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**Public Safety Employees and Disability
Discrimination in Employment under the ADA:**

An Introduction and Overview

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❖ **What is a Reasonable Accommodation?**

Once it is established that an employee is an otherwise qualified person with a disability, the employer has an obligation to reasonably accommodate that disability, unless doing so would cause the employer an undue hardship. The employer is required to engage in a good faith interactive process with the employee to attempt to find a reasonable accommodation which works.

“Undue hardship,” according to the EEOC, means that the accommodation would be too difficult or too expensive to provide, in light of the employer’s size, financial resources, and the needs of the business or agency. An employer may not refuse to provide an accommodation just because it involves some cost. An employer does not have to provide the exact accommodation the employee or job applicant wants. If more than one accommodation works, the employer may choose which one to provide.

In [*Reyazuddin v. Montgomery County*](#), #14-1299, 789 F.3d 407 (4th Cir. 2015), for instance, a county opened a new call center using software that was inaccessible to blind employees, and therefore did not transfer a blind employee there along with her sighted co-workers. Summary judgment should not have been granted to the employer on a disability discrimination claim as there were genuine disputed issues of material fact as to whether she could perform the essential functions of the job, whether the county failed to reasonably accommodate her, and whether the alleged failure to accommodate her was excused due to undue hardship.

In [*Calero-Cerezo v. Dept. of Justice*](#), #02-2643, 355 F.3d 6 (1st Cir. 2004), a federal appeals court declined to dismiss a suit brought by a Justice Dept. employee with depression who sought a transfer. There was no evidence that the transfer would cause an undue hardship and the employer failed to engage in an interactive process to explore whether some variant of the proposal was workable.

See also, [*Kelley v. Corr. Med. Servs., Inc.*](#), #11-2246, 707 F.3d 108 (1st Cir. 2013). In this case, a nurse working for a correctional medical provider suffered an off-duty injury shattering the right side of her pelvis while horseback riding. She was later fired, and claimed that this happened in retaliation for her requesting an accommodation for her disability under federal and state law. She had needed surgery and had a number of restrictions, including using crutches and not using her hands for lifting. Her ability to bend and squat was also limited. The trial court granted summary judgment to the defendant employer.

The federal appeals court reversed, finding that the plaintiff presented sufficient circumstantial evidence from which a jury could conclude that her supervisor was hostile to any accommodation of her disability, based on both comments and actions. The jury could have concluded that the plaintiff’s refusal to obey one instruction from that supervisor was only a “convenient pretext” for firing an employee who had repeatedly asked for accommodations of her disability.

When a proposed accommodation would pose a danger to fellow employees or the public, it will not be deemed reasonable. *In [Johnson v. Maryland](#)*, Civil #Y-95-2756, 940 F.Supp. 873 (D.Md. 1996), affirmed without opinion, #96-2655, 113 F.3d 1232 (4th Cir. 1997), a federal court rejected the ADA claim of a disabled corrections officer who was unable to use a firearm. Accommodating his disability posed a threat to other officers and the public.

Reassignment to other available job may constitute a reasonable accommodation. *In [Rorrer v. City of Stow](#)*, #13-3272, 743 F.3d 1025 (6th Cir. 2014), a lawsuit concerning a disability discrimination claim by a firefighter who lost all vision in one eye in an accident unrelated to work, there was a genuine issue of fact as to whether driving a fire apparatus under emergency lights was an essential function of a firefighter's job. The department claimed that his vision loss prevented him from driving at high speeds. The trial court prematurely ruled, as a matter of law, that the employee could not meet the burden of demonstrating that his requested accommodation was reasonable. The parties disputed whether there was a vacant job opening in the Fire Prevention Bureau when the plaintiff made a request for a transfer. [In *[Pond v. Michelin North America](#)*, #98-592, 183 F.3d 592 (7th Cir. 1999), however, a case involving a private employer, the court held that the ADA does not require an employer to bump an employee from a position to create a vacancy for a disabled employee regardless of seniority.].

In [Sanchez v. Moniz](#), #16-2056, 870 F.3d 1185 (10th Cir. 2017), an employee who read a daily report out loud to his colleagues skipped over sections, gave briefing points out of order, and mixed up the order of numbers and words. He had a reading disorder but was unaware of it. Part of his job duties involved him giving transportation information to nuclear convoys so this disorder posed a possible threat to national safety. After being diagnosed, he lost his safety and security clearance.

He requested "accommodations" for his disability, but was instead fired. He sued his ex-employer for all due process violations as well as a disability discrimination claim. A federal appeals court held that the trial court erred in dismissing the failure to accommodate claim. The plaintiff had indicated that he was willing to take "any" available job his employer had and there were 29 positions that did not require a security clearance.

