To Valerie, Phillip, Jennie Rae, and in memory of my parents. To the memory of Frank J. Landy for teaching me so much about the law and the profession, and for being a great friend.

—Arthur Gutman

To my husband, Kim Robert Bryan, for his patience, support, and encouragement; to my sister, Kathleen Ray, for her love and strength; and to my mother, Dolores Koppes, whose concern, compassion, humor, and sacrifices give me strength and perseverance. To Frank J. Landy for his mentorship and inspiration that helped me see my potential.

—Laura L. Koppes

To my wife, Donna, for her loving support and encouragement, and for my parents, whose caring, hard work, and sacrifices gave me opportunities they never had.

—Stephen J. Vodanovich
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
<td></td>
<td>xxiii</td>
</tr>
<tr>
<td>Preface</td>
<td></td>
<td>xxv</td>
</tr>
<tr>
<td>1</td>
<td>An Introduction to EEO Law</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Section I The US Legal System</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>The US Constitution</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>The Three Branches of Federal Government</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Federal Agencies</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Section II Six Dimensions for EEO Laws</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Dimension 1: Protected Classes</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Dimension 2: Covered Entities</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>Dimension 3: Covered Practices</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>Dimension 4: Administrative Procedures</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Dimension 5: Remedies</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Dimension 6: Judicial Scenarios</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>Individuous Disparate Treatment</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>Pattern or Practice</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>Adverse Impact</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>Statutory Defenses</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>Section III Civil Trial Procedures</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>Section IV Overview of Covered Topics</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>Chapter 2: Major Title VII Judicial Scenarios</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>Chapter 3: Major Title VII Protected Class Issues</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>Chapter 4: The Civil Rights Acts of 1866 and 1871</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>Chapter 5: The Equal Pay Act of 1963 (EPA)</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>Chapter 6: Age Discrimination in Employment Act of 1967 (ADEA)</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>Chapter 7: Affirmative Action</td>
<td>14</td>
</tr>
</tbody>
</table>
## Contents

Chapter 8: The Americans with Disabilities Act of 1990 (ADA) ................................................................. 14
Chapter 9: Retaliation ................................................................................................................................. 15
Section V  
Brief Overview of CRA-91 .................................................................................................................. 15
Conclusion .................................................................................................................................................... 16

2 Major Title VII Judicial Scenarios ........................................................................................................ 19
Introduction .................................................................................................................................................. 19
Section I  
The McDonnell–Burdine Scenario .................................................................................................. 20
*McDonnell-Douglas v. Green* (1973) ...................................................................................................... 21
Clarification of the Defense Burden ........................................................................................................... 23
Clarification of the Proof of Pretext .......................................................................................................... 25
Section II  
The Mixed-Motive Scenario ......................................................................................................... 28
The CRA-91 ............................................................................................................................................... 30
Implications of Costa ................................................................................................................................ 32
Section III  
Pattern or Practice Scenarios .............................................................................................................. 33
*International Teamsters v. United States* (1977) ..................................................................................... 34
Teamsters and Hazelwood Compared ........................................................................................................ 37
Other “Reverse Discrimination” Rulings .................................................................................................... 37
More Recent Trends .................................................................................................................................... 38
Section IV  
The BFOQ and BFSS Statutory Defenses ....................................................................................... 40
The BFOQ Defense .................................................................................................................................... 40
The BFSS Defense ...................................................................................................................................... 41
Section V  
Early Adverse Impact Traditions ......................................................................................................... 44
*Albemarle v. Moody* (1975) .................................................................................................................... 47
*Washington v. Davis* (1976) .................................................................................................................... 48
Adverse Impact “Light” .............................................................................................................................. 49
Adverse Impact “Heavy” ............................................................................................................................ 50
Section VI  
The Watson and Wards Cove Rulings ............................................................................................... 52
*Watson v. Fort Worth Bank* (1988) ........................................................................................................ 52
Section VII  
The Aftermath of Wards Cove ........................................................................................................ 58
The CRA-90 Debates .................................................................................................................................... 58
The CRA-91 Compromise ............................................................................................................................ 60
Watson and Wards Cove Revisited ............................................................................................................ 62
Section VIII  
Issues for Compliance ........................................................................................................................... 63
# Contents

<table>
<thead>
<tr>
<th>Section I</th>
<th>Discrimination Based on Race</th>
<th>161</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section II</td>
<td>Discrimination Based on Religion</td>
<td>161</td>
</tr>
<tr>
<td>Section III</td>
<td>Discrimination Based on National Origin</td>
<td>161</td>
</tr>
<tr>
<td>Section IV</td>
<td>Sexual Harassment</td>
<td>161</td>
</tr>
<tr>
<td>Section V</td>
<td>Other Sex Discrimination Scenarios</td>
<td>162</td>
</tr>
<tr>
<td>Section VI</td>
<td>Issues for Compliance</td>
<td>162</td>
</tr>
<tr>
<td>Section VII</td>
<td>Implications for Practice</td>
<td>162</td>
</tr>
<tr>
<td>Notes</td>
<td>162</td>
<td></td>
</tr>
</tbody>
</table>

## 4 Constitutional Claims

<table>
<thead>
<tr>
<th>Introduction</th>
<th>167</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section I</td>
<td>Historical Overview</td>
</tr>
<tr>
<td>The 13th Amendment</td>
<td>168</td>
</tr>
<tr>
<td>The 14th Amendment</td>
<td>169</td>
</tr>
<tr>
<td>Additional Statutes</td>
<td>170</td>
</tr>
<tr>
<td>Section II</td>
<td>Section 1981 of the Civil Rights Acts of 1866 and 1871</td>
</tr>
<tr>
<td>Protected Classes (D1)</td>
<td>173</td>
</tr>
<tr>
<td>Covered Entities (D2)</td>
<td>174</td>
</tr>
<tr>
<td>Covered Practices (D3)</td>
<td>174</td>
</tr>
<tr>
<td>Administrative Procedures (D4)</td>
<td>176</td>
</tr>
<tr>
<td>Remedies (D5)</td>
<td>177</td>
</tr>
<tr>
<td>Judicial Scenarios (D6)</td>
<td>177</td>
</tr>
<tr>
<td>Section III</td>
<td>Section 1983 of the Civil Rights Acts of 1866 and 1871</td>
</tr>
<tr>
<td>Protected Classes (D1)</td>
<td>179</td>
</tr>
<tr>
<td>Covered Entities (D2)</td>
<td>179</td>
</tr>
<tr>
<td>Covered Practices (D3)</td>
<td>180</td>
</tr>
<tr>
<td>Administrative Procedures (D4)</td>
<td>181</td>
</tr>
<tr>
<td>Remedies (D5)</td>
<td>182</td>
</tr>
<tr>
<td>Sovereign State Immunity in Section 1983 Claims</td>
<td>182</td>
</tr>
<tr>
<td>State Liability in Other Statutes</td>
<td>183</td>
</tr>
<tr>
<td>Municipal Liability in Section 1983 Claims</td>
<td>184</td>
</tr>
<tr>
<td>Judicial Scenarios (D6)</td>
<td>185</td>
</tr>
<tr>
<td>The Rational Basis Test</td>
<td>185</td>
</tr>
<tr>
<td>Strict Scrutiny</td>
<td>186</td>
</tr>
<tr>
<td>Moderate (or Intermediate) Scrutiny</td>
<td>187</td>
</tr>
<tr>
<td>Section IV</td>
<td>Issues for Compliance</td>
</tr>
<tr>
<td>Strict Scrutiny in State Constitutional Law</td>
<td>188</td>
</tr>
<tr>
<td>Another Viewpoint</td>
<td>189</td>
</tr>
<tr>
<td>Generalization of Strict Scrutiny to Test Validation</td>
<td>189</td>
</tr>
</tbody>
</table>
Contents

Background Information ........................................................... 224
The Legal Issues in Comparable Worth ..................................... 225
Section VII Critical Issues Relating to the FOS Defense ............. 229
FOS Cannot Reference Sex ..................................................... 229
Market Forces ......................................................................... 230
Prior Salary ............................................................................ 230
Section VIII The Ledbetter and Paycheck Acts ....................... 233
The Ledbetter Fair Pay Act of 2009 ........................................... 233
The Ledbetter Fair Pay Act of 2009 ........................................ 235
Early Judicial Returns ......................................................... 236
The Paycheck Fairness Act ...................................................... 240
Section IX Issues for Compliance ............................................ 242
The Establishment ................................................................... 242
Wages and Fringe Benefits .................................................... 242
Past Salary and Market Forces .............................................. 243
Section X Implications for Practice ......................................... 243
Job Analysis and Job Evaluation ............................................ 244
Gender-Based Job Classifications .......................................... 246
Fair Performance Evaluations .............................................. 246
Pay Secrecy Policies ............................................................. 247
Conclusion ............................................................................... 247
Key Summary Points ............................................................. 247
Discussion Questions .............................................................. 248
Section I Historical Background Issues ..................................... 248
Section II Overview of the Six Dimensions .............................. 249
Section III The Department of Labor Era ............................... 249
Section IV The Post-Department of Labor Era ....................... 249
Section V The Bennett Amendment and Title VII .................. 249
Section VI Comparable Worth Claims in Title VII ................. 249
Section VII Critical Issues Relating to the FOS Defense ......... 249
Section VIII The Ledbetter and Paycheck Acts ..................... 250
Section IX Issues for Compliance ......................................... 250
Section X Implications for Practice ....................................... 250
Notes ....................................................................................... 250

6 The Age Discrimination in Employment Act of 1967 ............ 253
Introduction ............................................................................... 253
Section I Historical Background Issues .................................... 253
Section II Overview of the Six Dimensions ............................. 257
Protected Class (D1) ............................................................... 258
Covered Entities (D2) ................................................................. 259
Covered Practices (D3) ................................................................. 260
Administrative Procedures (D4) .................................................. 261
Remedies (D5) ............................................................................... 261
Judicial Scenarios (D6) ................................................................. 262

Section III McDonnell–Burdine Scenario ....................................... 263
Review of McDonnell–Burdine .................................................... 264
Age-Specific Scenarios ................................................................. 265
  Small Age Differences ............................................................... 266
  Same Actor Defense ............................................................... 268
  Reductions in Force ............................................................... 269
  Reorganization Schemes .......................................................... 270

Section IV Other Disparate Treatment Scenarios ............................ 272
Mixed-Motive Scenarios .............................................................. 272
  Background on Mixed Motive in Title VII ................................. 272
  Background on Mixed Motive in the ADEA ................................. 273
  Gross v. FBL Financial Services (2009) ........................................ 276
Pattern or Practice Scenarios ...................................................... 277
Hostile Environment Harassment ............................................... 278
Good Cause and RFOA ............................................................... 279
After-Acquired Evidence ........................................................... 280

Section V Adverse Impact Theory in the ADEA ............................. 282
Early ADEA Adverse Impact Rulings ........................................... 283
  Smith v. City of Jackson (2005) ................................................ 286
  Meacham v. KAPL (2008) ........................................................ 288

Section VI The BFSS and BFOQ Statutory Defenses ....................... 290
The BFSS Defense ................................................................. 290
The BFOQ Defense ................................................................. 291

Section VII OWBPA of 1990 ......................................................... 294
The BFBBP Defense ................................................................. 294
  United Air Lines v. McMann (1977) ......................................... 294
  Kentucky Retirement System v. EEOC (2008) ......................... 296
Voluntary Early Retirement ....................................................... 297
Voluntary Waivers ................................................................. 297

Section VIII Issues for Compliance ............................................. 299
Advertisements and Employment Applications .......................... 299
BFOQ ...................................................................................... 300
Considerations for Discharge Scenarios ..................................... 300
Contents

Section IX Implications for Practice ................................................. 302
  Recruitment and Selection ......................................................... 302
  Performance Evaluation and Management ................................ 304
  Reduction-in-Force .................................................................... 305
  Additional Considerations ......................................................... 307
Conclusion .................................................................................. 307
Key Summary Points ...................................................................... 307
Discussion Questions ..................................................................... 309
  Section I Historical Background Issues .................................. 309
  Section II Overview of Six Dimensions .................................. 309
  Section III McDonnell–Burdine Scenario .............................. 309
  Section IV Other Disparate Treatment Scenarios ................... 309
  Section V Adverse Impact Theory in the ADEA .................... 309
  Section VI The BFSS and BFOQ Statutory Defenses ............. 309
  Section VII OWBPA of 1990 ................................................... 310
  Section VIII Issues for Compliance ........................................ 310
  Section IX Implications for Practice ....................................... 310
Notes .......................................................................................... 310

7 Affirmative Action ..................................................................... 313
  Introduction .............................................................................. 313
  Section I Overview of Major Issues Surrounding AA ............ 314
  Section II The Evolution of EO 11246 ..................................... 316
  Section III The Scope of EO 11246 ........................................... 319
    Preferred Groups (D1) ............................................................ 319
    Covered Entities (D2) ............................................................ 319
    Covered Practices (D3) ........................................................... 320
    Administrative Procedures (D4) ............................................ 322
    Remedies (D5) ..................................................................... 322
    Judicial Scenarios (D6) .......................................................... 323
  Section IV Challenges to Voluntary AA ................................. 324
    Regents v. Bakke (1978) ......................................................... 324
    United Steelworkers v. Weber (1979) ..................................... 326
    Wygant v. Jackson (1986) ..................................................... 327
    Johnson v. Transportation (1987) ........................................... 328
  Section V Challenges to Consent Decrees and Court Orders .... 330
    Local 93 v. Cleveland (1986) and Local 28 v. EEOC (1986) ............................................................................. 331
    Martin v. Wilks (1989) ............................................................ 334
Section VI  Challenges to Federal and State Government
Set Asides ........................................................................................................... 335

City of Richmond v. Croson (1989) ......................................................... 337

Section VII  The Aftermath of Croson and Adarand .................. 340
The Croson Standard .................................................................................. 340
Chronology of Rulings Surrounding Adarand ........................................ 341
Satisfying the Croson Standard ................................................................. 341

Section VIII  Pre-Grutter Rulings Related to Diversity ................. 343
The Post-Bakke Era ................................................................................. 343
The Post-Adarand Era .............................................................................. 345

Section IX  Supreme Court Rulings in Grutter, Gratz, and Parents ... 349

Section X  Recent OFCCP Activities Relating to Affected Class Rulings .......... 359

Section XI  New Rules for Internet Recruitment ......................... 363
Definition of the Term “Applicant” ...................................................... 363
A Sample Court Case ........................................................................ 364
  Rule 1: Expression of Interest ......................................................... 366
  Rule 2: Particular Positions ............................................................. 366
  Rule 3: Indication of MQs ................................................................. 366

Section XII  Issues Implications for Compliance ......................... 367
Tension between EO 11246 and Nondiscrimination Laws ............ 367
Recordkeeping for Internet Recruitment ................................................. 368

Section XIII  Implications for Practice .............................................. 372
Diversity and Job-Relatedness ................................................................. 372
Recruitment ......................................................................................... 374
  Organizational Image .................................................................. 375
  Recruiters ..................................................................................... 375
Selection and Retention ........................................................................ 376
  Interviewing .................................................................................. 376
  Orientation ..................................................................................... 376
  Personnel Decision-Making ......................................................... 376

Conclusion ................................................................................................. 377
Key Summary Points ............................................................................... 377
Discussion Questions ............................................................................... 378
Section I  Overview of Major Issues Surrounding AA .......... 378
Section II  Evolution of EO 11246 ........................................... 378
Section III  The Scope of EO 11246 ..................................... 378
Section IV  Challenges to Voluntary AA ............................... 378
Section V  Challenges to Consent Degrees and Court Orders .......................................................... 378
Section VI  Challenges to Federal and Government Set Asides .......................................................... 378
Section VII  The Aftermath of Croson and Adarand ............... 379
Section VIII  Pre-Grutter Rulings Related to Diversity ............ 379
Section IX  Supreme Court Rulings in Grutter, Gratz, Petit, and Parents ................................................ 379
Section X  Recent OFCCP Activities Relating to Affected Class Rulings .................................................. 379
Section XI  New Rules for Internet Recruitment ....................... 379
Section XII  Issues for Compliance ........................................ 379
Section XIII  Implications for Practice .................................. 380
Notes ......................................................................................... 380

8 The Americans with Disabilities Act of 1990 ....................... 383
Introduction .................................................................................. 383
Section I  Historical Background .................................................. 384
Section II  Overview of the Six Dimensions for Title I of the ADA ................................................................. 385
Protected Class (D1) ................................................................. 385
Covered Entities (D2) .............................................................. 387
Covered Practices (D3) ............................................................. 387
Administrative Procedures (D4) and Remedies (D5) ................. 387
Judicial Scenarios (D6) ............................................................. 388
Section III  Critical Precedents from the RE-73 ......................... 389
Overview of Section 501 ............................................................. 389
Overview of Section 504 ............................................................. 390
Southeastern Community College v. Davis (1979) ................. 392
The Choate and Arline Rulings .................................................. 394
Southeastern v. Davis Revisited ................................................ 395
Summary of Implications of RE-73 for the ADA ....................... 396
Section IV  Impact of the ADAAA of 2008 .................. 397
Overview of Cases and Regulations Addressed in the ADAAA ................................................................. 398
The Prong 1 Definition of Disability ........................................ 400
Valid Major Life Activities ......................................................... 400
Substantial Limitations ................................................................. 401
Working as a Major Life Activity .................................................. 402
Manual Tasks and Caring for Oneself ........................................ 404
Mitigation of Impairments ............................................................ 404
Prongs 2 and 3 ................................................................................ 405
Section V Focus on the ADA Rulings Targeted in the ADAAA .... 408
The Facts in *Sutton v. UAL* .......................................................... 408
The Facts in *Murphy v. UPS* and *Albertsons v. Kirkingburg* .... 410
The Facts in *Toyota v. Williams* .................................................. 413
Section VI Definition of being Qualified ........................................ 415
Determining What is Essential ...................................................... 415
Definition of Being Qualified ....................................................... 417
Section VII Threats to Workplace Safety ....................................... 420
Illegal Drugs .................................................................................. 420
Definition of Rehabilitation .......................................................... 421
Reasonable Accommodations ....................................................... 422
Alcoholism and Alcohol Abuse .................................................... 422
When to Terminate ....................................................................... 423
When to Reasonably Accommodate ............................................. 424
The Statutory Direct Threat Defense ............................................ 425
Lower Court Rulings on Infectious Diseases .............................. 427
Lower Court Rulings on Other Impairments ............................. 428
Section VIII Ground Rules for Assessing KSAs and
Reasonable Accommodations ....................................................... 430
Ground Rules for Medical Exams and Related Inquiries ............ 430
Major Preoffer Proscriptions ......................................................... 431
Major Preoffer Exemptions ........................................................... 432
Ground Rules for Inquiries about Reasonable
Accommodations ......................................................................... 433
Caveats for Applicants and Employees ...................................... 434
Flexible Employers ..................................................................... 435
Reasonable Accommodation for the Hiring Process ............... 436
Section IX Statutory Prescriptions for Reasonable
Accommodations ......................................................................... 437
Accommodation 2: Job Restructuring .......................................... 438
Accommodation 3: Part-Time Work and Modified
Work Schedules ........................................................................... 439
Accommodation 4: Reassignment to Vacant Positions ............. 441
Employer Errors ................................................................. 441
Unreasonable Requests ..................................................... 442
Emerging Issues ................................................................. 444
Accommodations 5 through 7 ............................................. 446
Accommodation 8: Other Similar Accommodations .......... 447
Section X Employer Defense Strategies ............................... 449
Defenses 1 through 6 ........................................................... 450
  Defense 1: Refuting Class Membership ......................... 450
  Defense 2: Defending KSAs and Essential Job Functions 
  Defense 3: Failure to Inform or Flexibly Interact ......... 451
  Defense 4: Reasonable Accommodations were Made ..... 451
  Defense 5: McDonnell–Burdine .................................. 452
  Defense 6: Direct Threat .............................................. 452
Defenses 7 and 8 ................................................................ 453
  Defense 7: Unreasonable Requests .............................. 453
  Defense 8: Undue Hardship ......................................... 454
Section XI Issues for Compliance ........................................ 456
Essential Job Duties and KSAs ........................................... 457
Section XII Implications for Practice ................................. 459
A Sample Selection Strategy .............................................. 460
  A Selection Strategy .................................................... 461
Reasonable Accommodations ........................................... 462
Flexible Interaction .......................................................... 463
Affirmative Strategies ....................................................... 464
Conclusion .............................................................................. 466
Key Summary Points ........................................................ 465
Discussion Questions .......................................................... 466
Section I Historical Background .......................................... 466
Section II Overview of the Six Dimensions for Title I of the ADA .................................................. 466
Section III Critical Precedents from the Rehabilitation Act of 1973 (RE-73) ................................. 466
Section IV Impact of the ADA Amendments Act of 2008 (ADAAA) ............................................. 467
Section V Focus on the ADA Rulings Targeted in the ADAAA .................................................... 467
Section VI Definition of Being Qualified .................................. 467
Section VII Threats to Workplace Safety ............................. 467
Section VIII Ground Rules for Assessing KSAs and Reasonable Accommodations ................. 467
Contents

Section IX  Statutory Prescriptions for Reasonable Accommodations ............................................. 467
Section X  Employer Defense Strategies ......................................................................................... 468
Section XI  Issues for Compliance ................................................................................................. 468
Section XII  Implications for Practice ......................................................................................... 468
Notes ........................................................................................................................................ 468

9 Retaliation ................................................................................................................................. 471
Introduction ................................................................................................................................... 471

Section I  Overview of Title VII Provisions for Retaliation ....................................................... 472
Prong 1: Establishing a Protected Activity ..................................................................................... 472
Prong 2: Establishing a Materially Adverse Action ....................................................................... 474
Ultimate Employment .................................................................................................................. 475
Adverse Employment ................................................................................................................... 476
EEOC Deterrence .......................................................................................................................... 477
Prong 3: Establishing a Causal Connection .................................................................................. 477

Section II  Robinson v. Shell Oil (1997) .......................................................................................... 480
Impact on Retaliation Claims ....................................................................................................... 481
Impact on EEOC Guidance .......................................................................................................... 482

Section III  BNSF v. White (2006) ............................................................................................... 483
Lower Court Rulings .................................................................................................................... 483
The Supreme Court Ruling .......................................................................................................... 484

Section IV  Implications of BNSF v. White (2006) ....................................................................... 487
Pre-BNSF Rulings ....................................................................................................................... 487
Post-BNSF Rulings ....................................................................................................................... 489
Affirmed SJD Rulings .................................................................................................................... 490
Nonaffirmed SJD Rulings ............................................................................................................. 492

Section V  Issues for Compliance .................................................................................................. 496
Recommendation 1 ....................................................................................................................... 496
Recommendation 2 ....................................................................................................................... 496
Recommendation 3 ....................................................................................................................... 497
Recommendation 4 ....................................................................................................................... 498
Recommendation 5 ....................................................................................................................... 498
Recommendation 6 ....................................................................................................................... 498

Section VI  Implications for Practice ............................................................................................ 499
Additional Recommendations ....................................................................................................... 499
Conclusion ....................................................................................................................................... 499
Key Summary Points .................................................................................................................... 499
Discussion Questions ..................................................................................................................... 501

Section I  Overview of Title VII Provisions for Retaliation ....................................................... 501
Contents

Section II  Robinson v. Shell Oil (1997) .................................................. 501
Section III  BNSF v. White (2006) .......................................................... 501
Section IV  Implications of BNSF v. White (2006) ................................. 501
Section V   Issues for Compliance .......................................................... 501
Section VI   Implications for Practice ...................................................... 501
Notes .................................................................................................. 502

Glossary of Legal Terms .................................................................... 503
Cases Cited ....................................................................................... 507
References ......................................................................................... 533
Author Index ..................................................................................... 543
Subject Index ..................................................................................... 547
Chapter 8

The Americans with Disabilities Act of 1990

Introduction

The Americans with Disabilities Act, or ADA, enjoyed bipartisan support in Congress, passing 91-6 in the Senate and 377-27 in the House, and was strongly endorsed by President George H.W. Bush. The ADA contains five titles: (I) Employment; (II) Public Services; (III) Public Accommodations and Services Operated by Private Entities; (IV) Telecommunications; and (V) Miscellaneous Provisions. This chapter focuses on Title I (Employment).

