unpaid leave in a 12-month period for specified family and medical reasons. The FMLA also generally prohibits employing offices from interfering with or denying the exercise of FMLA rights, and from discriminating against

any person who either opposes a practice made unlawful by the FMLA or participates in a proceeding relating to the FMLA.[2]

FMLA Terms and Principles

Eligible Employee – The term "eligible employee" means a covered employee who has been employed in any employing office for twelve months and for at least 1,250 hours of employment during the previous twelve months. 2 U.S.C. § 1312(a)(2)(B). If an employee worked for two or more employing offices sequentially, the time worked will be aggregated to determine whether it equals twelve months. OCWR FMLA Reg. § 825.110(b). Additionally, if an employee was employed by two or more employing offices, either sequentially or concurrently, the hours of service will be aggregated to determine whether the minimum of 1,250 hours has been reached. *Id.* at § 825.110(c).

Qualifying Reasons for Leave – Employing offices covered by the FMLA as applied by the CAA are required to grant leave to eligible employees for reasons enumerated at OCWR FMLA Reg. § 825.112. These include having a serious health condition, including a mental condition, that makes the employee unable to perform the functions of the employee's job; and caring for the employee's spouse, son, daughter, or parent with a serious health condition. In short, a "serious health condition" entitling an employee to FMLA leave involves inpatient care or continuing treatment by a healthcare provider. *Id.* at § 825.114. Mental illness resulting from stress may be a serious health condition. *Id.* at § 825.114(c). Substance abuse can constitute a serious health condition, but absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave. *Id.* at § 825.114(d).

Employer Notice Requirements – The FMLA, as incorporated by the CAA, requires employing offices to provide covered employees with notices regarding their rights and obligations. OCWR FMLA Reg. § 825.301.

Employee Notice Requirements – An employee must provide at least 30 days of advance notice before FMLA leave is to begin if the need is foreseeable, such as in the case of planned medical treatment for a serious health condition of the employee or of a family member. OCWR FMLA Reg. § 825.302(a). If the need for leave is foreseeable but the 30-day period is not practicable, notice must be given as soon as practicable. *Id.* at § 825.302(b). As to the content of the notice for foreseeable leave, the employee must provide "at least verbal notice sufficient to make the employing office aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." *Id.* at § 825.302(c).

Provisions for notice regarding unforeseeable leave require that when the need for leave is not foreseeable, an employee must provide notice to the employing office as soon as practicable under the facts and circumstances of the particular case. *Id.* at § 825.303(a). Notice of unforeseeable leave may be given by the employee's spokesperson (e.g., spouse, adult family

[2] In addition, the Federal Employee Paid Leave Act (FEPLA), passed in 2019, grants federal employees – including covered employees under the CAA – up to 12 weeks of paid leave under the FMLA in connection with the birth of a child or the placement of a child for adoption or foster care.

member, or other responsible party) if the employee is unable to do so personally. *Id.* at § 825.303(b).

Certification – The employing office may require that leave be supported by a certification issued by a health care provider of the employee or of the employee's family. OCWR FMLA Reg. § 825.305(a). In most cases, the employing office should request that an employee furnish certification at the time the employee gives notice of the need for leave or within two business days thereafter. *Id.* at § 825.305(c). The employing office shall advise an employee whenever the employing office finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency. *Id.* at § 825.305(d).

<u>Regulations</u>

Regulations implementing the FMLA in the legislative branch were originally approved by Congress in 1996. In 2021, the OCWR Board adopted modified regulations which included provisions implementing FEPLA. In 2022, the House of Representatives adopted House Resolution 1516, thereby approving the FMLA regulations for all employees and employing offices of the House. These regulations became effective for House employees and employing offices on April 30, 2023. For other legislative branch employing offices, the 1996 regulations remain in effect.

<u>Enforcement</u>

Employees may raise two types of FMLA claims: interference claims, where the employee alleges that the employer denied or otherwise interfered with the employee's substantive FMLA rights; and retaliation claims, where the employee alleges that the employer discriminated against him or her for FMLA-protected activity, such as requesting FMLA leave.

- Interference claims require proof that the plaintiff was entitled to take FMLA leave; an adverse action by the plaintiff's employer, which interfered with the plaintiff's right to take FMLA leave; and proof that the employer's adverse action was related to the plaintiff's exercise of, or attempt to exercise, FMLA rights.

- FMLA retaliation claims require proof that the employee engaged in a statutorily protected activity; the employee suffered an adverse employment decision; and the decision was causally related to a protected activity.

Claims of FMLA violations in the legislative branch must initially be filed with the OCWR. A claimant may then file a civil action in a federal district court or continue with the OCWR administrative dispute resolution (ADR) process. If the claim passes preliminary review, a claimant may then request a hearing and proceed to an administrative hearing before a Merits Hearing Officer (MHO). If no hearing is requested or if the claim does not pass preliminary review, a civil action may be filed in federal district court within the time limits specified under the CAA. If, after an administrative hearing, any party is dissatisfied with the final decision of the MHO, that party may petition the OCWR's Board of Directors to review the MHO's decision. After review, the Board will issue a written decision on the case along with its reasoning for the decision. If the employee or the employer is dissatisfied with the Board's

ruling, the decision may be appealed to the U.S. Court of Appeals for the Federal Circuit for further review. The Board typically publishes its final decisions.

III. Case Law

What follows is a selection of case law addressing allegations of discrimination, failure to accommodate, retaliation, and FMLA interference brought by employees with mental health conditions. These summaries are organized loosely into categories based on the types of allegations or the nature of the circumstances giving rise to the complaints; however, some cases might well fit into multiple categories.

Although the OCWR Board of Directors and Hearing Officers are not bound by the holdings of the U.S. Courts of Appeals, they often look to those courts' decisions for guidance. We have also included a few recent cases of interest from federal district courts, mostly from the U.S. District Court for the District of Columbia, because the majority of federal court complaints under the CAA are filed in that court.

Telework as a Reasonable Accommodation

Prior to the COVID-19 pandemic, employers routinely argued – and courts often agreed – that in-person attendance was an "essential function" of many jobs, and therefore full-time or frequent telework would not be a reasonable accommodation under the ADA. Now that the pandemic has ended and many workplaces are reinstating in-person work requirements, it will be interesting to see how the courts' analysis of such accommodation requests changes in light of employers' pandemic-era experiences with telework and their enhanced technological capabilities. The facts underlying the cases below all arose before the pandemic, but the types of arguments raised by the defendants in these cases may no longer be as convincing.

- *Doak v. Johnson*, 798 F.3d 1096 (D.C. Cir. 2015), *cert. denied*, 137 S.Ct. 33 (2016) – A Coast Guard program analyst suffered from depression, migraines, and other symptoms as a result of a closed head trauma. Her illness and her medications' side effects forced her to frequently miss work or show up late. She requested an accommodation to move her start time from 8:15 AM to 10:00 AM with the option to telework when she was adjusting to a new medication. The Coast Guard denied the request and terminated her. The program analyst sued, arguing that the accommodation was reasonable and the termination violated the Rehabilitation Act. The D.C. Circuit affirmed the district court's dismissal, holding that in-person meetings during normal business hours were an essential function of the job which she was unable to perform with an accommodation. Notably, the program analyst did not present evidence attempting to rebut the Coast Guard's assertion that in-person work was an essential function of the job.

- *Trahan v. Wayfair Me., LLC*, 957 F.3d 54 (1st Cir. 2020) – It would not have been a reasonable accommodation for the plaintiff, a call center employee and military veteran with PTSD, to work from home. The employer was in the process of developing a work-

from-home program, but lacked the technological capabilities to support such an arrangement at the time the plaintiff requested it. The First Circuit found that the employer was not required, as part of a reasonable accommodation, to allow the plaintiff to remain in place pending the availability of a work-from-home program. Additionally, the plaintiff did not explain how working from home would have enabled her to perform her job in accordance with the employer's reasonable expectations. Her PTSD triggers were inherently unpredictable and could occur anywhere, and were likely to reappear in Wayfair's team-oriented environment whether she was working from the call center or from her own residence.

- *Theilig v. United Tech Corp.*, 415 F. App'x 331 (2d Cir. 2011) – Though "there is no per se rule against a change in supervisor," an employee with depression who sought an accommodation that would permit him to work from home for two months with no contact whatsoever with any coworker or supervisor failed to carry his burden of identifying an accommodation "the costs of which, facially, do not clearly exceed its benefits."

- *Brown v. Austin*, 13 F.4th 1079 (10th Cir. 2021) – The Tenth Circuit held that three rejected accommodations requested by a former federal employee with PTSD were not plausibly reasonable: telework twice a week, weekend work, and reassignment to another supervisor. Granting Brown's telework and weekend-work requests would have eliminated essential functions of his job (in part, being present in the office during standard work hours to review physical case files and collaborate with law enforcement partners who worked a standard schedule), making those requests unreasonable as a matter of law. His reassignment request was also unreasonable since he did not allege the limited circumstances in which the Agency would need to consider reassigning him despite the fact that he performed the essential functions of his position with other accommodations.

