



## **Tackling Tough ADAAA Reasonable Accommodation Challenges: *Mental Disorders, Obesity, Back and Neck Injuries, and Pregnancy Related Conditions***



October 17, 2014  
Fred J. Bissinger



Knoxville   Morristown   Cookeville   Nashville

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## **I. Introduction**



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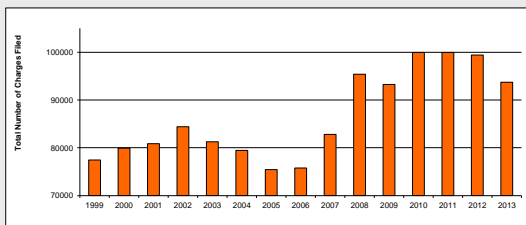
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## **Total Number of Charges Filed**



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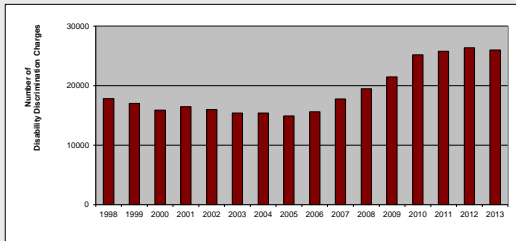
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## Disability Discrimination



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## II. What is a Disability?

### Definition of Disability:

- (1) A **physical** or **mental impairment** that **substantially limits** one or more **major life activities**; or
- (2) a **record of** such an impairment; or
- (3) being **regarded as** having such an impairment



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## II. What is a Disability?

### Broad Coverage under the Amendments

- Whatever the situation, remember that the definition of disability “**shall be construed in favor of broad coverage of individuals**”
- The focus is on **reasonable accommodation**, not whether a condition is a disability



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## II. What is a Disability?

### Duration

- Temporary conditions may be a disability under the ADAAA...



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## II. What is a Disability?

### Duration

- **Summers v. Altarum Inst. Corp.**  
(4<sup>th</sup> Cir. Jan. 23, 2014) - Facts
  - Employee sustained injuries to both legs
  - Doctors forbade employee from putting any weight on his left leg and opined he could not walk normally for about 7 months



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## II. What is a Disability?

### Duration

- **Summers v. Altarum Inst. Corp.**

(4<sup>th</sup> Cir. Jan. 23, 2014) - Holding

- Court held that while employee's injuries were temporary, they rendered him immobile for more than seven months and that was severe enough to qualify as a disability



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## II. What is a Disability?

### Duration

- **Summers v. Altarum Inst. Corp.**

(4<sup>th</sup> Cir. Jan. 23, 2014) - Holding

- Court clarified that the EEOC's regulations stated that **"the effects of an impairment lasting or expected to last fewer than 6 months can be substantially limiting"** for proving a disability
- The EEOC Appendix states conditions of short duration **are typically not covered unless "sufficiently severe"**



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## III. Mental/Emotional Disorders

### Intellectual Disabilities

- Definition:

- An ID is characterized by significant limitations in both **functioning** and in **adaptive** behavior that affect many everyday social and practical skills
- Generally diagnosed as having an ID when:
  - Person's intellectual functioning is below 70-75;
  - Person has significant limitations in adaptive skills areas (i.e., conceptual, social, and practical skills), and
  - Disability originated before 18 years of age



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### III. Mental/Emotional Disorders

#### Intellectual Disabilities

- Statistics (survey by Special Olympics and conducted by Gallup and the Univ. of Massachusetts at Boston):
  - 44% of adults with an ID ages 21-64 are in the labor force. This is compared to 83% of working-age adults w/o disabilities who are in the labor force
  - **The unemployment rate for adults with ID is more than twice as high w/o disabilities**



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### III. Mental/Emotional Disorders

#### Post-Traumatic Stress Disorder

- PTSD is becoming more prevalent since we have veterans returning from the Iraq and Afghanistan wars
- According to the U.S. Dep't of VA, **10% to 18% of OEF/OIF troops are likely to have PTSD when they return home**



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### III. Mental/Emotional Disorders

#### Post-Traumatic Stress Disorder

- Courts have explained that "standing alone, a diagnosis of PTSD is not enough -- **the plaintiff must go farther and demonstrate that his/her PTSD substantially affects major life activities**
- **Exercise Caution – multiple statutes may apply!**



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### III. Mental/Emotional Disorders

#### Case Law & Other Mental Impairments

- **Hardenburg v. Dunham's Athleisure Corp.**,  
2013 WL 4042663 (E.D. Mich. 2013) —  
Employee who suffered a cognitive deficiency  
following a stroke was incapable of keeping  
up with processing vendor invoices, and thus,  
was not qualified for his accounts payable  
clerk job