In [*Williams v. Philadelphia Housing Auth. Police Dept.*](#), #03-1158, 380 F.3d 751 (3rd Cir. 2004), *cert. denied*, #04-873, 544 U.S. 961 (2005), a federal appeals court held that a police sergeant, who for psychological reasons cannot be entrusted with a firearm, is entitled to a reasonable accommodation with a position that does not require him to be armed. The trial court failed to consider whether the plaintiff's inability to carry a firearm would prevent him from performing work in a "class of jobs."

But if there are not other suitable jobs available, failure to transfer an employee to one will not amount to a viable failure to accommodate claim. In [*Iverson v. City of Shawnee*](#), #08-3264, 332 Fed. Appx. 501, 2009 U.S. App. Lexis 12931 (10th Cir. 2009), a police officer with a spinal injury, who was unable to requalify on the firing range to maintain her certification, lost her ADA failure to accommodate claim. She lacked evidence that any civilian positions were vacant at the time she sought reassignment.

Flexible work schedules that do not impose undue hardships on the employer may also constitute a reasonable accommodation. In [*Solomon v. Vilsack*](#), #12-5123, 763 F.3d 1 (D.C. Cir. 2014), a federal appeals court ruled that a federal employee's request that her employer grant her a flexible work schedule ("maxiflex" schedule) to accommodate her disability of severe depression was not unreasonable as a matter of law. The court reversed summary judgment for the employer on a reasonable accommodation disability discrimination claim, as well as on her claim that revoking her permission to work late was unlawful retaliation for requesting accommodation for her disability.

See also, [*McMillan v. City of New York*](#), #11-3932, 711 F.3d 120 (2nd Cir. 2013). In this case, a city employee's severe disability of schizophrenia required treatment that resulted in him being unable to get to work at a consistent daily time. A federal appeals court vacated a trial court order granting summary judgment to the city, since it was not clear that arriving in a timely manner at work was an essential job function, provided that the employee could make up for the time missed and work additional hours to get the actual essential job functions done. For a number of years, the court noted, the employee's late arrivals were either implicitly or explicitly approved, and the city's flex-time policy indicated that punctuality and being on the job at precise times might not be essential. The trial court had failed to conduct a sufficiently detailed analysis of these issues.

But there are limits to how flexible a schedule must be. In [*Kendall v. Ashcroft*](#), #03A50006, 2005 EEO PUB Lexis 350 (2005), for instance, the EEOC sustained the termination of a DEA employee for excessive tardiness. An agency is not required to accommodate employees with sleep disorders by allowing them to report to work “whenever” they are able. In this case, a DEA Intelligence Analyst was supposed to work from 9 a.m. to 5:30 p.m. He sought to change his arrival time to 11:00 a.m. to accommodate a sleep disability. As a result of “delayed sleep phase syndrome” and sleep apnea, he rarely arrived before 11 a.m.

Management scheduled him to start work an hour later, but declined the two-hour request. After persistently tardiness, he received one 5-day and one 14-day suspension for unauthorized AWOL. Finally, he was fired for a “lack of reliability and availability,” having accumulated more than 50 hours of tardiness during a one-month period.

He appealed the termination, alleging disability and age discrimination. An Administrative Law Judge sustained the charges and found no merit to his claims. He appealed to the EEOC.

The EEOC found that the only effective accommodation of his sleep disability would have allowed him to report to work whenever he was able. Such an accommodation was not reasonable on its face, because it is not feasible for an employer to excuse chronic erratic absenteeism and tardiness by an employee who cannot provide timely notice sufficient to enable the employer to provide for adequate staffing.

An accommodation is not reasonable if it involves an employee being excused from performing an essential job function. In [*Robert v. Carter*](#), #1:09-cv-0425, 819 F. Supp. 2d 832 (S.D. Ind. 2011), an employee of a county sheriff’s department was working as a civil deputy process server, but was entitled to carry a weapon and had arrest powers. He was asked to undergo Taser training, and, as part of that training, to receive a single one-to-five-second exposure to a Taser shock. He sought to avoid this part of the training because of a medical condition involving his back, for which he had previously undergone surgery. He was offered the alternative of either termination or transfer to another position monitoring prisoners on a computer screen at the county jail. He declined the transfer, and was fired.

He claimed that his termination was disability discrimination in failing to reasonably accommodate his medical condition by allowing him to avoid the Taser shock exposure training exercise. The court ruled that undergoing the Taser training involved an essential job function of the plaintiff's position. Even if he were held to have a disability, the offer to transfer him to another job constituted a reasonable accommodation.

