

27th Annual Labor and Employment Law Conference**May 7-8, 2020
Austin, Texas****Developments in
Disability Discrimination Law****2019 - 2020****JAMES H. KIZZIAR, JR.****AMBER K. DODDS****CAROLINE M. MELO****Bracewell LLP**

James H. Kizziar, Jr.
Amber K. Dodds
Caroline M. Melo
Bracewell LLP
San Antonio, Texas

Jim.Kizziar@bracewell.com
Amber.Dodds@bracewell.com
210-299-3526/210-299-3569

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	1
II. The EEOC Regulations Implementing the ADAAA	1
A. Construction	1
B. Definition of Disability	2
C. Definition of Physical or Mental Impairment	2
D. Definition of Major Life Activities	2
E. Definition of “Substantially Limits”	3
F. Definition of Has a Record of an Impairment	5
G. Definition of Is Regarded as Having an Impairment	5
H. Definition of Qualified Person	5
I. Reasonable Accommodations	5
J. Prohibition Against Reverse Discrimination	6
K. Qualification Standards, Tests, and Other Selection Criteria	6
L. Defenses	6
M. Other Issues	6
N. Interpretive Guidance	6
III. The Ministerial Exception and the ADA	6
A. Supreme Court Holds that Ministerial Exception Applies to ADA Claims of Teacher Working for Ecclesiastical Corporation	6
B. Seventh Circuit Applies <i>Hosanna-Tabor</i> Test to Disability Claims of Teacher at Religious School	8
IV. Administrative and Legislative Developments	9
A. Strategic Enforcement Plan	9
B. Department of Labor Issues FLSA Opinion Letter on Compensation for Short Breaks Due to Employee’s Medical Condition	9
V. Impairments Under the ADA	9
A. Conditions Considered Impairments	9
B. Impairments Excluded from the ADA	10
1. Physical Characteristics	10
2. Personality Characteristics	10
3. Pregnancy	10
4. Illegal Use of Drugs	11
5. Sexual Conditions	12
6. Social Conditions	12
7. Obesity	12
8. Stress	14
9. Miscellaneous	14
C. Court Decisions on Impairments	15
1. Eleventh Circuit Case Holds that the Potential to Contract a Disease is Not a Disability	15
2. Gender Dysphoria” Not Resulting from Physical Impairment is Excluded as a Disability Under the ADA	16
3. State Court Allows Discrimination Suit by Medical Marijuana User	17
4. Failure to Allege How Impairment Limited Major Life Activities Defeats Employee’s ADA Claims	18
5. ADA Does Not Cover Potential Future Disabilities	18

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
VI. The Three-Part Definition of Disability	19
A. Physical or Mental Impairment that Substantially Limits One or More Major Life Activities	19
B. Record of an Impairment	20
C. Regarded as Having an Impairment.....	21
D. Court Decisions on Regarded as Having an Impairment.....	21
1. Eleventh Circuit Case Holds that the Potential to Contract a Disease is Not a Disability	21
VII. Consideration of Mitigating Measures	23
VIII. Major Life Activities	23
A. Developments in Major Life Activities	23
B. EEOC Standard for the Major Life Activity of Working	23
C. Court Decisions on Major Life Activities.....	24
1. Inability to Perform a Specific Job is Not a Substantial Limitation of the Major Life Activity of Working	24
IX. Substantial Limitations.....	24
A. Recent Court Decisions on the Substantial Limitation Standard.....	25
1. Employee Performance Deficiencies in Meeting Quality Control Standards Did Not Substantially Limit His Major Life Activities	25
2. Employee’s Difficulties with Workplace Airborne Irritants Did Not Rise to Level of a Substantial Limitation.....	26
X. Qualified Individual	27
A. Definition	27
B. Recent Court Decisions on the Qualified Individual Standard.....	28
1. Employee Who Sought Accommodation that Burdened Other Workers Was Not Qualified	28
2. Sixth Circuit Holds that Work Restrictions Do Not Automatically Make an Employee Disabled	29
3. ”Qualified Individual” Must Show They Can Perform Essential Functions of the Job with a <i>Reasonable</i> Accommodation.....	30
4. Failure to Meet Federal Regulation Standards Renders Employee Not Qualified	32
XI. Essential Job Functions	32
A. Recent Court Decisions on Essential Job Functions.....	33
1. Remote Work Which Requires Aid From Other Employees to Complete Essential Functions is Not a Reasonable Accommodation.....	33
2. Employer Can Add Essential Job Functions Which Render Employee Unable to Perform the Position.....	34
3. Eighth Circuit Holds that Overtime Can Constitute Essential Function.....	35
4. Infrequent Tasks Can Still Be Essential Functions.....	36
5. Full-Time Work is Not Always an Essential Function.....	38
6. Eighth Circuit Reaffirms that Regular and Reliable Job Attendance is Typically an Essential Function.....	39
7. In-Person Attendance as an “Essential Function” under the ADA, but Not Always	41