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### III. Mental/Emotional Disorders

#### Depression

- **Estate of Nancy Murray v. UHS of Fairmount, Inc.**,  
2011 WL 5449364 (E.D. Penn 2011)-  
Employee was terminated for wasting  
narcotics after advising her immediate  
supervisor that she suffered from depression  
and was under the care of a physician,  
resulting in two leaves of absence for same



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### III. Mental/Emotional Disorders

#### Depression

- **Estate of Nancy Murray v. UHS of Fairmount, Inc.**,  
2011 WL 5449364 (E.D. Penn 2011)-  
"In light of the ADAAA and the EEOC  
regulations interpreting the statute, the Court  
agrees with the plaintiff that the nature of  
Murray's depression, by itself, does not  
preclude the finding that her depression  
'substantially limits' major life activities."



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### III. Mental/Emotional Disorders

#### Examples of Reasonable Accommodation

- **Schwarzkopf v. Brunswick Corp.**, 833 F. Supp. 2d 1106 (D. Miss. 2011): employee's request that his supervisors and co-workers not yell at him because of his depression and general anxiety disorder and his request to be transferred were not requests for reasonable accommodations—**employer's obligation to make reasonable accommodations did not extend to providing an aggravation and stress-free environment**



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### IV. Obesity

- According to Gallup's 2013 survey, 27.2% of adults are obese in the U.S.
- In the Summer of 2013, the American Medical Association adopted a policy that officially labeled obesity as a disease **"requiring a range of medical interventions to advance obesity treatment and prevention."**



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### IV. Obesity

- Prior to the ADAAA, the EEOC Interpretive Guideline stated that severe or morbid obesity was an impairment but that obesity, alone, rarely is
- After the ADAAA was passed, the EEOC deleted the language indicating that obesity "rarely" would be a disability.



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## IV. Obesity

- **EEOC v. Resources for Human Development, Inc.,**

2011 WL 6091560 (E.D. La. Dec. 2011):

- Claimant alleged she was fired because of her disability, severe obesity. She was 5'2 and weighed 500 pounds when she was fired



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## IV. Obesity

- **EEOC v. Resources for Human Development, Inc.,**

- The Court held that **severe obesity** is an impairment and that it qualifies as a disability regardless of whether it is caused by a physiological disorder. The court stated that proving a physiological cause was only required when an employee's weight was within the normal range. The parties settled for \$125,000



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## IV. Obesity

- **EEOC v. BAE Systems Tactical Vehicle Systems, LP**

(U.S. District Court – Southern District of Texas - July 2012):

- Suit alleged that company fired employee because of his disability (morbid obesity) and because it regarded him as disabled
- Employee was hired in 1994, and in 2009 informed employer he could no longer perform job duties because of his weight



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## IV. Obesity

- **EEOC v. BAE Systems Tactical Vehicle Systems, LP**

(U.S. District Court – Southern District of Texas - July 2012):

- Asked to be placed in another position or be provided reasonable accommodation, but employer refused
- At time he was terminated, he weighed 680 pounds
- Parties eventually settled for \$55,000



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## IV. Obesity

- **EEOC v. BAE Systems Tactical Vehicle Systems, LP**

(U.S. District Court – Southern District of Texas - July 2012):

- Following the settlement, EEOC trial attorney Kathy Boutchess stated **that the ADA, “protects morbidly obese employees and applicants from being subjected to discrimination because of their obesity”.**



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## IV. Obesity

- **Whittaker v. America’s Car-Mart, Inc.**

U.S. District Court – Eastern District of Missouri - April 24, 2014:

- Employee of car dealership alleged that his employer fired him because of his weight
- Federal judge in Missouri ruled that employee sufficiently supported his claim that he is disabled within the meaning of the ADA



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## IV. Obesity

- **Whittaker v. America's Car-Mart, Inc.**

U.S. District Court – Eastern District of Missouri - April 24, 2014:

- Employer filed a motion to dismiss arguing that obesity is not a disability
- Judge ruled that employer relied on outdated case law and allowed claim to proceed



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## IV. Obesity

- **Conclusions**

- Morbid obesity is an impairment
  - **Anderson v. Macy's Inc.**, 943 F. Supp. 2d 531 (W.D. Penn. 2013): Refusing to decide whether morbid obesity or obesity is a disability if not caused by an underlying physiological condition