Leave as a Reasonable Accommodation

- *Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119 (1st Cir. 2017) – Plaintiff was a pharmaceutical company sales representative with depression and anxiety. She had been out on short-term disability and other leave for 5 months when her doctor indicated she needed 12 months of additional leave (the employer's leave form called for an "estimate [of] the beginning and ending dates for the period of incapacity" and Plaintiff's doctor wrote "12 months"). Her employer declined to extend short-term disability benefits. After she did not return to work and her employment was terminated, she filed claims under the ADA and other laws. In affirming summary judgment for the employer on all claims, the First Circuit wrote, "[W]e are leery to conclude that the form could be reasonably understood to have conveyed to AstraZeneca that the proposed accommodation of an additional twelve months of leave would allow [Plaintiff] to return to work able to perform the essential functions of her position[,]" especially since she submitted no additional documentation that 12 months of leave would be an effective accommodation. Additionally, she failed to show 12 months of leave (on top of the 5-month leave she had already taken) was a facially reasonable accommodation. Concerning her contention that

her employer violated the ADA by failing to engage in an interactive process, the court noted that such a claim cannot be maintained where an employee fails to satisfy her burden of showing that a reasonable accommodation existed.

- *Diaz v. City of Philadelphia*, 565 F. App'x 102 (3d Cir. 2014) – A police officer with PTSD, depression, and anxiety claimed the city denied her a reasonable accommodation when it placed her on leave instead of transferring her from patrol to a Closed Circuit Television (CCTV) unit, which worked to monitor prisoners. The Third Circuit held that the leave *was* an accommodation, noting that the ADA does not require an employer to provide a disabled employee with the accommodation of her choosing. Regarding Plaintiff's claim that the City's proffered reasons for not transferring her to the CCTV unit were pretextual, the court found reasonable the City's justification that it required officers performing CCTV unit duties (which involved in-person interaction with prisoners) to be mentally fit for duty.

Other Reasonable Accommodation Cases

- *Katsouros v. Off. 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), *aff'd*, 594 F. App'x 683 (Fed. Cir. 2015) – An AOC employee who was on medical leave for bipolar disorder was denied postponement of a disciplinary hearing, and the hearing was conducted without him, resulting in a suspension. The employee alleged, among other things, that the AOC had denied him a reasonable accommodation in violation of the ADA as applied by the CAA. The Board of Directors of the OCWR (then the Office of Compliance) affirmed the Hearing Officer's decision that the AOC violated the ADA by failing to accommodate Katsouros's need to postpone the hearing, explaining that "the ADA may require an employer to provide a reasonable accommodation to allow a qualified individual with a disability to participate effectively in disciplinary proceedings." As the Board noted in an earlier decision in the case, a psychiatrist's certification put the AOC on notice that Katsouros was "'so disorganized in thought and verbal expression' that he could not work" at the time his postponement request was denied. *Katsouros v. Off. of the Architect of the Capitol*, Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 484744, at *5 (Jan. 21, 2011).

- *Bell v. O'Reilly Auto Enters., LLC*, 972 F.3d 21 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2755 (2021) – Bell was a store manager who had Tourette's syndrome, ADHD, and major depression. When his store was understaffed, he worked 100 hours a week, at the cost of his concentration, sleep, and mental health. His doctor filled out a form recommending that he only work 9 hours per day, 5 days a week, and Bell clarified that it meant only scheduled hours, and he could work some unscheduled time when needed. The employer denied his accommodation because at least 50 hours a week of work was an essential function for managers, and then terminated him. Bell sued for failure to accommodate under the ADA. At trial, Bell said that he could physically work the 50 hours a week when required, but that it took a toll on him. The district court instructed the jury that that, to succeed on a claim that an employer failed to provide a reasonable accommodation, a plaintiff must prove that they *needed* an accommodation to perform

the essential functions of the job. The jury returned a verdict for the employer.

The First Circuit vacated and remanded for a new trial. In holding that the district court erred in its jury instruction, the court looked to the ADA's definition of "qualified individual": "an individual who, *with or without reasonable accommodation*, can perform the essential functions of the employment position …" 42 U.S.C. § 12111(8) (emphasis added). The court held that "[a]n employee who can, with some difficulty, perform the essential functions of his job without accommodation remains eligible to request and receive a reasonable accommodation."

- *Sepulveda-Vargas v. Caribbean Rests., LLC,* 888 F.3d 549 (1st Cir. 2018) – Plaintiff, an associate restaurant manager, had PTSD and depression as a result of an on-the-job attack (while making a bank deposit on behalf of his employer, he was attacked at gunpoint, hit over the head, and had his car stolen). He requested a fixed work schedule (as opposed to a rotating one) as a disability accommodation. In holding that the employer did not fail to accommodate him because being able to work rotating shifts was an essential function of the assistant manager job, the First Circuit focused on the employer's perspective: rotating shifts were listed as a requirement in advertisements for the job and on the job application Plaintiff filled out, and were necessary for the equal distribution of work among the managerial staff (his requested accommodation "would have had the adverse impact of inconveniencing all other assistant managers who would have to work unattractive shifts in response to [Plaintiff's] fixed schedule").

- *Stevens v. Rite Aid Corp.*, 851 F.3d 224 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 359 (2017) – Plaintiff, a pharmacist with trypanophobia (fear of needles), was terminated after his employer, Rite Aid, began requiring its pharmacists to administer immunizations to customers. A jury found in his favor on his ADA claims, and the district court denied Rite Aid's motion for judgment as a matter of law, but the Second Circuit reversed. It held that immunization injections were an essential job requirement for company pharmacists at the time of Plaintiff's termination: Rite Aid had revised its job description for pharmacists to require immunization certification and by including immunizations in the list of "essential duties and responsibilities" for its pharmacists, and it had discharged another pharmacist with needle phobia because, like Plaintiff, he failed to undergo Rite Aid's immunization training program.

  The court then considered whether a reasonable accommodation existed that would have allowed Plaintiff to perform immunizations, and concluded that none existed. Plaintiff suggested several that the court rejected, including Rite Aid offering him desensitization therapy (employers are not obligated to offer employees medical treatment as a reasonable accommodation) and hiring a nurse to give immunization injections for him (which would not be a reasonable accommodation, but an exemption that would have involved other employees performing Plaintiff's essential immunization duties).

- *McMillan v. City of New York*, 711 F.3d 120 (2d Cir. 2013) – Plaintiff often arrived late to work because his schizophrenia medications made him drowsy and sluggish in the morning. In 2008, his supervisor stopped approving his tardy arrivals after a decade of doing so. He was disciplined with a 30-day suspension without pay, and his

accommodation requests for scheduling flexibility were denied. Observing that it was "required to give considerable deference to the employer's judgment and its general policies" in "determining whether the ability to arrive at work within a designated time period with some degree of consistency is an essential function of plaintiff's job[,]" the district court granted summary judgment to the City.

The Second Circuit reversed, noting that "a court must avoid deciding cases based on unthinking reliance on intuition about the methods by which jobs are to be performed" (internal citation omitted) and that the district court appeared "to have relied heavily on its assumption that physical presence is an essential requirement of virtually all employment and on the City's representation that arriving at a consistent time was an essential function" of Plaintiff's job. In conducting, as it acknowledged it must, "a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice[,]" the Second Circuit looked at factors such as the City's flex-time policy for all employees and the previous approval (for many years) of Plaintiff's late arrivals, and concluded that a reasonable juror could find that arriving at a specific time was not an essential function of Plaintiff's job, provided that he would still be able to complete his work in a sufficiently timely fashion.

- *Hrdlicka v. Gen. Motors, LLC*, 63 F.4th 555 (6th Cir. 2023) – After 30 years at GM, Hrdlicka began regularly missing and arriving late to work. She suffered from Persistent Depressive Disorder and an undiagnosed brain tumor. Her negative mid-year performance review reflected her absences, but she did not inform her supervisor about her deteriorating mental health. Hrdlicka requested a transfer from the department as an accommodation. She was terminated for lateness the next day. She filed claims of discrimination and failure to accommodate under the ADA and interference with FMLA benefits. The district court granted summary judgment to GM on all claims and the Sixth Circuit affirmed. Hrdlicka did not make a prima facie case of discrimination because she did not put her employer on notice of her disability, because (1) her vague text messages and statements to her supervisor would have required the employer to speculate, and (2) her request to transfer was understood as a complaint about her colleagues and job satisfaction, rather than notice of her depression. Additionally, GM had a legitimate reason to terminate Hrdlicka for absenteeism after a negative performance review and specific warning letter did not change her behavior. Hrdlicka's failure to accommodate claim failed because she did not link her request for transfer to her disability, only to her dislike for the department. The court noted that transfer requests are usually not reasonable accommodations when the aim is to avoid working with certain people rather than to avoid doing specific work precluded by disability. (This case is also discussed in the FMLA case law section below.)