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
XII. Disability Discrimination	42
A. Imputing Supervisor’s Knowledge to Management	42
XIII. Regarding Individuals as Disabled.....	44
A. Standard for Regarding Person as Disabled.....	44
B. Discrimination Claims under “Regarded As” Prong Require an ADA- Qualifying Physical Impairment	44
C. Accommodations Not Required For “Regarded As” Disability	45
D. Ninth Circuit Holds that “Regarded As” Disability Requires Subjective Belief of Impairment, Not Necessarily an Impairment of a Major Life Activity.....	46
XIV. Mental and Emotional Disabilities	46
A. Mental Impairment Must Substantially Limit a Major Life Activity	47
B. Individuals With Mental Impairment Must Be Otherwise Qualified.....	47
C. Regarding Employees with Mental Impairments as Disabled	47
D. Employees with Mental Impairments May - or May Not - be Required to Request Reasonable Accommodation.....	47
E. Recent Court Decisions on Mental and Emotional Disabilities.....	48
1. Employer Lawfully Terminated Employee for Harassing Behavior, Even Though Conduct was “Compelled by his Mental Illness”.....	48
XV. Misconduct and Disabilities	49
A. Court Decisions on Misconduct and Disabilities	50
1. Disabled Employees Can Be Terminated for Even Unaddressed Performance Issues	50
2. Employee Lawfully Terminated for Insubordination based on Belligerent Cursing and Grabbing Supervisor in Response to Employer Request for Medical Documentation	51
3. Conduct Caused by a Disability is Not Disability Discrimination Per Se under the <i>Rehabilitation Act</i>	52
XVI. Direct Threat to Health or Safety	54
A. Introduction.....	54
B. Court Decisions on Direct Threat	55
1. Consideration of Additional, Non-physician Information in Determining Direct Threat	55
XVII. The Interactive Process	56
A. Key Elements of Employer Actions and Procedures for Conducting the Interactive Process	57
B. Engaging in the Interactive Process	58
1. No Separate Cause of Action Exists for Failure to Engage in the Interactive Process	58
2. Employee Impatience Hinders Interactive Dialogue with Employer	60
XVIII. Reasonable Accommodation.....	61
A. Transfer to a Vacant Position as a Reasonable Accommodation.....	61
1. Conflict in the Circuit Courts Remains Unresolved	61
2. Court Decisions on Transfer to a Vacant Position.....	63
B. Service Animals as an Accommodation	66
1. Animal Need Not be Formally Trained as a Service Animal for Presence in the Workplace to be a Reasonable Accommodation	68

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
C. Court Decisions on Reasonable Accommodation.....	69
1. Seventh Circuit Reaffirms that Employees are Not Entitled to Choose Between Effective Reasonable Accommodations	69
2. Tenth Circuit Reaffirms that Reasonable Accommodation Requests do not Require “Magic Words”	71
3. Employer’s Strict Application of Company Policy Can be Unreasonable Under the ADA	72
4. Texas State Appellate Courts Disagree on Whether Request for Reasonable Accommodation is Protected Activity.....	72
5. Accommodation of Allergic Reactions.....	75
D. Requests For Accommodation Found to be Unreasonable/Undue Hardship.....	77
1. Employee Class Claims Stricken in Reassignment as a Reasonable Accommodation Case	77
2. Lifting Restriction Which Shifts Essential Functions onto Other Staff is Not a Reasonable Accommodation.....	78
3. Seeking “Guarantee” of Never Seeing Former Supervisor was Unreasonable.....	79
4. Considerations on Requirement for Employee Vaccination.....	80
5. Retroactive Leniency in Discipline is Not a Reasonable Accommodation.....	82
E. Leave of Absence As a Reasonable Accommodation.....	82
1. Multiple Extensions May Be Reasonable Accommodations.....	83
2. A Prolonged Leave of Absence May Be an Undue Hardship	83
3. An Indefinite Leave of Absence Is Not a Reasonable Accommodation	84
4. Must An Employer Provide "Reinstatement Rights" During an Extension of Leave As a Reasonable Accommodation?	87
5. Intermittent Leave as a Reasonable Accommodation.....	90
XIX. The ADA and the Corona Virus Pandemic	93
A. Is Coronavirus a Disability?.....	93
B. Coronavirus as a “Direct Threat”	94
C. Medical Examinations and Disability Related Questions, Including Temperature Taking	94
D. COVID-19 Testing (Not Antibody Testing).....	95
E. Genetic Information Nondiscrimination Act	95
F. Confidentiality of Medical Information.....	95
G. Teleworking as a Reasonable Accommodation	96
H. Personal Protective Equipment (“PPE”) as a Reasonable Accommodation.....	97
I. Providing Reasonable Accommodations at Home.....	98
J. The Interactive Process	98
K. Returning to Work.....	98
L. Future Changes in the Workplace	100
XX. Hostile Work Environment	100
A. Analysis.....	100
B. Case Authority on Hostile Work Environment.....	101
1. Second Circuit Joins the Tenth, Eighth, Fifth and Fourth Circuits in Holding that ADA Protects Employees from Hostile Work Environment based on Disability.....	101

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
XXI. Interference Claims	102
A. Court Decisions	103
1. Seventh Circuit Addresses Elements of ADA Interference Claim	103
XXII. Medical Examinations and Inquiries	103
A. Pre-Offer Medical Examinations and Inquiries	104
B. Post-Offer Medical Examinations and Inquiries	104
C. Medical Examinations and Inquiries Regarding Employees	104
D. Fitness for Duty Examinations	105
E. Periodic Medical Testing	105
F. Court Decisions on Medical Inquiries and Examinations	106
1. Test for Illegal Use of Drugs Not Automatically an ADA “Medical Examination”	106
2. Examination of Employee’s Ability to Cope with Stress Found to be Necessary and Business-Related	108
3. Fourth Circuit Reverses Summary Judgment on Medical Inquiry and Direct Threat Claims	108
G. Medical Marijuana	109
1. State Court Allows Discrimination Suit by Medical Marijuana User	109
H. Doctor’s Work Restrictions	110
1. Employer Can Follow Physicians Instructions Despite Employee’s Contradictory Assertions	110
XXIII. Discrimination Due to a Relationship or Association With a Disabled Person	111
XXIV. Coverage of Independent Contractors	111
A. Independent Contractors Covered by Rehabilitation Act	111
XXV. Procedural and Litigation Issues	113
A. Sincere Belief, Even if Inaccurate, is Legally Permissible Basis for Adverse Employment Action	113
B. Ninth Circuit Affirms “But For” Standard in ADA Discrimination Analysis	113
C. Second Circuit Affirms that Rehabilitation Act Causation Standard is “But For”	114
D. Employers Should Exercise Caution in Interpreting the Allegations of the EEOC Charge	116
E. No Direct Evidence of a Disability Where an Inference is Needed to Prove a Claim	117
XXVI. Wellness Programs	119