The prior edition of this text used eight sections for this chapter. In view of subsequent complexities, including several major Supreme Court rulings and passage of the ADA Amendments Act of 2008 (ADAAA), 12 sections are used in this edition. Section I contains background information about 72 years of legislation on disabilities that served as precursors to the ADA. Section II overviews the six dimensions for the ADA and Section III discusses major precedents from RE-73. Sections IV through VI are devoted to the definition of being disabled and qualified within the meaning of the ADA, including the major amendments in the ADAAA. The remaining sections of the chapter focus on workplace safety (Section VII), rules for assessing KSAs and reasonable accommodations (Section VIII), specific reasonable accommodations codified in the ADA statute (Section IX), defense options available to employers (Section X), compliance issues (Section XI), and implications for practice (Section XII).
Section I  Historical Background

As depicted in Table 8.1, the ADA culminated 72 years of legislation on disabilities (or handicaps), and took effect on July 26, 1992.

The key precursor to the ADA was the Rehabilitation Act of 1973 (RE-73), a sweeping law containing the three statutes depicted in Table 8.2. For our purposes, the critical comparison is between Sections 501 and 504. By the late 1980s, it was clear that Section 501 was a strong statute because of its connection to Title VII and its clear statutory language. In contrast, Section 504 was connected to a weaker statute (Title VI), and contained opaque statutory language supported by questionable regulatory language. As a result, Section 504 provided weaker coverage for nonfederal entities than Section 501 provided for federal entities. A major purpose of Title I of the ADA was to harmonize Sections 501 and 504, thus equalizing protections for employees in all sectors. As a result, ADA statutory and regulatory language applies to both of these statutes, and RE-73 court rulings consistent with the ADA serve as critical precedents for ADA rulings.

More recently, the ADAAA was strongly endorsed by bipartisan majorities in both houses of Congress, and by President George W. Bush, who signed it into law on September 25, 2008 with an effect date of January 1, 2009. With minor exceptions, the ADAAA focuses on the definition of being disabled within the meaning of the ADA.

Table 8.1  Disability Statutes—1918–1990

<table>
<thead>
<tr>
<th>Year</th>
<th>Statute Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1918</td>
<td>Smith–Fess Act: Training and education for physically disabled WWI veterans</td>
</tr>
<tr>
<td>1920</td>
<td>Smith–Fess Act is extended to all physically disabled Americans</td>
</tr>
<tr>
<td>1935</td>
<td>Social Security Act permanently codifies Smith–Fess Act</td>
</tr>
<tr>
<td>1943</td>
<td>Amendment adds first time protections for mentally disabled people</td>
</tr>
<tr>
<td>1973</td>
<td>Sections 501, 503, and 504 of Rehabilitation Act (RE-73)</td>
</tr>
<tr>
<td>1974</td>
<td>Veterans Assistance Act: affirmative action for disabled veterans</td>
</tr>
<tr>
<td>1989</td>
<td>Disability provisions added to Fair Housing Act</td>
</tr>
<tr>
<td>1990</td>
<td>Americans with Disabilities Act of 1990 (ADA)</td>
</tr>
</tbody>
</table>
The Americans with Disabilities Act of 1990

Section II Overview of the Six Dimensions for Title I of the ADA

The six dimensions for Title I of the ADA are depicted in Table 8.3. These dimensions represent the current status of the ADA as amended by the ADAAA.

Protected Class (D1)

As depicted in Table 8.4, class membership (D1) has two major hurdles. Hurdle 1 (being disabled) is satisfied in any of three ways (or prongs): (1) a current physical or mental impairment that substantially limits a major life activity; (2) a record...
(or history) of such impairment; or (3) being regarded as physically or mentally impaired. Major life activities include breathing, seeing, sleeping, walking, working, and many others. However, the plaintiff must prove exclusion from a broad range of jobs when working is the substantially limited major life activity.

Hurdle 2 (qualification) has two requirements, both of which must be satisfied: (1) having the or KSAs to perform all essential job functions (or duties), and (2) having the ability to perform these duties with or without reasonable accommodation. Critically, employers are not required to eliminate or alter any essential duties. Therefore, individuals who cannot perform all essential job duties, even when accommodations are considered, face what several courts have termed an insurmountable barrier.

Additionally, there are unconditional exclusions from the definition of disability. Specifically, Section 111 of the ADA excludes the following:

1. transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual impairments or other sexual behavior disorders;
2. compulsive gambling, kleptomania, or pyromania; or
3. psychoactive substance use disorders resulting from current illegal use of drugs.

The third exclusion applies only to current users of illegal drugs, not to individuals with a history of addiction who are in recovery and have no recent record of drug use.

Table 8.4 Disability and Qualification

<table>
<thead>
<tr>
<th>Hurdle 1—Being Disabled</th>
<th>Hurdle 2—Being Qualified</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prong 1</strong> Current physical or mental impairment that substantially limits a major life activity</td>
<td><strong>Requirement 1</strong> Possession of KSAs need to perform essential job functions (or duties)</td>
</tr>
<tr>
<td><strong>Prong 2</strong> A record of such an impairment</td>
<td><strong>Requirement 2</strong> Performance of all essential duties with or without reasonable accommodation</td>
</tr>
<tr>
<td><strong>Prong 3</strong> Being regarded as having such an impairment</td>
<td></td>
</tr>
</tbody>
</table>

(qualifications)
Covered Entities (D2)

The ADA covers (D2) all private and municipal employers under Title VII rules (15 or more employees in the current or prior year). The ADA has never covered federal employees. As suggested earlier, the logic behind excluding federal employees from ADA coverage is they already enjoyed strong coverage under RE-73 that nonfederal employees did not enjoy. When signed into law in 1990, the ADA did cover private lawsuits by state employees, but this private right was struck down by the Supreme Court in Board of Trustees of Alabama v. Garrett (2001) in a 5-4 ruling.1 However, the Garrett ruling does not apply to municipal entities, and the EEOC may sue for remedies on behalf of individuals against state entities.2

Covered Practices (D3)

As in Title VII, the ADA covers (D3) terms, conditions, and privileges of employment, segregation and classification, and retaliation. The ADA also codifies and lists specific reasonable accommodations to enable performance of essential job functions that otherwise, could not be performed because of a disability. The list includes: job restructuring, part time work or modified work schedules, reassignment to vacant positions, modification of equipment, modification of employment tests, training materials or work policies, providing readers and interpreters, and “other similar accommodations.” Additionally, as discussed in Chapter 3 for sincerely held religious beliefs (in Title VII), employers and employees (or applicants) must cooperate (or flexibly interact) to discover accommodations that permit performance of essential job functions in the ADA.

The ADA also proscribes medical or psychiatric inquiries prior to a conditional job offer. This proscription applies regardless of how an inquiry is made and irrespective of whether it is job-related. For example, personality tests such as the Minnesota Multiphasic Personality Inventory (MMPI) contain test items relating to physical and mental health, and therefore, are illegal to administer prior to a conditional job offer. Even personality tests without invasive questions, such as the 16PF, are not allowed prior to a conditional job offer because mental health professionals may use test data for mental health purposes. However, tests for current use of illegal drugs are not medical inquiries, and therefore, are legal prior to a conditional job offer.

Administrative Procedures (D4) and Remedies (D5)

These dimensions follow directly from Title VII, as amended in CRA-91. Thus, administrative procedures (D4) include statutory limits for filing claims
of discrimination with the EEOC in deferral states (300 days) and nondeferral states (180 days), EEOC investigation and attempted conciliation, and the 90-day statutory limit for filing a private lawsuit in the federal district court after the EEOC has issued a right-to-sue notice. The remedies (D5) include equitable relief (e.g., backpay, declaratory or injunctive relief, front pay, and attorney fees) and legal relief (compensatory damages for pain and suffering and punitive damages for willful violations). As in Title VII, legal relief is capped at $300,000, and punitive damages are not available against government agencies.

**Judicial Scenarios (D6)**

The judicial scenarios (D6) include two statutory defenses (direct threat and undue hardship), and other defense strategies related to the definition of disability and the requirement to reasonably accommodate. Direct threat applies when a physical or mental impairment endangers oneself or others in the workplace. Undue hardship applies if a requested accommodation imposes undue organizational difficulty or financial expense. It should be noted, however, that undue hardship is a “last-resort” defense because employers may win the case short of having to use this strategy.

The most common claim by plaintiffs is failure to reasonably accommodate a current impairment (i.e., Prong 1). However, plaintiffs cannot make this claim unless they can first prove they are disabled and qualified within the meaning of the ADA. Plaintiffs must also make a facial showing (i.e., provide plausible reasons) that a requested accommodation will enable them to perform essential job functions. This leaves employers with several defenses other than and in addition to the statutory defenses of direct threat and undue hardship.

Among these, the four most common defenses are: (1) that the plaintiff is not disabled within the meaning of the ADA; (2) that a requested accommodation requires alteration or elimination of essential job functions, and therefore, is unreasonable as a matter of law; (3) that the plaintiff did not flexibly interact with the employer to discover a reasonable accommodation; and (4) that the plaintiff cannot perform one or more essential job functions, even with accommodations (i.e., insurmountable barrier). It should be noted, however, that the insurmountable barrier defense requires that the essential job functions under discussion are job-related.

Additionally, traditional McDonnell–Burdine disparate treatment rules apply if an employer acknowledges (1) the plaintiff is disabled and qualified; and (2) an adverse employment decision was made (e.g., hiring, promotion, demotion, termination, etc.); but (3) claims that the adverse employment decision was not causally connected to the disability. For example, if an employer articulates that
a disabled applicant or employee is less qualified than a nondisabled counterpart, even with reasonable accommodations for the disabled counterpart, the plaintiff must prove that the articulation is a pretext for discrimination.

**Brief Summary:** Class membership (D1) requires disability and qualification. Disability means (1) physical or mental impairments that substantially limit major life activities; (2) a history of such impairments; or (3) being regarded as being impaired. Special rules apply for working as the major life activity. Qualification means having prerequisite KSAs and performing all essential job duties with or without accommodation. Inability to do so, even with reasonable accommodation, constitutes an insurmountable barrier. The ADA covers (D2) private and municipal entities, but not state or federal entities. Federal employees are protected under RE-73 with rules parallel to the ADA, and the EEOC may sue on behalf of state employees. The ADA covers (D3) the same trilogy of practices as Title VII, and codifies specific reasonable accommodations. The administrative procedures (D4) and remedies (D5) are the same as in Title VII. The judicial scenarios (D6) include two statutory defenses and several defense strategies relating to the definition of disability and qualification, and reasonable accommodation. McDonnell–Burdine disparate treatment rules apply in some cases.

**Section III  Critical Precedents from the RE-73**

Among the statutes in RE-73, Section 503 mandates affirmative action for any entity receiving federal funds in any amount, whereas Section 504 mandates nondiscrimination for any federal grant recipient (i.e., employment or otherwise) and agencies that administer those grants. In comparison, Section 501 mandates both affirmative action and nondiscrimination, but only for federal employees. For reasons to be discussed below, it was the relative strength of Section 501 and the relative weakness of Section 504 that likely motivated Title I of the ADA.

**Overview of Section 501**

Originally, Section 501 was an affirmative action statute enforced by the (then) Civil Service Commission (now Office of Personnel Management). In 1978, administration of Section 501 was passed to the EEOC in President Carter’s Reorganization Plan #1. At about the same time, Congress amended Section
501 to add Title VII provisions to the original affirmative action provisions as follows:

The remedies, procedures, and rights set forth in section 717 of [Title VII], including sections 706(f) through 706(k), shall be available with respect to any complaint under [Sec.501] of this title …. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary workplace accommodation, and the availability of alternatives therefore or other appropriate relief in order to achieve an equitable and appropriate remedy.

Therefore, as depicted in Table 8.5, Section 501 is a strong statute because of its Title VII procedures (D4) and remedies (D5), and its statutory coverage of two key practices (D3): affirmative action and reasonable accommodation. The statutory reference to “reasonableness” of costs implicates the undue hardship defense.

**Overview of Section 504**

On paper, Section 504 presents as a broader statute than Section 501, covering any entity receiving federal funds in any amount, including educational institutions, hospitals, training programs, state welfare programs, and so on. Section 504 also contains special provisions for employment. However, critically, in the 1978 amendments, Congress connected Section 504 to Title VI, not Title VII. As depicted in Table 8.6, there was one major benefit to the Title VI connection—plaintiffs may directly access federal court (D4) in Section 504 claims. However, the deficits far outweighed this benefit.

**Table 8.5  Section 501 of RE-73**

<table>
<thead>
<tr>
<th>D1: Protected class</th>
<th>Being handicapped and qualified</th>
</tr>
</thead>
<tbody>
<tr>
<td>D2: Covered entities</td>
<td>Federal agencies only</td>
</tr>
<tr>
<td>D3: Covered practices</td>
<td>Nondiscrimination, affirmative action, and reasonable accommodation</td>
</tr>
<tr>
<td>D4: Admin procedures</td>
<td>Title VII EEOC procedures</td>
</tr>
<tr>
<td>D5: Remedies</td>
<td>Title VII equitable relief</td>
</tr>
<tr>
<td>D6: Judicial scenarios</td>
<td>Disparate treatment, business necessity, and reasonable accommodation</td>
</tr>
</tbody>
</table>
The major deficits are in the Section 504 statute itself, the relevant portion of which reads as follows:

No **otherwise qualified** [emphasis by authors] handicapped individual in the United States, as defined in section 706(8) of this title shall, solely by reason of his handicap, shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

As written, Section 504 outlaws nondiscrimination for **otherwise qualified** handicapped individuals. Critically, unlike Section 501, there is no statutory reference to reasonable accommodation or affirmative action in Section 504.

At the time, these seemed like minor flaws. Section 504 regulations written by the (then) Department of Health, Education, and Welfare (now Health & Human Services) defined **qualified** to mean performance of essential job functions with or without reasonable accommodation. These regulations also mandated affirmative action. However, there was early confusion regarding the legality of these regulations.

For example, in *Carmi v. Metro* (1979), a Missouri district court ruled that a handicapped individual should be treated like any other applicant. Accordingly:

The term “otherwise qualified” … does not mean that a handicapped individual must be hired **despite** [emphasis by authors] his handicap.

---

**Table 8.6 Section 504 of RE-73**

<table>
<thead>
<tr>
<th>D1: Protected class</th>
<th>Regulatory definition of “otherwise qualified” handicapped individuals</th>
</tr>
</thead>
<tbody>
<tr>
<td>D2: Covered entities</td>
<td>Recipients of federal money in any amount and federal agencies</td>
</tr>
<tr>
<td>D3: Covered practices</td>
<td>Nondiscrimination and regulatory reference to reasonable accommodation and affirmative action</td>
</tr>
<tr>
<td>D4: Admin procedures</td>
<td>Direct access to federal court in accordance with Title VI</td>
</tr>
<tr>
<td>D5: Remedies</td>
<td>Equitable relief in accordance with Title VI</td>
</tr>
<tr>
<td>D6: Judicial scenarios</td>
<td>Like Section 501, but complicated owing to ambiguous statutory language</td>
</tr>
</tbody>
</table>
The statute prohibits the nonhiring of a handicapped individual when the disability does not prevent the individual from performing the job.

This ruling ultimately proved to be incorrect. However, it took eight years and three Supreme Court rulings to properly define the meaning of otherwise qualified, and to distinguish between reasonable accommodation and affirmative action. The key rulings were: Southeastern Community College v. Davis (1979), Alexander v. Choate (1985), and School Board of Nassau County v. Arline (1987).

Southeastern Community College v. Davis (1979)

Frances Davis had a severe hearing impairment. Her only means of understanding speech was lip-reading. The college rejected Davis from nursing school, reasoning that her impairment would require substantial modifications in the program in order for her to attend classes. Relying on the Section 504 regulations, Davis claimed she was otherwise qualified and that the school was obligated by affirmative action requirements to make the necessary modifications.

The district court accepted Southeastern’s arguments and ruled that Davis was not otherwise qualified. However, the 4th Circuit reversed on two grounds: (1) that “otherwise qualified” means satisfying the “technical and academic standards” for acceptance in the program, and (2) that the college was obligated by affirmative action requirements to make the modifications in the program. The Supreme Court reversed the 4th Circuit, but the ruling itself was confusing.

As in Carmi v. Metro, a unanimous Supreme Court interpreted otherwise qualified to mean qualified in spite of a handicap. Or in the words of Justice Powell:

The [4th Circuit] believed that “otherwise qualified” persons … include those who would be able to meet the requirements of a particular program in every respect except [emphasis by authors] as to limitations imposed by their handicaps. … We think … [a]n otherwise qualified person is one who is able to meet all of a program’s requirements in spite [emphasis by authors] of his handicap.

Powell also rejected the affirmative action provision in the Section 504 regulations, ruling that “neither the language, purpose, nor history of 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds.”

During the Davis era, both rulings were taken at face value. For example, commenting on Carmi v. Metro, Mack Player (1981), a well-respected legal scholar, stated that the employer in Carmi did not discriminate “because of the
Commenting on Powell’s interpretation of the term *otherwise qualified*, Player stated:

The Court has held that under Sec.504 “an otherwise qualified person is one who is able to meet ... requirements in spite of his handicap”, including physical requirements legitimate and necessary for performance of the duties. ... **an employer is under no duty to hire a handicapped individual who is unable adequately to perform the job requirements.** [emphasis by authors]

Commenting further on Powell’s rejection of the affirmative action provision in the Section 504 regulations, Player stated:

The Court in Southeastern Community College v Davis, supra, noted the difference in language between Sec.504, which only proscribes discrimination, and the language of Sec.503, which specifically authorizes “affirmative action” obligations. This power granted by Sec.503, the Court suggested, could serve as authority to require reasonable accommodation that would reach the level of **substantial modification**. [emphasis by authors]

In short, initially, the *Carmi* and *Davis* rulings implied: (1) that *otherwise qualified* means performing essential job functions *without* reasonable accommodation, and (2) that an individual protected by Section 501 or Section 503 might be entitled to the substantial modifications requested by Frances Davis.

However, there was a third major ruling in *Davis* that went virtually unnoticed. Specifically, in attempting to distinguish between affirmative action and reasonable accommodation, Powell stated the following:

We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals **without imposing undue financial and administrative burdens** [emphasis by authors] upon a state. Identification of those instances where a **refusal to accommodate**
[emphasis by authors] the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW. [emphasis by authors]

This statement seemed to imply that reasonable accommodation was a valid Section 504 requirement unless it imposes undue burdens (or undue hardship). Ultimately, this interpretation proved to be correct, as clarified by the Supreme Court in Alexander v. Choate (1985) and School Board v. Arline (1987).

The Choate and Arline Rulings

Apart from the main issues in Choate (adverse impact) and Arline (infectious diseases), the Supreme Court used both occasions to revisit the Davis ruling. In Choate, the Supreme Court distinguished between affirmative action and reasonable accommodation, suggesting that even when affirmative action is required, it cannot be at the expense of undue hardships. Accordingly:

In Davis, we stated that Sec.504 does not impose an “affirmative action” obligation … Our use of the term “affirmative action” … has been severely criticized for failing to appreciate the difference between affirmative action and reasonable accommodation; the former refer[s] to a remedial policy for the victims of past discrimination, while the latter relates to elimination of existing obstacles against the handicapped. … Regardless … it is clear from the context of Davis that the term “affirmative action” referred to those “changes”, “adjustments”, or “modifications” to existing programs that would be “substantial” … or that would constitute “fundamental alteration[s] in the nature of a program … rather than to those changes that would be reasonable accommodations. [emphasis by authors]

The Choate Court also echoed Powell’s third ruling that “refusal to accommodate the needs of a disabled person” may still amount to discrimination.

Subsequently, in Arline, the Supreme Court stated in clear terms that reasonable accommodation is required for handicapped individuals, unless those accommodations are unreasonable, or impose undue burdens (i.e., undue hardship). Accordingly:

When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any “reasonable accommodation” [emphasis by authors] by the employer would enable the handicapped person to perform those functions.
Accommodation is not reasonable if it either imposes “undue financial and administrative burdens” on the grantee … or requires “a fundamental alteration in the nature of the program”.

Southeastern v. Davis Revisited

In retrospect, Frances Davis had a losing claim even under affirmative action rules because there is no requirement under Section 501 or Section 504 to eliminate or alter essential job functions, and analogously, no requirement for colleges and universities to eliminate or alter essential coursework in their degree programs. Thus, Frances Davis faced what the 5th Circuit in Prewitt v. Postal (1981) termed an insurmountable barrier.

In Prewitt v. Postal, war injuries left Prewitt incapable of lifting 70 pounds, a standard requirement for postal jobs. The 5th Circuit required a facial showing, or plausible reasons to believe that:

[W]ith or without reasonable accommodation, a handicapped individual who meets all employment criteria except for the challenged discriminatory criteria ‘can perform the essential functions of the position in question …

Applying the Prewitt standard, Frances Davis could not complete the program in full with or without reasonable accommodations, and there was no requirement for the college to make “fundamental alterations” in its nursing curriculum. The Prewitt standard was subsequently adopted by other courts.

For example, in Gardner v. Morris (1985), a Section 501 case analogous to Southeastern v. Davis, Gardner applied for a job in Saudi Arabia. Unfortunately, he required substantial daily medical care related to the diagnosis of Manic Depression, and the closest available site to accommodate his treatment needs was in West Germany. The 8th Circuit summarized Gardner’s plight as follows:

Certainly it would be unreasonable to require the Corps to construct a hospital to accommodate Gardner’s handicap. Hiring a full-time physician and providing on-site laboratory facilities are also not the type of reasonable accommodations envisioned by Congress when it enacted the Rehabilitation Act. The cost of such accommodations in the early stages of a construction project would be unreasonable.

In effect, Gardner requested fundamental alterations in Army Corp’s Saudi Arabia operations, and the 8th Circuit found this request unreasonable.
In a *Gilbert v. Frank* (1991), a case analogous to *Prewitt v. Postal*, Gilbert, like Prewitt, could not lift 70 pounds. He requested that the lifting requirement be waived or performed by others, but the 3rd Circuit ruled “reasonable accommodation does not mean eliminating any of the job’s essential functions.”

Two other pre-ADA Prewitt-type cases are worth noting. In *Treadwell v. Gardner* (1983), Treadwell was denied the job of park technician with the Army Corps of Engineers because a heart condition left him incapable of performing all-day foot patrols. He proposed that other technicians perform his patrols, but the 11th Circuit ruled that Treadwell had to perform all essential job functions. Similarly, in *Simon v. St. Louis* (1984), a paraplegic proposed he could perform some essential duties of police work, but he lost because he could not perform one of them—making a forcible arrest.