- *Herrmann v. Salt Lake City Corp.*, 21 F.4th 666 (10th Cir. 2021) – In chronic impairment cases, ongoing exchanges between employers and employees are likely to start with discussion of FMLA leave and morph into discussion of ADA accommodations. It is also likely that an estimate of when symptoms will subside and allow return to work is the best an employee or medical provider can offer, given that chronic conditions can last a lifetime. Moreover, an employee on leave due to a chronic condition may have limited ability to respond to an employer, and an employer will have to consider multiple

communications from the employee and the employee's medical providers together when determining whether a request for leave is unreasonable or indefinite. Here, an employee's request for leave to afford her time to recover from PTSD symptoms was plausibly reasonable as an accommodation under the ADA. In requesting FMLA leave for the employee, her health care professional estimated that the probable duration of her condition was 3-6 months, and with weekly treatments for 8 weeks, it was his hope that she would be able to return to work at some point after treatment; a subsequent request in ADA paperwork referred to "enough time off" so that her PTSD symptoms could subside before returning to work.

- *Bey v. Wash. Metro. Area Transit Auth*, 341 F. Supp. 3d 1 (D.D.C. 2018) (Judge Reggie B. Walton) – Bey, a bus mechanic for WMATA, sued his employer for failure to accommodate and retaliation under the Rehabilitation Act. Bey was diagnosed with ADHD and was prescribed Adderall. He reported his prescription to WMATA in monthly reporting and was informed it was against policy for bus mechanics to use Adderall. He began taking the medication Strattera instead and had an accident at work which he attributed to side effects of the medication change. WMATA suspended him, required him to enroll in an Employee Assistance Program, and threatened him with termination. WMATA eventually reinstated him and allowed him to use Adderall. The district court granted summary judgment to the employer on the failure to accommodate claims, holding that WMATA did allow Bey to take Adderall. The court further held that Bey's proposed accommodation exempting him from the monthly reporting requirements was not reasonable. However, the court denied the employer summary judgment on Bey's claim that WMATA refused to accommodate him by denying him extra time to finish assignments. The court also denied summary judgment on the retaliation claims, because there was a genuine issue of fact as to whether WMATA's actions were based on true safety concerns.

- *Husain v. Power*, 630 F. Supp. 3d 188 (D.D.C. 2022) (Judge Randolph D. Moss) – A former employee of the U.S. Agency for International Development (USAID) brought a claim against the agency alleging that she had been denied a transfer request in violation of the Rehabilitation Act. The employee had been assigned to the agency's Bureau for Policy, Planning, and Learning (PPL), where she alleged she had suffered a hostile work environment that led to severe psychological stress, which in turn led to fatigue and other physical symptoms. A letter from her psychiatrist "indicated that she suffered 'from severe anxiety, depression, and fear, resulting from a hostile work environment created by her immediate supervisor' and should 'be placed under a different supervisor[ ] immediately.'" After taking leave, she returned to PPL and continued to experience mental health issues; a subsequent letter from her psychiatrist stated that she "had 'developed Post Traumatic Stress disorder (PTSD),' 'panic attacks, severe anticipatory anxiety of going back to the same hostile environment, and [d]epression,' as a result of a hostile work environment." She requested a transfer to accommodate the mental health issues that were being caused by the allegedly hostile work environment created by her supervisors.

  The court granted summary judgment for USAID because the plaintiff failed to carry her burden of identifying a suitable vacancy to which she could have been reassigned. The

record showed that she had merely submitted vague requests from her doctors asking that she be "relocated via the 'federal detail' process to 'an agency outside USAID, preferably the Department of State.' But these requests did not identify any vacant position within or 'outside USAID' to which Plaintiff could have been detailed at that time." (citations to the record omitted). The court noted that even if the agency was responsible for a breakdown in the interactive process, summary judgment would still be warranted, because there is no independent cause of action for failure to engage in the interactive process, only for failure to accommodate generally, and "there can be no failure to accommodate where no accommodation was available (*e.g.*, where there was no suitable vacancy) at the relevant time."

- *Congress v. Gruenberg*, — F. Supp. 3d — , No. CV 19-01453 (CKK), 2022 WL 17356878 (D.D.C. Dec. 1, 2022) (Judge Colleen Kollar-Kotelly) – An FDIC employee with generalized anxiety disorder and depression sued under the Rehabilitation Act, alleging he was denied a reasonable accommodation for his disability. He had requested several accommodations, including a change in his work assignments, telework several days a week, and reassignment. The judge granted the FDIC's motion for summary judgment on the telework claim, because a delay in granting the telework accommodation was not unreasonable as the agency was waiting for documentation regarding the employee's disability; she also granted summary judgment for the agency regarding reassignment, because the agency was continuing to work with the plaintiff to identify suitable vacancies. However, summary judgment was not warranted on the plaintiff's claim that he was denied the reasonable accommodation of relieving him of certain stress-inducing job duties, because there was a genuine issue of material fact as to whether those job duties were essential functions of his job.

- *Meyer v. City of Chehalis*, No. 3:22-CV-05008, 2023 WL 4157661 (W.D. Wash. June 23, 2023) – A firefighter requested that he be allowed to bring his service dog to work with him as a reasonable accommodation for his PTSD. This accommodation request was denied, and the plaintiff sued the city under the ADA and state law. The city moved to compel a psychological evaluation of the plaintiff, as well as an evaluation of his current service dog. The plaintiff argued that undergoing a new psychological evaluation would not be relevant to the case, because the salient issue was that he had PTSD at the time he was denied his accommodation request; the court disagreed and granted that part of the city's motion to compel, explaining that "Plaintiff cannot seriously contest that he has put his mental health in controversy in this suit. The existence, causes, and potential treatments for Plaintiff's PTSD are critical elements of Plaintiff's claims and the City's defenses thereto."

  However, the court denied the city's motion to compel an evaluation of the service dog: "The Court finds that subjecting Plaintiff's current service dog or dogs to an examination to determine 'what, if anything, the dog(s) is/are trained to do for his PTSD' is not relevant nor proportional to the needs of the case. Under the ADA, the City must prove that accommodating Plaintiff's service dog or dogs constitutes an undue hardship. Whether Plaintiff's specific service dog is trained as a service animal sheds little light on whether the use of a trained service animal would constitute an undue hardship. … The ultimate focus of the inquiry is not on Plaintiff's specific service dog, but rather on the

impact of a potential service dog on Plaintiff's PTSD and his ability to continue working in his current role. Specifically, the Court must determine whether the City denied, and continues to deny, an 'available and reasonable accommodation' that would permit Plaintiff to continue with his job in a manner that accommodates his disability. The Court, at this time, fails to see how evaluating Plaintiff's current service dog will help the Court answer this ultimate question or support the City's defenses." (internal citations omitted)

- *Hopman v. Union Pac. R.R.*, 68 F.4th 394 (8th Cir. 2023) – Hopman alleged his employer violated the ADA when it refused his request to have his Rottweiler service dog on board moving freight trains as an accommodation for his PTSD and migraines. A jury returned a verdict for the employee, but the district court granted the employer's motion for judgment as a matter of law. The Eighth Circuit affirmed. Hopman limited his argument to being denied "benefits and privileges of employment" because while he suffered mental pain without his service animal, he was able to physically perform the essential functions of the job without accommodation. The court held that mitigating pain is not an employer-sponsored program or service covered as benefits or privileges of employment, which (1) refers only to employer-provided services, and (2) must be offered to non-disabled individuals in addition to disabled ones.

- *Simpson v. DeJoy*, No. 21-1547, 2021 WL 6124885 (7th Cir. Dec. 28, 2021) – Plaintiff developed anxiety after she was robbed at gunpoint while working at a USPS branch. After the robbery, USPS accommodated her by allowing her to work temporarily at a window equipped with protective glass, installing protective glass at her usual station, and always scheduling a coworker to work with her. Her "problems persisted," however, and she sued USPS, alleging among other things a failure-to-accommodate claim under the Rehabilitation Act. The district court granted summary judgment in favor of USPS and the Seventh Circuit affirmed. The plaintiff did not identify any added measure USPS could have taken to make the workplace more accessible to her, other than further altering her coworkers' jobs. "Because USPS supplied the precise accommodations requested – even if they did not altogether ease Simpson's mind – a reasonable jury could not find in her favor" on her Rehabilitation Act failure-to-accommodate claim.