APPENDICES

- APPENDIX A: ADA Charges Filed with EEOC FY 2019
- APPENDIX B: Types of Impairments in ADA Charges, FY 2019
- APPENDIX C: Mental Health Issues in ADA Charges Filed in FY 2018
- APPENDIX D: Resolution of ADA Charges filed with EEOC FY 2019
- APPENDIX E: Map Regarding Federal Circuit Courts Positions on Mandatory Preference for Reassignment of Employees as a Reasonable Accommodation
- APPENDIX F: Texas Governor Gregory Abbott April 27, 2020, Executive Order to Open Texas

**THIS OUTLINE IS INTENDED TO ASSIST PARTICIPANTS WITH A
GENERAL UNDERSTANDING OF CURRENT DEVELOPMENTS IN THE LAW.
IT IS NOT TO BE CONSIDERED LEGAL ADVICE.**

The author gratefully acknowledges the assistance of Director of Knowledge Resources Natalie Lira with Bracewell LLP in the preparation of these materials.

James H. Kizziar, Jr.
Bracewell LLP

300 Convent Street, Suite 2700
San Antonio, TX 78205

2001 M Street NW, Suite 900
Washington, DC 20036

210-299-3526

jim.kizziar@bracewell.com

Practices

Labor and Employment • Health Care

Admitted

State Bar of Texas • District of Columbia Bar

Education

J.D., Duke University School of Law, 1976

B.A., magna cum laude, Ohio Wesleyan University, 1973

Court Admissions

U.S. Court of Appeals, Fifth, and Eleventh, District of Columbia Circuits • U.S. District Court Texas, Southern and Western Districts • U.S. District Court, District of Columbia • U.S. Supreme Court

Board Certifications

Board certified in labor and employment law by the Texas Board of Legal Specialization

Experience

For 44 years, Jim Kizziar has represented management in all aspects of labor and employment law before federal and state agencies and courts. His practice includes litigation and preventative counseling of management on issues such as discrimination, harassment, union organizing and wage-hour issues.

Mr. Kizziar is also a lecturer and prolific writer on labor law issues. He served on the editorial board of the Texas Labor Letter and co-authored a chapter entitled "Risk Management Issues in Employment" for the American Hospital Association's Risk Management Handbook for Health Care Facilities. He has also co-authored a resource guide entitled Human Resources Management: A Comprehensive Guide for Apartment Professionals for the National Apartment Association.

Mr. Kizziar has served as chairman of The University of Texas Law School Conferences on the Americans with Disabilities Act and chairman of The University of Texas Law School Conferences on Developments in Labor and Employment Law.

Professional recognition

- The Best Lawyers in America, labor and employment law 2003-2020
- Selected as the Best Management Labor and Employment Attorney in San Antonio, Texas for 2013 and 2019 by The Best Lawyers in America
- Texas Super Lawyer, labor and employment law, 2003-2020
- Scene in SA: San Antonio's Best Lawyers, labor and employment law, 2005-2009, 2013-2018
- Listed in Chambers USA: America's Leading Lawyers for Business, Labor & Employment, 2011-2013

Community Involvement

Mr. Kizziar served as chairman of the American Heart Association, San Antonio Division, 2003-2004, and 2013-16; he served on the organization's board of directors from 1991 to 2005 and from 2012 to 2017. In 2004, he received the Paul D. Apgar Award of Excellence from the American Heart Association. Mr. Kizziar served from 1982 to 1988 on the Board of Directors of the San Antonio YMCA. He also serves on the board of directors of the Canyon Lake Sailing Foundation.

Affiliations

Texas Bar Foundation, life fellow • Federal Bar Association, National Council, past member • Federal Bar Association, San Antonio Chapter, Past President • San Antonio Human Resources Management Association, past officer and board member

Amber K. Dodds
Bracewell LLP
300 Convent Street, Suite 2700
San Antonio, TX 78205
210-299-3569
amber.dodds@bracewell.com

Practices

Labor and Employment

Admitted

State Bar of Texas

Education

The University of Texas School of Law, J.D., 2012 – *with honors*
Boston University, Master of Theological Studies, 2008 – *summa cum laude*
Trinity University, B.A., 2006 – *summa cum laude, Phi Beta Kappa*

Court Admissions

U.S. District Court Texas, Southern and Western Districts

Board Certifications

Board certified in Labor and Employment Law by the Texas Board of Legal Specialization

Experience

Amber Dodds counsels employers in all areas of employment law. Her advice includes analysis and direction on employment and benefits issues, such as leave administration, employee investigations, use of background checks and consumer reports, employee discipline and preventing harassment and retaliation claims. She drafts employment policies and employee handbooks specific to client industry and management needs. Amber also routinely advises on employee pay practices, such as compliance with overtime, per diem, pay deduction, and exemption classification requirements. She has experience advising clients on compliance with Occupational Safety and Health Act (OSHA) regulations, including the General Duty Clause, Process Safety Management, and a variety of industry or hazard-specific regulations.

In addition to regulatory and employment-law compliance, Amber represents employers in pre-litigation administrative investigation and hearings, settlement negotiations, and federal and state court litigation. Her litigation matters have included a variety of employment-law claims, such as retaliation, wrongful termination, discrimination, harassment, and wage and hour issues, as well as general civil litigation matters in the public, private and religious organization employer context. Amber is also experienced in Fair Labor Standards Act (FLSA) collective action litigation, including class certification and notice issues.

Amber served as an intern in the United States District Court for the Western District of Texas with the Honorable Lee Yeakel and the Texas First Court of Appeals with Justice Evelyn V. Keyes.