**Summary of Implications of RE-73 for the ADA**

Title I of the ADA adopts all the Section 504 regulations except one—it does not require affirmative action. Additionally, by design, the ADA defines disability (D1) in the same way that RE-73 defines handicap. Based on the strength of Section 501, the covered entities (D2) include only nonfederal employees. Unlike Section 504, which relies on regulatory language for reasonable accommodation, the ADA codifies reasonable accommodation as a covered practice (D3) in plain statutory language, and unlike Section 504, which uses Title VI administrative procedures (D4) and remedies (D5), the ADA uses Title VII procedures and remedies, as amended in CRA-91. Finally, the ADA makes it easier for employers to defend requests for accommodation (D6) such as those by Francis Davis, by making it illegal as a matter of law for applicants or employees to request alteration or elimination of any essential job functions (i.e., an insurmountable barrier).

**Brief Summary:** Section 501 had clear statutory language and was connected to Title VII, whereas Section 504 relied on federal regulations and was connected to Title VI. As a result, early on, Section 501 provided stronger coverage for federal employees than Section 504 for nonfederal employees. The Supreme Court appeared to reject reasonable accommodation in Section 504 in *Southeastern v. Davis* (1979), and it took two unrelated rulings in *Alexander v. Choate* (1985) and *School Board v. Arline* (1987) to clarify that Section 504 requires reasonable accommodation, and that reasonable accommodation is distinguishable from affirmative action. Over time, it was clear that Frances Davis faced an insurmountable
Section IV  Impact of the ADAAA of 2008

The challenges associated with proving protected class membership (D1) in the ADA are illustrated in *McKay v. Toyota* (1997). In that case, Pamela McKay was required to prove the following:

1. that she is a **disabled person** [emphasis by authors] within the meaning of the Act;
2. that she is **qualified** [emphasis by authors] to perform the essential functions of her job with or without reasonable accommodation; and
3. that she suffered an **adverse employment decision because of her disability**. [emphasis by authors]

In other words, the plaintiff must first prove (1) disability and (2) qualification before the (3) a claim of discrimination (i.e., an adverse employment decision) is evaluated. Moreover, the adverse employment decision must be causally connected to the impairment.

As it turned out, Pamela McKay did establish a causal connection; termination related to carpal tunnel syndrome. However, the court never evaluated this connection because McKay could not first prove that she was disabled within the meaning of the Prong 1 definition of disability (having a current impairment).

Protected class membership has always been difficult for plaintiffs to prove and courts to evaluate. The ADAAA reduces the load on plaintiffs, but does so in a way that further complicates for the courts, what was already a very complex statute. The major motive for these amendments was the belief in Congress that the ADA was originally designed to interpret the definition of disability consistently with the definition of handicap under RE-73, and that this expectation has not been met. Or as stated in Section (2)(3) of the ADAAA:

[W]hile Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.
As written, the vast majority of the ADAAA amendments focus on one RE-73 and four ADA Supreme Court rulings, and four EEOC guidelines. These rulings and guidelines relate primarily to the Prong 1 definition of disability (current impairments). There is one surgical amendment that can be tied to Prong 3 (being regarded as impaired), and two surgical amendments related to reasonable accommodation.

For purposes of exposition, this section focuses on the impact of the ADAAA on the definition of disability, introducing broadly, the targeted Supreme Court rulings and EEOC regulations. Section V below provides a more detailed evaluation of the four Supreme Court ADA rulings addressed in the ADAAA, and Section VI below covers the definition of being qualified.

**Overview of Cases and Regulations Addressed in the ADAAA**

Table 8.7 depicts the five Supreme Court rulings targeted by the ADAAA. The ADAAA endorses *School Board v. Arline*, an RE-73 ruling. In doing so, it

<table>
<thead>
<tr>
<th>Supreme Court Rulings Addressed in the ADAAA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>School Board v. Arline</strong> (1987)</td>
</tr>
<tr>
<td><strong>Sutton v. UAL</strong> (1999)</td>
</tr>
<tr>
<td><strong>Murphy v. UPS</strong> (1999)</td>
</tr>
<tr>
<td><strong>Albertsons v. Kirkingburg</strong> (1999)</td>
</tr>
<tr>
<td><strong>Toyota v. Williams</strong> (2002)</td>
</tr>
</tbody>
</table>
The Americans with Disabilities Act of 1990

The Americans with Disabilities Act of 1990 codifies as impairments, illnesses that are episodic or in remission (e.g., tuberculosis). However, the rulings in *Sutton v. United Airlines* (UAL) and two companion rulings (*Murphy v. United Parcel Service* [UPS] and *Albertsons v. Kirkingburg*), which created new rules for mitigation of impairments, are partially or fully reversed. Also, the ruling in *Toyota v. Williams*, which restricted the definition of manual tasks to daily life activities related to caring for oneself, is fully reversed.

Table 8.8 depicts the four EEOC guidelines targeted in the ADA. Each guideline reflects an EEOC interpretation of ADA statutory language that is not expressly codified in the ADA statute itself. Three of the guidelines are endorsed in the ADAAA, and the fourth is rescinded.

Each of the endorsed guidelines was challenged or reversed by the Supreme Court. The guideline on mitigation of physical or mental impairments was struck down in *Sutton v. UAL* and its two companion cases. The guideline on working as a major life activity was challenged by Justice O’Connor in both *Sutton* and *Toyota v. Williams*, but was not struck down. The guideline on manual tasks and caring for oneself was redefined by Justice O’Connor in *Toyota v. Williams* to include only those tasks related to caring for oneself (e.g., bathing, brushing teeth, and household chores), and excluded other tasks related to job performance (e.g., lifting, stretching, and bending).

The rescinded guideline in Table 8.8 has no Supreme Court connection. Congress examined the EEOC interpretation of what it means to be substantially limited with respect to major life activities and found that it set “too high a standard.” Or as written in Section 2(8) of the ADAAA:

<table>
<thead>
<tr>
<th>Table 8.8 EEOC Guidance Addressed in the ADAAA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mitigation of impairments (endorsed)</td>
</tr>
<tr>
<td>EEOC endorses assessment of physical or mental impairments in their nonmitigated state (i.e., before corrective effects of medication and other remedial measures)</td>
</tr>
<tr>
<td>Working as a major life activity (endorsed)</td>
</tr>
<tr>
<td>EEOC endorses working as a valid major life activity as long as at-issue physical or mental impairments are a barrier to working in a broad class or range of jobs</td>
</tr>
<tr>
<td>Manual tasks and caring for oneself (endorsed)</td>
</tr>
<tr>
<td>EEOC endorses manual tasks used in the workplace and manual tasks used to care for oneself as valid and separable major life activities</td>
</tr>
<tr>
<td>Substantial limitations (rescinded)</td>
</tr>
<tr>
<td>EEOC excludes from substantial limitations to major life activities and physical or mental impairments that are temporary, regardless of the length of the recuperative period</td>
</tr>
</tbody>
</table>
Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term “substantially limits” as “significantly restricted” are inconsistent with congressional intent, by expressing too high a standard.

The main objection was that temporary (or transient) impairments, by the EEOC’s definition, may not be viewed as substantially limiting, even if the actual or expected recuperation periods for such impairments are lengthy.

The Prong 1 Definition of Disability

The easy part of the Prong 1 definition of disability is the impairment itself. Virtually all physical (e.g., loss of limb, blindness, and deafness) and mental impairments (e.g., depression, Schizophrenia, and dyslexia) qualify. The more difficult parts relate to determining what qualifies as a valid major life activity and proving that a physical or mental impairment substantially limits (or severely restricts) a valid major life activity. Additionally, there are complications for the substantial limitation test related to the major life activities of working, manual tasks, and caring for oneself, as well as the issue of assessing limitations in the non-mitigated state (i.e., absent the corrective effect of medication and other devices).

Valid Major Life Activities

Sections 3(2)(A) and 3(2)(B) of the ADAAA provide extensive, but nonexhaustive lists of valid major life activities. Accordingly:

(A) In general.—major life activities include, but are not limited to, caring for oneself, performing manual tasks, [emphasis by authors] seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. [emphasis by authors]

(B) Major bodily functions—a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Many of the major life activities listed in Section (3)(2)(A) survived legal challenges in pre-ADAAA rulings, such as eating (Fraser v. Goddalle, 2003; Lawson v. CSX, 2001), cognitive ability (Brown v. Cox Medical Centers, 2002),
and sleeping (Pack v. K-Mart, 1999). However, prior to ADAAA, the three underlined major life activities in Section 3(2)(A) (caring for oneself, manual tasks, and working) were clearly on the “endangered species” list.

Substantial Limitations

The pre-ADAAA EEOC definition of substantial limitation had two critical tests. First, all comparisons must be made relative to average people, and second, the impairments themselves must be permanent.

The average person test is written in Section 1630.2(j)(1) of the ADA Interpretive Guidelines. Accordingly, individuals are substantially limited if they are:

(i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

To illustrate, in Williams v. Channel Master (1996), Williams had a back injury that prevented her from lifting 25 pounds. Applying the average person test, the 4th Circuit ruled that “a twenty-five pound lifting limitation—particularly when compared to an average person’s abilities—does not constitute a significant restriction on one’s ability to lift, work, or perform any other major life activity” (see also Aucutt v. Sex [Six?] Flags Over Mid-America, 1996). Likewise, in Penny v. UPS (1997), the 6th Circuit rendered an analogous ruling with respect to moderate difficulty in walking. Accordingly:

Although the record clearly indicates that Penny suffers an impairment that affects to some degree his ability to walk, he has not “adduced sufficient evidence from which a factfinder reasonably could conclude that the nature and severity of his injury significantly restricted his ability to walk as compared with an average person in the general population.”

Other failures to pass the average person test include fungus allergy (Byrne v. Bd. of Education, 1992); infertility (Krauel v. Iowa Methodist, 1996); depression as it affects normal social interactions (Breiland v. Advance Circuits, 1997); depression as it affects sexual appetite (Johnson v. NY Medical College, 1997); test anxiety (Mguinnes v. University of New Mexico, 1998); breathing difficulties and
sensitivity to dust and fumes as a result of pneumonia (Rinehimer v. Cemcolift, 2002); and eye problems causing reading difficulties (Szmaj v. AT&T, 2002).

The permanence test is written in Section 1630.2(j)(2) of the EEOC Interpretive Guidelines. Accordingly:

In deciding whether an individual is substantially limited in a major life activity, courts should consider the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or expected permanent or long term impact, of the impairment.

This guidance generated a host of pre-ADAAA rulings against plaintiffs where recovery from impairments was possible or probable, even though the actual or expected recuperation periods were lengthy. Examples include back injuries (Halperin v. Abacus Tech, 1997), abdominal surgery (McDonald v. Pennsylvania, 1998), wrist and elbow surgery (Gutridge v. Clure, 1998), back surgery (Pollard v. High’s of Baltimore, 2002), and even major heart attacks (Katz v. City Metal, 1996). For example, in Halperin, the 4th Circuit ruled “it is evident that the term ‘disability’ does not include temporary medical conditions, even if those conditions require extended leaves of absence from work.” The 4th Circuit subsequently applied the same reasoning in Pollard, where the expected recovery period was nine months.

The average person test is not explicitly addressed in the ADAAA. Therefore, it should be presumed to have the force and effect of law unless and until it is altered by the EEOC. However, the permanence test is rescinded in Section 3(3)(B) of the ADAAA by expressly excluding substantial limitations that are transitory. Section 3(3)(B) of the ADAAA defines as transitory “an impairment with an actual or expected duration of 6 months or less.” Therefore, the aforementioned rulings are overturned including, as for example, the 4th Circuit rulings in Halperin and Pollard, where the expected or actual recuperation period was longer than 6 months.

An additional point to note is that the ADAAA’s endorsement of the Supreme Court’s RE-73 ruling in School Board v. Arline (1987) on illnesses that are “episodic or in remission” (e.g., tuberculosis), has the same caveat as permanent impairments; the illness itself must substantially limit a major life activity in its active state.

**Working as a Major Life Activity**

Unlike the other major life activities codified in Section (3)(2)(A), individuals claiming *working* as the major life activity must prove they are substantially
limited with respect to a *broad range of jobs*. Accordingly, as defined in Section 1630.(3)(i) of the EEOC Interpretive Guidelines:

With respect to the major life activity of working—The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a *broad range of jobs* [emphasis by authors] in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of “working.”

To illustrate, acrophobia (fear of heights) is a valid mental impairment. However, in *Forrisi v. Bowen* (1986), an acrophobic unable to work in the upper floors of a building could not overcome *broad range* test because, in the words of the 4th Circuit:

> Far from being regarded as having a “substantial limitation” in employability, Forrisi was seen as unsuited for one position in one plant—and nothing more.

Similarly, in the aforementioned case of *McKay v. Toyota* (1997), Pamela McKay, who had carpal tunnel syndrome, failed the *broad range* test because she had educational training to perform jobs more advanced than the one from which she was excluded. A similar ruling was rendered in *Heilweil v. Mt. Sinai* (1994), where the plaintiff claimed that poor ventilation exacerbated her asthma. Other failures of the *broad range* test include exclusion from firefighting (*Bridges v. Bossier*, 1995), police work (*Epps v. City of Pine Lawn*, 2003; *Rosbach v. City of Miami*, 2004; *Sheehan v. City of Glouster*, 2003), inability to teach retarded children (*Patterson v. Retarded Citizens*, 1998), and inability to cite specific limitations owing to cancer (*Andrews v. Jones Truck Lines*, 1993).

However, the DC Circuit found that severe irritable bowel syndrome passed the *broad range* test because it impedes regular attendance for virtually any job (*Maziarka v. Mills Fleet Farm*, 2001). This position was echoed by the 8th Circuit with respect to brain damage that resulted in attention and memory problems, because the condition was viewed as impeding the acquisition of new skills (*Moysis v. DTG Datanet*, 2002). However, there were caveats in each case. Maziarka lost his claim on other grounds (that regular attendance is an essential job function), and Moysis did not have to claim working as the major life activity, as attention and memory are themselves major life activities.
Manual Tasks and Caring for Oneself

The issues associated with manual tasks and caring for oneself are closely related to the issues associated with working. However, this relationship is somewhat complex. For purposes of exposition, these issues are summarized next and are discussed in greater detail in Section V below.

In a nutshell, Justice O’Connor questioned the validity of the EEOC guideline on working as a major life activity in Sutton v. United Airlines (UAL), but did not overturn it because the plaintiffs failed the broad range test. However, in Toyota v. Williams, the plaintiff circumvented the broad range test based on Section 1630.3(i) of the EEOC Interpretive Guidelines, which cites both “caring for oneself” and “performing manual tasks” as separable major life activities.

Ella Williams, a carpal tunnel victim, was aware that other carpal tunnel victims failed the broad range test (e.g., McKay v. Toyota, 1997). Taking advantage of the EEOC guidance in Section 1630.3(i), Williams claimed she was substantially limited with respect to manual tasks (e.g., lifting, bending) that prevented her from performing essential job functions at work. The 6th Circuit ruled in her favor, but that ruling was overturned by O’Connor, who limited the definition of manual tasks to daily life activities central to caring for oneself (e.g., bathing, brushing teeth, and household chores).

As noted earlier, Section 3(2)(A) of the ADAAA codifies manual tasks and caring for oneself as separate life activities. Thus, it effectively overturns O’Connor’s limitation of manual tasks to daily life activities associated with caring for oneself and, by inference, permits claims such as those by Ella Williams to proceed.

Mitigation of Impairments

The issues associated with mitigation of physical and mental impairments are also complex. Therefore, as with the prior discussion of manual tasks and caring for oneself, the issues associated with mitigation are summarized next, and are discussed in greater detail in Section V below.

In a nutshell, the primary target in Sutton v. UAL and its companion cases was Section 1630.2(j) of the EEOC ADA Interpretive Guidelines, which creates the following conditions for proving substantial limitation:

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, [emphasis by authors] without regard to mitigating measures [emphasis by authors] such as medicines, or assistive or prosthetic devices.
This guidance contains two principles. First, the term *case by case basis* means that no impairment is a disability as a matter of law. Rather, substantial limitation must be proven by each individual, regardless of how the impairment affects people in general. For example, if two people are depressed, and the depression is substantially limiting for one but not the other, the substantially limited person is disabled within the meaning of the ADA whereas the counterpart is not. This principle was supported in *Sutton* and its companion cases, and served as the basis for the overall rulings in these cases.

The second EEOC principle, on *mitigating measures*, requires assessment of impairments in their *noncorrected* state. To illustrate, impairments such as depression, diabetes, epilepsy, and hypertension should be assessed assuming the individual is not medicated, and impairments involving loss of limbs should be assessed without the corrective effects of prosthetic devices. This requirement was struck down in *Sutton v. UAL* and *Murphy v. UPS* as follows:

> [I]f a person is taking measures to *correct for, or mitigate*, [emphasis by authors] a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is “substantially limited” in a major life activity and thus “disabled” under the Act.

The EEOC subsequently rescinded Section 1630.2(j) of the ADA Interpretive Guidelines as relates to mitigating measures in June 2000. Of course, as noted earlier, the ADAAA supports the original EEOC guideline, and therefore, reverses the Supreme Court’s requirement for assessing impairments in their mitigated state.

**Prongs 2 and 3**

According to Section 1630.(3)(k) of the ADA Interpretive Guidelines, a *record* of impairment (Prong 2) means:

> A *history* of, or [being] *misclassified* [emphasis by authors] as having, a mental or physical impairment that substantially limits one or more major life activities.

As written, Prong 2 applies to individuals who either (1) satisfied Prong 1 sometime in the past (*history*) or (2) were falsely thought to satisfy Prong 1 sometime in the past (*misclassification*). There are few Prong 2 rulings in case
law. Logic dictates that if a disability is past tense, it is extremely difficult to make a causal connection between that disability and a current adverse employment decision.

One of the few published cases exclusively tied to Prong 2 was Doe v. Syracuse (1981). Doe applied for a substitute teaching position and was deemed handicapped within the meaning of RE-73 owing to a pre-employment inquiry into his past mental condition. Doe claimed he was excluded based on this illegal inquiry and sued for summary judgment. The case was then ordered to trial, of which there is no official record. However, it is clear from the summary judgment ruling that absent the illegal inquiry, Doe would not have qualified for a trial. More importantly for present purposes, Doe v. Syracuse illustrates the pitfalls of making an illegal inquiry prior to a conditional job offer, an issue that will be discussed in greater detail in Section VIII below.

As defined in Section 1630.(3)(l) of the ADA Interpretive Guidelines, being regarded as being disabled means being “treated” as satisfying Prong 1, or being misperceived as satisfying Prong 1 because of the “attitudes of others.” In other words, regarding misclassification, the only difference between Prongs 2 and 3 reduces to being falsely regarded as satisfying Prong 1 in the past (Prong 2) versus the present (Prong 3). Given the requirement to causally connect to a current adverse employment action, virtually all misclassification claims fall under Prong 3.

The first known claim of misclassification is E.E. Black v. Marshall (1980), an RE-73 case in which George Crosby had history of back problems. Crosby was deemed a “poor risk for heavy labor” by a doctor after a pre-employment physical. He was denied a construction job by the contractor (E.E. Black) even though a second doctor, an orthopedic surgeon, informed the contractor that Crosby could perform “whatever he prefers,” as long as he “kept his back and abdominal muscles in good tone.” The court favored Crosby, ruling:

The back problem that Black perceived in Mr. Crosby was a condition that “weakens, diminishes, restricts, or otherwise damages an individual’s health or physical or mental activity.” Black’s perception was that the back problem weakened, diminished and restricted Mr. Crosby’s physical activity. Black found that Mr. Crosby was unsuited for jobs involving heavy labor. Thus, he was clearly impaired or regarded as impaired.

Clearly, based on the orthopedic surgeon’s opinion, Crosby’s impairment (perceived or otherwise), did not substantially limit a current major life activity. Thus, Crosby, a likely loser under Prong 1, was able to establish protected class membership because the contractor falsely treated him as being disabled.
Generally, employers who run afoul of Prong 3 give employees a free pass on having to prove a current disability (Prong 1). For example, in *Hollihan v. Lucky Stores* (1996), Hollihan, who was terminated for repeated outbursts, failed on Prong 1 because he could not prove substantial limitation. However, because he was forced to seek counseling for the outbursts, the 9th Circuit concluded that Lucky may have “regarded Hollihan as disabled.” In *Doane v. Omaha* (1997), a police chief who excluded Doane because of blindness in one eye, testified that Doane’s blindness was not severely restrictive. This prompted the 8th Circuit to rule that even if Doane had no “significant limitation,” the chief nevertheless “perceived” it as such. Thus, like Hollihan, Doane was spared the task of having to pass the substantial limitation test.

Consequently, actual impairments may generally be irrelevant if a person is treated or misperceived as being disabled. For example, even a cancer victim who was not disabled under Prong 1 because he could cite no substantial limitations (*Andrews v. Jones Truck Lines*, 1993) could qualify under Prong 3 if the employer, fearing for the employee’s health, assigned him unnecessarily to lighter duties.

There are three additional factors to consider. First, in the lone surgical amendment applying to Prong 3, Section 6(h) of the ADAAA stipulates that employers “need not provide a reasonable accommodation or a reasonable modification of policies, practices or procedures” based solely on Prong 3 (being regarded as disabled). This settles a major disagreement among six Circuit Courts. The 3rd and 11th Circuits previously endorsed reasonable accommodations for Prong 3 (see *D’Angelo v. ConAgra Foods*, 2005; *Williams v. Philadelphia Housing Authority Police Department*, 2004), whereas the 5th, 6th, 8th, and 9th Circuits did not (see *Kaplan v. N. Las Vegas*, 2003; *Newberry v. East Texas State*, 1998; *Weber v. Strippit*, 1999; *Workman v. Frito Lay*, 1999).

Second, in two recent cases (*Taylor v. Pathmark*, 1999; *Taylor v. USF Red Star Express*, 2006), the 3rd Circuit adopted a “reasonable mistake” defense. Here, the employer may affirmatively prove “the employee is responsible for the employer’s erroneous perception and the employer’s perception is not based on stereotypes about disability.” In other words, if the employer has a mistaken belief, and the employee knows it, the employee must attempt to correct it. However, there are two caveats. First, the employer failed in this defense in both cases, and second, other Circuit Courts have yet to weigh in on this issue. Nevertheless, the “reasonable mistake” defense is a potential emerging issue, and one in which the reader should be aware.

Finally, as in Prong 1, Prong 3 claims of being falsely regarded as being substantially limited with respect to working must also pass the broad range test. For example, in *EEOC v. Hunt Transportation* (2003), applicants citing exclusion from truck driving based on a policy of exclusion for use of certain medications failed Prong 3 because they were regarded as being excluded from only a single
job. Similar rulings include exclusion from assembly line work because of susceptibility to carpal tunnel syndrome (EEOC v. Woodbridge, 2001), being barred from a general labor position because of inability to lift 30 pounds (Conant v. City of Hibbing, 2001), elimination from police work because of use of a blood thinner (Giordano v. City of New York, 2001), and being prohibited from driving because of seizures (Cash v. Smith, 2000).

**Section V Focus on the ADA Rulings Targeted in the ADAAA**

As noted earlier, the Sutton, Murphy, and Kirkingburg rulings relate to mitigation of impairments, and the Toyota ruling relates to working, manual tasks, and caring for oneself as a major life activities. Additionally, Sutton served as a “setup” case for Toyota. Each of these cases featured important facts and issues beyond the broader issues addressed in Section IV above.

**The Facts in Sutton v. UAL**

The plaintiffs in Sutton were twin sisters with severe myopia. Both were qualified to fly small commuter planes, but their goal was to fly bigger commercial
jets. Their uncorrected visual acuity was 20–200 in each eye, but corrected to 20–20 in both eyes with corrective lenses. As such, they were qualified to fly commercial jets under a Federal Aviation Association (FAA) rule requiring correction to 20–20 in each eye. However, they were excluded based on a UAL rule that additionally required uncorrected vision of 20–100 in each eye, which the twins could not meet.