Hostile Work Environment

- *Alvarado v. Donahoe*, 687 F.3d 453 (1st Cir. 2012) – Alleged harassment experienced by a USPS rural mail carrier with recurrent schizoaffective disorder was not sufficiently severe or pervasive to give rise to an actionable hostile work environment claim. The harassment included episodes that the First Circuit characterized as "taunting and mocking comments [that] were both callous and objectionable[,]" such as coworkers telling him, "crazy, crazy, you're crazy" or asking "which pill hasn't he taken" when they heard him singing to himself. However, the court held that these remarks did not rise to the level of "severe or pervasive," especially since he did not specify dates of the incidents and left the court to conclude that his claim rested on "three discrete verbal exchanges taking place over the course of a period spanning more than eight months."

Thus, this alleged harassment could not serve as the basis of claim for retaliation under the Rehabilitation Act following Plaintiff's filing an EEOC charge of discrimination.

- *Fox v. Costco Wholesale Corp.*, 918 F.3d 65 (2d Cir. 2019) – As a result of Plaintiff's Tourette's Syndrome and OCD, he would often touch the floor before moving and would cough when he felt a verbal tic come on in order to prevent others from hearing him swear. Other Costco employees mocked him, saying "hut-hut-hike" to mimic his verbal and physical tics. He pursued multiple ADA claims against Costco stemming from the stress he suffered during a change in management. The Second Circuit affirmed the district court's grant of summary judgment to Costco with respect to Plaintiff's disparate treatment, retaliation, and failure to accommodate claims.

  Regarding his claim that he was subject to a hostile work environment, the court first held that hostile work environment claims were cognizable under the ADA (which it had previously assumed without deciding). It wrote, "Because the ADA echoes and expressly refers to Title VII, and because the two statutes have the same purpose – the prohibition of illegal discrimination in employment – it follows that disabled Americans should be able to assert hostile work environment claims under the ADA, as can those protected by Title VII under that statute[.]" (internal quotations omitted).

  The court next held that that Plaintiff could make out a hostile work environment claim. At issue was whether the work environment was objectively abusive, and, if so, whether the abusive conduct could be imputed to Costco. The court wrote that the Plaintiff "is not required to list the [number of times the comments were made per] shift, week, or month to be able to present this issue to a jury." Because he identified specific comments that were repeated for months, he provided evidence sufficient to meet his burden to demonstrate pervasiveness. In addition, Plaintiff introduced evidence that his supervisors witnessed this conduct for "months and months" and did nothing, demonstrating a specific basis for imputing the objectionable conduct to Costco. The court thus held that Plaintiff met his burden to defeat Costco's motion for summary judgment on his hostile work environment claim.

FMLA Interference and Abuse of FMLA Leave

- *O'Donnell v. Passport Health Commc'ns, Inc.*, 561 F. App'x 212 (3d Cir. 2014) – On January 6, the employer informed Plaintiff that her position was being eliminated effective immediately and offered her a position at another location subject to her signing a non-compete agreement by January 10. On January 10, she notified HR that her attorney was reviewing the non-compete and that she was negotiating salary with her new boss. On January 19, she sought FMLA leave for treatment of anxiety and panic attacks. In the ensuing days, HR emailed her a number of times regarding the job offer, but she never returned the non-compete or the offer letter, and was formally terminated on January 28 while on leave. She then pursued FMLA interference and retaliation claims.

  In deciding whether the employer interfered with Plaintiff's leave by requiring her to

perform work-related tasks during her leave – specifically, by requiring her to sign the offer letter and non-compete agreement and by negotiating with her concerning her salary – the Third Circuit noted that the employer's contacts with Plaintiff while she was on leave were limited to the status of her decision, the documents, and her salary request, as well as acknowledging she was on medical leave – de minimis contacts that did not require her to perform work to benefit the company, were aimed only at retaining her as an employee, and did not materially interfere with her leave. It wrote, "[T]here is no right in the FMLA to be left alone, and be completely absolved of responding to the employer's discrete inquiries." (internal quotations omitted). It therefore held that the district court properly granted summary judgment in the employer's favor on the interference claim.

Plaintiff's retaliation claim also failed, because the requirement that she sign the forms was instituted before she took FMLA leave. Even if she could set forth a prima facie case of retaliation, her failure to sign those forms constituted a legitimate, nondiscriminatory reason for terminating her.

- *Lupyan v. Corinthian Colls. Inc.,* 761 F.3d 314 (3d Cir. 2014) – Plaintiff was fired when she failed to return from medical leave for depression. She filed suit alleging that her employer, CCI, interfered with her rights under the FMLA by failing to give notice that her leave fell under the FMLA, and that she was fired in retaliation for taking FMLA leave. CCI alleged it sent Plaintiff a letter at the beginning of her leave to notify her that her leave was designated as FMLA leave, and further explain her FMLA rights. Relying on the evidentiary presumption that arises under the "mailbox rule" ("an evidentiary presumption, based on the historic efficiency of the United States Postal Service, that letters will be timely delivered to the addressee when properly mailed") to find that Plaintiff had received the letter, the district court entered summary judgment in favor of CCI.

  Reversing, the Third Circuit noted the letter was not tracked, registered, or certified, and CCI's "self-serving affidavits signed nearly four years after the alleged mailing date" created only a very weak rebuttable presumption, and Plaintiff's denial of receipt of the letter was enough to create a genuine issue of material fact. The court admonished the employer: "In this age of computerized communications and handheld devices, it is certainly not expecting too much to require businesses that wish to avoid a material dispute about the receipt of a letter to use some form of mailing that includes verifiable receipt when mailing something as important as a legally mandated notice. The negligible cost and inconvenience of doing so is dwarfed by the practical consequences and potential unfairness of simply relying on business practices in the sender's mailroom. ... Where, as here, denial of receipt creates a genuine issue of material fact, justice should not give way to expediency or the rigid application of a common law presumption that was adopted long before modern forms of communication and proof could have even been imagined." Further, the court found that Plaintiff could demonstrate prejudice even though she had received all the leave she was entitled to under the FMLA: she stated (and her doctor corroborated) that she could have returned to work within twelve weeks had she known her job was in jeopardy.

- *Vannoy v. Fed. Rsrv. Bank of Richmond*, 827 F.3d 296 (4th Cir. 2016) – Plaintiff's doctors recommended that he enter a 30-day rehabilitation program for treatment of depression and alcohol dependency, but he refused, expressing concern that taking additional time off from work would result in termination. His employer, FRBR, approved FMLA leave, but did so via a notice that omitted reference to job protection rights – the precise information he later contended he needed to answer his concerns. Six weeks later, after a work trip where he traveled using company funds but did not show up to work on the project, he was terminated for failure to properly communicate unscheduled time off from work, insubordinate behavior, and failure to complete a performance improvement plan.

  The Fourth Circuit reversed summary judgment for FRBR on Plaintiff's FMLA interference claim because genuine issues of material fact existed as to whether FRBR interfered with Plaintiff's FMLA rights by providing him defective notice that omitted his right to reinstatement at the conclusion of the medical leave term. His retaliation claim, however, failed. He argued that once FRBR became aware of the extent of his illness and his ongoing need for intermittent FMLA leave, it fired him. The court found that FRBR had legitimate, non-discriminatory reasons for terminating him – i.e., his documented job performance failures. (This case is also discussed in the ADA section of this outline.)

- *Brandt v. City of Cedar Falls*, 37 F.4th 470 (8th Cir. 2022) – In an action against her former employer for FMLA interference and retaliation, a city employee failed to demonstrate that she sustained recoverable damages for interference with her rights under the FMLA, which she had taken in the form of intermittent regular additional breaks for her depression, anxiety, and ADHD. The Eighth Circuit held, as matter of first impression, that nominal damages are not recoverable for interference with FMLA rights. The court noted that the *McDonnell Douglas* burden-shifting framework applies to FMLA retaliation claims, but not to claims of FMLA interference. Brandt failed to show that her termination was pretextual and retaliatory because she had no evidence of an impermissible discriminatory animus. By contrast, the employer's intent in denying FMLA benefits was immaterial when it came to Brandt's FMLA interference claim.

- *Whittington v. Tyson Foods, Inc.*, 21 F.4th 997 (8th Cir. 2021) – The plaintiff took intermittent FMLA time off over the course of six months for his depression and anxiety, then began taking longer stretches of time without prior notification and without providing requested medical certification. The Eighth Circuit held that the employer's request for physician recertification of the employee's leave was reasonable even though it was before the end of the minimum duration of the plaintiff's condition, because there had been a significant change in the plaintiff's absences; the employer therefore did not interfere with Whittington's FMLA rights.

