# *ADA Issues That Continue to Confound and Confuse Employers, and Give Hope To Even Slightly Impaired Plaintiffs and Their Lawyers*

## HBA – August 8, 2016


Mark J. Oberti
Oberti Sullivan LLP
723 Main Street, Suite 340
Houston, Texas 77002
(713) 401-3556
mark@osattorneys.com

Edwin Sullivan
Oberti Sullivan LLP
723 Main Street, Suite 340
Houston, Texas 77002
(713) 401-3557
ed@osattorneys.com

Joseph Y. Ahmad
Ahmad Zavitsanos Anaipakos Alavi Mensing
3460 One Houston Center
1221 McKinney Street
Houston, Texas 77010
(713) 655-1101
joeahmad@azalaw.com


OBERTI/ SULLIVAN LLP

OBERTI/ SULLIVAN LLP

AHMAD ZAVITSANOS ANAIPAKOS ALAVI MENSING AZA
*Tough Name. Tougher Opponent.*

## 1. Be Careful Disqualifying an Employee as "Unfit for Duty"

- It may be that the function they cannot perform without or without reasonable accommodation is not an "essential" function, such that their inability to perform it does not render them "unqualified" under the ADA:

  - *EEOC v. LHC Group., Inc.*, 773 F.3d 688, 702 (5th Cir. 2014) (even though the job description indicated that driving was an essential function of Team Leader position, there was a genuine dispute of material fact as to whether it really was, and thus the employee's inability to drive did not necessarily render her unqualified for the position).

## 1. Be Careful Disqualifying an Employee as "Unfit for Duty"

- *Carmona v. Southwest Airlines Co.*, 604 F.3d 848, 859 (5th Cir. 2010) (regular attendance was not an essential function of flight attendant's job; hence, his inability to attend his job regularly did not render him unqualified under the ADA).

- *Barber v. Nabors Drilling, U.S.A., Inc.*, 130 F.3d 702 (5th Cir. 1997) (affirming jury verdict for the plaintiff in an ADA case because the employer refused to allow an employee to return to work due to the fact that he could not obtain a "full medical release," even though he could perform all his job's essential functions, and the only functions he could not perform were not essential, but rather marginal).

## 1. Be Careful Disqualifying an Employee as "Unfit for Duty"

- Important and often overlooked point: Most courts hold that, once challenged, it is the **employer's burden to demonstrate that an alleged essential function really is "essential."** *See Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675, 680 (8th Cir. 2001) ("an employer who disputes the plaintiff's claim that he can perform the essential functions must put forth evidence establishing those functions."); *see also Johnson v. Cleveland City School Dist.*, 443 Fed. Appx. 974, 985 n.18 (6th Cir. 2011) (same); *Bates v. United Parcel Svc., Inc.*, 511 F.3d 974, 991 (9th Cir. 2007) (en banc) (same).

## 1. Be Careful Disqualifying an Employee as "Unfit for Duty"

- Or, it may be that even if the at-issue function is "essential," they could perform it with a reasonable accommodation, and thus be a "qualified individual" under the ADA:

  - *EEOC v. LHC Group., Inc.*, 773 F.3d 688, 699 (5th Cir. 2014) (reversing summary judgment for employer in part because, "[e]ven if driving were an essential function of a Team Leader, Sones might have carried out the job with reasonable accommodation.").

  - *Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586, 592-94 (5th Cir. 2016) (although driving and climbing ladders were essential functions of the job, there was sufficient evidence that the plaintiff could have performed both functions with or without a reasonable accommodation, so as to mandate reversal of summary judgment in the employer's favor and submission of the case to a jury).

## 2. Causation Conundrum Currently Cutting in Plaintiffs' Favor

- The ADA prohibits discrimination "on the basis of disability." 42 U.S.C. § 12112(a).

- In 2002 and 2008, both pre-*Gross* and *pre-Nassar*, The Fifth Circuit has held that "[u]nder the ADA, 'discrimination need not be the sole reason for the adverse employment decision'" as long as the discrimination "'actually play[s] a role in the employer's decision making process and ha[s] a determinative influence on the outcome.'" *Soledad v. United States Dept. of Treasury*, 304 F.3d 500, 503-04 (5th Cir. 2002). *See also Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008) (same).

## 2. Causation Conundrum Currently Cutting in Plaintiffs' Favor

- In 2014, post-*Gross* and post-*Nassar*, the Fifth Circuit applied a "motivating factor" standard to an ADA case. The court reversed summary judgment for the employer even though the EEOC failed to demonstrate pretext, finding that nevertheless the EEOC raised a fact question as to whether disability discrimination was a motivating factor in the employee's termination. *See EEOC v. LHC Group., Inc.*, 773 F.3d 688, 702 (5th Cir. 2014).