Interestingly, the twins claimed they were substantially limited with respect to working, not seeing. Noting this oversight, Justice O'Connor stated:

Petitioners do not make the obvious argument that they are regarded due to their impairments as substantially limited in the major life activity of seeing. They contend only that respondent mistakenly believes their physical impairments substantially limit them in the major life activity of working.

Of course, the twins had a losing case on working under the broad range test because they were already flying small commuter planes.

As important, the twins would likely lose a Prong 1 challenge related to seeing even under the ADAAA. Although the ADAAA affirms the EEOC’s guidance on nonmitigation, it exempts eyeglasses and contact lenses. More specifically, Section (3)(4)(E) of the ADAAA requires that the substantial limitation test is made “without regard to the ameliorative effects of mitigating measures such as”:

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies … (II) use of assistive technology … (III) reasonable accommodations or auxiliary aids or services; or … (IV) learned behavioral or adaptive neurological modifications.

Section (3)(4)(E) also states:

The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
Section (3)(4)(E) further distinguishes *ordinary eyeglasses or contact lenses* that “correct visual acuity or eliminate refractive error” from *low vision devices* that “magnify, enhance, or otherwise augment a visual image.” Therefore, the twins would be unprotected in Section (3)(4)(E) because their corrective measure falls under the *ordinary eyeglasses or contact lenses* category.

However, lost in the primary ruling in *Sutton* was a potentially valid Prong 3 claim. As we will see shortly, the exclusions in *Murphy* and *Kirkingburg* were backed by federal agency regulations. In *Sutton*, the twins satisfied the relevant FAA regulation (corrected vision to 20–20), but were facially excluded based on a more restrictive UAL rule (uncorrected vision of 20–100 or better). Consequently, the twins could have challenged the UAL rule as falsely regarding them as being disabled. For example, in *Sarcyki v. UPS* (1994), Sarcyki defeated a UPS rule excluding diabetics from driving trucks weighing less than 10,000 pounds. However, the relevant Department of Transportation (DOT) exclusion applied to trucks weighing more than 10,000 pounds. More recently, in *Morton v. UPS* (2005), and again in *Bates v. UPS* (2007), UPS was defeated in its attempt to generalize to lighter vehicles, a DOT rule relating to a hearing standard and trucks weighing more than 10,000 pounds.

**The Facts in *Murphy v. UPS* and *Albertsons v. Kirkingburg* Rulings**

In *Sutton*, Justice O’Connor ruled that the impairment cited by the twins was a physical characteristic, *not* an illness. However, Vaughn Murphy (*Murphy v. UPS*) clearly had an illness (hypertension). He was a truck mechanic who was required to road test the trucks he repaired. Despite an excellent driving record, he ran afoul of a DOT rule excluding individuals with hypertension from driving large trucks. He was initially misdiagnosed, but was later fired after his impairment was discovered. In effect, the medication that kept his blood pressure within the normal range, and permitted him to drive safely, also precluded him from claiming that he was substantially limited with respect to a major life activity in his *medicated* state. The reference in Section (3)(4)(E) of the ADAAA on medication clearly overturns this ruling.

Unlikely *Sutton* and *Murphy*, which involved external mitigation, *Albertsons v. Kirkingburg* involved internal mitigation. Hallie Kirkingburg was blind in one eye (i.e., amblyopia), but effectively performed his job (truck driving) using monocular cues. Like Murphy, Kirkingburg was initially misdiagnosed, and was later fired based on a DOT rule requiring corrected vision of at least 20–40 in each eye. The 9th Circuit ruled that Kirkingburg was substantially limited because his visual processing was *significantly different* than most normally
sighted people. But, the Supreme Court overturned the 9th Circuit, stating that different does not equate to disability. The reference in Section (3)(4)(E) of the ADAAA on learned behavioral or adaptive neurological modifications clearly over-turns this ruling.

Interestingly, Murphy and Kirkingburg did not lose simply because the EEOC nonmitigation guideline was struck down. Rather, their primary mistake was failure to satisfy the EEOC case-by-case test. They falsely assumed that their impairments were disabilities as a matter of law. This would be an error even under the ADAAA. For example, in Murphy, Justice O’Connor opined:

> Because the question whether petitioner is disabled when taking medication is not before us, we have no occasion here to consider whether petitioner is “disabled” due to limitations that persist despite his medication or the negative side effects [emphasis by authors] of his medication.

Moreover, in Kirkingburg, Justice Souter opined:

> This is not to suggest that monocular individuals have an onerous burden in trying to show that they are disabled. On the contrary, our brief examination of some of the medical literature leaves us sharing the Government’s judgment that people with monocular vision “ordinarily” will meet the Act’s definition of disability. … We simply hold that the Act requires monocular individuals, like others claiming the Act’s protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, [emphasis by authors] is substantial.

Therefore, even under pre-ADAAA rules, Murphy had a provable case that he was substantially limited because of side effects of the medication he was using or that the medication was not fully effective, and Kirkingburg had a provable case that he was substantially limited because of the primary effects of not having binocular vision.

Interestingly, in several subsequent lower court cases, plaintiffs took advantage of the caveats cited by O’Connor and Souter and proved they were substantially limited despite corrective measures. These corrective measures featured medication for paranoia and mood disturbance (Taylor v. Phoenixville, 1999), anxiety disorder (McAlindin v. San Diego, 1999), sleep disorder (Gile v. UAL,
EEO Law and Personnel Practices


However, plaintiffs lost cases in which they proffered that medication and/or counseling completely mitigates depression (Spades v. Walnut Ridge, 1999; Krocka v. Chicago, 2000). For example, in Spades, the 8th Circuit rendered the following ruling for a depressed police officer with a history of violence:

The record shows that Spades took medication and received counseling for his alleged disability of depression. He concedes that resort to medicines and counseling “allow him to function without limitation.” Thus, his depression is corrected and cannot substantially limited a major life activity—a requirement for finding that an individual is disabled within the meaning of the ADA.

A similar ruling was rendered in Krocka, where a former police officer attempted to commit suicide and survived, and later claimed he was no longer substantially limited because of his medication. Other losing cases included heart medication that permits normal full-time work (Taylor v. Nimock’s Oil, 2000), sleep medication that causes too much sleep (Doyle v. Oklahoma, 2001), and side effects of drugs when the condition in question does not compel medication (Hill v. Kansas City, 1999).

Four of these cases are likely losers under the ADAAA. Thus, assuming that Krocka or Spades would qualify as being disabled in the nonmedicated state, both would likely be excluded for other reasons (e.g., using a “direct threat” defense). Moreover, it is unlikely that oversleeping (Doyle v. Oklahoma) or the side effects of nonrequired medication (Hill v. Kansas City) could pass the average person test. However, a heart patient without heart medication (Taylor v. Nimock’s Oil) faces a threat to the most basic of all major life activities (living). In this particular case, the exclusion was for a cashier’s job, and it was likely causally connected to the heart problem.

A final point to note is that both Murphy and Kirkingburg could have challenged the respective DOT rules on grounds that they falsely regarded them as being disabled (via Prong 3). Although a tougher case to prove than challenging a company rule (as in Sutton), this proof had been previously made. For example, in Strathie v. DOT (1983), an RE-73 case, Strathie was suspended based on a DOT rule prohibiting bus drivers from wearing hearing aids. The court examined a number of barriers to safety cited by the DOT and ruled that each one could be surmounted with reasonable accommodation. Thus, hearing aids were deemed no more threatening than eyeglasses.
The Facts in Toyota v. Williams

The connection between the Sutton v. UAL and Toyota v. Williams relates to Justice O’Connor’s suggestion in Sutton that working is not a valid major life activity. Accordingly:

Because parties accept … “major life activities” includes working, we do not determine the validity [emphasis by authors] of the cited regulations. We note, however, that there may be some conceptual difficulty [emphasis by authors] in defining “major life activities” to include work, for its seems “to argue in a circle to say that if one is excluded … that the exclusion constitutes an impairment, when the question you’re asking is, whether the exclusion itself is by reason of handicap”.

In other words, there was no reason to invalidate working in Sutton because (1) the defendants did not challenge it, and (2) the Sutton twins lost on the major life activity test based on their failure of the broad range test. However, it looked like Toyota v. Williams presented a good case to invalidate working as a major life activity, but the Supreme Court took a different route.

Ella Williams, a carpal tunnel victim, began working for Toyota in 1990 in a job that caused her much pain (using pneumatic tools). Based on a recommendation by her physician, Williams performed lighter duties for 2 years. She later filed worker compensation and ADA claims, both of which were settled. She returned to work in 1993, joining a work team responsible for four major job tasks, two of which caused her pain and two of which did not. At first, she was permitted to only perform the two pain-free tasks. However, in 1996, Toyota mandated that all team members had to rotate through every job task. Her physician then ordered a no-work restriction, and Williams was later fired for poor attendance.

At trial, Williams claimed she was substantially limited with respect to manual tasks that encompassed housework, gardening, playing with her children, lifting, and working. The district court ruled that housework, gardening, and playing were not major life activities and that Williams was not substantially limited with respect to either lifting or working. Moreover, the court held that her ability to perform two of the job tasks without pain contradicted her claim of substantial limitations with respect to manual tasks. The 6th Circuit reversed, ruling that Williams was substantially limited with respect to manual tasks needed to perform her job. This included tool gripping and repetitive motion with hands and arms extended at or above shoulder level for extended time periods. The Supreme Court then reversed the 6th Circuit.

Speaking for a unanimous Supreme Court, Justice O’Connor referenced her earlier warning in Sutton, but did not invalidate the EEOC guideline on working.
Instead, she limited the EEOC guideline on manual tasks to include only those that are “central to most people’s daily lives.” Accordingly:

When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform a variety of tasks central to most peoples daily lives, [emphasis by authors] not whether the claimant is unable to perform the tasks associated with her specific job. Otherwise, Sutton’s restriction [emphasis by authors] on claims of disability based on substantial limitation in working will be rendered meaningless because an inability to perform a specific job always can be recast as an inability to perform a class of tasks associated with that specific job.

The manual tasks deemed “central to daily life” included household chores, bathing, and brushing teeth, which by her own admission, Williams could perform.

Interestingly, the Williams ruling was used to support the plaintiff’s claim in Fenney v. Dakota, Minnesota, & Eastern Railroad (2003). Fenney, a locomotive engineer, lost his thumb and most of the middle finger on his right hand in an accident in a prior job. He requested an accommodation for his job of on-call engineer (extra time before a call to bathe, shave, prepare a meal, and drive to work on time). The request was rejected, and Fenney was demoted to a less desirable job. The district court favored the employer, but the 8th Circuit reversed, ruling that Fenney was substantially limited with respect to caring for himself, and the adverse employment decision (demotion) was causally connected to a failure to reasonably accommodate.

Ironically, Fenny had a stronger claim than Ella Williams. The ADAAA’s reversal of Justice O’Connor’s ruling would permit Williams to move forward with her claim that she is substantially limited with respect to manual tasks associated with working. However, she would likely lose downstream on grounds that she is not qualified, because she could not perform two out of four essential job functions without pain. However, Fenny could perform all essential functions of his job with seemingly minor accommodations.

**Brief Summary:** There are unique facts associated with each of the four Supreme Court ADA rulings addressed in the ADAAA. The Sutton twins erred in citing working as the major life activity. They could have argued they were regarded as substantially limited with respect to seeing under Prong 3 because UAL requirements exceeded FAA regulations. Murphy
mistakenly believed his hypertension is a disability as a matter of law, as did Kirkingburg with respect to amblyopia. Neither plaintiff attempted to pass the case-by-case test, and therefore, would lose even under ADAAA rules. Although a difficult proof, Murphy and Kirkingburg could have challenged the DOT regulations via Prong 3. Ella Williams claimed she was substantially limited with respect to manual tasks associated with working. Although the main ruling (that manual tasks include those related to caring for oneself) was overturned in the ADAAA, Williams was a likely loser downstream on the requirement to perform all essential job functions, with or without reasonable accommodation.

Section VI Definition of being Qualified

Section 101(8) of the ADA defines a qualified individual with a disability as one who can perform all essential job functions with or without reasonable accommodation. Section 1630.2(m) of the EEOC Interpretive Guidelines supports this definition with the following two steps for determining qualification:

- The **first step** [emphasis by authors] is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skill, licenses, etc. The **second step** [emphasis by authors] is to determine whether or not the individual can perform the essential functions of the position held or desired with or without reasonable accommodation.

Thus, as noted earlier, being qualified has two hurdles: (1) having prerequisite KSAs for essential job functions and (2) performing those essential job functions **either** with or without reasonable accommodation.

**Determining What is Essential**

The following analogy by the 7th Circuit in *Miller v. Illinois* (1996) illustrates the distinction between essential and marginal job duties. Accordingly:

If it is reasonable for a farmer to require each of his farmhands to be able to drive a tractor, clean out the stables, bale the hay, and watch the sheep, a farmhand incapable of performing any of these tasks except the lightest one (watching the sheep) is not able to perform the essential duties of his position.
In this hypothetical example, it is reasonable to eliminate marginal duties (watching sheep), but unreasonable as a matter of law to expect the employer to eliminate the other tasks (driving tractors, cleaning stables, or baling hay).

A more realistic example of marginal duties is illustrated in Borrowski v. Valley Central (1995). Borrowski, a school librarian, had memory and concentration deficits as a result of an automobile accident. She was able to perform the essential duties of actual librarian work, but could not control her students during class. She requested a teacher’s aide to help in controlling the students, but the school refused. The 2nd Circuit ruled that Borrowski’s request was reasonable if the duty in question was not essential, an issue that was remanded back for a jury to decide. Likewise, in Stone v. Mt. Vernon (1997), a fire chief denied reassignment of paraplegic former firefighter to a “bureau” job involving deskwork. The chief claimed that bureau personnel must fight fires in emergencies. However, the 2nd Circuit ruled for Stone, as two long-term bureau employees testified that such emergencies had never occurred before.

More recently, in PGA v. Martin (2001), Casey Martin, a professional golfer requested use of a golf cart as a reasonable accommodation. This request was made because Martin suffered from a progressive circulatory disease (Klippel-Trenaunay-Weber Syndrome) that made it difficult for him to walk on a golf course without pain. The PGA requires golfers to walk on the course during golf tournaments and denied his request. The PGA claimed that using a golf cart would fundamentally alter its tournament events. However, the Supreme Court ruled that walking is not “an essential attribute of the game.” Accordingly:

The use of carts is not inconsistent with the character of golf, the essence of which has always been shot-making. The walking rule … is neither an essential attribute of the game itself nor an indispensable feature of tournament golf. [emphasis by authors] The walking rule contained in petitioner’s hard cards is neither an essential attribute of the game itself nor an indispensable feature of tournament golf.

The Supreme Court also ruled that the PGA walking rule runs counter to the case-by-case rule affirmed in Sutton v. UAL. Accordingly:

Even if petitioner’s factual predicate is accepted, its legal position is fatally flawed because its refusal to consider Martin’s personal circumstances in deciding whether to accommodate his disability runs counter to the ADA’s requirement that an individualized inquiry be conducted. Cf. Sutton v. United Air Lines, Inc.
More generally, the PGA’s claim was countered by the fact that carts were permitted in some phases of its annual qualifying school and in PGA Senior Tour events. There were other issues as well. For example, golf courses leased and operated for PGA Tour events were defined as places of “public accommodation” under Title III of the ADA. Martin won under Title III, as the Supreme Court ruled that he is a client or customer of the PGA Tour, and consequently, is a protected class member.

It should be noted that Section 6(f) of the ADAAA now officially relieves employers from having to make fundamental alterations. Accordingly:

Fundamental Alteration.—Nothing in this Act alters the provision of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.

This amendment clearly applies to the request by Frances Davis in Southeastern v. Davis (1979) to fundamentally alter its nursing curriculum. However, it is unlikely that it applies to the Martin case because the Supreme Court ruled shot-making is fundamental to the game of golf whereas walking is not.

More importantly, the Martin ruling illustrates that employers cannot arbitrarily define essential job functions. Otherwise, they could easily define themselves out of ADA coverage by asserting that relatively marginal duties are essential to the job. From the perspective of I-O Psychology, Human Resources Management, and related fields, essential job functions should be based on a job analysis. The role of job analysis in determining essential job functions will be discussed in greater detail in Section XI below on compliance issues.

**Definition of Being Qualified**

As noted in our prior discussion of RE-73, individuals who cannot perform essential job duties, either with or without reasonable accommodation, face what the 5th Circuit in Prewitt v. Postal (1981) termed an insurmountable barrier. This follows because it is unreasonable as a matter of law to expect employers to alter or eliminate the essential job functions that cannot be performed by employees or applicants.

The Prewitt standard, which was illustrated in several RE-73 cases in Section III above, was adopted in ADA case law. For example, in White v. York
(1995), White suffered an ankle injury while working for York. He challenged York’s requirements of standing for 4 hours at a time and lifting a minimum of 15 pounds, both of which he could no longer do. The 10th Circuit, quoting from *Prewitt*, ruled:

Once the plaintiff produces evidence sufficient to make a **facial showing** [emphasis by authors] that accommodation is possible, the burden of production shifts to the employer to present evidence of its inability to accommodate.

White lost because he did not cite any reasonable accommodations that would permit him to meet these two requirements.

In *Milton v. Scrivner* (1995), two injured employees could no longer meet “production standards” and requested that these standards be relaxed. The 10th Circuit ruled that employers are not required to “reallocate job duties in order to change the essential function of a job.” Further, the plaintiffs in *Allison v. Corrections* (1996; an injured corrections officer incapable of controlling inmates in “conflict situations”) and *Miller v. Illinois* (1996; a blind corrections officer facing the same dilemma as Allison) argued they could perform some essential job functions, but both courts ruled that they must perform all of them.

Courts have continued to rule against reallocation of essential job duties. For example, in *Lloyd v. Hardin County, Iowa* (2000), a road department employee suffered an injury to his spinal cord that required him to wear leg braces to walk. After an on-the-job accident that eventually led to his termination, Lloyd filed suit, contending that the County violated the ADA by refusing to restructure his job to accommodate his disability. The 8th Circuit disagreed, ruling:

[W]e hold that his employer, Hardin County, cannot be required under the ADA, to provide him with such a position—because that would necessarily entail reallocating one or more of the essential functions of Lloyd’s job, which he cannot perform with or without reasonable accommodation.

Other comparable rulings include: *Mole v. Buckhorn Rubber* (1999; not necessary to change the essential nature of the job for a customer service coordinator with Multiple Sclerosis and depression); *Moritz v. Frontier Airlines* (1998; not necessary to eliminate one of two jobs for ticket counter worker suffering from Multiple Sclerosis); *Peters v. City of Mauston* (2002; not necessary to eliminate “heavy lifting” for an injured construction worker); and *Dropinski v. Douglas County* (2002; not necessary to eliminate job tasks involving strength and agility for injured equipment operator).
There was another important ruling in *Lloyd v. Hardin County.* After he was terminated, and before he filed his ADA claim, Lloyd filed for (and received) Social Security Disability Insurance (SSDI) on grounds that he was *totally disabled.* The Supreme Court addressed the relationship between SSDI and ADA claims in *Cleveland v. Policy Management Systems* (1999), and *Lloyd v. Hardin County* was one of the first related rulings after the *Cleveland* ruling.

Prior to *Cleveland,* Circuit Courts were divided on whether SSDI claims such as Lloyd’s automatically preclude (or estop) ADA claims. Some courts favored automatic disqualification (see *Simon v. Safelite Glass,* 1997; *McNemar v. Disney Stores,* 1966; *Weigel v. Target,* 1997). Other courts opposed such exclusion on grounds that SSDI claims are decided without considering reasonable accommodations (see *Swanks v. Washington Transit,* 1997; *Talevera v. Palm Beach County,* 1997). The 8th Circuit, which ruled in *Lloyd,* opposed automatic estoppel, but with an important caveat. In *Downs v. Hawkeye Health Systems* (1998), the 8th Circuit ruled that an SSDI claimant must provide “strong countervailing evidence that he was qualified to perform the essential functions of the job.” Downs, a nurse suffering from hepatitis C, could not pass this test.

Carolyn Cleveland suffered a stroke that severely impaired her concentration, memory, and language. As in *Lloyd,* Cleveland was terminated and filed an SSDI claim (which she received) and an ADA claim challenging her termination. The Supreme Court ruled that SSDI claims do *not* automatically prevent ADA claims, but with a caveat similar to the one used by the 8th Circuit in *Downs v. Hawkeye Health Systems.* Accordingly:

> To defeat summary judgment … [an] … explanation must be sufficient to warrant a reasonable juror’s concluding that … [in] … the earlier statement, the plaintiff could nonetheless “perform the essential functions” of her job with or without “reasonable accommodation.”

In *Lloyd v. Hardin County,* the 8th Circuit read the *Cleveland* ruling as being consistent with its prior ruling in *Downs v. Hawkeye Health Systems* and other like cases, and granted summary judgment for the defense. Accordingly:

> [Lloyd] failed to explain the inconsistency between his prior allegation, when applying for Social Security benefits, that he was totally disabled, and his present allegation that he could perform his job with reasonable accommodation.

In short, absent SSDI claims, ADA plaintiffs must make a *facial showing* that accommodation is plausible, as in *White v. York* (1995). Although somewhat of a victory for SSDI claimants, the *Cleveland* ruling forces a tougher burden. That
is, to avoid summary judgment in favor of the employer, the plaintiff must explain why the SSDI claim does not contradict the ADA claim. That means the more impaired the individual claims to be for SSDI purposes, the more difficult it will likely be to provide “strong countervailing evidence” for an ADA claim.

**Brief Summary:** Being qualified means (1) possessing the perquisite KSAs for a job and (2) performing all essential duties of that job without reasonable accommodation. The Supreme Court’s ruling in *PGA v. Martin* warns employers to distinguish between essential and marginal duties. It is reasonable to eliminate marginal duties, but not essential duties. Requests for elimination or reallocation of essential duties have met with the response that it is unreasonable as a matter of law to do so. The Supreme Court’s ruling in *Cleveland v. Policy Management Systems* means that SSDI claims do not automatically estop ADA claims. However, an SSDI claimant must explain why the SSDI claim does not contradict the ADA claims to avoid summary judgment for the employer.

**Section VII  Threats to Workplace Safety**

Under RE-73, addiction to illegal drugs and alcoholism were protected under the Prong 1 definition of handicap. Under ADA rules, current users of illegal drugs are not protected under Prong 1, but individuals with a record of addiction to illegal drugs are protected if they are not current users (i.e., are rehabilitated). Alcoholism is protected under Prong 1, but there are codified proscriptions related to consuming or being under the influence of alcohol in the workplace. In general, the statutory Direct Threat may be raised for any other threat to workers or workplace safety that cannot be eliminated with reasonable accommodation, including infectious and noninfectious diseases, and other impairments.

**Illegal Drugs**

Illegal drugs are defined in accordance with the Controlled Substances Act (e.g., heroin, cocaine, and marijuana). The ADA permits drug testing both prior to and after a conditional job offer, but the testing policies must be reasonable (i.e., nondiscriminatory). Reasonable policies include testing all applicants, testing all employees regularly or randomly, testing anyone after a workplace accident, testing for medical clearance to return to work after an injury, and testing individuals who qualify as being disabled based on rehabilitation. Additionally, federal
agencies (e.g., defense and transportation) may require exclusion of any individual with a record of illegal drug use, and may insist upon periodic drug testing for all applicants and employees.

**Definition of Rehabilitation**

Rehabilitation implies a prior addiction, not simply past casual use. For example, in *Hartman v. Petaluma* (1994), Hartman lied about past illegal drug use in his application for police officer and later claimed to be a rehabilitated drug addict. The court ruled that a person who “casually used drugs illegally in the past, but did not become addicted” is not a rehabilitated drug addict.