- *Ziccarelli v. Dart*, 35 F.4th 1079 (7th Cir. 2022), *cert. denied*, 143 S.Ct. 309 (2022) – The Seventh Circuit held that the text of the FMLA makes clear that denial of FMLA benefits is not required to demonstrate an FMLA interference violation. Interference or restraint alone is enough to establish a violation, and a remedy is available if the plaintiff can show prejudice from the violation. Ziccarelli, a corrections officer, had taken FMLA leave throughout his 27-year career. He took part of his leave in 2016 and then requested

more, in combination with sick leave, to attend an eight-week treatment program for PTSD. A supervisor warned him that he would be disciplined if he took more leave. Ziccarelli chose not to take leave and retired instead. The district court granted summary judgment to the employer on all counts and the Seventh Circuit affirmed for Ziccarelli's FMLA retaliation and ADA discrimination claims, but reversed on his FMLA interference claims. The court found there was a genuine issue of fact as to whether the sheriff's office interfered when it discouraged Ziccarelli from taking FMLA leave by threatening to discipline him for using it, and whether these actions prejudiced him and affected his decisions about FMLA leave.

- *Garrison v. Dolgencorp, LLC*, 939 F.3d 937 (8th Cir. 2019) – The plaintiff, a sales associate who suffered from depression and anxiety, had taken a number of sick days, and her supervisor made rude comments about her time off. She requested FMLA leave but was dissuaded by her supervisor and quit one week later. She alleged retaliation and interference under the FMLA, and discrimination and failure to accommodate under the ADA. The district court granted summary judgment to the employer, but the Eighth Circuit reversed on the failure to accommodate charge, while affirming the others.

  The court held that by requesting leave and informing her supervisor of her medical issues, the company was on notice that she had a disability and required an accommodation of some kind. Although Garrison never used the "magic words" of asking for an accommodation, the court held that her employer had an obligation to take some initiative and begin the interactive process of accommodating her.

  The court affirmed summary judgment for the employer on Garrison's FMLA interference claim because she had not followed the proper steps to request FMLA as laid out in the employee handbook, which said to inform her supervisor and then apply through the company's third-party leave administrator. When Garrison's supervisor told her that "no leave was available" but to "check the handbook," Garrison gave up, when she could have gone to the second step of applying. By failing to do so, she did not give the company notice of her need for FMLA leave, and therefore it was not liable for interfering with her FMLA rights.

- *Hrdlicka v. Gen. Motors, LLC*, 63 F.4th 555 (6th Cir. 2023) – After 30 years at GM, Hrdlicka began regularly missing and arriving late to work. She suffered from Persistent Depressive Disorder and an undiagnosed brain tumor. Her negative mid-year performance review reflected her absences, but she did not inform her supervisor about her deteriorating mental health. GM issued a formal Attendance Letter warning, informing her to seek FMLA leave if needed. She filed claims of discrimination and failure to accommodate under the ADA and interference with FMLA benefits. The district court granted summary judgment to GM on all claims and the Sixth Circuit affirmed. Hrdlicka's FMLA claim failed because she had previously used GM's FMLA request system and the attendance letter explicitly reminded her of that option, but she never gave any notice of intention or need to use FMLA leave. (This case is also discussed in the Other Reasonable Accommodations section above).

- *VanHook v. Cooper Health Sys.,* No. 21-2213, 2022 WL 990220 (3d Cir. Mar. 31, 2022) – The plaintiff, a patient representative, took frequent intermittent leave for her depression and anxiety, and to care for her son with ADHD. After becoming concerned that she might be abusing her FMLA leave, the company hired a firm to conduct surveillance on her, which confirmed its suspicions, and she was subsequently fired. She sued, alleging among other things that the company fired her in retaliation for using FMLA leave. The Third Circuit affirmed the district court's holding that the employer offered a legitimate, non-pretextual, nondiscriminatory reason for VanHook's termination: its belief, based on surveillance, that she abused her FMLA leave. The court was not persuaded by VanHook's argument that the employer's stated reason for firing her was pretextual because it initiated surveillance without a reasonable suspicion that she abused her FMLA leave; the court noted that even had the employer not provided evidence of its basis for suspicion, nothing in the FMLA prevents employers from monitoring employees' activities while on FMLA leave to ensure that they do not abuse their leave.

- *Warwas v. City of Plainfield,* 489 F. App'x 585 (3d Cir. 2012) – Plaintiff was on FMLA leave and indicated to her employer that she was not able to work due to acute serious health conditions, including depression, but she continued her remote part-time job with another city. The Third Circuit held that the employer did not interfere with the plaintiff's FMLA rights when it terminated her based on its belief that she failed to use FMLA leave for the intended purpose, noting that "[t]he FMLA … does not prohibit the termination of an employee who abuses her leave, nor does it shield an employee from dismissal merely because the alleged misconduct occurred while on leave." (internal citation omitted).

Other Discrimination and Retaliation Cases

- *Millea v. Metro-N. R.R. Co.*, 658 F.3d 154 (2d Cir. 2011) – Plaintiff with PTSD claimed his employer retaliated against him for taking FMLA leave by creating a work environment that motivated him to transfer to a lower paying job. The district court charged the jury using a narrow definition of "adverse employment action," leading to a judgment for the employer. The Second Circuit reversed, joining other circuits in applying the *Burlington Northern* standard for materially adverse action (*Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)) to the FMLA context: "For purposes of the FMLA's anti-retaliation provision, a materially adverse action is any action by the employer that is likely to dissuade a reasonable worker in the plaintiff's position from exercising his legal rights." In reaching this conclusion, the court analyzed *Burlington Northern*, highlighting that a broad definition of "adverse employment action" "fulfilled the purpose of Title VII's anti-retaliation provision: preventing employers from deterring their employees from exercising their legitimate legal rights. This rationale applies with comparable force to the anti-retaliation provision of the FMLA. The FMLA's anti-retaliation provision has the same underlying purpose as Title VII – and almost identical wording." (internal citation omitted).

- *Gibbs v. City of Pittsburgh*, 989 F.3d 226 (3d Cir. 2021) – Applicant with ADHD applied to work as a policeman and got a job offer conditioned on a psychological exam finding him capable of performing the job duties. Two psychologists who screened him recommended not hiring him after learning of his ADHD diagnosis, though his ADHD had not been a problem at jobs at five other police departments or as a Marine. In holding that the applicant plausibly alleged discrimination, the court noted that the city cannot dodge liability by labeling the psychologists' approval as a job qualification, as it would equate to using psychological testing as a cover to discriminate.

- *Jacobs v. N.C. Admin. Off. of the Cts.*, 780 F.3d 562 (4th Cir. 2015) – When Plaintiff, a deputy clerk at a courthouse who had social anxiety disorder, was assigned to provide customer service at the courthouse front counter, she requested, as an accommodation, to be assigned to a role with less direct interpersonal interaction. Her employer waited three weeks without acting on her request and then fired her. The Fourth Circuit reversed in part the district court's order granting summary judgment to the employer and remanded to the district court for trial of her disability discrimination, retaliation, and failure to accommodate claims. This opinion is a well-written discussion of many aspects of these claims; here are some interesting points:

  Plaintiff's disability: The court held that the EEOC regulation identifying "interacting with others" as a major life activity, for ADA purposes, was entitled to Chevron deference. Congress deliberately left a gap for the agency to fill, and it was reasonable for the EEOC to conclude that interacting with others fell in the same category as "caring for oneself," "speaking," "learning," and "communicating" (listed in the ADAAA as major life activities). Responding to the employer's argument that Plaintiff could not have been substantially limited in interacting with others because she engaged in interactions daily, it wrote, "A person need not live as a hermit in order to be substantially limited in interacting with others … the fact that Jacobs may have endured social situations does not per se preclude a finding that she had social anxiety disorder. Rather, Jacobs need only show she endured these situations with intense anxiety[,]" consistent with the diagnostic criteria for social anxiety disorder. (internal quotations omitted)

  Pretext for discriminatory discharge: The fact that none of the employer's proffered reasons for Plaintiff's termination were documented factored significantly in the court's finding that a reasonable jury could conclude that Plaintiff set out a prima facie case of disability discrimination and sufficient evidence of pretext to ultimately prevail on her claim.

  Essential function: From evidence including the fact that fewer than 15% of the office's deputy clerks worked behind the front counter, and some deputy clerks never performed this task, the court found that Plaintiff established a genuine issue of fact regarding whether working behind the front counter was an essential function of the position of deputy clerk.