## 2. Causation Conundrum Currently Cutting in Plaintiffs' Favor

- On the other hand, post-*Gross*, at least three Circuit Courts have held that the ADA requires "but for" causation to establish prohibited discrimination under the law. *See Gentry v. E.W. Partners Club Mgmt. Co.*, 816 F.3d 228 (4th Cir. 2016); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012) (en banc); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010).

- So, the Fifth Circuit's "motivating factor" standard per *LHC Group., Inc.* is very arguably subject to attack by employers. That said, for now, it is the law in the Fifth Circuit, and certainly favors plaintiffs.

## 3. Because It Is Now So Easy To Prove "Regarded As" Status, Any Employer That Terminates An Employee Shortly After Even A Relatively Minor Injury Could Face An ADA Claim

- For example, in *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 239-40 (5th Cir. 2015), the plaintiff inhaled chemical fumes while on the job, later reported chest pains at work and was ultimately attended to by the company medical department and then EMS. As a result, a workers' compensation claim was filed. About two weeks later the decision was made to fire her for alleged poor performance. She sued under the ADA, for discrimination based on her status as being "regarded as" having a disability. The district court granted SJ, but the Fifth Circuit reversed.

- The Fifth Circuit noted that post-amendment a "regarded as" ADA plaintiff can prevail by establishing "she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment **whether or not the impairment limits or is perceived to limit a major life activity**." *Burton*, 798 F.3d at 230 (citing 42 U.S.C. § 12102(3)(A) (bold added)).

## 3. Because It Is Now So Easy To Prove "Regarded As" Status, Any Employer That Terminates An Employee Shortly After Even A Relatively Minor Injury Could Face An ADA Claim

- This is a low standard, that Burton easily satisfied through proof that Freescale was well aware of Burton's health related complaints, treatment, and that its supervisors generated multiple reports explicitly tying complaints about Burton's conduct at work to her asserted medical needs. *Id*. at 231.

- Similarly, in *Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586 (5th Cir. 2016), the plaintiff had an inoperable rotator cuff injury that limited him to no driving of company vehicles; no lifting, pushing, or pulling more than ten pounds; and no working with his hands above shoulder level. Based on this, a technical services manager from Jacobs stated that Cannon would "not be able to meet the project needs and required job duties." In reversing SJ, the Fifth Circuit held that this evidence alone was sufficient to make out a fact question as to whether Jacobs regarded Cannon to be disabled under the ADA. *Id*. at 591-92.

# 4. Sleeper Alert: Associational ADA Discrimination

The ADA provides that it is unlawful for an employer to discriminate against an individual because of his relationship or association with an individual with a disability. 42 U.S.C. § 12112(a), (b)(4).

**More informally, this provision prohibits three types of discrimination against employees associated with, or related to someone with, a disability:**

- Discrimination based on **expense**: where an employee suffers an adverse employment action because of an association with a disabled individual covered under the employer's health plan, which is costly to the employer.

- Discrimination based on **disability by association**: where the employer fears that the employee may contract the disability of the person he or she is associated with (e.g., HIV), or the employee is genetically predisposed to develop a disability that his or her relatives have.

- Discrimination based on **distraction**: where the employee suffers an adverse employment action based on the employer's speculation that they will be inattentive at work because of the disability of someone with whom he or she is associated.

## 4. Sleeper Alert: Associational ADA Discrimination

- Relying on this theory, the EEOC sued the employer in *E.E.O.C. v. DynMcdermott Petroleum Operations Co.*, 537 Fed. Appx. 437 (5th Cir. 2013), the EEOC alleged that the employer had refused to hire an otherwise outstanding candidate because his wife had cancer. The district court threw the EEOC's lawsuit out, but the Fifth Circuit Court of Appeals reversed the district court's decision and remanded the case for trial.

## 5. Fort Worth TCHRA Interpretation v. Fifth Circuit ADA Interpretation: Conflict On Important Reasonable Accommodation Question

If there is a vacant position for which an actually disabled employee is qualified, and has sought as a reasonable accommodation, does the ADA entitle that employee to the position, or merely entitle them to be considered for that position on equal terms as anyone else?

The Fifth Circuit has held the ADA only entitles that employee to be considered for that position on equal terms as anyone else. *See Allen v. Rapides Parrish School Board*, 204 F.3d 619, 622-23 (5th Cir. 2000) and *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1263 (1996).

In contrast, the Fort Worth Court of Appeals has held that the TCHRA actually entitles that employee to the job itself, not merely to compete for the job on equal terms, provided that such accommodation would not create an undue hardship or run afoul of a collective bargaining agreement. *See Davis v. City of Grapevine*, 188 S.W.3d 748, 765 (Tex. App.–Fort Worth 2006, pet. denied). Several federal circuit courts agree with this holding. *See EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc); *Aka v. Washington Hospital Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc).