Noteworthy

U.S. District Court for the Western District of Texas, Intern
Texas First Court of Appeals, Intern
The University of Texas School of Law, *Texas International Law Journal*, Article and Notes Editor
The University of Texas School of Law, Dean's Achievement Award, Outstanding Performance in Business Associations

Community Involvement

YWCA San Antonio, Board of Directors; 2014-2019
Concordia University, Nebraska, Personnel Committee

Caroline M. Melo
Bracewell LLP
711 Louisiana St. Suite 2300
Houston, TX 77002
713.221.1391
caroline.melo@bracewell.com

Practices

Labor and Employment

Admitted

State Bar of Texas

Education

J.D., cum laude, SMU Dedman School of Law, 2019

B.S., honors, The University of Texas at Austin, 2013

Court Admissions

U.S. District Court of Texas, Southern and Eastern Districts

Experience

Caroline Melo represents employers in litigation, administrative investigations, and other actions related to employment including the defense of claims of alleged discrimination, retaliation, harassment, wrongful discharge, and occupational safety and health violations. She also provides advice and counsel to employers regarding a variety of workplace matters.

Prior to joining Bracewell, Caroline served as a Judicial Extern for Judge Kimberly Priest Johnson at the US District Court for the Eastern District of Texas and as a summer clerk at the US Senate Judiciary Committee with the Office of Senator John Cornyn. She also worked as a staffer in the Senate offices of the Majority Whip (Senator Cornyn) and completed a fellowship in the office of Senator James Inhofe.

Publications

- "Pandemic Telework May Undermine Employer ADA Defense" *Law360*
- "When Must Employee Illnesses Be Recorded by OSHA?" *IndustryWeek*
- "Should I Let My Employees Wear Earbuds?" *IndustryWeek*

Noteworthy

- U.S. District Court for the Eastern District of Texas, Judicial Extern for Judge Kimberly Priest Johnson
- U.S. Senate Judiciary Committee, Office of U.S. Senator John Cornyn, Summer Clerk
- Innocence Clinic, Buried Alive Project
- U.S. Senate, Office of the Majority Whip, Staff Assistant/Media Tracker
- U.S. Senate, Office of U.S. Senator James Inhofe, Congressional Fellow

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>AARP v. EEOC</i> , 267 F. Supp. 3d 14 (D.D.C. 2017)	120
<i>Abouhamad v. Bank of Am., Corp.</i> , 2012 WL 4023579 (D. Mass. 2012).....	57
<i>Aka v. Washington Hosp. Ctr.</i> , 156 F.3d 1284 (D.C. Cir. 1998)	62
<i>Albertson’s, Inc. v. Kirkingburg</i> , 527 U.S. 555 (1999)	32
<i>Alexander v. Northland Inn</i> , 321 F.3d 723 (8th Cir. 2003).....	111
<i>Anderson v. JPMorgan Chase & Co.</i> , 418 Fed. Appx. 881 (11th Cir. 2011)	75
<i>Arias v. McHugh</i> , No. 2:09-690 WBS GGH, 2010 U.S. Dist. LEXIS 60814 (E.D. Cal. 2010).....	14
<i>Arrieta-Colon v. Wal-Mart Puerto Rico Inc.</i> , 434 F.3d 75 (1st Cir. 2006)	101
<i>Barlow v. Walgreen Co.</i> , 2012 U.S. Dist. LEXIS 34026 (M.D. Fla. 2012).....	20
<i>Battle v. Mineta</i> , 387 F. Supp. 2d 4 (D.D.C. 2005)	2
<i>Black v. Wayne Center</i> , 225 F.3d 658 (6th Cir. 2000).....	77
<i>Blatt v. Cabela’s Retail, Inc.</i> , No. 5:14-cv-04822 (E.D. Pa. May 18, 2017)	12
<i>BNSF Railway Co. v. Feit</i> , 663 Fed. App’x 504 (9th Cir. 2016).....	13, 14
<i>Budde v. Kane Cnty. Forest Pres.</i> , 597 F.3d 860 (7th Cir. 2010).....	49
<i>Campbell v. Wal-Mart Stores, Inc.</i> , 272 F. Supp. 2d 1276 (N.D. Okla. 2003)	61

<i>Cannata v. Catholic Diocese of Austin</i> , 700 F.3d 169 (5th Cir. 2012).....	8
<i>Brunckhorst v. City of Oak Park Heights</i> , 914 F.3d 1177 (8th Cir. 2019), <i>reh’g denied</i> (Mar. 21, 2019).....	33, 88
<i>Chapman v. Yellow Cab Coop.</i> , 875 F.3d 846 (7th Cir. 2017).....	117
<i>Christopher Fox v. Costco Wholesale Corp.</i> , 918 F.3d 65 (2d Cir. Mar. 6, 2019)	101
<i>Cisneros v. Wilson</i> , 226 F.3d 1113 (10th Cir. 2000), <i>overruled on other grounds by Bd. of Trustees of Univ. of Ala. v. Garrett</i> , 531 U.S. 356 (2001).....	85
<i>Conlon v. InterVarsity Christian Fellowship</i> , 777 F.3d 829 (6th Cir. 2015).....	8
<i>Cook v. R.I. Dep’t of Mental Health</i> , 10 F.3d 17 (1st Cir. 1993)	13
<i>Core v. Champaign County Board of Commissioners</i> , No. 3:11-cv-166, 2012 U.S. Dist. LEXIS 149120 (S.D. Ohio 2012).....	75
<i>D’Angelo v. Conagra Foods</i> , 422 F.3d 1200 (11th Cir. 2005).....	45
<i>Daugherty v. City of El Paso</i> , 56 F.3d 695 (5th Cir. 1995).....	62
<i>Davis v. NYC Dept. of Educ.</i> , 2012 U.S. Dist. LEXIS 5633 (E.D.N.Y. 2012)	44
<i>Denson v. Steak ‘n Shake, Inc.</i> , 910 F.3d 368 (8th Cir. 2018).....	110
<i>Dewitt v. Sw. Bell Tel. Co.</i> , 845 F.3d 1299 (10th Cir. 2017).....	82
<i>Doe v. Northrop Grumman Systems Corp.</i> , 2019 WL 5390953 (N.D. Alabama, 2019).....	16
<i>Dube v. Texas Health and Human Services Comm’n</i> , 2011 U.S. Dist. LEXIS 99680 (W.D. Tex. 2011)	44
<i>Duckett v. Dunlop Tire Corp.</i> , 120 F.3d 1222 (11th Cir. 1997).....	83
<i>Easter v. Arkansas Children’s Hosp.</i> , 4:17CV00361 JLH, 2018 WL 4778045 (E.D. Ark. 2018).....	85