- *Watkins v. Tregre*, 997 F.3d 275 (5th Cir. 2021) – Watkins claimed that she was terminated from her position as a shift supervisor in the dispatch department of the Sherriff's office in retaliation for requesting FMLA leave recommended by her doctor for

her severe anxiety. She also made a Title VII racial discrimination claim. On February 9, Watkin's supervisor discussed a performance issue with her: she had been caught sleeping on the job. Watkins submitted paperwork to request FMLA leave on February 20. The supervisor recommended she be terminated on February 22, and the Sheriff's disciplinary board agreed to her termination on March 1. The district court granted the employer summary judgment. The Fifth Circuit vacated the district court decision and remanded. The court held that Watkins successfully made out a prima facie case for retaliation because she was "fired as immediately after her protected activity as established procedures would allow." She raised a genuine dispute over whether the reason for her termination was pretextual because no other dispatcher supervisor had been terminated for sleeping on the job, even though others had been caught doing so.

- *Williams v. Tarrant Cnty. Coll. Dist.*, 717 F. App'x 440 (5th Cir. 2018) – Williams worked for Tarrant County College District (TCCD) for three years as a writing tutor. She was diagnosed with PTSD, ADHD and Major Depressive Disorder. While on administrative leave, she requested FMLA leave, supporting the request with a form from her psychiatrist. She returned to work after being cleared by her doctor and requested accommodations. The HR department told her to stay on leave and five days later terminated her. Williams claimed discrimination, failure to accommodate, and retaliation under the ADA and FMLA. The district court granted summary judgment to TCCD because (1) Williams did not exhaust her administrative remedies, (2) she had not proven that she had an actual disability or that TCCD considered her disabled, and (3) the FMLA claims were time barred. The Fifth Circuit reversed summary judgment on the ADA claims, holding that the administrative charge Williams filed sufficiently encompassed her claims, and her emails about taking leave and requests for accommodation showed that TCCD was aware of her disability. However, the court affirmed summary judgment on the FMLA claims because Williams failed to provide evidence of a willful violation, which would have extended the two-year limitations period.

- *Marshall v. Rawlings Co. LLC*, 854 F.3d 368 (6th Cir. 2017) – The plaintiff, a workers compensation team lead, took two longer periods of FMLA leave and some intermittent leave over the course of a year and a half to address her depression, anxiety, and PTSD. She was demoted after her first FMLA leave and fired after her second, leading her to file claims of FMLA interference and retaliation, and ADA discrimination. The district court granted summary judgement to the employer; the Sixth Circuit affirmed for the interference claim, as she had not been denied any leave, but reversed on the retaliation and discrimination claims. The court applied the *McDonnell Douglas* test and found genuine issues of fact with regard to Marshall's performance, her employer's adverse actions, and the employer's articulated non-discriminatory reasoning. The court also considered cat's paw liability, as Marshall asserted that her direct supervisors were biased, rather than the decision makers who fired her. The court held that cat's paw liability was applicable to FMLA retaliation and ADA discrimination claims. There was a genuine issue of fact whether Marshall's supervisors, in order to terminate her for discriminatory reasons, influenced multiple levels of managers to reach the decision makers. The court also noted that in cat's paw liability cases, the "honest belief" of the higher-level supervisors is not a defense, as their intent is irrelevant when the bias of lower-level managers they rely on is at issue.

- *Arroyo v. Volvo Grp N. Am., LLC*, 805 F.3d 278 (7th Cir. 2015) – Arroyo, a reservist and veteran who suffered from PTSD, filed charges against Volvo for discrimination, retaliation, and failure to accommodate under both the ADA and USERRA. Arroyo took time off over several years for military training and two deployments. After her second deployment, she was diagnosed with PTSD and took FMLA and disability leave for twelve weeks to seek treatment. When she returned to work, she requested accommodations such as a quiet space at work, time off for treatment, and earplugs, which were all either granted or under review when she was terminated seven months later. During those seven months, Arroyo was written up multiple times for arriving to work less than ten minutes late. Arroyo filed internal and EEOC complaints against her manager. She was late by one minute once the next month and twice after that. She was then terminated due to her accumulated write-ups. The district court granted summary judgment for Volvo and the Seventh Circuit affirmed, except for the discrimination claims, which they reversed and remanded. The court held that Volvo had provided reasonable accommodations and that because Arroyo started filing complaints after the discipline for lateness began, there was no causal link between the adverse write-ups and her protected activity. The court reversed summary judgment on the discrimination claim because (1) numerous emails and messages between Arroyo's supervisors contained jokes and complaints about her disability-specific absences and accommodations, and (2) while they had shown frustration at her military-related absences, Volvo only began its adverse actions against Arroyo after her medical leave and request for accommodations.

- *Rutledge v. Ill. Dep't of Hum. Servs.*, 785 F.3d 258 (7th Cir. 2015) – In this action against his former employer, Rutledge, a veteran with PTSD, bipolar disorder, schizophrenia, and depression, claimed that he was discriminated against under the Rehabilitation Act. The district court dismissed the claim, but the Seventh Circuit reversed, holding that he had sufficiently stated a claim of disability, and the fact that the VA had declared him "100% disabled" did not mean he was unqualified for his job or unable to complete its essential functions.

- *Weaving v. City of Hillsboro*, 763 F.3d 1106 (9th Cir. 2014), *cert. denied*, 574 U.S. 1191 (2015) – Weaving filed a claim of discrimination under the ADA against his former employer. He was a police officer with ADHD who had several interpersonal problems with coworkers and was terminated because of them. At trial, the argument turned on whether Weaving was substantially limited in a major life activity because of his ADHD, and a jury found in Weaving's favor. The district court denied the employer's motion for judgment as a matter of law, but the Ninth Circuit reversed the denial. The court held that a jury could not reasonably conclude that Weaving's ADHD substantially limited his ability to work, as he had strong technical competence as an officer. The court further held that, even though the Ninth Circuit specifically recognizes the ability to interact with others as a major life activity, Weaving's ADHD did not limit his ability to "interact," only to "get along with" others, specifically a handful of coworkers, and therefore he was not covered under the ADA.

- *Litzsinger v. Adams Cnty. Coroner's Off.*, 25 F.4th 1280 (10th Cir. 2022) – A former employee with anxiety and depression alleged that she was terminated in retaliation for exercising her FMLA and ADA rights. The Tenth Circuit affirmed summary judgment

for the employer on Litzsinger's claims because she failed to demonstrate that the reason for her termination was pretextual. Other than temporal proximity between Litzsinger's FMLA leave and her termination – which, absent more, does not establish pretext – she presented no evidence to show that the employer's proffered reason for terminating her was false or unworthy of belief. The employer's changing justifications for terminating her could not establish pretext; providing additional justifications for termination without abandoning the primary reason for termination does not, without more, establish pretext. Inconsistent evidence is only helpful to a plaintiff if the employer has changed its explanation under circumstances that suggest dishonesty or bad faith.

- *Ingram v. D.C.*, No. CV 18-1598 (RC), 2021 WL 3268379 (D.D.C. July 30, 2021), *aff'd sub nom. Ingram v. D.C. Child & Fam. Servs. Agency*, No. 21-7085, 2022 WL 1769140 (D.C. Cir. June 1, 2022) (Judge Rudolph Contreras) – An employee with anxiety alleged that she had been fired because of her disability. Judge Contreras granted summary judgment for the District, because the employee failed to demonstrate that the agency was aware she had a mental health diagnosis. She testified that she had told her supervisor – on one occasion, over a year before her termination – "that she 'gets anxious at times.' The Court is skeptical that this single interaction—and general phrasing— was enough for [the supervisor] to conclude that Ms. Ingram had a mental impairment such that it constituted a disability under the ADA and DCHRA, as is required for Ms. Ingram to make a *prima facie* discrimination claim." She also failed to present any evidence to dispute the District's legitimate, non-discriminatory reason for her termination, which related to performance issues and behavior that risked child safety.

Misconduct Arising from a Disability

Most Circuit Courts of Appeal hold that employers do not violate the FMLA or ADA when they discipline employees for misconduct that stems from the employee's disability.

- *Krasner v. City of New York*, 580 F. App'x 1 (2d Cir. 2014) – City sufficiently articulated a legitimate, nondiscriminatory explanation for Plaintiff's termination: that he repeatedly engaged in serious misconduct, as evidenced by his extensive disciplinary history, which included instances of insubordination, use of profane language, and threats to coworkers of serious physical harm. The Second Circuit wrote that "the fact that such aberrant behavior may be a result of [Plaintiff's] Asperger's is immaterial, inasmuch as workplace misconduct is a legitimate and nondiscriminatory reason for terminating employment, even when such misconduct is related to a disability." (internal quotations omitted).

- *Vannoy v. Fed. Rsrv. Bank of Richmond*, 827 F.3d 296 (4th Cir. 2016) – After job performance issues, including a work trip where he traveled with company funds but did not show up to work on the project, Plaintiff with depression and alcohol dependency was terminated for failure to properly communicate unscheduled time off from work, insubordinate behavior, and failure to complete a performance improvement plan. In addition to FMLA claims (discussed in the FMLA section of this outline), he claimed that his employer failed to accommodate his disabilities and discriminated against him in violation of the ADA. The Fourth Circuit affirmed summary judgment for the employer

on his ADA claims, since "the ADA does not require an employer to simply ignore an employee's blatant and persistent misconduct, even where that behavior is potentially tied to a medical condition."