To be a rehabilitated (or recovering) drug addict, the individual must prove absence of *current use* in accordance with Section 1630.3 of the EEOC Interpretive Guidelines. Accordingly:

The term “**currently engaging**” [emphasis by authors] is not intended to be limited to the use of drugs on the day of, or with a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct.

This guidance was applied in *EEOC v. Exxon* (1997), where a Texas district court ruled as follows:

> Courts construing the meaning of “currently,” although declining to create a bright-line distinction, hold that a person must be drug-free for a considerable period and in recovery long enough to have become stable to be covered by the ADA.

More generally, courts have defined as *current use* drug-free periods of 3 weeks (*Sally v. Circuit City*, 1997), 6 weeks (*McDaniel v. Mississippi Baptist*, 1995), and even several months (e.g., *Collings v. Longview*, 1995). For example, in *Collings*, workers were fired for illegal drug use. The employees alleged that they were protected under the ADA because they were participating in a rehabilitation program (and purportedly drug-free) when they were terminated. The 9th Circuit ruled in favor of Longview stating it was the intent of Congress in passing the ADA to protect individuals who had not used illegal drugs for a *substantial* amount of time.

Courts have also denied claims for employees seeking treatment because they were caught using illegal drugs. For example, in *Shafer v. Preston Memorial*
Hospital (1997), Shafer, a nurse, was caught stealing narcotics from the hospital. After learning that Shafer was addicted, the hospital gave her medical leave to enroll in a rehabilitation program, but fired her while she was on leave. Shafer argued that she was a qualified disabled person, but the 4th Circuit ruled that:

[I]f we were to apply Shafer’s interpretation of the safe harbour provision phrase “is participating in a supervised rehabilitation program and is no longer engaging in such use, an employee … engaging in the illegal use of drugs could escape responsibility … by immediately enrolling in a drug rehabilitation program.


Reasonable Accommodations

Although not the norm, rehabilitated drug addicts occasionally require accommodations. For example, in Wallace v. VA (1988), a nurse was excused from drug administration duties, and in Nisperos v. Buck (1989), a government lawyer was excused from trying drug cases. Critically, in both cases, the waived duties were deemed marginal. In contrast, in EEOC v. Amego (1997), an employee who was addicted to and stole prescription drugs from her employer suffered a different fate. The illegal drug proscription does not generally apply to legally prescribed drugs. However, in this case, the request to waive drug administration duties was legally denied because drug administration was deemed an essential duty for the job in question.

Alcoholism and Alcohol Abuse

Section 105(c) of the ADA contains four proscriptions related to drug and alcohol abuse that stipulates employers may do any of the following:

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees; (2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace; (3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 …; (4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards of employment … [as] other employees …
The application of these proscriptions to illegal drugs is relatively clear. However, the applications to alcoholism are problematic even for seasoned EEO attorneys. For example, according to Hartman, Homer, & Reff (1998):

[i]t should be noted that the exclusion from the [ADA’s] protections is limited to illegal drug users and does not apply to alcohol abusers. Accordingly, while an employer may prohibit employees from consuming or being under the influence of alcohol at the workplace, and may hold alcohol abusers to the same performance and conduct standards as other employees, an employer may not take adverse action against an applicant or employee based upon their abuse of alcohol during off duty hours.

Given such caveats, employers need to establish clear and consistent policies regarding when to terminate, and when and how to accommodate alcohol abuse.

**When to Terminate**

Employers may terminate for consuming, or being under the influence of alcohol, while at work. For example in *Altman v. NYC Health* (1996), a chief of surgery was legally fired for on-the-job drunkenness, as was another doctor in *Bekker v. Humana Health Plan Inc.* (2000). Termination is also legal for illegal and/or “egregious” acts at (or away) from work. For example, in *Despears v. Milwaukee* (1998), Despears claimed that alcoholism caused the DWI that cost him his job. However, 9th Circuit ruled that termination is “appropriate” for “egregious or criminal conduct.” A similar ruling was rendered by the 6th Circuit *Maddox v. Univ. of Tennessee* (1995) for an assistant football coach arrested after a DWI.

Other examples of “egregious” acts include *Newland v. Dalton* (1995), where Newland was terminated for “notoriously disgraceful conduct” after he fired an assault rifle in a bar. The 9th Circuit ruled that alcoholics are “responsible for conduct which would otherwise result in their termination.” Similar rulings were rendered in *Johnson v. NY Hospital* (1996; for an alcoholic who attacked workplace staff during off hours), and in *Williams v. Widnall* (1996; for an alcoholic who threatened his supervisors and co-workers during rehabilitation).

Although alcoholism does not justify proscribed employee conduct at (or outside of) work, employers must ensure that alcoholism is causally connected to an employer sanction. For example, in *Miners v. Cargill* (1997), Miners was fired for refusing to enter rehabilitation. She had driven a company car after having consumed alcohol and, subsequently missed a day of work. Miners was not cited for DWI on the occasion in question, and there was no evidence that she was an alcoholic. As a result, the 8th Circuit ruled that a jury could infer that Miners was falsely regarded as being an alcoholic.
Additionally, employers must ensure that sanctions are not automatically applied even if there is evidence of alcoholism. For example, in *Smith v. Davis* (2001), a probation officer was fired for violating the company’s drug and alcohol policy. There was evidence of absenteeism, but there was minimal evidence that Smith was under the influence of alcohol at work. Indeed, Smith had received satisfactory performance appraisals over a 6-year period. The district court granted summary judgment to the company, but the 3rd Circuit reversed and remanded for a trial, stating:

> The appellees’ brief contends, and the District Court agreed, that Smith was fired for absenteeism, but the supervisors’ declarations do not mention absenteeism, and the drug and alcohol policy contains no provision about absenteeism or sick leave that applies to Smith’s termination.

In other words, the 3rd Circuit questioned whether the drug and alcohol policy was a pretext for discrimination, and left it for a jury to decide.\(^6\)

**When to Reasonably Accommodate**

In pre-ADA cases, the general rule was to accommodate for instances of poor performance or excessive absences, as long as there was no workplace abuse or off the job “egregious” conduct. A major question in most of these cases was how much accommodation is reasonable? For example, in *Lemere v. Brumley* (1988), an employee who had two extended leaves of absence was legally terminated after failing to keep an appointment with hospital treatment staff. However, in *Burchell v. Dept. of Army* (1988), the Army argued that Burchell was terminated because his rehabilitation provider diagnosed him as a “rehabilitative failure.” However, the court ruled that Burchell should be permitted to use accumulated sick leave time to obtain further help.

A frequently cited model for accommodating alcoholism was presented in *Rodgers v. Lehman* (1989), where the 4th Circuit suggested the following four steps: (1) notifying employees of available counseling services; (2) offering a “firm choice” between treatment versus discipline for continued poor job performance; (3) providing progressive discipline for those in outpatient treatment who continue to drink; and (4) offering the option of inpatient treatment when outpatient treatment fails. Many courts have followed these prescriptions.

For example, in *Teahan v. Metro North* (1991), Teahan argued that his excessive absences were due to his alcoholism. However, the 2nd Circuit upheld termination because Teahan was given multiple chances to rehabilitate and “progressively more severe disciplinary measures … including warning letters
and suspensions.” Similarly, in *Mararri v. WCI Steel* (1997), the 6th Circuit upheld a termination decision because of multiple violations and the breaking of a “last chance [written] agreement.” In *Evans v. Federal Express* (1998), the 1st Circuit upheld termination because the employer had endured “Evans’ errant work habits [and excessive absences] well beyond anything the law could reasonably expect.”

The moral, therefore, is that when excessive absence and/or poor performance are traced to alcoholism, employers should consider establishing written agreements that incorporate progressive discipline, the opportunity to rehabilitate, and the use (if applicable), of accrued sick leave days for rehabilitation.

**The Statutory Direct Threat Defense**

In the wake of the Supreme Court’s ruling in *School Board v. Arline* (1987), Congress, in 1988, amended the definition of being handicapped in RE-73. This definition excluded individuals with infectious diseases who “constitute a direct threat to the health or safety of other individuals” or who are “unable to perform the duties of the job.” Section 103(b) of the ADA generalizes direct threat beyond infectious diseases, and Section 103(d)(2) contains provisions for infectious diseases and food handling. Therefore, the direct threat defense applies to any protected physical or mental condition. More recently, in *Chevron v. Echazabal* (2002), the Supreme Court supported an EEOC regulation generalizing the direct threat defense to oneself as well as others. Of course, most recently, the ADAAA codified illnesses that are episodic or in remission (as in *Arline*) as valid disabilities, as long as they can be reasonably accommodated.

**School Board v. Arline (1987)**

Arlene, a teacher, was discharged after a relapse of tuberculosis. The school board argued that Arline was discharged because of safety concerns, not because of her disease or her abilities. Speaking for a 7-2 majority, Justice Brennan ruled that “the contagious effects of a disease” cannot be “meaningfully distinguished from the disease’s physical effects.” Brennan also ruled that individuals are not qualified if an infectious disease poses a significant risk that cannot be reasonably accommodated. Accordingly:

> A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be “otherwise qualified” for his or her job within the meaning of [Sec.504] … if reasonable accommodation will not eliminate that risk; the Act does not require
a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary school children.

Brennan’s definition of significant risk contained four prongs, including: (1) nature of the risk (how a disease is transmitted); (2) duration of infection; (3) severity (potential harm to others); and (4) probability of transmission. In the immediate aftermath of Brennan’s ruling, the 9th Circuit interpreted the Arline ruling to mean that a teacher with AIDS is protected in Chalk v. District Court (1988), as did the 11th Circuit in Doe v. Garrett (1990).

After the ADA was enacted, the EEOC adopted guidelines consistent with the Arline ruling. Thus, Section 1630.3 of the ADA Interpretive Guidelines uses the same four significant risks as specified by Justice Brennan, namely:


There are two other guidelines on direct threat. This includes the EEOC’s guidance on self-threat, upheld in Chevron v. Echazabal (2002), and the case-by-case test endorsed by the Supreme Court in Sutton v. UAL (1999) and several other cases. Accordingly:

Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others [emphasis by authors] 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 [emphasis by authors] 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.

For purposes of exposition, we will first examine Echazabal, and then backtrack to cover lower court direct threat rulings, both pre- and post-Echazabal.

**Echazabal v. Chevron (2002)**

As with several other EEOC guidelines examined by the Supreme Court in various cases, self-threat is not specifically codified in the ADA. The ADA speaks only of threat to others or the workplace. Chevron refused to hire Mario Echazabal on grounds that a medical exam revealed liver damage, a condition Chevron claimed would worsen with exposure to chemicals in the plant. The Supreme
Court endorsed the EEOC guidance on self-threat, and ruled in favor of Chevron. Accordingly:

A regulation of the Equal Employment Opportunity Commission authorizes refusal to hire an individual because his performance on the job would endanger his own health, owing to a disability. The question in this case is whether the Americans with Disabilities Act of 1990 permits the regulation. We hold that it does. [citation omitted]

The Supreme Court also distinguished between “moral concerns” and concerns related to operating a business. Accordingly:

Chevron’s reasons for calling the regulation reasonable are unsurprising: moral concerns aside, it wishes to avoid time lost to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating the national Occupational Safety and Health Act of 1970. [citation omitted]

Thus, in addition to concerns related to the targeted EEOC guideline, the Supreme Court credited OSHA guidelines related to a safe workplace.

Lower Court Rulings on Infectious Diseases

Most of the relevant rulings on infection diseases focus on probability of transmission (Brennan’s fourth prong). For example, in Ferdo v. Reno (1994), the 7th Circuit ruled in favor of a Federal Marshall who had recovered from hepatitis B. The defense argued that Ferdo posed a significant risk because of the potential for blood mixture during altercations. However, the court ruled “the likelihood of a US Marshall being involved in an altercation in which there was an exchange of blood is practically nil.”

In contrast, courts have routinely treated AIDS and other infectious diseases as an insurmountable barrier in jobs involving invasive medical procedures (e.g., Bradley v. University of Texas, 1993; Doe v. Maryland, 1995; Estate of Mauro v. Borgess Medical Center, 1998), dental practices (Waddell v. Valley Forge Dental Associates, 2001), and other jobs involving contact with sharp objects (EEOC v. Prevo, 1998). For example, in Doe v. Maryland, a hospital terminated a resident in surgery after he contacted HIV and refused a transfer to a nonsurgical residency. Doe presented the same argument as Ferdo, but the 4th Circuit rejected his claim. Accordingly:

We hold that Dr. Doe does pose a significant risk to the health and safety of his patients that cannot be eliminated by reasonable
accommodation. Although there may be presently no documented case of surgeon-to-patient transmission, such transmission is clearly possible. And the risk of percutaneous injury can never be eliminated through reasonable accommodation.

The Bradley and Mauro courts rendered similar rulings for surgical technicians, as did other courts for the jobs of dental hygienist and meat cutter. Additionally, some courts accepted 1991 recommendations by the Center for Disease Control that hospitals should themselves identify procedures that are “exposure prone.” This policy was subsequently supported by the Supreme Court in Bragdon v. Abbot (1998), involving a dentist’s desire to treat an AIDS patient in a hospital rather than his office.

Lower Court Rulings on Other Impairments

The aforementioned rulings on infectious diseases, including Arline, implicate the vital role of job context. That is, a person with an infectious disease who might qualify to be a teacher or a Federal Marshall would likely face an insurmountable barrier in any job requiring contact with sharp objects. This logic holds for other threats as well. For example, in Turco v. Hoechst (1996), the 5th Circuit ruled that “any diabetic episode or loss of concentration” was a threat to safety in a job (chemical process operator) that involved heavy machinery and intense heat. Similarly, in Darnell v. Thermafiber (2005), the 7th Circuit ruled that a diabetic applicant, whose diabetes was not under control, was a direct threat to safety because the job involved operating (and working around) dangerous equipment.

Other examples of cases implying insurmountable barriers include epileptics who work with heavy machinery and toxic chemicals (Moses v. American Nonwovens, 1996), epileptics responsible for maintaining store security (Martinson v. Kinney Shoe, 1997), and epileptics working as firing cooks (LaChance v. Duffy’s Drafthouse, 1998). Courts have also ruled that asthmatics cannot safely fight fires (Huber v. Howard County, 1994), police officers cannot safely perform their work with only one good arm (Champ v. Baltimore, 1995), people incapable of concentrating cannot drive gasoline trucks safely (Newman v. Chevron, 1997), and individuals with a history of substance abuse may be excluded from various “safety-sensitive” jobs (EEOC v. Exxon, 1997).

However, recall that in Sarycki v. UPS (1994), Sarcyki defeated a UPS rule excluding diabetics from driving vehicles weighing less than 10,000 pounds. This was because the relevant DOT rule applied only to vehicles in excess of 10,000 pounds. Critically, Sarcyki was permitted to make a facial showing that
he could safely operate the at-issue vehicles if he had access to food at all times. In other words, he was permitted to pass the case-by-case test. In contrast, in what was basically a tale of three cities, the 5th Circuit denied the opportunity for plaintiffs to pass this individualized test in two cases (*Chandler v. City of Dallas*, 1993; *Daugherty v. City of El Paso*, 1996), while later ruling that plaintiffs have this right in a third case (*Kapche v. City of San Antonio*, 2002). All three cases featured diabetics excluded from operating motor vehicles.

In *Chandler* and *Daugherty*, the 5th Circuit ruled that the case-by-case test was inapplicable because diabetics could be excluded as a matter of law. However, unlike *Sarcyki*, in which UPS violated a DOT regulation, the Cities of Dallas and El Paso were in compliance with DOT regulations. Similarly, in *Kapche*, the City of San Antonio was in compliance with Federal Highway and Safety regulations. Nevertheless, in *Kapche*, the 5th Circuit cited four cases since *Daugherty* in which the Supreme Court endorsed the case-by-case test. On this basis, they reversed their prior rulings in *Chandler* and *Daugherty*, and twice remanded the district court ruling in *Kapche* for reconsideration based on failure to use the case-by-case test.

Jeff Kapche was excluded from the job of police officer. The district court ruled that driving was an essential function for a police officer, and supported the exclusion (including inapplicability of the case-by-case test) based on Federal Highway and Safety regulations, as well as the *Chandler* and *Daugherty* prece- dents. A potential problem with the reversal of the district court ruling, as well as the prior rulings in *Chandler* and *Daugherty*, is that the 5th Circuit may have taken prior Supreme Court precedents out of context. Specifically, although the Supreme Court has consistently applied the case-by-case test as a prerequisite to proving substantial limitations, it has never ruled that it trumps a valid federal agency regulation.

As noted in Section V above case-by-case assessment and the validity of DOT regulations were separable issues in *Murphy v. UPS* and *Albertsons v. Kirkingburg*. The primary ruling in both cases was failure of the substantial limitation test (in the nonmitigated state) based on the case-by-case test. If anything, the Supreme Court credited the DOT regulations in both cases, and neither plaintiff issued a Prong 3 challenge. Therefore, there is no basis for assuming that the Supreme Court would endorse *Kapche*, or the reversals of *Chandler* and *Daugherty*, as the plaintiffs in these cases did not challenge the relevant federal agency regulations. Consequently, unless and until the Supreme Court rules otherwise, it is best to assume that the case-by-case test is inapplicable under Prong 1 when employers are compliant with valid federal agency regulations. Indeed, employers could be vulnerable if they fail to endorse federal agency regulations, and an individual subsequently endangers the public.
**Brief Summary:** Current users of illegal drugs are disqualified, and strict criteria are used for defining “rehabilitation” (regarding time frames between recovery and termination). Alcohol abusers who drink or are under the influence of alcohol at work, as well as those who commit illegal and/or egregious acts away from work, may be terminated. Alcoholics who perform poorly but are not under the influence of alcohol at work are entitled to attempt recovery. In some cases, use of available sick leave time for treatment is reasonable. The critical issue for infectious diseases is job context. For example, HIV is surmountable in some contexts (e.g., teaching), but not in others (e.g., surgery). The same is true for noninfectious diseases such as diabetes, epilepsy, and mental disorders. The Supreme Court’s ruling in *Echazabal v. Chevron* extends the direct threat defense to threat against oneself as well as others in the workplace.

---

**Section VIII  Ground Rules for Assessing KSAs and Reasonable Accommodations**

Employers are entitled to assess KSAs for essential job duties and to know if accommodations are required. However, there are ground rules for such inquiries, particularly at the *pre-employment stage*. The basis for much of the discussion that follows is EEOC Policy Guidance 915.002, issued originally on October 10, 1995 and revised on July 27, 2000. In essence, employers may ask applicants if they are capable of performing essential job tasks, to show how they would perform such tasks, and discuss possible accommodations in cases where an impairment is obvious (e.g., people in wheelchairs, wearing prosthetic devices).

**Ground Rules for Medical Exams and Related Inquiries**

Section 102(C)(2)(A) of the ADA, states that: “Except as provided in paragraph (3) a covered entity shall *not*”:

[C]onduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

These proscriptions are derived from Section 84.14 of the Section 504 regulations.8 The major exception in paragraph (3) is that medical exams and related inquiries are permitted *after* a conditional job offer.9
Major Preoffer Proscriptions

EEOC Policy Guidance dictates that “any [pre-offer] question that is likely to elicit information about a disability” is illegal. This incorporates medical and psychiatric exams in addition to inquiries using other methods (e.g., application blanks, background checks, interviews, and psychological tests). Also proscribed are questions relating to major life activities (e.g., lifting, standing, and walking), which the EEOC contends, “are almost always disability-related.” These proscriptions may be violated in subtle ways.

For example, in *Leonel v. American Airlines* (2005), applicants for the position of flight attendant were given conditional job offers pending the results of a background check, medical exam, and a medical history questionnaire. Three applicants were then terminated for failing to disclose that they were HIV+. The 9th Circuit ruled:

> The ADA recognizes that employers may need to conduct medical examinations to determine if an applicant can perform certain jobs effectively and safely. The ADA requires only that such examinations be conducted as a separate, second step [emphasis by authors] of the selection process, after an individual has met all other job prerequisites.

The 9th Circuit further ruled that the background check was part of the “first step,” and therefore, must be completed before either of the medical inquiries. However, the airline made the medical inquiries shortly after the provisional job offers, meaning it was impossible to complete the background check prior to the “second step.” Therefore, the conditional offer was deemed to be premature.

Proscriptions relating to psychological or psychiatric inquiries are sometimes subtle and sometimes not so subtle. Tests that assess only ordinary personality traits (e.g., honesty, integrity, conscientiousness) are clearly permitted, as long as they contain no invasive items related to physical or mental impairments. However, both the MMPI (not so subtle) and the 16PF (very subtle) are legally suspect, even though the MMPI has invasive questions and the 16PF does not.10

The MMPI contains items relating to physical or mental impairments, and therefore, is proscribed at the preoffer stage by EEOC Policy Guidance. Accordingly:

> Even if a psychological test is not itself a medical examination, individual inquiries on the test that concern the existence, nature, or severity of a disability are prohibited at the pre-offer stage.
For example, in *Karraker v. Rent-A-Center* (RAC; 2005), RAC used the MMPI for promotion. The 7th Circuit favored the plaintiffs. They ruled that promotions fit the pre-employment context (as the at-issue jobs were new), and that the MMPI was a *medical examination*. Accordingly:

> Because it is designed, at least in part, to reveal mental illness and has the effect of hurting the employment prospects of one with a mental disability, we think the MMPI is best characterized as a medical examination. And even though the MMPI was only a part, albeit a significant part, of a battery of tests administered to employees looking to advance, its use, we conclude, violated the ADA.

Subsequently, in *Karraker v. RAC* (2007), the 7th Circuit remanded to the district court to determine if $267,023.25 was a reasonable amount for attorney fees.

Although devoid of invasive items seen on the MMPI, the 16PF is suspect based on the following EEOC Policy Guidance relating to mental health professionals.

[1] Whether administered by either a health care professional or someone trained by a health care professional; [2] whether interpreted by a health care professional or someone trained by a health care professional; and [3] whether designed to reveal the existence, nature, or severity of an impairment, or … general physical or psychological health.

Here, the critical concern is that even if diagnostic test was used for benign purposes, test data are still available for diagnostic purposes.

**Major Preoffer Exemptions**

There are two major preoffer exemptions: (1) tests for illegal drug use and (2) tests of agility and/or fitness. Neither of these is considered as medical exams, and therefore, are permitted at pre-employment. However, there are related caveats.

Regarding illegal drugs, questions about current or past use are generally legal if restricted to *casual* use. However, questions about prior addictions are suspect because rehabilitated drug addicts are protected. Therefore, it is probably a good idea to restrict drug use questions to application forms, as questions asked during an interview may inadvertently lead to follow-up discussions of past addictions.
There are two critical issues for physical testing. First, tests that sample or simulate essential job duties (e.g., running, lifting, and dragging) are permitted at the preoffer stage. However, assessments that measure the capacity to perform physical tests are not legitimate (e.g., heart rate, blood pressure, and lung capacity). To illustrate, EEOC Policy Guidance provides the following example:

A messenger service tests applicants’ ability to run one mile in 15 minutes. At the end of the run, the employer takes the applicants’ blood pressure and heart rate. Measuring the applicants’ physiological responses makes this a medical exam.

A second critical issue for physical tests concerns liability for applicants who may suffer injuries as a result of such testing. For example, a person with a heart condition could suffer a heart attack during a 1-mile run. Questions regarding heart conditions are obviously illegal. However, the employer may seek medical certification. Or as stated in the EEOC Policy Guidance:

Although an employer cannot ask disability-related questions, it may give the applicant a description of the agility or fitness test and ask the applicant to have a private physician simply state whether she/he can safely perform the test.