## 6. The "Full Duty" Trap

- *Barber v. Nabors Drilling, U.S.A., Inc.*, 130 F.3d 702 (5th Cir. 1997) (affirming jury verdict for the plaintiff in an ADA case because the employer refused to allow an employee to return to work because he could not obtain a "full medical release" even though he he could perform all the essential functions of his job).

- *Wright v. Middle Tenn. Elec. Membership Corp.*, M.D. Tenn., No. 3:05-cv-00969 (Dec. 7, 2006) ("While an employer is not required to create a light duty position where none exists and the ADA permits job requirements that are job-related and consistent with business necessity, a '100 percent healed' or 'fully-healed' policy is a per se violation of the ADA").

# 7. "Direct Threat" Debacles

"Direct threat" is regarded by most, but not all, courts to be an affirmative defense. It is not easy to prove, and employers often lose when relying on this defense, especially when they have not relied on solid medical guidance. For example:

- *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007) (affirming jury verdict in ADA, affirming $300,000 punitive damages award, and rejecting defendant's direct threat defense based on its claim that the employee's medical condition prevented her from safely exiting the plant if there was an emergency, and thus presented a direct threat to herself and others).

- *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996) (reversing summary judgment because the evidence did not prove as a matter of law that the bus driver's hearing impairment presented a threat to safety of the children on her bus, especially given that she had safely driven the bus for twelve years).

- *Rodriguez v. ConAgra Grocery Products Co.,* 436 F.3d 468 (5th Cir. 2006) (reversing summary judgment for employer and rendering judgment for plaintiff because the employer's doctor's conclusion that the plaintiff's diabetic condition prevented him from safely doing his job was wrong as a matter of law). *See also Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013) (reversing district court's summary judgment ruling that a deaf person could not be a lifeguard due to safety reasons, and reasoning that employers cannot escape liability under the ADA merely by mechanically relying on the medical opinions and advice of third parties).

## 8. Interactive Process Missteps

-Violation of the interactive process requirement is not independently actionable in the Fifth Circuit, but often it leads to the conclusion that summary judgment is not appropriate on the question of whether or not the employee could have been reasonably accommodated. For example:

-*EEOC v. LHC Group., Inc.*, 773 F.3d 688, 700 (5th Cir. 2014): "Sones expressly reached out to her supervisors, indicating that she wanted temporary help using computer programs and remembering her passwords in light of her high medication levels. Faced with Sones's request for "extra help," Taggard, her supervisor, kept silent and walked away. On this record, a reasonable jury could find that Sones reached out to LHC for accommodation and was denied an interactive process. Because the EEOC has identified a genuine dispute of material fact regarding whether LHC satisfied its duty to accommodate Sones's disability, the district court erred in granting summary judgment on this issue."

# 8. Interactive Process Missteps

- In addition, when an employer fires an employee shortly after the employee requests an accommodation, rather than going through the interactive process, bad results for the employer often follow:

  - *EEOC v. Chevron Phillips Chemical Co., LP*, 570 F.3d 606, 621-22 (5th Cir. 2009) (reversing summary judgment and finding that a reasonable jury could find that once Chevron received a doctor's note requesting accommodations for the plaintiff it set about to find a pretextual reason to fire her, and then did so).

  - *Cutrera v. Board of Supervisors of Louisiana State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005) (reversing summary judgment an holding that "[a]n employer may not stymie the interactive process of identifying a reasonable accommodation for an employee's disability by preemptively terminating the employee before an accommodation can be considered or recommended").

# *ADA Issues That Continue to Confound and Confuse Employers, and Give Hope To Even Slightly Impaired Plaintiffs and Their Lawyers*

## HBA – August 8, 2016


Mark J. Oberti
Oberti Sullivan LLP
723 Main Street, Suite 340
Houston, Texas 77002
(713) 401-3556
mark@osattorneys.com

Edwin Sullivan
Oberti Sullivan LLP
723 Main Street, Suite 340
Houston, Texas 77002
(713) 401-3557
ed@osattorneys.com

Joseph Y. Ahmad
Ahmad Zavitsanos Anaipakos Alavi Mensing
3460 One Houston Center
1221 McKinney Street
Houston, Texas 77010
(713) 655-1101
joeahmad@azalaw.com


OBERTI/ SULLIVAN LLP

OBERTI/ SULLIVAN LLP

AHMAD ZAVITSANOS ANAIPAKOS ALAVI MENSING AZA
*Tough Name. Tougher Opponent.*