- *Dark v. Curry Cnty.*, 451 F.3d 1078 (9th Cir. 2006), *cert. denied*, 549 U.S. 1205 (2007) – Although this case involved a physical disability rather than a mental health disability, it shows that not all Circuits agree on how to analyze misconduct arising out of disability. A construction worker with epilepsy went to work on a day when he knew he was likely to have a seizure and did not inform anyone of the likely danger. He had a seizure while driving a truck, forcing the passenger to take control. Employer fired him because he could not perform the essential functions of the job. The construction worker sued, claiming that his employer violated the ADA. The district court granted summary judgment for the employer, but the Ninth Circuit reversed and remanded, holding that "conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination."

- *Todd v. Fayette Cnty. Sch. Dist.*, 998 F.3d. 1203 (11th Cir. 2021) – The school district fired a middle school art teacher with major depressive disorder after the teacher made repeated threats to kill herself and her son, who was a student at the school. The teacher sued, alleging that the termination violated the ADA, Rehabilitation Act, and FMLA. The Eleventh Circuit affirmed district court's grant of summary judgment in favor of the school district. Eleventh Circuit determined that even though the teacher's violent threats "likely stemmed from her major depressive disorder," the threats, not the disorder, motivated the school district's action. As such, the school district had a legitimate, nondiscriminatory reason for the termination under *McDonnell Douglas*.

- *Caporicci v. Chipotle Mexican Grill*, 729 F. App'x 812 (11th Cir. 2018) – Chipotle fired an employee with bipolar disorder after she was visibly intoxicated at work. The employee sued, alleging that Chipotle terminated her because of her disability – i.e., her bipolar disorder. The employee admitted that she had been prescribed new drugs for her disorder and that those drugs had impaired her at work, but argued that her termination was unlawful because Chipotle was aware of her disorder and that she needed to be medicated. The Eleventh Circuit affirmed summary judgment for Chipotle, finding that the employee was terminated for the legitimate, nondiscriminatory reason of workplace intoxication.

Employee Assistance Programs

- *Thompson v. City of Charlotte*, 827 F. App'x 277 (4th Cir. 2020) – Defendant's Employee Assistance Program (EAP) was a counseling resource provided to all employees. Plaintiff contacted the EAP twice because of depression, trouble sleeping, and work-related distress. Since the ADA's retaliation provision prohibits discrimination "against any individual because such individual has opposed any act or practice *made unlawful by this chapter* or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this

chapter[,]" 42 U.S.C. § 12203(a) (emphasis added), Plaintiff's allegations that he engaged in protected activity by contacting the EAP failed.

- *Hannah P. v. Coats*, 916 F.3d 327 (4th Cir. 2019), *cert. denied*, 140 S.Ct. 1294 (2020) – After trying numerous accommodations to address Plaintiff's attendance issues, her supervisors referred her to the Employee Assistance Program (EAP), a voluntary counseling service for employees that provided free, confidential, short-term counseling. Her supervisors required that she meet with an EAP counselor before they would approve her request for medical leave related to depression. This factored into two of her Rehabilitation Act claims against her employer. As part of her failure-to-accommodate claim, she asserted that her employer failed to engage in an interactive, collaborative process when her supervisors unilaterally decided she should participate in EAP counseling. Affirming summary judgment for the employer, the Fourth Circuit noted that an employer "has the ultimate discretion to choose between effective accommodations," and that Plaintiff's supervisors did collaborate with her in establishing the earlier accommodations, and only acted unilaterally when those did not work.

  Plaintiff also failed to demonstrate that the EAP constituted a prohibited medical examination of a current employee. First, EAP policies make clear that the EAP is a voluntary counseling service and not a mandatory medical examination that would violate the Rehabilitation Act. However, even if the EAP did constitute a mandatory medical examination under the facts of the case, summary judgment for the employer was still appropriate because Plaintiff's referral to the EAP was "job-related and consistent with business necessity." An employer's request for a medical examination is job-related and consistent with business necessity when: "(1) the employee requests an accommodation; (2) the employee's ability to perform the essential functions of the job is impaired; or (3) the employee poses a direct threat to himself or others[,]" *Kroll v. White Lake Ambulance Auth.,* 763 F.3d 619, 623 (6th Cir. 2014), and the record amply demonstrated that Plaintiff could not fulfill the essential function of attendance to her job.

Pregnancy-Related Mental Health Issues

The cases below involve mental health issues arising from pregnancy and childbirth. These cases all predate the Pregnant Workers Fairness Act (PWFA), which took effect in June 2023. It is important to recognize that under the PWFA the courts' analysis of fact patterns like these could lead to different results. The ADA requires accommodation to the extent the individual can perform the essential functions of the employment position; in contrast, under the PWFA, employers must accommodate pregnant employees even if they cannot perform the essential functions of their positions when their inability to do so is for a temporary period, the essential job function could be performed in the near future, and the inability to perform the essential function can be reasonably accommodated. 42 U.S.C. § 2000gg(5).

- *Trautman v. Time Warner Cable Tex., L.L.C.*, 756 F. App'x 421 (5th Cir. 2018) – Trautman filed claims of discrimination and failure to accommodate under the ADA and retaliation under the FMLA. The district court granted the employer's motion for summary judgment on all counts. The Fifth Circuit affirmed. While pregnant, Trautman

began experiencing panic attacks and acquired a phobia of driving in heavy traffic. She requested various accommodations to avoid the situations that caused her anxiety attacks. She exhausted her FMLA leave after giving birth and received an accommodation to work from home for several months. When that was rescinded, she requested to leave at 2:00 PM and telework for the remainder of the day. Time Warner offered that she could leave at 4:00 PM, with no remote work. Trautman did not accept and communication broke down. She submitted intermittent FMLA claims and began leaving the office at 2:00 PM every day. She took numerous unapproved days off until she was terminated for absenteeism. For the retaliation and discrimination claims, the court held that under *McDonnell Douglas* Time Warner's reason for termination was valid and not pretextual: Trautman had accrued over 200 hours of unexcused absences and Time Warner provided evidence that Trautman was disciplined similarly to other employees. On the failure to accommodate claim, the court held that Trautman had not engaged in a flexible, interactive process and had caused the process to break down.

- *Blanchet v. Charter Commc'ns, LLC*, 27 F.4th 1221 (6th Cir. 2022), *reh'g denied*, 2022 WL 1519183 (6th Cir. May 5, 2022) – The Sixth Circuit reversed summary judgment for the employer on Blanchet's failure-to-accommodate claim. She was terminated after seven months of paid disability leave for postpartum depression. The court found that a fact issue remained as to whether Blanchet would be "otherwise qualified" for her position after her medical leave accommodation. When an employee's proposed accommodation is medical leave, examining her qualifications on the date of her termination does not indicate whether she is otherwise qualified under the ADA. The court rejected the employer's argument that attendance was an essential function of her work. Blanchet did not request an accommodation that would permanently remove attendance as a requirement for her position, by, for example, allowing her to telework or work part-time. Rather, she requested an extension of medical leave as a temporary accommodation, with the goal of fulfilling the attendance requirement once her medical leave was over. Because a reasonable jury could find that Blanchet could have returned after she recovered, a genuine dispute of material fact existed as to whether she was "otherwise qualified" for her position.

- *Hostettler v. Coll. of Wooster*, 895 F.3d 844 (6th Cir. 2018) – Hostettler suffered from severe postpartum depression and anxiety and her doctor sent a certification recommending that she work a half-time in-person schedule. The doctor renewed that recommendation after the first month. Two months after beginning the part-time schedule, Hostettler was fired, and the employer claimed that working full time was a job requirement. She filed claims under the ADA and the FMLA. The district court granted summary judgment to the employer, holding that full-time work was a valid essential function, and that Hostettler was not a covered individual. The Sixth Circuit reversed, holding that full-time presence at work must be tied to some other job requirement to be considered an essential function. The court held that there was a genuine dispute of material fact because Hostettler had been able to complete the core tasks of her job on a half-time schedule, as shown by the fact that she had gotten a positive performance review and had no written criticisms or complaints about the work she did. The court noted that those facts standing alone would have led them to grant summary judgement to the employee, but that there was instead a genuine issue of fact because the employer

provided enough evidence that certain in-person duties were slipping, and that with other employees taking time off, there was a strain on the department.