<i>Echevarria v. AstraZeneca Pharm. LP</i> , 856 F.3d 119 (1st Cir. 2017)	86
<i>EEOC v. Chevron Phillips Chem. Co.</i> , 570 F.3d 606 (5th Cir. 2009).....	56, 57
<i>EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.</i> , 132 S. Ct. 694 (Jan. 11, 2012).....	6, 8
<i>EEOC v. Humiston-Keeling, Inc.</i> 227 F.3d 1024 (7th Cir. 2000).....	63
<i>EEOC v. Methodist Hosps. of Dall.</i> , No. 3:15-cv-03104, 2016 WL 6565949 (N.D. Tex. 2016).....	64
<i>EEOC v. Methodist Hosps. of Dall.</i> , No. 3:15-cv-03104 (N.D. Tex. Mar. 2017)	62
<i>EEOC v. Sara Lee Corp.</i> , 237 F.3d 349 (4th Cir. 2001).....	62
<i>EEOC v. St. Joseph’s Hosp. Inc.</i> , 842 F.3d 1333 (11th Cir. 2016).....	62
<i>EEOC v. STME, LLC d/b/a Massage Envy</i> , 938 F.3d 1305 (11th Cir. Sept. 12, 2019).....	15, 21
<i>EEOC v. U.S. Steel Corp.</i> , 2013 WL 625315 (W.D. Pa. 2013)	106
<i>EEOC v. United Airlines, Inc.</i> , 693 F.3d 760 (7th Cir. 2012), cert. den’d, 133 S.Ct. 2734 (May 28, 2013).....	62, 63
<i>EEOC v. Watkins Motor Lines</i> , 463 F.3d 436 (6th Cir. 2006).....	12
<i>Equal Employment Opportunity Comm’n v. Dolgencorp, LLC</i> , 899 F.3d 428 (6th Cir. 2018).....	72
<i>Equal Employment Opportunity Comm’n v. McLeod Health, Inc.</i> , 914 F.3d 876 (4th Cir. 2019).....	108
<i>Faidley v. United Parcel Service of America, Inc.</i> , 889 F.3d 933 (8th Cir. 2018).....	35
<i>Faulkner v. Douglas County Nebraska</i> , 906 F.3d 728 (8th Cir. 2018).....	37
<i>Fjellestad v. Pizza Hut of Am., Inc.</i> , 188 F.3d 944 (8th Cir. 1999).....	86

<i>Flowers v. So. Reg'l Physician Serv.</i> , 247 F.3d 229 (5th Cir. 2001).....	101
<i>Flynn v. Distinctive Home Care, Inc.</i> , 812 F.3d 422 (5th Cir. 2016).....	111
<i>Fox v. Gen. Motors Corp.</i> , 247 F.3d 169 (4th Cir. 2001).....	101
<i>France v. Johnson</i> , 795 F.3d 1170 (9th Cir. 2015).....	44
<i>Francis v. City of Meriden</i> , 129 F.3d 281 (2d Cir. 1997).....	12, 45
<i>Frankes v. Peoria School District No. 150</i> , No. 15-3091 (7th Cir. Sept. 26, 2017).....	37, 103
<i>Fratello v. Archdiocese of N.Y.</i> , 863 F.3d 190 (2d Cir. 2017).....	8
<i>Fricke v. E.I. Dupont Co.</i> , No. 05-6521, 2007 U.S. App. LEXIS 2425 (6th Cir. 2007)	14
<i>Fulp v. Columbiana Hi Tech, LLC</i> , No. 116-1169, 2018 WL 1027159 (M.D.N.C. 2018).....	25
<i>Funmilayo Adetimehin v. Healix Infusion Therapy, Inc.</i> , No. 4:14-cv-00334 (S.D. Tex. 2015)	24
<i>Gambini v. Total Renal Care</i> , 486 F.3d 1087 (9th Cir. 2007).....	49
<i>Garner v. Chevron Phillips Chem. Co. L.P.</i> , 834 F.Supp.2d 528 (S.D. Tex. 2011)	58
<i>Gaul v. Lucent Tech., Inc.</i> , 134 F.3d 576 (3d Cir. 1998).....	14
<i>Gogos v. AMS Mech. Sys., Inc.</i> , No. 153603 (7th Cir. 2017).....	51
<i>Graham v. Arctic Zone Iceplex, LLC</i> , 930 F.3d 926 (7th Cir. July 23, 2019)	50
<i>Graves v. Finch Pruyn</i> , 18 AD Cas. (BNA) 193, 196 (2d Cir. 2006)	88
<i>Grussgott v. Milwaukee Jewish Day Sch., Inc.</i> , 882 F.3d 655 (7th Cir. 2018), cert. denied, 139 S. Ct. 456 (2018)	8