In accord is [*Scruggs v. Pulaski County*](#), #15-1248, 817 F.3d 1087 (8th Cir. 2016), in which a juvenile detention officer sued a county for disability discrimination as well as for retaliation in violation of federal and state disability discrimination statutes and the Family Medical Leave Act (FMLA). The county fired her because she could not meet the job requirement of lifting 40 pounds. The requirement was related, the employer maintained, to protecting juveniles from harming themselves or others. A federal appeals court upheld summary judgment for the employer. The plaintiff was not an otherwise qualified individual because she could not perform the essential functions of her job with or without reasonable accommodation. Because this was still the case at the end of her FMLA leave period, the county did not violate the FMLA by firing her after her leave expired.

In [*Faulkner v. Douglas County*](#), #17-1387, 906 F.3d 728 (8th Cir. 2018), a 56-year-old woman worked as a correctional officer until she became injured during fights with inmates. After she worked the maximum number of days of light duty provided for under the terms of a collective bargaining agreement, she was fired because no other suitable position was found for her.

A federal appeals court found that the plaintiff's prima facie evidence of bad faith supporting her claim of failure to accommodate/disability discrimination was rebutted by the "incontrovertible" evidence that she could not have been reasonably accommodated, as she could not perform the essential duties of her prior job and no other suitable job was available.

Just because a requested accommodation would make life "easier" or preferable for a disabled employee does not automatically make the accommodation reasonable. In [*Brunckhorst v. City of Oak Park Heights*](#), #17-3238, 914 F.3d 1177 (8th Cir. 2019), a city was entitled to summary judgment on claims of employment discrimination under the Americans with Disabilities Act (ADA) when it refused to allow a senior accountant to return to his now eliminated city job because he had not

returned to work after the expiration of his Family Medical Leave Act (FMLA) leave. He had previously contracted Fournier's gangrenous necrotizing fasciitis, a rare, life-threatening disease commonly known as "flesh-eating" bacteria and underwent three life-saving surgeries, spent nearly five months in a hospital/nursing care facility, and returned to his home. He took leave under the Family and Medical Leave Act and when that was exhausted was granted further unpaid leave.

The disease left him with long-term injuries. The evidence showed that there was no medical reason why he needed to be reinstated to his former position, and therefore he failed to show that returning to his original position was a reasonable accommodation. A federal appeals court further ruled that the plaintiff's request that he be allowed to work from home was not a reasonable accommodation, pointing to his testimony that he could work at city hall but that it "would have been easier" to work from home. He failed to show that he could perform the essential functions of the job from home. He also did not show that the city eliminated his job because of his disability or that it fired him because of his disability. There was no genuine issue of material fact that the employer engaged in anything but a good-faith interactive dialogue, and his claim of unlawful retaliation also failed.

The worsening of an employee's condition may alter what accommodation is reasonable or even whether they are an otherwise qualified person with a disability. In [*Swanson v. Village of Flossmoor*](#), #14-3309, 794 F.3d 820 (7th Cir. 2015), a police detective resigned from the department after suffering two strokes six weeks apart. The second stroke rendered him unable to perform his duties as a detective. He sued for discrimination under the Americans with Disabilities Act, arguing that the municipality failed to reasonably accommodate him after his return to work following the first stroke by not allowing him to work exclusively at a desk. A federal appeals court upheld summary judgment for the employer. The ADA claim was deficient because of the fact that the plaintiff's doctor recommended that he work "part-time" following his first stroke. The court noted that the employer allowed him to work part-time after the first stroke and granted a request to extend his leave following his second stroke in order to permit him to stay on the employer provided health insurance plan.

The duty to reasonably accommodate a disability does not require that the employer create a new job or change the essential functions of an existing job. In

[*Otto v. City of Victoria*](#), #11-2753, 685 F.3d 755 (8th Cir. 2012) after a city public works employee twice suffered back injuries on the job, he experienced numbness in his left leg. He underwent surgery, and was subsequently cleared to perform up to four hours of sedentary work per day, but otherwise was found by a doctor to be totally and permanently disabled from his prior job, which required heavy lifting. The city had no position available that he could perform, so he was fired. Rejecting his disability discrimination claim under the Americans with Disabilities Act (ADA), a federal appeals court noted that the duty to reasonably accommodate a disability does not require an employer to create a new position or to eliminate or reallocate an essential job function.

For more on this topic see [Reasonable Accommodation and Undue Hardship under the ADA](#), EEOC Enforcement Guidance.

❖ Regarded as Disabled

In addition to protecting employees with an actual disability, the ADA protects employees against discrimination when they do not have a disability, but are “regarded” as having one by the employer. Under the [ADA Amendments Act \(ADAAA\) of 2008](#), the scope of the ADA’s “regarded as” definition of disability was expanded. Now a plaintiff must show, under the ADAAA, that he or she has been subjected to prohibited discrimination because of a perceived physical or mental impairment regardless of whether or not the impairment limits or is perceived to limit a major life activity.