Addiction/Alcoholism/Drug Use

Addiction, alcoholism, and drug use among employees raise various issues under the ADA and FMLA. Notably, the ADA specifically excludes employees who are currently engaging in the illegal use of drugs, but has important safe harbors. 42 U.S.C. § 12114 states:

> (a) Qualified individual with a disability - For purposes of this subchapter, a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.
>
> (b) Rules of construction – Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who--
>
> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
>
> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
>
> (3) is erroneously regarded as engaging in such use, but is not engaging in such use;
>
> except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

- *Reilly v. Lehigh Valley Hosp.*, 519 F. App'x 759 (3rd Cir. 2013) – Plaintiff completed a health information form during the process of onboarding as a security guard. On the form, plaintiff denied that he had ever been diagnosed as a drug addict and that he sought treatment for addiction. After he was hired, his employer received medical records demonstrating that he had a history of narcotics use and was a recovering addict. Employer terminated him for being dishonest on the form. Plaintiff sued, alleging that he was being terminated for his disability, i.e., addiction. The Third Circuit affirmed summary judgment for the employer, finding that plaintiff's dishonesty on his form was a legitimate, nondiscriminatory reason for his termination.

- *Shirley v. Precision Castparts Corp.*, 726 F.3d 675 (5th Cir. 2013) – Plaintiff did not meet the 12114(b) safe harbor after he became addicted to Vicodin, requested medical leave from his employer to check into rehab, checked in with his employer's blessing, checked himself out two days later against the advice of his doctors, used drugs again,

checked himself back into rehab seven days after first checking in, and checked himself out one day later against doctor's wishes. The plaintiff's employer fired him after he checked out the second time, and the plaintiff sued, alleging that the termination violated the ADA and FMLA. The plaintiff admitted that he was "currently engaging in the illegal use of drugs," but argued nonetheless that his termination was because he failed to complete treatment, not because he used drugs. The court rejected this argument, holding that "the mere fact that an employee has entered a rehabilitation program does not automatically bring that employee within the safe harbor's protection."

- *Dennis v. Fitzsimons*, 850 F. App'x 598 (10th Cir. 2021) – Plaintiff, a detective sergeant in a Sheriff's office, was terminated for violating several office policies. Among his offenses were showing up to work drunk and allegedly committing domestic violence. The plaintiff claimed that he was an alcoholic and therefore protected under the ADA and Rehabilitation Act, such that his termination violated those statutes. However, the court held that he had failed to establish a causal connection between his alcoholism and his termination, because both statutes "recognize a distinction between alcoholism the disease and alcohol-related misconduct" and his termination resulted from his conduct, not his condition.

- *Mauerhan v. Wagner Corp.*, 649 F.3d 1180 (10th Cir. 2011) – The Tenth Circuit analyzed the "currently using" exception and held that an employee who had been drug-free for one month could be deemed "currently using," and thus not a qualified individual under the ADA. This is not a bright-line rule and "must be determined on a case-by-case basis, examining whether the circumstances of the plaintiff's drug use and recovery justify a reasonable belief that drug use is no longer a problem."

- *Jarvela v. Crete Carrier Corp.*, 776 F.3d 822 (11th Cir. 2015) – Plaintiff was employed as a commercial truck driver. The Department of Transportation's regulations, which covered the employer, included a job qualification that employees have "no current clinical diagnosis of alcoholism." The employer granted plaintiff's request for FMLA leave to attend rehab. He received treatment and doctors cleared him to return to work. In his return-to-work form, his doctor wrote that he was able to work but also checked a box acknowledging the plaintiff engaged in "regular, frequent alcohol use." The doctor recommended regular treatment for up to two years. The employer terminated him immediately after receiving the letter, relying on the DOT's regulations. The Eleventh Circuit upheld the termination, finding that he could not perform the essential functions of the job – as defined by the DOT regulations – as an alcoholic.

IV. <u>Other Relevant Statutes</u>

In addition to the ADA and FMLA, several other statutes applied through the CAA may have implications for employees with mental health conditions.

Genetic Information Nondiscrimination Act

The Genetic Information Nondiscrimination Act (GINA), which applies through section 102(c) of the CAA,[3] prohibits employers from requesting, obtaining, or disclosing employees' genetic information or basing an employment decision on such information. "Genetic information" is defined to include information about genetic tests conducted on the employee or the employee's family members, as well as "the manifestation of a disease or disorder" in the employee's family members.[4] Because some psychological conditions have genetic components, genetic tests associated with such conditions could fall under GINA, and the prohibition against requesting, obtaining, or disclosing such information would therefore apply.

Federal Service Labor-Management Relations Statute

Labor-management relations in the legislative branch are governed by the Federal Service Labor-Management Relations Statute (FSLMRS), which applies through section 220 of the CAA.[5]

During contract bargaining, unions may be able to propose systems to protect the mental health of the bargaining unit. For example, the creation of a joint labor-management workplace safety committee which analyzed workplace safety risks, investigated incidents, and recommended corrective action has been found negotiable.[6] However, unions cannot offer proposals that force supervisors to receive training or place union officials on a committee with authority to bind management's response to safety incidents.[7]

If management proposes a change to conditions of employment that could adversely affect employees' mental health, the union can likely demand to bargain over appropriate arrangements for affected employees.[8]

Occupational Safety and Health Act

The Occupational Safety and Health Act (OSHAct), which applies through section 215 of the CAA,[9] does not specifically address mental health. However, section 5(a)(1) of the OSHAct, known as the General Duty Clause, requires that an employer "furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees."[10] Employers may be

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[3] 2 U.S.C. § 1302(c).
[4] 42 U.S.C. § 2000ff(4)(A).
[5] 2 U.S.C. § 1351.
[6] *NFFE*, 30 F.L.R.A. 797, 803-07 (1987).
[7] *Id.* at 807.
[8] *Norfolk Naval Shipyard Portsmouth, Va.*, 6 F.L.R.A. 74, 77 (1981) (holding that management had a duty to bargain over appropriate arrangements for employees whose safety may be threatened by change to crane operation).
[9] 2 U.S.C. § 1341.
[10] 29 U.S.C. § 654(a)(1).

liable for violations of the General Duty Clause if the Secretary of Labor – or, in the legislative branch, the OCWR General Counsel – can demonstrate that: "(1) an activity or condition in the employer's workplace presented a hazard to an employee, (2) either the employer or the industry recognized the condition or activity as a hazard, (3) the hazard was likely to or actually caused death or serious physical harm, and (4) a feasible means to eliminate or materially reduce the hazard existed."[11]

It is possible that certain jobs or workplaces could create working conditions so stressful that they would be likely to give rise to mental health conditions including anxiety, depression, PTSD, or others, which – if severe enough – could lead to serious physical harm or even death. If feasible means existed to reduce the amount of psychological distress to which employees were subjected, and the employer failed to implement such safeguards, then potentially a case could be made for a General Duty Clause violation. Although this is not a conventional application of the OSHAct, it is conceivable that such cases could arise under the right circumstances, and employers should be aware of the mental health toll that certain jobs or workplaces might take on their employees.

V. <u>Resources and Articles</u>

Please see the following for more information:

- Department of Labor – Mental Health at Work: https://www.dol.gov/general/mental-health-at-work
- EEOC – guidance on mental health conditions in the workplace: https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights
- OSHA – mental health awareness: https://www.osha.gov/sites/default/files/Checklist-Senior_Manager_508.pdf
- OSHA – suicide prevention: https://www.osha.gov/preventingsuicides
- Centers for Disease Control – Mental Health in the Workplace: https://www.cdc.gov/workplacehealthpromotion/tools-resources/workplace-health/mental-health/index.html
- World Health Organization – Mental Health at Work: https://www.who.int/teams/mental-health-and-substance-use/promotion-prevention/mental-health-in-the-workplace
- Job Accommodation Network – Accommodation and Compliance: Mental Health Conditions: https://askjan.org/disabilities/Mental-Health-Conditions.cfm

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[11] *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2014) (quoting *Fabi Constr. Co. v. Sec'y of Lab.,* 508 F.3d 1077, 1081 (D.C. Cir. 2007)).

- Health Action Alliance – Sample Accommodations for Mental Health Conditions: https://www.healthaction.org/sample-accommodations-for-mental-health-conditions

- American Psychological Association – Why Mental Health Needs to Be a Top Priority in the Workplace: https://www.apa.org/news/apa/2022/surgeon-general-workplace-well-being

- Harvard Business Review – It's a New Era for Mental Health at Work: https://hbr.org/2021/10/its-a-new-era-for-mental-health-at-work

OCWR Information:

- Disability Discrimination: https://www.ocwr.gov/employee-rights-legislative-branch/unlawful-discrimination/disability/

- Family and Medical Leave Act: https://www.ocwr.gov/employee-rights-legislative-branch/family-and-medical-leave-act/

- Dispute Resolution: https://www.ocwr.gov/request-assistance/dispute-resolution/