<i>Hannah P., v. Coats,</i> 916 F.3d 327 (4th Cir. 2019).....	52
<i>Hargett v. Fl. Atlantic Univ. Bd. of Trustees,</i> No. 15-cv-80349 (S.D. Fla. 2016).....	14
<i>Harrison v. Proctor & Gamble Distributing, LLC,</i> No. 1:15-cv-00514 (S.D. Ohio 2017).....	63
<i>Harty v. City of Sanford,</i> 2012 U.S. Dist. LEXIS 111121 (M.D. Fla. 2012).....	23
<i>Haschmann v. Time Warner Entm't,</i> 151 F.3d 591 (7th Cir. 1998).....	83
<i>Hedrick v. W. Reserve Care Sys.,</i> 355 F.3d 444 (6th Cir. 2004).....	62
<i>Hernandez-Gil v. Dental Dreams, LLC,</i> No. 13-1141 (D. N.M. 2018).....	68
<i>Hostettler v. The College of Wooster,</i> 895 F.3d 844 (6th Cir. 2018).....	38
<i>Huber v. Wal-Mart Stores,</i> 486 F.3d 480 (8th Cir. 2007).....	63
<i>Hudson v. MCI Telecomm. Corp.,</i> 87 F.3d 1167 (10th Cir. 1996).....	84
<i>Hummel v. County of Saginaw,</i> 118 F. Supp. 2d 811 (E.D. Mich. 2000), <i>aff'd</i> , 2002 U.S. App. LEXIS 14684 (6th Cir. 2002)	85
<i>Hustvet v. Allina Health Sys.,</i> 910 F.3d 399 (8th Cir. 2018).....	81
<i>Jackson v. Oil-Dri Corp. of Am.,</i> No. 3:16-CV-189-DMB-RP, 2018 WL 1996474 (N.D. Miss. Apr. 27, 2018)	26
<i>Johnson v. N.Y. State Office of Alcoholism & Substance Abuse Servs.,</i> No. 16-9769, 2018 BL 86496 (S.D.N.Y. 2018)	18
<i>Jon Higgins v. Union Pacific Railroad Co.,</i> 931 F.3d 664 (8th Cir. July 24, 2019)	39
<i>Jose DeFreitas v. United Airlines, Inc.,</i> No. 19-C-3397 (N.D. Ill. Feb. 11, 2020).....	77
<i>Katz v. Adecco USA, Inc.,</i> 845 F.Supp.2d 539 (S.D.N.Y. 2012).....	20

<i>Lanman v. Johnson Cnty.</i> , 393 F.3d 1151 (10th Cir. 2004).....	100
<i>Larson v. Oregonian Publ’g Co. LLC</i> , 3:17-CV-01040-AC, 2018 WL 3849789 (D. Or. 2018).....	42
<i>Lincoln v. BNSF Railway Co.</i> , 900 F.3d 1166 (10th Cir. 2018).....	62
<i>Maddox v. University of Tenn.</i> , 62 F.3d 843 (6th Cir. 1995).....	49
<i>Maggio v. Konica-Minolta Bus. Solutions</i> , 578 F. Supp. 2d 969 (N.D. Ill. 2008)	101
<i>Mauerhan v. Wagner Corp.</i> , No. 09-4179, 2011 U.S. App. LEXIS 7952 (10th Cir. 2011)	11
<i>Mayorga v. Alorica, Inc.</i> , 2012 U.S. Dist. LEXIS 103766 (S.D. Fla. 2012).....	10
<i>McDonald v. UAW-GM Ctr. for Human Res.</i> , 738 Fed. Appx. 848 (6th Cir. 2018)	60
<i>McNelis v. Pennsylvania Power & Light Co.</i> , 867 F.3d 411 (3d Cir. 2017).....	32
<i>Mestas v. Town of Evansville, Wy.</i> , 786 F.App’x 153 (10th Cir. Sept. 6, 2019)	71
<i>Micari v. Trans World Airlines</i> , 43 F. Supp. 2d 275 (E.D.N.Y. 1999), <i>aff’d mem.</i> , 205 F.3d 1323 (2d Cir. 1999).....	83
<i>Michael Booth v. Nissan North Am., Inc.</i> , No. 18-5985 (6th Cir. Jun. 7, 2019)	29
<i>Michael Murry v. Mayo Clinic</i> , 934 F.3d 1101 (9th Cir. Aug. 20, 2019) <i>cert. denied</i>	113
<i>Mielnicki v. Wal-Mart Stores, Inc.</i> , 738 Fed. Appx. 947 (10th Cir. 2018)	36
<i>Mitchell v. United States Postal Service, et al.</i> , 738 Fed. Appx. 838 (6th Cir. 2018)	55
<i>Molina v. DSI Renal, Inc.</i> , 840 F. Supp. 2d 984 (W.D. Tex. 2012).....	20
<i>Monroe v. Consumers Energy</i> , No. 18-1006, 2018 WL 6933261 (6th Cir. Oct. 1, 2018).....	108

<i>Montenez-Denman v. Slater</i> , 208 F.3d 214 (6th Cir. 2000).....	77
<i>Morriss v. BNSF Railway Co.</i> , 817 F.3d 1104 (8th Cir. 2016), <i>cert. den'd</i> 137 S.Ct. 256 (Oct. 3, 2016).....	13, 19
<i>Mundo v. Sanus Health Plan</i> , 966 F. Supp. 171 (E.D.N.Y. 1997).....	14
<i>Myers v. Hose</i> , 50 F.3d 278 (4th Cir. 1995).....	84
<i>Natofsky v. City of N.Y.</i> , 921 F.3d 337 (2d Cir. Apr. 18, 2019) <i>cert. denied</i>	114
<i>Norton v. Assisted Living Concepts, Inc.</i> , 786 F. Supp. 2d 1173 (E.D. Tex. 2011)	20
<i>Nowak v. St. Rita High Sch.</i> , 142 F.3d 999 (7th Cir. 1998).....	84
<i>Nunies v. HIE Holdings, Inc.</i> , 908 F.3d 428 (9th Cir. 2018).....	46
<i>Ostrofsky v. Department of Rehabilitation</i> , No. CIV S-07-0987 EFB PS, 2009 WL 3011578 (E.D. Cal. 2009).....	101
<i>Ostrowski v. Con-Way Freight, Inc.</i> , No. 12-3800 (3d Cir. 2013) (unpublished).....	93
<i>Paolino v. US Airways, Inc.</i> , CV-14-01672 (D. Ariz. 2016)	113
<i>Parker v. Columbia Pictures</i> , 204 F.3d 326 (2d Cir. 2000).....	88
<i>Parker v. Crete Carrier Corp.</i> , 158 F.Supp.3d 813 (D. Neb. 2016)	106
<i>Parker v. Crete Carrier Corp.</i> , 839 F.3d 717 (8th Cir. Oct. 12, 2016), <i>cert. den'd</i> , 2017 WL 661743 (April 3, 2017)	13, 106
<i>Pegues v. Mississippi State Veterans Home</i> , 736 Fed. Appx. 473 (5th Cir. 2018)	78
<i>Popeck v. Rawlings Company, LLC</i> , No. 19-5092 (6th Cir. 2019).....	41
<i>Provenzano v. Thomas Jefferson Univ. Hosp.</i> , 115 AD Cas. (BNA) 1112 (E.D. Pa. 2004).....	88