Of course, some physicians might refuse to certify on grounds that they are liable in the event of a catastrophic injury.

**Ground Rules for Inquiries about Reasonable Accommodations**

EEOC Policy Guidance permits discussion of reasonable accommodations at the preoffer stage if an impairment is obvious, self-disclosed, or if a request for accommodation is made. Accordingly:

[F]inal guidance clarifies that employers may ask certain questions about reasonable accommodation at the pre-offer stage. In particular, employers will be permitted to ask limited questions about reasonable accommodation if they reasonably believe that the applicant will need accommodation because of an **obvious or voluntarily disclosed** [emphasis by authors] disability, or where the applicant has **disclosed a need for accommodation**. [emphasis by authors]
Thus, when accommodation issues arise, the ground rules are basically the same for applicants and injured employees. Critically, these ground rules imply caveats for either applicants or employees, and employers.

**Caveats for Applicants and Employees**

The ADA covers only known disabilities. As in religious accommodation cases discussed in Chapter 2, employers may not be “blind sided” by after-the-fact requests. To illustrate, in *Hedberg v. Indiana Bell* (1995), Hedberg notified his employer of his fatigue syndrome after he was terminated, prompting the 7th Circuit to rule:

Criteria that courts have developed regarding religious discrimination also shed light on the issue. In religious discrimination, as in some cases of disability discrimination, the employee’s protected characteristic may not be immediately obvious. We have held that establishing a prima facie case of religious discrimination … requires the employee to demonstrate that he informed his employer of his religious beliefs.

Analogously, in *Taylor v. Principle Financial* (1997), Taylor received a poor performance evaluation. In response, he told his supervisor (not his employer) that he had bipolar disorder. However, because he requested “secrecy,” he could not prove his employer “knew or should have known” about the disorder. Similar rulings have been rendered for other disabilities, including AIDS (*Dutson v. Farmers*, 1994) and alcoholism (*O’Keefe v. Niagara Mohawk*, 1994).

Additionally, in accordance with the ADA Interpretive Guidelines, applicants and employees must flexibly interact with employers to help fashion reasonable accommodations. For example, in *Hunt-Golliiday v. Metro* (1977), Hunt-Golliiday informed her employer of her mental problems and assumed she had fulfilled her end of the bargain. However, the 7th Circuit ruled:

Upon her return to Metro Water, Golliiday never indicated that her mental condition needed to be considered a disability. She simply returned to work to avoid being terminated. She did not request a change of shifts or modifications of facilities or suggest any other accommodation for her mental state.

In other words, as in the *Brener v. Diagnostics* (1982) case discussed in Chapter 2, where Brener stated a religious need and simply demanded results,
Hunt-Golliday falsely assumed that her responsibility ended with her statement of need.

The duty to flexibly interact includes responsiveness to employer requests for outside information, when it is needed. For example, in *Beck v. University of Wisconsin* (1996), Beck took a medical leave for arthritis and depression. Upon her return, Beck was twice accommodated with light duties. Before deciding on a more permanent job, the university requested medical input, but Beck refused to sign a medical release. Beck was then terminated because the university “never understood exactly what accommodations Beck required.” The 7th Circuit agreed, ruling that:

> The fact that the missing information concerns the employee’s medical conditions might not always indicate that the employee is responsible for failing to specify a necessary accommodation, but where, as here, the employer makes multiple attempts to acquire the needed information, it is the employer who appears to have made reasonable efforts.

Similar rulings have been rendered with respect to psychiatric information (*Brumley v. Pena*, 1995; *Grenier v. Cyanamid*, 1995), and in *EEOC v. Prevo* (1998), where Prevo refused to sign a medical release of information related to his AIDS virus.

**Flexible Employers**

Employers have lost several cases in which they seemed to hold a winning hand. For example, in *Bultmeyer v. Fort Wayne Schools* (FWCS, 1996), a psychiatrist certified that Bultmeyer, a school janitor, needed reassignment to a “less stressful” school. Bultmeyer was fired after reporting that his reassignment (Northrop) was too stressful. FWCS claimed that Northrop was no more stressful than any other school, but the 7th Circuit ruled that FWCS “stopped short of its responsibilities,” stating:

> [W]e view FWCS’ argument, that, in its view, Northrop is no more stressful than any other school as disingenuous. FWCS cannot measure what goes on in Mr. Bultmeyer’s mind, at it cannot know what is stressful to him.

Basically, FWCS made two mistakes. The first one was failure to scrutinize the psychiatric certification. Similar errors were made in *Ralph v. Lucent* (1998) and *Criado v. IBM* (1988). Ralph used up 52 weeks of paid leave after a “mental
breakdown” whereas Lucent ignored his psychiatrist’s request that he be given a 4-week trial at part-time work before returning to full-time duty. In ruling for Ralph, the court was “puzzled that Lucent has drawn a line in the sand at this point.” In *Criado*, the plaintiff received $300,000 in compensatory and punitive damages (plus attorney fees) because IBM ignored a psychiatrist’s notice that “Criado was suffering from a mental impairment” and “needed time to adjust.”

The second mistake by FWCS was assuming, without investigating, that Bultmeyer’s request was unreasonable. Similar mistakes were made in *Whitebeck v. Vital Signs* (1997) and *Dalton v. Suburu-Izuzu* (1998). In *Whitebeck*, an employee with motor difficulties requested a motorized cart, but the employer refused, stating “it’s not a good idea” and that “it wouldn’t look right.” In *Dalton*, the employer refused requests for step stools and guardrails, “voicing concern” that they were “safety hazards.”

Similar mistakes were made in *Feliberty v. Kemper* (1996) and *Henricks-Robinson v. Excel* (1998). In *Feliberty*, the employer assumed that a medical doctor would know what accommodations would be reasonable following his own hand surgery. This prompted the 7th Circuit to rule that:

> Undoubtedly, circumstances may exist where the employee has the laboring oar in identifying a reasonable accommodation; but an employer is not totally relieved of the responsibility simply because the employee has unusual expertise.

In *Hendricks v. Excel*, a seemingly progressive policy of encouraging injured workers to apply for other (easier) jobs was struck down. This only occurred because the company nurse made final decisions *without* directly interacting with affected employees. A class of 12 employees sued and won. The court ruled that Excel “must make a reasonable effort to explore the accommodation possibilities [directly] with the employee.”

**Reasonable Accommodation for the Hiring Process**

A final point to mention is that the dual responsibilities discussed before for claimants and employers also apply to otherwise legal tests administered during the *selection process*. For example, in *Stutts v. Freeman* (1983), Stutts was excluded from the job of heavy equipment operator owing to low scores on the General Aptitude Test Battery (GATB). However, his GATB scores were low because of his dyslexia. The 11th Circuit ruled that the KSAs required to perform well on the GATB were unrelated to those required to successfully operate heavy equipment.
However, in *Fink v. NYC* (1995), 12 visually impaired candidates for promotion were provided with readers and twice the normal time to take Civil Service Exam. Two candidates who failed the exam sued, claiming their readers were negligent. However, the 2nd Circuit ruled that the readers were not improperly trained, and that the defendant *cannot* be held responsible for “random occurrences, which, by chance, adversely affect disabled employees and candidates.”

The moral here is clear. First, employers should scrutinize their selection tests to ensure that the KSAs required for taking the test are also among the KSAs required to perform essential job duties (and accommodate for those KSAs that are irrelevant to the job). Second, employers who can document that they made a good faith effort to provide such accommodations are not responsible if these accommodations do not achieve their intended goal.

**Brief Summary:** Inquiries into the history, nature, or severity disabilities are prohibited at pre-employment, including medical and psychological exams, and inquiries in application blanks, interviews, background checks, and certain types of personality tests. Moreover, there are caveats associated with many types of inquiries that are otherwise legal. However, inquiries about accommodations are permitted at pre-employment if disabilities are obvious, are self-disclosed, or accommodations are requested. At either the pre- or posthire stage, employees must request accommodations, and must help in the identification process, including provision of medical and psychiatric information. The employer has a parallel responsibility in the interaction process, and should be responsive to the requested information. Similar responsibilities exist for elements of the hiring process, most notably, for accommodations that might be needed for cognitive tests.

**Section IX  Statutory Prescriptions for Reasonable Accommodations**

The ADA codifies the eight reasonable accommodations depicted in Table 8.9. Among them, Accommodation 1 applies broadly to all titles of the ADA. Accommodation 8 implies that Accommodations 2 through 7 illustrate, but do not exhaust, all possible accommodations. Most accommodation requests in case law are by injured or otherwise impaired employees. Moreover, case law representation is highest for Accommodation 4 (reassignment) than for all other accommodations combined.
There are three major considerations for job restructuring. First, employers should restructure or eliminate marginal job duties. Recall, the Stone v. Mt. Vernon case (1997) discussed earlier. Stone proved that the supposed need for bureau desk workers to fight fires was a marginal duty based on the testimony of two long-term bureau employees that such emergencies had never occurred.

Second, job restructuring is routinely used on a temporary basis for injured or otherwise impaired employees. For instance, in Shiring v. Runyon (1996), an injured letter carrier was assigned lighter duties (sorting mail) while he and his employer (the U.S. Postal Service) pondered vacant jobs that Shiring was qualified to perform. However, as we will see under reassignment to vacant jobs (Accommodation 4), Shiring was not entitled to perform the light duties indefinitely.

Third, employers may selectively restructure jobs for employees. For example, in Barth v. Gelb (1993), a diabetic applicant for a job at Voice of America (VOA) was rejected because of the requirement to rotate across all VOA locations. Barth could not rotate between jobs because most VOA locations lacked medical facilities. He requested exemption from rotation, an accommodation VOA permitted for existing employees on an as-needed basis. The DC Circuit rejected Barth’s request, ruling:

A willingness to accommodate incumbent employees increases the likelihood that they … will be retained … It will also contribute to employee morale and … to productivity. Thus there is economic logic as well as moral truth behind the intuition that distinguishes between “family” and “stranger” and the level of obligation owed to each.

**Table 8.9 ADA Accommodations**

1. Making facilities available
2. Job restructuring
3. Use of part-time work or modified work schedules
4. Reassignment of a disabled person to a vacant position
5. Using or modifying equipment used to perform job functions
6. Modifying employment tests, training materials, and/or work policies
7. Providing readers or interpreters
8. Other similar accommodations

**Accommodation 2: Job Restructuring**

There are three major considerations for job restructuring. First, employers should restructure or eliminate marginal job duties. Recall, the Stone v. Mt. Vernon case (1997) discussed earlier. Stone proved that the supposed need for bureau desk workers to fight fires was a marginal duty based on the testimony of two long-term bureau employees that such emergencies had never occurred.

Second, job restructuring is routinely used on a temporary basis for injured or otherwise impaired employees. For instance, in Shiring v. Runyon (1996), an injured letter carrier was assigned lighter duties (sorting mail) while he and his employer (the U.S. Postal Service) pondered vacant jobs that Shiring was qualified to perform. However, as we will see under reassignment to vacant jobs (Accommodation 4), Shiring was not entitled to perform the light duties indefinitely.

Third, employers may selectively restructure jobs for employees. For example, in Barth v. Gelb (1993), a diabetic applicant for a job at Voice of America (VOA) was rejected because of the requirement to rotate across all VOA locations. Barth could not rotate between jobs because most VOA locations lacked medical facilities. He requested exemption from rotation, an accommodation VOA permitted for existing employees on an as-needed basis. The DC Circuit rejected Barth’s request, ruling:

A willingness to accommodate incumbent employees increases the likelihood that they … will be retained … It will also contribute to employee morale and … to productivity. Thus there is economic logic as well as moral truth behind the intuition that distinguishes between “family” and “stranger” and the level of obligation owed to each.
Of interest here, the DC Circuit deemed the exemption an “undue hardship by virtue of loss of operational flexibility.” Therefore, VOA legally reserved a request it could have denied for employees and applicants alike.

**Accommodation 3: Part-Time Work and Modified Work Schedules**

As with lighter duties, part-time work is also used on a temporary basis. For example, in *Lamb v. Qualex* (2002), an account development specialist was permitted to temporarily perform his current job on a part-time basis. However, as in *Shiring*, the employee in this case was not entitled to keep his part-time schedule indefinitely.

The two other examples of modified work schedules are working at home and flexible work hours (flextime). There is limited case law on such requests, but what exists suggests flextime is generally a more reasonable request than working at home. However, working at home has been a reasonable request under certain circumstances.

For example, in *Langdon v. Health & Human Services* (HHS; 1992), the 9th Circuit endorsed the request of a computer programmer with multiple sclerosis to work at home because HHS (and other federal agencies) had a written policy of permitting “severely handicapped persons for whom it would be difficult to commute to the work site” to work at home. Similarly, in *Humphrey v. Memorial Hospital Association* (2001), the 9th Circuit endorsed the request of a medical transcriptionist with obsessive-compulsive disorder to work at home, but mainly because the hospital had previously permitted this accommodation for other transcriptionists.

In contrast, in *Vande Zande v. Wisconsin* (1995), the 7th Circuit rejected the claim of a paraplegic that she could perform her job of program assistant at home. The court ruled “an employer is not required to accommodate a disability by allowing the disabled worker to work by himself, without supervision, at home.” In *Smith v. Ameritech* (1997), an injured sales representative who used up his paid 52-week disability leave requested a new job (collections agent) because he felt he could perform the job at home. Smith offered evidence that another employee (with multiple sclerosis) had been permitted to work at home. However, the 6th Circuit ruled:

In essence, plaintiff has requested two accommodations: transfer to a new position, and permission to work at home. Plaintiff has failed to show that either of these accommodations were objectively reasonable in this case.
More generally, courts have viewed attendance at work as an essential job function for a variety of jobs, including account development specialist (Lamb v. Qualex, 2002), probation officer (Smith v. Davis, 2001), receiving department employee (Maziarka v. Mills Fleet Farm, 2001), financial services in a bank (Spangler v. Federal Home Loan Bank of Des Moines, 2002), factory worker (Amadio v. Ford Motor Co., 2001), store area coordinator (Earl v. Mervyns, 2000), and for an electrical engineer at a golf ball manufacturing plant (Mulloy v. Acushnet Co., 2006).

Flextime is a more reasonable request because the modification is considered to be less extreme than working at home. For example, in Stewart v. Happy Herman’s (1997), Stewart, who had prior pelvic surgery, requested frequent bathroom breaks. She was particularly concerned with her lunch break, which was lowered from 30 to 20 uninterrupted minutes for all employees. Stewart requested 30 uninterrupted minutes at full pay. The employer satisfied the primary objective of 30 uninterrupted minutes, but with partial pay. The 11th Circuit ruled that meeting the primary objective was sufficient to meet the burden to accommodate. Accordingly:

[U]se of the word “reasonable” as an adjective for the word “accommodate” connotes that an employer is not required to accommodate an employee in any manner in which that employee desires. … This is so because the word “reasonable” would be rendered superfluous if employers were required … to provide employees “the maximum accommodation or every conceivable accommodation possible” … “an employee is entitled only to a reasonable accommodation and not to a preferred accommodation.”

In other words, Stewart’s request for flexible scheduling was reasonable, but she was not entitled to her preferred accommodation.

In a more traditional case (Ward v. Massachusetts Health Research Institute, 2000), the employer had a flextime schedule in place. Employees could report to work at any time between 7 a.m. and 9 a.m., as long as they worked a full 7.5-hour shift. Ward, a data entry assistant, had severe inflammatory arthritis, and frequently clocked in well after 9 a.m. Nevertheless, he generally finished his 7.5-hour shift. Ward requested an extension in the window for reporting to work, but the employer refused the request and terminated him on grounds that he required close supervision, which was not possible when he reported well after 9 a.m. The district court supported the employer, but the 1st Circuit reversed, ruling:

We find nothing in the record to support the appellee’s position that a set schedule is an essential requirement for Ward’s job and … a reasonable factfinder could conclude that a regular and predictable
schedule is not an essential function of Ward’s position so long as he works the requisite 7.5 hours per day.

The case was then remanded for a jury trial, with the strong suggestion that the employer’s claimed need for close supervision was a pretext for discrimination.

In short, modifications of work schedule such as part-time work are reasonable as temporary assignments, and flextime is reasonable unless the employer can prove it interferes with an essential job function (e.g., close supervision). In contrast, working at home faces tougher barriers because most jobs require supervision, and many jobs require teamwork. Thus, for most jobs, attendance is an essential job function.

Accommodation 4: Reassignment to Vacant Positions

Reassignment to vacant positions is by far the most common request by injured or otherwise impaired employees. The job must be vacant, and the individual must be able to perform all of its essential duties. Case law reveals several examples of employer errors, but there are many more examples of unreasonable employee requests. There are also emerging issues relating to (1) the definition of a vacant position and (2) whether the injured (or otherwise impaired) employee is entitled to the reassignment if other, more qualified applicants, are available.

Employer Errors

In some cases, the employer errors are similar to those documented earlier in Section VIII in which employers failed to flexibly interact with employees. For example, in *Benson v. Northwest Airlines* (1995), an injured airline mechanic offered reasons as to why he could perform several vacant jobs. The employer mistakenly believed that the employee had the burden to prove he could perform the essential functions of these jobs. The 8th Circuit disagreed, ruling:

> Once the plaintiff makes a *facial showing* [emphasis by authors] that reasonable accommodation is possible, the burden of production shifts to the employer to show that it is unable to accommodate the employee. If the employer shows that the employee cannot perform the essential functions of the job even with reasonable accommodation, the employee must rebut that showing with evidence of his individual capabilities.

In other words, the employee must make only a *facial showing* of successful job performance, a relatively light burden similar to the burden of production in
McDonnell–Burdine cases. In this case, Benson carried his lighter burden, and it was the employer’s burden to prove that Benson could not perform the jobs he requested.

Other examples of employer errors include *Baert v. Euclid* (1998) and *Gile v. United Airlines* (1996). *Baert* involved a truck driver who could no longer drive after he was diagnosed with diabetes. He requested a warehouse job, and the employer erred by not notifying him when one became available. In *Gile*, a night worker with a sleeping disorder requested transfer to any day position. Here, the employer erred by providing information only for jobs available in her current job title.

### Unreasonable Requests

By our count, case law reveals six types of unreasonable requests. These are depicted in Table 8.10. The first two requests are intuitively unreasonable based on statutory ADA language and accompanying EEOC guidance. Thus, it is unreasonable to request reassignment to a position that is not vacant (e.g., *McCready v. Libbey-Owens*, 1997), and it is unreasonable to request reassignment to a position that the employee is not qualified to perform with or without accommodations (e.g., *Hankins v. Gap*, 1996). The Circuit Courts have also deemed requests 3 through 6 as being unreasonable.

Request 3 was alluded to previously in relation to the performance of light duties (*Shiring v. Runyon*, 1996) and part-time work (*Lamb v. Qualex*, 2002). Injured or otherwise impaired employees are not entitled to turn temporary arrangements into permanent ones. For example, the 3rd Circuit ruled that Shiring’s light duties were not “official” and were created to give Shiring “something to do on a temporary basis.” In another case (*Terrell v. US Air*, 1998), the 1st Circuit ruled that a reservations agent on temporary part-time job was not entitled to continue on that basis because part-time work was not generally available at the airline.

<table>
<thead>
<tr>
<th>Table 8.10 Unreasonable Employee Requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
<tr>
<td>2</td>
</tr>
<tr>
<td>3</td>
</tr>
<tr>
<td>4</td>
</tr>
<tr>
<td>5</td>
</tr>
<tr>
<td>6</td>
</tr>
</tbody>
</table>
Request 4 is unreasonable even if the injured or otherwise impaired employee is qualified or trainable for that job. This is illustrated in *Mengine v. Runyon* (1997), where an injured employee refused to consider alternative job suggestions offered by the United States Postal Service, requesting instead, a higher-level computer job. The 3rd Circuit ruled that Mengine must:

“[M]ake at least a facial showing that such accommodation … is possible”… Specifically, Mengine must demonstrate that there were vacant, funded positions whose essential duties he was capable of performing, with or without reasonable accommodation, and that these positions were at an equivalent level [emphasis by authors] or position as his former job.

Similarly, in *Malabarba v. Chicago Tribune* (1998), an employee no longer capable of performing the more strenuous work of packager, requested a higher-level customer service position. The 7th Circuit ruled “an employer is not obligated to accommodate a disabled employee by promoting him or her to a higher level position.”

Request 5 was addressed by the 2nd Circuit in *Wernick v. Federal Reserve Bank* (1996) and *Weiler v. Household Finance* (1996), and by the 7th Circuit in *Kennedy v. Dresser Rand* (2000). The gist of this type of request is that a supervisor triggers or exacerbates anxiety and/or depression in an employee, and the request is reassignment to a new supervisor. The 2nd Circuit termed the request an “undue administrative burden,” suggesting it is an undue hardship. However, the 2nd Circuit also ruled that Congress did not intend to “interfere with personnel decisions within the organizational hierarchy,” suggesting it is also unreasonable as a matter of law. The 7th Circuit left room for an affirmative proof by plaintiffs that changing supervisors is reasonable, but ruled it was unreasonable as a matter of law when such proof is lacking.

Request 6 is effectively a de facto BFSS defense, as lower courts have generally deemed it is unreasonable to request exemptions from seniority agreements. For example, in *Eckles v. Conrail* (1996), an epileptic made the seemingly reasonable request of transferring to another shift. However, honoring this request would require bumping a more senior employee in violation of a collectively bargained agreement (or CBA). The 7th Circuit ruled:

After examining the text, background, and legislative history of the ADA duty of “reasonable accommodation,” we conclude that the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees.
A similar ruling occurred in *Kralik v. Durbin* (1997) where an injured toll collector was not exempt from mandatory overtime because exemptions were seniority-based. Similarly, an expeditor with a pacemaker was denied reassignment to jobs because he lacked seniority to perform the jobs he requested (*Foreman v. Babcock & Wilcox*, 1997). Finally, a senior-level employee with high blood pressure could not be demoted to a lower-level job because seniority rules prohibited such “roll backs” for senior managers (*Duckett v. Dunlop*, 1997).

All the aforementioned rulings relate to CBAs. More recently, in *US Airways v. Barnett* (2002), the Supreme Court ruled that seniority systems *unilaterally imposed* by employers are generally as valid as CBAs. Barnett suffered a back injury and could no longer handle cargo. He had sufficient seniority for a less-demanding mailroom job. However, he did not have sufficient seniority to keep the job when the airline later put it up for competitive bid under its *unilaterally imposed* seniority system. Speaking for a 5-4 majority, Justice Breyer ruled that, generally, it is just as *unreasonable* to oppose unilaterally imposed rules as it is to oppose CBAs in making reassignments. This holds true unless there are irregularities in the design of the unilateral system. Accordingly:

> [T]he [unilaterally imposed] seniority system will prevail in the run of cases …. to show that a requested accommodation conflicts with the rules of a seniority system is *ordinarily* [emphasis by authors] to show that the accommodation is *not reasonable*. [emphasis by authors]

Hence such a showing will entitle an employer/defendant to summary judgment on the question *unless there is more*. [emphasis by authors]

Breyer cited two possible irregularities: (1) that the employer changes the rules too frequently, and (2) that an existing system prior to a change already contained all or most of the exceptions featured in the new system.

The *Barnett* ruling also addressed the broader issue of the relationship between reasonable accommodation and undue hardship. For purposes of exposition, this portion of the *Barnett* ruling will be addressed in Section X below on employer defense strategies.