In [*Lewis v. Union City, Georgia*](#), #15-11362, 877 F.3d 1000 (11th Cir. 2017), a female African-American police detective who had a heart condition was placed on administrative leave after she and her doctor raised concerns about her being required to be subjected to a Taser shock during training exercises. Ultimately, she was terminated. A federal appeals court reversed summary judgment for the defendants in a lawsuit claiming that the plaintiff was unlawfully discharged from the police department based on disability and/or racial or gender discrimination. A jury could find that the stated reason for terminating her—that she was absent without leave—was a pretext for one or more other motives.

The trial court correctly concluded that the detective did not produce sufficient evidence to permit a conclusion that she was actually disabled, within the meaning

of the American with Disabilities Act. But she did produce evidence sufficient to raise a genuine issue of fact on whether she was “regarded as” disabled and that her employer regarded her heart condition as a physical impairment and took adverse action—placing her on leave—because of the impairment. A jury would be justified in concluding that receiving a Taser shock was not an essential function of the detective’s job, in which case it would follow that she was a “qualified individual.” [A subsequent rehearing en banc vacated the ruling as to the race and gender claims for reasons not relevant here, without discussing the “regarded as disabled” issue. [Lewis v. Union City, Georgia](#), #15-11362, 918 F.3d 1213 (11th Cir. 2019)].

In [Nunies v. HIE](#), #16-16494, 908 F.3d 428 (9th Cir. 2018), the plaintiff filed a lawsuit against his former employer claiming disability discrimination under the ADA and state law. He asserted that he was fired because of his shoulder injury.

A federal appeals court ruled that the plaintiff established a genuine issue of material fact as to whether his employer regarded him as having a disability. The appeals court also found that the trial court erroneously concluded, as a matter of law, that the plaintiff was not regarded as disabled, and that the plaintiff did not meet the “physical” definition of disability under the ADA. While this case involved a private employer, the reasoning would also apply to a public employer under similar circumstances in which the employee was “regarded as” being disabled.

Because employees “regarded as” disabled do not have an actual disability, there is nothing to reasonably accommodate. You cannot accommodate what does not exist. Instead, the employer must merely refrain from taking adverse employment actions—such as termination or demotion—against the employee on the basis of the perceived disability. In [Robinson v. First State Community Action Agency](#), #17-3141, 920 F.3d 182 (3d Cir. 2019), an employee claimed that her manager told her that “you either don’t know what you’re doing, or you have a disability, or [you’re] dyslexic.” Based on this statement, she was tested for dyslexia. She submitted an evaluation that concluded that she had symptoms consistent with dyslexia and requested reasonable accommodations for that condition. She was told that any diagnosis would not excuse her from performing her work in a satisfactory matter. She was further advised to focus on improving her performance. Weeks later, she was fired, and sued for disability discrimination under the Americans with Disabilities Act (ADA). The plaintiff acknowledged that she could not prove she was dyslexic. She proceeded on a theory that she was perceived or regarded as

dyslexic by her employer and therefore was entitled to a reasonable accommodation under the ADA.

A federal appeals court upheld judgment of \$22,501 in favor of the plaintiff on her reasonable accommodation claim. It ruled that the employer had waived its argument under the 2008 ADA amendments. The Act now provides that employers “need not provide a reasonable accommodation . . . to an individual who meets the definition of disability in” 42 U.S.C. 12102(1)(C), which includes individuals who are “regarded as having” a physical or mental impairment. Despite the amendment, both parties proceeded under the “regarded as” case theory throughout the lawsuit. An error in advising the jury of a \$50,000 cap on damages was harmless, as the jury awarded damages well below the cap. The case involved a private employer, but the reasoning of the case would also apply to public employers.

Personality conflicts among coworkers -- even those expressed through the use or misuse of mental health terminology -- generally do not establish a perceived impairment on the part of the employer, nor does a management order to take a fitness for duty exam. [*Lanman v. Johnson County Kansas*](#), #03-3316, 393 F.3d 1151 (10th Cir. 2004). In this case, the plaintiff had worked as a deputy sheriff for 13 years. During her last year, she experienced conflicts with her coworkers. While she admitted that deputies commonly teased each other and that some of the comments made about her were good natured, she also claimed that some coworkers disliked and ridiculed her.

She resigned her job and then brought suit under the ADA, alleging a hostile work environment and that she was perceived by the department as mentally disabled. The federal appeals court ruled that the hostile work environment claim was actionable under the ADA, but concluded there was no evidence that the department mistakenly perceived her as mentally impaired. Instead, the evidence showed that the deputy underwent a fitness for duty examination, was declared fit for duty, and then was allowed to immediately return to work. Furthermore, the fact that the deputy was reassigned to a new position at the same rank, rather than being terminated for work related performance problems, was additional evidence that she was not perceived as suffering from a disability that substantially limited her ability to work.

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