<i>Pryor v. Americold Logistics, LLC.</i> , 2019 WL 5722223 (S.D. Ind. 2019).....	30
<i>Pugliese v. Ariz.</i> , No. 98 16448, 1999 U.S. App. LEXIS 38031 (9th Cir. 1999) (unpublished).....	61
<i>Rascon v. US West Comms.</i> , 143 F.3d 1324 (10th Cir. 1998).....	83
<i>Richard Turner v. Phillips 66 Company</i> , No. 19-5030 (10th Cir. Oct. 16, 2019).....	106
<i>Richardson v. Chi. Transit Auth.</i> , No. 1:16-cv-03027 (N.D. Ill. 2017).....	13, 44
<i>Riley v. Fry</i> , No. 98 C 7584, 2000 U.S. Dist. LEXIS 14541 (N.D. Ill. 2000) (unpublished).....	85
<i>Rowlands v. United Parcel Serv. - Fort Wayne</i> , 901 F.3d 792 (7th Cir. 2018).....	116
<i>Ruggiero v. Mount Nittany Med. Cntr.</i> , 736 Fed. Appx. 35 (3d Cir. 2018).....	80
<i>Saley v. Caney Fork, LLC</i> , 2012 U.S. Dist. LEXIS 112862 (M.D. Tenn. 2012).....	44
<i>Sch. Bd. of Nassau Cnty. v. Arline</i> , 480 U.S. 273 (1987).....	45
<i>Schmidt v. Safeway, Inc.</i> , 864 F. Supp. 991 (D. Or. 1994).....	61
<i>Sechler v. Modular Space Corp.</i> , 2012 U.S. Dist. LEXIS 54478 (S.D. Tex. 2012).....	20
<i>Sepulveda-Vargas v. Carribean Restaurants, LLC</i> , 888 F.3d 549 (1st Cir. 2018).....	28
<i>Sessoms v. Trustees of Univ. of Pennsylvania</i> , 739 Fed. Appx. 84 (3d Cir. 2018).....	65
<i>Shaver v. Indep. Stave Co.</i> , 350 F.3d 716 (8th Cir. 2003).....	100
<i>Shell v. Burlington Northern Santa Fe Railway Company</i> , 941 F.3d 331 (7th Cir. Oct. 29, 2019).....	18
<i>Shell v. Smith</i> , No. 14-2958 (7th Cir. 2015).....	28

<i>Smith v. Ameritech</i> , 129 F.3d 857 (6th Cir. 1997).....	76
<i>Smith v. Flying J</i> , No. 09-433, 2010 U.S. Dist. LEXIS 131393 (D.N.M. 2010).....	2
<i>Smith v. Midland Brake, Inc.</i> , 180 F.3d 1154 (10th Cir. 1999).....	62
<i>Soledad v. U.S. Dept. of Treasury</i> , 304 F.3d 500 (5th Cir. 2002).....	112
<i>Solloway v. Clayton</i> , 738 Fed. Appx. 985 (11th Cir. 2018)	79
<i>Stevens v. Rite Aid Corp.</i> , No. 15-277 (2d Cir. March 21, 2017)	34
<i>Sutton v. United Airlines, Inc.</i> , 527 U.S. 471, 119 S. Ct. 2139 (1999).....	23
<i>Szuskiewicz v. JPMorgan Chase Bank</i> , 257 F.Supp.3d 319 (E.D.N.Y. 2017).....	48
<i>Taylor v. Pepsi Cola Co.</i> , 196 F.3d 1106 (10th Cir. 1999).....	83
<i>Terrell v. USAir</i> , 132 F.3d 621 (11th Cir. 1998).....	62
<i>Tex. Dept. of Transp.</i> , 577 S.w.3d 641 (Tex.App. —Austin, May 9, 2019, <i>pet. for rev. filed.</i> Oct. 11, 2019)	72
<i>Toyota Motor Mfg. v. Williams</i> , 534 U.S. 184 (2002)	19
<i>Tyndall v. National Education Centers, Inc.</i> , 31 F.3d 209 (4th Cir. 1994).....	96
<i>Vande Zande v. State of Wisconsin Department of Administration</i> , 44 F.3d 538 (7th Cir. 1995).....	96
<i>Vaughn v. Parkwest Med. Ctr.</i> , 716 F. App'x 428 (6th Cir. 2017).....	58
<i>Waggoner v. Olin Corp.</i> , 169 F.3d 481 (7th Cir. 1999).....	84
<i>Walsh v. United Conveyor Corp.</i> , No. 01 C 2279, 2002 U.S. Dist. LEXIS 4387 (N.D. Ill. 2002) (unpublished).....	83, 84