**Emerging Issues**

One of the two emerging issues relates to a provision in Section 1630.2(o) of the ADA Interpretive Guidelines requiring employers to consider jobs for reassignment that will be vacant in a *reasonable amount of time*. Accordingly:

> Employers should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a *reasonable amount of time*. [emphasis
by authors] A “reasonable amount of time” should be determined in light of the **totality of the circumstances**. [emphasis by authors]

Unfortunately, the EEOC used only one example for *totality of circumstances*, and this example used a short (1-week) timeframe. As a result, there are at least two different types of opinions on what constitutes a *reasonable amount of time*.

In *Monett v. Electronic Data Systems* (1996), the 6th Circuit ruled that 37 days of unpaid leave is a reasonable amount of time for an injured customer service representative. However, in *Smith v. Midland Brake* (1999), the 10th Circuit ruled that 2 months is *not* “an unreasonably long time in light of the totality of the circumstances” for an assembler sidelined by a skin disorder. The 10th Circuit rendered a similar ruling for a truck driver sidelined because of mini-strokes in *Boykin v. ATC/Vancom of Colorado* (2001). Both 10th Circuit rulings were endorsed by the 9th Circuit for a heavy equipment operator sidelined by seizures in *Dark v. Curry County* (2006).

The second issue emerged in *Aka v. Washington Hospital* (1998), where an orderly sidelined by heart by-pass surgery was forced to compete with another nondisabled hospital employee. The DC Circuit rejected this practice, ruling:

> To assign, according to Webster’s Third New International Dictionary, means “to appoint (one) to a post or duty.” An employee who is allowed to compete for jobs precisely like any other applicant has not been “reassigned”; he may have changed jobs, but he has done so entirely under his own power, rather than having been appointed to a new position.

Subsequently, in the aforementioned case of *Smith v. Midland Brake*, the 10th Circuit (like the DC Circuit) stated that “requiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history.” However, contrary rulings were rendered by the 7th Circuit in *Humiston v. Keeling* (2000) and by the 8th Circuit in *Huber v. Wal-Mart* (2007).

In *Humiston*, 7th Circuit viewed the policies supported in *Smith v. Midland Brake* as “affirmative action with a vengeance.” The court ruled

> [G]iving a job to someone … solely on the basis of his status as a member of a statutorily protected group. It goes well beyond enabling the disabled applicant to compete in the workplace, or requiring the employer to rectify a situation (such as lack of wheelchair access).

In *Humiston*, an injured employee was sidelined from his job of warehouse “picker.” The EEOC argued that a “minimally qualified” disabled person should
be advanced over a “more qualified nondisabled person” unless the employer can show “undue hardship.” The 7th Circuit ruled that the EEOC’s policy does not apply because the employer had a “consistent policy of preferring the best candidate for a vacancy,” not a policy of hiring “the first qualified person to apply, as is often done for routine low-skilled jobs.”

In *Huber*, a dry grocery order filler was sidelined from his $13 dollar/hour job and was reassigned to a maintenance associate job that paid half his former wage. Huber then applied for a $13-an-hour job that he was qualified to perform (router). Nevertheless, Wal-Mart hired what it considered to be a more qualified applicant. Citing the 7th Circuit ruling in *Humiston*, the 8th Circuit agreed and ruled:

> We agree and conclude the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate.

In other words, like the 11th Circuit’s ruling in *Stewart v. Happy Hermans* (1997), the 8th Circuit concluded that Huber was reasonably accommodated, and was not entitled to the “perfect substitute job” he desired.

### Accommodations 5 through 7

There is comparatively less case law on Accommodations 5 through 7 as compared with Accommodations 2 through 4. Additionally, unlike Accommodations 2 through 5, which are conceptually distinct from each other, Accommodation 7 (readers and interpreters) is one of the primary ways of satisfying Accommodation 6 (e.g., modifying employment tests, training materials, and work policies). The small number of cases in this area suggests that some requests in these domains are reasonable.

For example, we have witnessed two examples in which modifying equipment used to perform job functions (Accommodation 5) has been deemed reasonable. These cases are *Whitebeck v. Vital Signs* (1997; motorized cart) and *Dalton v. Subaru-Izuzu* (1998; use of step stools and guard rails). Recall that both employers lost for failing to flexibly interact with the employees on the proposed accommodations.

We have also witnessed two examples of requests for readers (Accommodation 7) in the context of modifying employment tests procedures (Accommodation 6). Recall that in *Stutts v. Freeman* (1983), an RE-73 case, a dyslexic applicant was entitled to a reader for the GATB test because reading was *not* essential to the job for which he applied (heavy equipment operator). Moreover,
in *Fink v. NYC* (1995), an ADA case, 12 blind applicants for promotion were provided readers for a Civil Service Exam.

Additionally, *Nelson v. Thornburgh* (1983), another RE-73 case, illustrates the use of readers in the work setting. In *Nelson*, three blind employees earning approximately $20,000 a year at the Pennsylvania Department of Public Welfare (DPW) requested personal readers at the cost of approximately $6,000 a year. The DPW used the undue hardship defense, but the court ruled for the plaintiffs. Accordingly:

> [I]n view of DPWs [3 billion dollar] … budget, the modest cost of providing half-time readers, and the ease of adopting that accommodation without any disruption of DPW’s services, it is apparent that DPW has not meet is burden of showing undue hardship.

It should be noted that prior to the lawsuit, the three plaintiffs paid for their own part-time readers, an accommodation permissible under both RE-73 and ADA rules.

A final point to note is that the odds of receiving one aspect of Accommodation 6 (modified employer policies) are low unless the policy relates to a nonessential job function (e.g., *PGA v. Martin*, 2001). Generally, employers are not required to alter policies related to essential job functions, and when they do, it is usually a temporary arrangement (e.g., light duties, temporary part-time work). In two examples of requests to modify employer policies, the courts have rejected second requests after major mishaps (*Siefken v. Arlington Heights*, 1995) and continuation of an accommodation that was never required from the beginning (*Holbrook v. City of Alpharetta*, 1997).

**Accommodation 8: Other Similar Accommodations**

Section 1630.2(o) of the EEOC ADA Interpretative Guidelines contains the following statement about Accommodation 8:

> There are any number of other specific accommodations [emphasis by authors] that may be appropriate for particular situations but are not specifically mentioned in this listing. This listing is not intended to be exhaustive of accommodation possibilities. For example, other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment, making employer provided transportation accessible, and providing reserved parking spaces. Providing personal assistants, [emphasis by authors] such as a page turner for an employee with no hands or a
travel attendant to act as a sighted guide to assist a blind employee on occasional business trips, may also be a reasonable accommodation.

Another accommodation that is most commonly requested is for leave time. However, there are caveats associated with this accommodation.

For example, in *Myers v. Hose* (1995), a diabetic bus driver failed a physical exam required to drive busses with 16 or more passengers. After using all his accrued leave time, he again failed a physical. Meyers requested additional time to recuperate at half pay, which the 4th Circuit rejected. Accordingly:

> Requiring paid leave in excess of an employee’s scheduled amount would unjustifiably upset … budgetary expectations, and thus cannot be … a reasonable accommodation.

Importantly, the 4th Circuit also ruled that “reasonable” means accommodations “which presently or in the near future enable the employee to perform the essential functions of his job,” meaning extended leave is unreasonable if the prognosis is uncertain. Similar rulings were rendered in *Hudson v. MCI* (1996; “uncertainty of prognosis” for a hand injury), *Smith v. Blue Cross* (1996; uncertain prognosis for an anxiety disorder), and *Rogers v. International Marine* (1996; indefinite leave for persistent pain).


> It is clear that Amadio’s record of attendance does not meet even the minimum requirements of his position. Amadio took 23 medical leaves during his last three years of employment (totaling approximately eighteen months of absence) and was disciplined several times in connection with his absenteeism. We have consistently found that plaintiffs who have attendance records similar to or substantially better than Amadio’s do not qualify for protection under the ADÁ.

In *Fogleman*, the 3rd Circuit ruled:

> There is no evidence that permits any conclusion other than that the requested leave was for an indefinite and open-ended period of time. This does not constitute a reasonable accommodation.
Courts have also ruled on two of the three “other” accommodations cited in Section 1620.2(o), and found two of them to be reasonable. Recall, that in Borrowski v. Valley Central (1995), a school librarian qualified for a personal assistant (to control students) under the assumption that controlling students was a marginal duty. In Lyons v. The Legal Aid Society (1995), the 2nd Circuit overturned a summary judgment for a special parking place for an injured attorney, even though the employer had a blanket policy of not reserving parking places for any of its employees. However, in Jacques v. Clean-Up (1996), a jury ruled that Jacques, an epileptic, was not entitled to transport to work by his employer. This decision was affirmed by the 1st Circuit.

Brief Summary: The ADA codifies eight specific accommodations, including (1) making facilities available and seven others. Most accommodations are for injured/impaired employees, most notably; (2) elimination of marginal duties and use of temporary assignments; (3) temporary part-time work, working at home and flextime; and (4) reassignment to vacant positions that can be performed with or without accommodations. However, injured/impaired employees are not entitled to turn temporary assignments into permanent ones, working at home is rarely supported as most jobs require attendance as an essential function, and many reassignment requests are unreasonable as a matter of law because they require alteration or reallocation of essential job duties. Two emerging issues in reassignment are the EEOC’s requirement to consider anticipated vacancies, and whether injured/impaired employees have less status than more qualified nondisabled applicants. The remaining accommodations include: (5) modifying equipment to facilitate job performance; (6) modifying employment tests, training materials, and/or work policies; (7) providing readers and interpreters; and (8) other modifications. Chief among the other accommodations is the use of accrued leave time to permit injured/impaired employees to recuperate from the illnesses or injuries. However, employers are not required to provide extra leave time above what is due, and are not required to hold jobs if the prognosis is uncertain.

Section X  Employer Defense Strategies

Table 8.11 depicts eight ADA defense strategies. We have seen each of them at one point or another earlier in the chapter. Defenses 1 through 6 are easiest to describe, and are summarized briefly. Conversely, Defenses 7 and 8 are inherently
more complicated, and are discussed in greater detail. An important point to note is that the employer wins by succeeding with any single defense. Therefore, by inference, undue hardship (Defense 8) is a last-resort defense.

**Defenses 1 through 6**

**Defense 1: Refuting Class Membership**

Defense 1 is unique to the ADA. The protected classes in Title VII and the ADEA are facially apparent and rarely disputed. In contrast, ADA plaintiffs must affirmatively prove they are *disabled* and *qualified* within the meaning of the statute. As a result, there is substantial case law in which (1) employers challenge impairments on grounds that they do not substantially limit a major life activity, and/or (2) rebut qualification on grounds that the individual cannot perform essential job duties with or without reasonable accommodation (i.e., an insurmountable barrier).

**Defense 2: Defending KSAs and Essential Job Functions**

Defense 2, which references adverse impact, is statutorily mandated in Section 103(a) of the ADA as follows:

*It may be a defense to a charge of discrimination under this Act than an alleged application of standards, tests, or selection criteria that screen out or otherwise deny a job or benefit to an individual* [emphasis

<table>
<thead>
<tr>
<th>Table 8.11 Employer Defense Strategies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defense 1</td>
</tr>
<tr>
<td>Defense 2</td>
</tr>
<tr>
<td>Defense 3</td>
</tr>
<tr>
<td>Defense 4</td>
</tr>
<tr>
<td>Defense 5</td>
</tr>
<tr>
<td>Defense 6</td>
</tr>
<tr>
<td>Defense 7</td>
</tr>
<tr>
<td>Defense 8</td>
</tr>
</tbody>
</table>

It may be a defense to a charge of discrimination under this Act than an alleged application of standards, tests, or selection criteria that screen out or otherwise deny a job or benefit to an individual.
by authors] with a disability has been shown to be job-related and consistent with business necessity, [emphasis by authors] and such performance cannot be accomplished by reasonable accommodation, [emphasis by authors] as required under this Act.

At its core, the ADA is an adverse impact statute, as KSAs (e.g., seeing, hearing) or job requirements (e.g., lifting 70 pounds) that have no impact on most people, may adversely impact disabled people. However, as implied in Section 103(a), there are two major differences between adverse impact in the ADA as compared with Title VII. First, the ADA applies to individuals. Therefore, the statistical group comparisons required in Title VII cases are irrelevant in the ADA. Second, when required, a successful job-relatedness defense automatically segues into the issue of reasonable accommodation. Therefore, Section 103(a) applies to cases where plaintiffs challenge stated essential job duties as being marginal (e.g., Stone v. Mt. Vernon, 1997).

**Defense 3: Failure to Inform or Flexibly Interact**

Defense 3 follows from religious accommodation case law discussed in Chapter 3. Recall that in religious accommodation cases, applicants must (1) notify the employer of the need for accommodation, and (2) cooperate (or flexibly interact) to help in their discovery. The duty to flexibly interact includes responding to reasonable requests by employers for medical (e.g., Beck v. University of Wisconsin, 1996; EEOC v. Prevo, 1998) or psychiatric information (e.g., Brumley v. Pena, 1995; Grenier v. Cyanamid, 1995). Moreover, it is an ongoing process that is not satisfied by a single attempt (e.g., McAlindin v. San Diego, 1999; Ralph v. Lucent Technologies, 1998).

**Defense 4: Reasonable Accommodations were Made**

Defense 4 also follows from religious accommodation case law. Recall, that in Ansonia v. Philbrook (1986), Philbrook wanted 6 days a year for religious observance and was willing to pay for a substitute teacher for three of those days. The Supreme Court ruled that the counter offer (3 days unpaid leave) was reasonable. Similarly, in Stewart v. Happy Herman’s (1997), the employer provided a workable accommodation for a disability, but the employee wanted something better. The moral for both religion and ADA cases is that accommodations that overcome barriers posed by sincerely held religious beliefs or disabilities are reasonable. They do not have to consist of those preferred by employees.

On a related issue, recall that in Fink v. NYC (1995), the defendants were not liable for an accommodation that was offered but failed to work as intended.
Similarly, in *Stewart v. County of Brown* (1996), Stewart received several accommodations, none of which were effective. Stewart believed he was entitled to more, but the 7th Circuit ruled that the “fundamental problem” was the false belief that “accommodation” equates to a “perfect cure for the problem.” In essence, the employer is obligated to make a good faith effort to reasonably accommodate, but there is no implied guarantee that the accommodation(s) must be successful.

**Defense 5: McDonnell–Burdine**

Defense 5 applies in rare cases where employers concede the existence of both disability and qualification, but claim there is no causal connection between the disability and an adverse employment action. For example, in *Norcross v. Sneed* (1985), an RE-73 case, Norcross finished second in the search for librarian and claimed discrimination based on blindness. The employer articulated that the chosen applicant was more qualified than Norcross, even with a reasonable accommodation. Applying McDonnell–Burdine rules, 8th Circuit ruled that Norcross did not prove pretext.

Similar rulings have been rendered in ADA cases. For example, in *DeLuca v. Winer* (1995), DeLuca claimed he was fired because of multiple sclerosis. Winer countered that DeLuca failed to adapt to a new position after a reduction-in-force (RIF). Using ADEA-like RIF rules, the 7th Circuit ruled that:

> The prima facie case requires the plaintiff to prove that (1) he is a member of the protected class; (2) his work performance met the legitimate job expectations; (3) his employment was terminated; and, because Winer Industries was conducting a general reduction-in-force, (4) employees not in the protected class were treated more favorably.

DeLuca lost because he could not prove that similarly situated nondisabled employees were more favorably treated. Analogous rulings include *Champagne v. Servistar* (1998; termination for rules violations, not depression), *Wilking v. Ramsey* (1998; termination for poor performance, not attention deficit disorder), and *Wallin v. Minnesota* (1998; termination for security breach, not depression).

**Defense 6: Direct Threat**

Defense 6 is a fact-specific statutory defense that applies to any threat to workplace safety. Based on the Supreme Court’s ruling in *Chevron v. Echazabal* (2002), the threat may be to oneself as well as others. To succeed, employers must prove
that the threat cannot be eliminated with reasonable accommodation. As discussed in Section VII above, the direct threat defense has been applied to infectious diseases, as well as noninfectious physical and mental impairments.

Defenses 7 and 8

In religion cases, virtually any accommodation that overcomes the barrier posed by a sincerely held religious belief is reasonable, forcing the employer into a \textit{di minimis} (very minimal) burden to prove undue hardship (e.g., minor changes in expense or business efficiency). In the ADA, the undue hardship defense is far more burdensome on employers, but at the same time, far more difficult for plaintiffs to argue. This follows because undue hardship applies \textit{only} to accommodations that are reasonable, and many accommodations capable of overcoming barriers posed by disabilities are \textit{unreasonable}. Therefore, in the ADA, there are many cases in which courts need not assess undue hardship (Defense 8) because the accommodations requested by the plaintiff are unreasonable as a matter of law (Defense 7).

Defense 7: Unreasonable Requests

As we have seen in prior sections, it is unreasonable to request elimination or reallocation of essential job duties or reassignment to nonvacant positions. Additionally, the Circuit Courts have generally found that it is unreasonable to request employers to turn temporary reassignments into permanent ones, reassign employees to jobs requiring a promotion, reassign to new supervisors, or reassign in opposition to seniority rules. In addition to its main ruling in \textit{US Airways v. Barnett} (2002; on seniority rules), the Supreme Court addressed the distinction between reasonable accommodation and undue hardship. They also endorsed the general run of Circuit Court rulings regarding the definition of what is unreasonable as a matter of law.

Prior to the \textit{Barnett} ruling, there was tension between the EEOC and the Circuit Courts on the definition of the term \textit{reasonable}. For example, in \textit{Reed v. LePage Bakeries} (2001), Reed requested that she be permitted to leave the room whenever she and her supervisor were in conflict. The EEOC supported this request because it was \textit{effective} in eliminating the barrier posed by Reed’s mental disability. But, the 1st Circuit found the request unreasonable. Accordingly:

\[ we \text{ reject the position urged on us by the EEOC. In contrast to the basic approach followed by our sister circuits, the EEOC argues that the only burden a plaintiff has on proving reasonable accommodation is to show that the accommodation would effectively enable her} \]
perform her job: [emphasis by authors] whether the accommodation would be too costly or difficult, on the EEOC’s view, is entirely for the defendant to prove.

The Supreme Court rendered a similar ruling in *Barnett*. Accordingly:

Congress [has not] indicated in the statute, or elsewhere, that the word “reasonable” means no more than “effective.” The EEOC regulations do say that reasonable accommodations “enable” a person with a disability to perform the essential functions of a task. But that phrasing simply emphasizes the statutory provision’s basic objective. The regulations do not say that “enable” and “reasonable” mean the same thing. And as discussed below, no Circuit Court has so read them.

The Supreme Court also ruled that *LePage* and other similar rulings (most notably *Barth v. Gelb*, 1993; *Borrowski v. Valley Central*, 1995) “reconciled” the definitions of reasonable accommodation and undue hardship in a “practical” way. Therefore, the Supreme Court essentially endorsed the rulings of the lower courts on these two issues.

**Defense 8: Undue Hardship**

The undue hardship defense was re-codified from the Section 504 regulations and written into Section 101(10) of the ADA statute. Accordingly, *undue hardship* refers to “an action requiring significant difficulty or expense,” including:

(i) the nature and cost of the accommodation …; (ii) the overall financial resources of the [employer]; (iii) … overall size of the business … with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations … including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

The *significant difficulty test* was commonly used in RE-73 cases. For example, in *Treadwell v. Gardner* (1983), the 11th Circuit ruled it was an undue hardship to accommodate Treadwell’s heart condition by assigning his foot patrol duties to other park rangers. The *significant difficulty* analysis was also used by the 8th Circuit (*Gardner v. Morris*, 1985) and the DC Circuit (*Barth*
The Americans with Disabilities Act of 1990 — 455

\[v.\ Gelb, 1993\) regarding requests to work in locations with medical facilities. In \textit{Dexler v. Tisch} (1987), a Connecticut district court ruled it was an undue hardship to permit a dwarf to sort mail on a stool because it would slow down the mail-sorting operation.

Under ADA rules, the requests in \textit{Treadwell, Gardner,} and \textit{Barth} are unreasonable as a matter of law because the employer is not required to alter essential job duties (\textit{Treadwell}) or make fundamental alterations in the business (\textit{Gardner} and \textit{Barth}). In fact, the requests by Treadwell and Gardner were also deemed unreasonable under RE-73. However, Dexler’s request to work on a stool was arguably reasonable if it enabled him to sort mail, and if it did not pose a significant expense for the employer.\(^1\) Therefore, the undue hardship defense (slowing down the mail sorting operation) would likely apply under ADA rules.

The most frequently cited case on significant expense in RE-73 case law is \textit{Nelson v. Thornburgh} (1983). Recall that in \textit{Nelson}, a Pennsylvania district court ruled that a $6,000 expense was not an undue hardship for an employer with a $3 billion budget. However, in \textit{Vande Zande v. Wisconsin Administration} (1995), an ADA case, the 7th Circuit rejected the “deep pockets” claim for a plaintiff who requested a laptop to work at home so that she could save 16.5 hours of sick leave time. Accordingly:

\begin{quotation}
\textit{[A]}t the very least, the cost could not be disproportionate to the benefit. \textbf{Even if an employer is so large and wealthy} \textit{[emphasis by authors]}—or, like the principal defendant in this case, is a state, which can raise taxes to finance any accommodation … it would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee.
\end{quotation}

Additionally, in \textit{EEOC v. Amego} (1997), another ADA case, the plaintiff requested the waiver of an essential job function (drug administration) of an organization with a more limited budget. The 1st Circuit ruled that the “expense of hiring … additional staff would be too great for a small nonprofit like Amego to be reasonably expected to bear.”

Under ADA rules, the request in \textit{Nelson} (for part-time readers) is codified in the statute, and therefore, is reasonable by definition. However, the requests in \textit{Vande Zande} (working at home) and \textit{Amego} (waiving essential job duties) were deemed unreasonable as a matter of law under ADA standards. For example, in \textit{Vande Zande}, the 7th Circuit ruled that “the employee must show that the accommodation is reasonable.” In \textit{Amego}, the 5th Circuit ruled that a request to waive an essential job function “would be to alter the very nature of the position, and such redefinition exceeded reasonable accommodation.”
A major difficulty in separating Defenses 7 from 8 is that both are frequently referenced in the same case, even though one of them (Defense 7) is sufficient to win. For example, in Gaul v. Lucent (1998), Gaul requested that he be shifted away from co-workers “who cause him prolonged and inordinate stress.” The 3rd Circuit deemed the request unreasonable as a matter of law because “Gaul is asking … to establish the conditions of his employment.” Therefore, it was unnecessary for this court to also rule that Gaul’s request posed extraordinary administrative burdens. Other examples of unnecessary undue hardship requests include Myers v. Hose (1995; extended sick leave imposes a “significant burden”) and Wernick v. Federal Reserve (1996; choosing one’s supervisor imposes an “undue administrative burden”) because the requests themselves were unreasonable as a matter of law.

In short, in reading ADA rulings in which the undue hardship defense is referenced, the reader needs to distinguish between those cases in which employee requests are reasonable (and the undue hardship defense is required), as opposed to those cases in which the employee requests are unreasonable as a matter of law (and the undue hardship defense is not required).

**Brief Summary:** Employers have several defense options short of the undue hardship defense (Defense 8). The employer can refute class membership (Defense 1), claim that employees failed to flexibly interact (Defense 3), claim that good faith reasonable accommodations were made and were refused (or did not work; Defense 4), that there is no causal connection between the adverse employment decision and the disability as in McDonnell–Burdine (Defense 5), or that the requested accommodation is unreasonable as a matter of law (Defense 7). Direct threat (Defense 6) is appropriate when a physical or mental impairment threatens oneself or others in the workplace, and defending essential job duties (Defense 2) is specific to the claim that the employer excludes based on marginal duties. The employer’s main advantage is that the undue hardship defense (Defense 8) is often preempted because one of more of the other defenses has succeeded. However, if an accommodation is reasonable, the employer must affirmatively prove that it requires too much expense or interferes with efficient operation of the business.