<i>Walsh v. United Parcel Serv.</i> , 201 F.3d 718 (6th Cir. 2000).....	83
<i>Wernick v. Fed. Reserve Bank</i> , 91 F.3d 379 (2d Cir. 1995).....	62
<i>Williams v. United Parcel Services, Inc.</i> , 2012 U.S. Dist. LEXIS 23080 (D.S.C. 2012)	28, 33
<i>Yinger v. Postal Presort, Inc.</i> , 693 Fed. Appx. 768 (10th Cir. 2017)	89
<i>Yochim v. Carson</i> , 935 F.3d 586 (7th Cir. Aug. 15, 2019).....	69
<i>Zenor v. El Paso Healthcare Sys.</i> , 176 F.3d 847 (5th Cir. 1999).....	11

I. INTRODUCTION

The Americans with Disabilities Act of 1990 (the “Act” or the “ADA”) protects individuals with disabilities from discrimination in employment, access to facilities, and access to services. Title I of the ADA prohibits covered employers from discriminating against qualified individuals with disabilities (“QID’s”) in job application procedures, hiring, advancement, discharge, compensation, training, and other terms, conditions, and privileges of employment.

On September 25, 2008, President Bush signed the ADA Amendments Act (“ADAAA”). The ADAAA reversed various Supreme Court decisions interpreting Title I of the ADA and required a broader application of the ADA. Among other things, the ADAAA bans lawsuits by non-disabled individuals for reverse disability discrimination, clarifies the Equal Employment Opportunity Commission’s authority under the ADA to develop and implement binding regulations, and amends the definition of disability for claims under the Rehabilitation Act. The amendments, which significantly change the ADA, became effective on January 1, 2009.

In September 2009, the EEOC issued proposed regulations implementing the ADAAA. On March 25, 2011, the EEOC published final regulations in the Federal Register. The regulations became effective on May 24, 2011.

The ADAAA’s broad coverage mandate, the expanded definition of “major life activity,” the virtual elimination of mitigating measures and the easing of the burden of plaintiffs to meet the “regarded as disabled” standard, have contributed to a surge in disability discrimination claims filed with the EEOC and the courts. See Appendix A, which shows that since the passage of the ADAAA, disability-based charges have reached their highest levels since the EEOC began enforcing Title I in 1992. Between 2010 and 2019, the average number of disability-based claims brought per year was 25,933, whereas in the preceding nine years (2001-2009) the annual average was 16,921. The number of claims filed with the EEOC peaked at an all-time high of 28,073 in 2016 and has since declined approximately 14 percent to 24,238 in EEOC fiscal year 2019.

Because of the extensive changes wrought by the amendments and the subsequently issued regulations, this outline includes only post-amendment decisions in sections where the ADAAA has resulted in significant changes. For ADA issues that were not affected by the ADA Amendments, this outline summarizes both pre-and post-amendment decisions.

II. THE EEOC REGULATIONS IMPLEMENTING THE ADAAA

The EEOC issued final rules implementing the ADAAA on March 25, 2011. The EEOC also concurrently issued a fact sheet, questions and answers regarding the final rule, and guidance for small businesses. The following is a summary of the significant provisions of the rule:

A. Construction (29 C.F.R. § 1630.1(c)(4))

Under this section, the EEOC emphasizes that the ADA now has “broad application”:

a. The purpose of the amendments was to make it easier for people with disabilities to obtain protection under the ADA.

b. Consistent with the purpose of reinstating a broad scope of protection, the definition of “disability” is to be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.

c. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability.

d. The question of whether an individual meets the definition of disability should not demand extensive analysis.

B. Definition of Disability (29 C.F.R. § 1630.2(g))

This section explains that the definition of the term “disability” was preserved, but “redefined”, by the ADA. For clarity, the EEOC refers to the first prong as “actual disability” to distinguish it from the other two prongs—a record of a disability and “regarded as” disabled. This section clarifies that:

a. Being “regarded as” having an impairment means that the individual “has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both ‘transitory and minor.’”

b. An individual may establish coverage under any one or more of the three prongs.

c. Where claims do not involve a failure to accommodate or the need for a reasonable accommodation, it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. Claims not involving reasonable accommodation can be made solely under the “regarded as” prong, which requires no showing of an impairment that substantially limits a major life activity or a record of such an impairment.

C. Definition of Physical or Mental Impairment (29 C.F.R. § 1630.2(h))

In this section, the EEOC emphasized that the enumeration of bodily systems provided is not exhaustive, just as the list of mental impairments is not exhaustive. The EEOC has also supplemented these definitions by:

a. Adding the immune and circulatory systems to the list of major bodily functions.

b. Changing the term mental retardation to “intellectual disability.”

D. Definition of Major Life Activities (29 C.F.R. § 1630.2(i))

In this section, the EEOC emphasized that the list of major life activities enumerated is not exhaustive. Changes in this section include:

a. The inclusion of the following additional enumerated major life activities: eating, sleeping, standing, sitting, reaching, lifting, bending, reading, concentrating, thinking, communicating, and interacting with others. Some of these activities were rejected by the courts as not constituting a major life activity (see *Smith v. Flying J*, No. 09-433, 2010 U.S. Dist. LEXIS 131393 (D.N.M. 2010) (“As an initial matter, ‘concentration’ is not considered a major life activity by the Tenth Circuit.”); *Battle v. Mineta*, 387 F. Supp. 2d 4 (D.D.C. 2005) (holding that the ability to interact positively with others is not a major life activity, being generally “too undefined, indistinct, and unlike the sort of activities that have been held by other courts to be major life activities”)).

b. The inclusion of “major bodily functions” (including the operation of an individual organ within a body system) as a major life activity, including functions of the immune system, special

Also available as part of the eCourse

[2020 Federal Employment Law Updates](#)

First appeared as part of the conference materials for the
27th Annual Labor and Employment Law Conference session
"Developments in Disability Discrimination Law"