**Section XI   Issues for Compliance**

As noted in Section VI, Section 101(8) of the ADA defines a “qualified individual with a disability” as one who can perform all essential functions “with or
without reasonable accommodation.” Therefore, the focal compliance topic for this chapter is the identification of essential job duties and their associated KSAs and the importance of job analysis.

**Essential Job Duties and KSAs**

A significant factor for personnel decisions (e.g., hiring and selection, promotion, and termination) to comply with the ADA is to ensure that claimed essential duties (and their associated KSAs: knowledge, skills, abilities) are truly essential. In general, the EEOC defines essential duties as (1) the job exists to perform those duties, (2) only a limited number of employees can perform those duties, and (3) the duties are highly specialized. It is important to recognize that claimed essential duties may be challenged. As stated in Section 1630.(n) of the EEOC ADA Interpretive Guidelines:

The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential. For example, an employer may state that typing is an essential function of a position. If, in fact, the employer has never required any employee in that position to type, this will be evidence that typing is not actually an essential function of the position.

Although the ADA does not require employers to have job descriptions, the best preparation for challenges to essential duties and/or KSAs is to have a well-written job description based on a well-performed job analysis. The job description should specify major duty areas, important job tasks within each duty area, KSAs associated with those job tasks, and a summary of working conditions. Without a proper job analysis, job descriptions may be self-incriminating.

Job analysis is a process used to identify the tasks, duties, knowledge, skills, abilities, and working conditions. Overviews of job analysis that are helpful for both researchers and practitioners can be found in Brannick and Levine (2002) and Sackett and Laczo (2003). The following discussion is from Gutman and Dunleavy (in press), and illustrates several options. It is not recommended that untrained employers or managers perform a job analysis. If there are no in-house trained personnel specialists who can perform this work, professional help should be sought.

Job analysis uses a variety of data inputs, including job inspection, training manuals, worker diaries, interviews with job incumbents and supervisors, and surveys. In addition, the analysis itself may focus on job characteristics, worker
characteristics, or both. For present purposes, the authors recommend Levine’s (1983) text because of its clear and humorous presentation and his procedures for combining work and worker issues. Larger entities, however, may have to use less labor-intensive techniques discussed by Levine and others (e.g., Brannick, Levine, & Mogenson, 2007; Cascio, 2005; Gatewood & Feild, 2007; Landy & Conte, 2006; Muchinsky, 2008; Schneider & Schmidt, 1992).

Levine advocates a two-step combination (or CJAM) approach. In Step 1, job tasks are defined by their action, equipment, and purpose. For example, an assembler may inspect a product (action) using a microscope (equipment) to search for defects (purpose). Subsequently, task importance is computed from ratings on three dimensions: criticality, complexity, and time required for task completion. Complexity and criticality are more important than time spent on the task. For example, a law officer may only occasionally make a forcible arrest. However, the procedure for making an arrest is complex and the consequences of failing to properly perform this task can be dreadful.

In Step 2, Levine uses four dimensions to identify KSAs associated with important job tasks. Dimensions 1 and 2 require yes/no determinations for whether a KSA is a necessary for new hires to possess, and if it is practical to expect new hires to possess them. Dimensions 3 and 4 require numerical ratings on problems to expect if a given KSA is ignored and whether a given KSA distinguishes between average versus superior workers. Critically, Dimensions 1 and 2 are helpful in determining entry versus training needs, whereas Dimensions 3 and 4 are helpful in determining the KSAs needed to make actual selection decisions.

More generally, job analysis procedures permit employers to assess the status of suspect KSAs (e.g., abilities to sit, stand, see, hear, lift, read, and write). Questions relating to how well people can see, walk, talk, and so on can easily segue into inquiries on the nature or severity of a disability. Jobs may exist for which suspect KSAs are critical. However, unless they are critical, we see no need to represent such KSAs in a job description, or within any selection procedure.

A final point to note is that most people who specialize in job analysis can probably adequately describe working conditions. However, few job analysts actually specialize in ergonomic or human factors issues, that is, the fit between the employee and the design of the job, work, equipment, and workplace. Because environmental or physical barriers associated with various disabilities are critical for many jobs, employers may want to use the expertise of specialists in ergonomics/human factors. Beyond the ADA requirement of providing accessibility, altering the environment to meet the needs of disabled people is encouraged in both the ADA statute and EEOC regulations.
Section XII  Implications for Practice

Several implications for practice can be ascertained from the case law discussed throughout this chapter, as presented in Table 8.12. Three practice topics for this chapter are a sample selection strategy to cope with the complex demands of the ADA statute, reasonable accommodations, and affirmative strategies.

Table 8.12  Implications for Practice

| Scrutinize all selection instruments for illegal pre-employment inquiries |
| Be particularly mindful of personality tests that contain such inquiries or serve clinical purposes |
| Structure interviews to avoid unnecessary tangential inquiries |
| Ensure that background checks avoid issues relating to past physical or mental impairments |
| If possible, use only those tests the require KSAs also required for the job |
| Be prepared to accommodate during testing for KSAs that are not essential |
| Use job analysis procedures to identify essential KSAs and essential job duties; and restructure or eliminate marginal duties |
| Scrutinize job descriptions for potentially challengeable KSAs |
| Employers may ask applicants if they are capable of performing essential job tasks, show how they would perform such tasks, and discuss possible accommodations in cases where an impairment is obvious |
| For most jobs, use attendance as an essential job function |
| Ensure that drug-testing policies are reasonable and nondiscriminatory |
| Be aware of caveats when using preoffer tests for illegal drug use |
| Restrict drug use questions to application forms because interviews may lead to inquiries about past addictions |
| Be aware of caveats when using preoffer tests for agility and/or fitness; tests that measure capacity to perform physical tests are not permitted. |
| Treat with confidentiality all legally obtained medical/psychiatric data |
| Employers may seek medical certification |

continued
Table 8.12  (continued) Implications for Practice

Discourage rumors among employees and managers regarding physical or mental impairments

Employees must attempt to correct an employer’s mistaken belief if the employee is aware of this belief

Investigate all requests for accommodation unless they are facially unreasonable

Know required accommodations (job restricting, part-time work, or modified work schedules, etc.)

Do not reallocate essential job duties

For job restructuring: eliminate marginal duties, selectively restructure jobs, use on temporary basis for an injured or impaired employee

Use part-time work on a temporary basis

Using flextime work is reasonable unless the employer can prove that it interferes with essential job functions

Provide information about vacant jobs for injured employees requesting reassignment

Establish written agreements that incorporate progressive discipline, offer the opportunity to rehabilitate, and use accrued sick leave days for rehabilitation, when there is excessive absence and/or poor performance as a result of alcoholism

Establish clear and consistent policies when to terminate and when and how to accommodate alcohol abuse

A Sample Selection Strategy

As previously discussed in Section VIII, there are ground rules for employer inquiries about applicants’ capabilities in performing essential job tasks during the pre-employment phase. The EEOC Interpretive Guidance clearly states that it is illegal to ask questions about a disability prior to an offer. This includes asking questions on medical and physical exams, applications, background checks, interviews, and other selection formats. Two exemptions, however, are tests for illegal drug use and tests for agility or fitness if essential to perform the job. Thus, employers should carefully review their selection process to ensure that essential job duties are being assessed, and that the KSAs required
to participate in the selection process are also among the KSAs required to perform essential job functions. A comprehensive discussion of developing a legally defensible selection strategy is beyond the scope of this book; other resources provide this information (e.g., Gatewood, Field, & Barrick, 2007; Guion & Highhouse, 2006; Hersen, 2004). For purposes of illustration, we provide the following sample strategy.

A Selection Strategy

The goals of any global selection strategy should be to (1) incorporate the implications of practice from case law, and (2) limit opportunities for making errors. The following strategy is based on a consultation by the first author and two colleagues during Spring of 1992. The goal of that consultation was to bring a police testing center into compliance by the (then) effective date of the ADA (July 26, 1992). The purpose of the testing center was to select applicants for police academy training.

Existing procedures involved a brief job preview and multiple hurdles that included drug testing, agility testing, polygraph testing, personality testing, and clinical interviews. The client was concerned about specific selection criteria, most notably medical exams, fitness for agility testing, drug history inquiries, and generally, the timing of any inquiry that could be construed as illegal prior to selection. The solution adopted was to present a lengthier realistic preview and to “back load” suspect inquiries beyond a conditional offer of admission to training. These items included a medical exam, polygraph testing, personality testing, and the clinical interview.

Obviously, there was no choice but to back load some of these inquiries. However, the extended job preview had other benefits. The client presented extensive videotaped information portraying the major job duties of police work, KSAs associated with this work, the selection criteria, and information about applicable EEO laws. The information about selection criteria was designed to encourage less qualified applicants to withdraw from the selection process. The legal information was designed to encourage those with hidden disabilities to identify themselves and discuss potential accommodations.

Other measures were taken. For example, job analysis data were examined to certify the essential duties and prerequisite KSAs, application blanks were carefully examined, as was the content of all interviews. Therefore, the strategy permitted examination of the “Implications for Practice.” At the same time, it reduced costs (e.g., for drug testing, polygraph administration). Perhaps most importantly, it reduced the likelihood of unintended illegal inquiries for those applicants most likely to stimulate such questions.
Reasonable Accommodations

Reasonable accommodations are adjustments or exceptions to allow a qualified disabled individual to successfully perform the job. As noted in Section IX of the chapter, the ADA identifies those reasonable accommodations that are required. However, an employer may not make an accommodation because of undue hardship (see Section X). Undue hardship exists when the accommodation creates a significant difficulty or expense for an employer (for further discussion, see Blanck, 2000; MacDonald-Wilson, Rogers, Massaro, Lyass, & Crean, 2002).

Extensive empirical research has been conducted and best practices have been identified with regard to reasonable accommodations outlined in the ADA: job restructuring, part-time work, and modified work schedules. Specifically, we can learn from scholars who have examined accommodations (work hour requirements, work scheduling, job design, or restructure) as they pertain to managing work-family integration or work-life effectiveness (e.g., Greenhaus & Powell, 2006; Koppes & Swanberg, 2007; Kossek & Lambert, 2005; Major, Klein, & Ehrhart, 2002; Parasuraman & Simmers, 2001; Thompson, Andreassi, & Prrottas, 2005; Thompson, Beauvais, & Allen, 2006). Lobel and Kossek (1996) identified four general types of work-life programs offered by organizations, one being time-based strategies, which include flexible scheduling and other work arrangements (e.g., part-time work, flextime, job sharing, and telecommuting). Recently, Hammer, Kossek, Yragui, Bodner, and Hanson (2009) validated that supervisors who are family supportive provide instrumental support when responding to scheduling requests for flexibility and also implement creative work-family management, which includes strategic actions to restructure work. The EEOC (2009) issued Employer Best Practices for Workers with Caregiving Responsibilities, which cites several studies that supported the positive effects of flexible workplace policies on productivity, absenteeism, recruitment, and retention. These best practices specifically state that employers should “Encourage employees to request flexible work arrangements” (p. 4).

Upon further review of the literature, however, the results are mixed about the effectiveness of these strategies on attitudes and performance (Anderson, Coffey, & Byerly, 2002; Batt & Valcour, 2003; Boswell & Olson-Buchanan, 2007; Brewer, 2000; Hill, Ferris, & Martinson, 2003; Kossek, 2005; Nord, Fox, Phoenix, & Viano, 2002); thus, one lesson learned from this research is the need to carefully examine accommodations before making adjustments. Thompson et al. (2006) and Kossek (2005) recommend that careful planning and implementation are necessary when considering alternative flexible work arrangements. Work schedule arrangements or accommodations should not be made
without consideration for the structure of the job to create flexibility while allowing for productivity and performance.

Flexible Interaction

As noted earlier in this chapter, applicants and employees must *flexibly interact* with employers to help determine reasonable accommodations, according to the ADA Interpretive Guidelines. With regard to applicants and employees, the duty to flexibly interact includes responsiveness to employer requests for outside information, when it is needed. Employers are responsible for responding to an accommodation request. Vodanovich and Piotrowski (2008) stated that how managers respond to a request may affect the judgment of whether employers reacted in good faith or not. They noted that responding to a request with a letter or e-mail and not providing alternative accommodations is not sufficient. Vodanovich and Piotrowski (2008, p. 10) offer several practical recommendations for meeting the flexible interactive requirement (see Table 8.13).

**Table 8.13  Recommendations: Flexible Interactive Process**

| Identify and record the essential functions of jobs (e.g., a job analysis) |
| Documentation of ADA-related communication between employees and company representatives (e.g., meetings, letters, and e-mails) |
| Creation of an open climate of communication that encourages dialog between employees and company representatives |
| Development of a written accommodation request form |
| Supervisor training (e.g., on ADA legal requirements, communication style, and conflict resolution skills) |
| Guarantee privacy of employee’s disability and disability-related accommodation request(s) |
| Individualized assessment of employee’s disability limitations by the company |
| Consideration of employee’s preference(s) regarding accommodations |
| Establishment of relationships with outside agencies to assist in identifying possible disability-related accommodation options |
| Communication of accommodation decision in written form |

Affirmative Strategies

Finally, it is legal to exceed the requirements of the ADA. For example, recall that in *Barth v. Gelb* (1993), the employer voluntarily endured undue hardships for valued employees. More generally, employers can restructure work and modify jobs as they see fit, as long as certain other agreements (e.g., collective bargaining, seniority rights) are maintained. Employers can seek grants and contracts to promote employment of the disabled, they can establish special programs, and they can engage in cooperative relationships with other businesses or agencies. Employers must permit applicants or employees to pay for the expense of their own accommodations, if they choose to do so.

Another affirmative strategy is to establish a drug-free workplace. The federal Drug Free Workplace Act of 1988 (DFWA) is mandatory for some companies (e.g., all defense contractors, transportation agencies, any contract worth $25,000 or more), but not for most employers. However, the DFWA has been adopted for other reasons, most notably on the assumption that (1) a drug-free workplace limits accidents, absenteeism, and tardiness, and promotes better work and/or (2) some states allow for reduced worker compensation premium for DFWA programs. The minimum requirement for a DFWA is a drug-free policy. But the “spirit” of this statute goes beyond a written document, and includes drug testing, drug education, and employee assistance initiatives.

There are other advantages to a DFWA program. For example, all states have statewide chambers of commerce. All statewide chambers coordinate drug-free programs through local chambers. A chamber of commerce can provide critical information regarding when employees can be legally drug tested, when they should be tested, and when they must be tested. Additionally, some local chambers coordinate employee assistance programs, and there is a considerable body of data indicative of savings as a result of prevention and rehabilitation through EAP programs.

Conclusion

The goal of this chapter was to describe the six dimensions of the ADA, critical precedents from the RE-73, and the impact of the ADAAA 2008. Furthermore, explanations were provided about the definition of being qualified, threats to workplace safety, ground rules for reasonable accommodations, and defense strategies. The chapter concluded with a section on issues for compliance, with particular focus on the essential duties, followed by practical implications.
Key Summary Points

1. Title I of the ADA generalizes key precedents from Sections 501 and 504 in RE-73 deeply into nonfederal sectors. Title I does not itself cover federal entities and does not require affirmative action. A 1992 amendment dictates that post-1992 claim using the ADA or RE-73 must follow ADA rules.

2. To be protected, claimants must fit the statutory definition of “being disabled,” possess prerequisite KSAs for essential job duties, and perform those duties with or without reasonable accommodation.

3. The ADAAA amendments relate primarily to current impairments (Prong I), most notably, that impairments must be evaluated in their mitigated state, manual tasks, as broadly defined, constitute major life activities, temporary impairments are 6 months or less, and episodic illnesses qualify as impairments.

4. The ADA does not protect current users of illegal drugs or those who use or abuse alcohol at the workplace. However, there are Part B and C protections for illegal drugs and Part A, B, and C protections for alcoholics and individuals with communicable diseases such as AIDS.

5. The direct threat defense applies to any physical or mental impairment, not just to safety issues associated with illegal drugs, alcoholism, and communicable diseases.

6. The ADA proscribes medical exams and other inquiries into the nature or severity of a disability prior to a conditional job offer regardless of how such inquiries are made. Employers may, however, inquire into what an applicant or employee can do and hold discussions of reasonable accommodations if a disability is obvious or if accommodations are requested.

7. Accommodations must be requested, and claimants and employers must cooperate in determining what accommodations are necessary to perform essential job duties.

8. The ADA codifies examples of reasonable accommodations in plain statutory language, three of which apply mainly to employees (job restructuring, reassignment, and modified work schedules). The other accommodations cited (policies, equipment modifications, and readers/interpreters) apply as readily to applicants or employees.

9. The most frequently requested accommodation (reassignment) requires that a position be vacant and that its essential duties can be performed with or without accommodation. Also, the recommendation to restructure jobs does not mean elimination of essential duties and for most jobs, attendance is essential.
10. The undue hardship defense is often a “last resort” strategy because
employers have other ways to win, including rebutting class membership,
failure to cooperate, McDonnell–Burdine, reasonable accommodation
was made, and requests made were unreasonable as a matter of law.
11. Even though courts are undecided on the difference between an “unrea-
sonable” request versus an “undue” hardship, employers should focus on
the likelihood that both defenses require affirmative proof. Moreover,
employers should be prepared to prove that essential duties and associated
KSAs are truly essential.
12. The authors recommend developing overall strategies that address specific
“Implications for Practice” and that reduce the opportunities for making
events. As part of any overall strategy, the employer should consider using
job analysis techniques to define essential duties and associated KSAs, and
they should also consider affirmative measures that go beyond the letter of
the law.

Discussion Questions

Section I Historical Background

1. What were the historical precursors to the ADA?
2. What were the major weaknesses in RE-73 that motivated Congress to
   enact the ADA?

Section II Overview of the Six
Dimensions for Title I of the ADA

1. What are the three ways of “being disabled” within the meaning of the
   ADA?
2. What is the definition of “being qualified” within the meaning of the
   ADA?
3. What are the implications of “being disqualified” for marginal versus
   essential job functions?
4. What is the major judicial scenario in the ADA?

Section III Critical Precedents from the
Rehabilitation Act of 1973 (RE-73)

1. Why are federal entities not covered in the ADA?
2. What are the major distinctions between Sections 501 and 504 of RE-73
   with respect to federal versus nonfederal employees?
Section IV  Impact of the ADA Amendments Act of 2008 (ADAAA)

1. What major Supreme Court rulings were struck down in the ADAAA and which RE-73 ruling was supported?
2. Which EEOC regulations were supported and struck down in the ADAAA?

Section V  Focus on the ADA Rulings Targeted in the ADAAA

1. What were the major rulings in the Sutton, Murphy, and Kirkingburg cases partially or fully reversed in the ADAAA?
2. How does the ADAAA resolve issues relating to working as a major life activity?

Section VI  Definition of Being Qualified

1. Why does it mean to face an “insurmountable barrier”?
2. Which plaintiffs in which cases faced the “insurmountable barrier,” and for what reasons?

Section VII  Threats to Workplace Safety

1. What major rules apply to alcoholism and alcohol abuse?
2. How does the ADA define a “rehabilitated” drug addict?
3. How does the direct threat statutory defense apply to AIDS and other threats to individual and workplace safety?

Section VIII  Ground Rules for Assessing KSAs and Reasonable Accommodations

1. What types of inquiries are prohibited at pre-employment?
2. What types are permitted at pre-employment?
3. What are the respective responsibilities of applicants or employees versus employers when negotiating reasonable accommodations?

Section IX  Statutory Prescriptions for Reasonable Accommodations

1. What are the eight reasonable accommodations codified in the ADA?
2. Why are job restructuring, reassignment, and modified work schedules more likely to apply to employees rather than applicants?
3. What restrictions apply to these three accommodations?
Section X  Employer Defense Strategies

1. What defenses are available and where do they best apply?
2. Why is undue hardship a “last resort” defense?
3. What distinguishes an unreasonable request for accommodation from an undue hardship?
4. Why do employers use multiple defenses?

Section XI  Issues for Compliance

1. Why is it important to identify essential job functions?
2. How are these functions identified?
3. What are the major benefits of job analysis?

Section XII  Implications for Practice

1. Why is it best to adopt an overall selection strategy for complying with the ADA?
2. What are some best practices for reasonable accommodations?
3. What types of affirmative steps may employers take beyond the legal requirements of the ADA?

Notes

1. As documented in Chapter 4, Congress has the power within the 14th amendment to abrogate 11th amendment sovereign state immunity, but only if it can demonstrate congruence (evidence of past purposeful discrimination) and proportionality (remedies in proportion to the unconstitutional conduct cited). As documented in Chapter 6, a 5-4 Supreme Court majority ruled that Congress failed both prongs of the congruence and proportionality test by allowing private ADEA lawsuits against state governments. In Garrett, the same majority rendered the same ruling for private ADA claims.

2. As documented in Chapter 4, in Garrett, the Supreme Court ruled that the ADEA and ADA “can be enforced by the United States in actions for money damages.” Translated, that means the EEOC has the right sue on behalf of state employees. This right was affirmed by the 7th Circuit in EEOC v. Bd. of Regents of the University of Wisconsin (2002), an ADEA case, and by the Supreme Court in EEOC v. Waffle House (2002), an ADA case. As important, in Waffle House, the EEOC’s right to sue for individual monetary damages was supported even though the employee abrogated his private right to sue by signing an agreement at the point of hiring to submit any future employment claims to binding arbitration.
3. This reference is not a criticism of Player, but rather, illustrates that even well-known distinguished legal scholars were fooled by the opaque language used in *Davis* and other like cases.

4. One of the twins was married and had a different surname. Therefore, technically, it would be incorrect to call them the “Sutton twins.”

5. There is also a 5th provision permitting tougher proscriptions for either drug addiction or alcoholism by federal agencies.

6. There is no record of an actual trial beyond the 3rd Circuit ruling in this case. Therefore, it is likely that the parties settled after the lower court’s summary judgment order was reversed.


8. Section 84.14 of the original Section 504 regulations states that employees may not “conduct a pre-employment medical examination or may not make pre-employment inquiries of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of the handicap. A recipient may, however, make pre-employment inquiry into the applicant’s ability to perform job-related functions.”

9. Voluntary medical exams for purposes of employee health programs are permitted at pre-employment. Postoffer medical exams must be given to all employees, medical information must be kept confidential, and exclusions based on medical information must be job-related.

10. For more detailed discussion of this issue, the reader is directed to Arnold and Thiemann (1992), Division 5 of the American Psychological Association Newsletter (Score; 1993), Arnold and Thiemann (1994), and Gutman (1994).

11. The distinctions here are made for purposes of exposition. In some cases, these requests blend into each other. Moreover, there are many cases featuring two or requests by one plaintiff.

12. Recall that BFSS is a statutory defense in Title VII and other statutes. There is no statutory BFSS defense in the ADA. Nevertheless, courts honor seniority agreements in the ADA.

13. This was a complicated case in which the district court granted summary judgment to the employer and the 10th Circuit supported the employer in a divided 2-1 and then later reversed itself in an *en banc* ruling. The case was ultimately remanded for a jury trial, but by that time, the plaintiff died and the defendant likely settled with the plaintiff’s estate.

14. For example, in *Alexander v. Choate* (1985), it was shown statistically that reduction in Medicaid hospital payments from 20 to 14 days adversely impacted disabled people. However, the Supreme Court ruled that it was not necessary for states to ensure that such benefits must equally affect all people.

15. The defendants also argued that it was unsafe for Dexler to work on a stool.