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## IV. Obesity

- **Conclusions**

- **Most courts that have decided the issue have stated that obesity is an impairment when it is caused by an underlying physiological condition**
- **What we do not definitely know, is whether obesity is an impairment when it's not caused by an underlying physiological condition**



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## V. Orthopedic Issues

- **Molina v. DSI Renal, Inc.**

(2012 WL 29348) (W.D. Tex. Jan. 4, 2012):

- Court applied ADAAA standards and EEOC's amended ADA regulations
- Court denied motion for summary judgment on a denial of accommodation claim brought by certified medical student with lumbar internal disc derangement, lumbar radiculopathy, and lumbago



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## V. Orthopedic Issues

- **Molina v. DSI Renal, Inc.**

(2012 WL 29348) (W.D. Tex. Jan. 4, 2012):

- **Court held a reasonable juror could find plaintiff's impairments substantially limited in various major life activities, including lifting, bending, and the operation of major bodily function (musculoskeletal) in light of intermittent pain and other symptoms**



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## V. Orthopedic Issues

- **Molina v. DSI Renal, Inc.**

(2012 WL 29348) (W.D. Tex. Jan. 4, 2012):

- Court noted that under revised statute, **an impairment that is "episodic" is a disability if it "substantially limits a major life activity when active"**
- Court also applied ADAAA standard for determining substantial limitation without regard to mitigating measures



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## V. Orthopedic Issues

- **Poper v. SCA Americas, Inc.**

(2012 WL 3288111) (E.D. Pa. Aug. 23, 2012):

- District court granted summary judgment because **proffered evidence** – consisting primarily of plaintiff's deposition testimony that he suffered from back pain and experienced limitations in brushing teeth, bending, lifting – **was insufficient for jury to conclude plaintiff was substantially limited in major life activity under the ADAAA**



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## V. Orthopedic Issues

- **Eastman v. Research Pharmaceuticals, Inc.**

(2013 WL 3949236) (E.D. Pa. 2013):

- Defendant argued plaintiff's back pain was non-permanent and non-permanent injuries are not disabilities under the law
- Plaintiff presented sufficient evidence for jury to conclude that back pain was not an insufficient duration
- **Plaintiff suffered from pain for previous two to three years; would flare up for about a week a few times a year**



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## V. Orthopedic Issues

- **Eastman v. Research Pharmaceuticals, Inc.**

(2013 WL 3949236) (E.D. Pa. 2013):

- Plaintiff treated by seeing chiropractors; diagnosed with disc disruption
- Defendant argued plaintiff failed to testify that back pain substantially limited her major life activities
- **Although plaintiff may have been able to drive and work, plaintiff put forth evidence from which a factfinder could conclude that these activities were more difficult for her as compared to general population because they caused significant pain**



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## VI. Pregnancy Related Conditions

### EEOC's New Guidance (June 2014)

- General Requirements of Pregnancy Discrimination Act – Employer cannot:
  - Fire;
  - Refuse to hire;
  - Demote;
  - Or take any other adverse action against a woman – **if pregnancy, childbirth, or a related medical condition was a motivating factor in the adverse employment action**



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## VI. Pregnancy Related Conditions

- Protection extends to differential treatment based on an employee's **fertility** and **childbearing capacity** – not just those who are pregnant
  - **Including an intention to become pregnant**, as well as past pregnancy, childbirth, or related medical condition



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## VI. Pregnancy Related Conditions

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|---|-------------------------------------|
| • Pelvic inflammation                           | • Gestational diabetes              |
| • CTS   | • Complications requiring back rest |
| • Impairments that limit reproductive functions | • After-effects of delivery         |
| • Back pain                                     | • Lactation*                        |
| • Preeclampsia                                  |                                     |



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## VI. Pregnancy Related Conditions

### ADAAA/PDA Interaction

- Pregnancy  disability
- Same "disability" analysis applies
- Regarded as claims
- Associational claims
- Caregiver claims/issues



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## VI. Pregnancy Related Conditions

### Pregnancy & Reasonable Accommodation Options:

- Redistributing marginal or nonessential functions;
- Modifying workplace policies;
- Modifying work schedule;
- Allowing a pregnant worker placed on bed rest to telework where feasible;



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## VI. Pregnancy Related Conditions

### Pregnancy & Reasonable Accommodation Options:

- Granting leave in addition to what an employer would normally provide under a sick leave policy;
- Purchasing or modifying equipment; and
- Temporarily reassigning an employee to a light duty position



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## VII. Conclusion

- Supervisor/Manager Awareness of an Employer's ADAAA obligations
- Appropriate/Effective Reporting Mechanism of Disability Issues
- Interactive Process
  - Sliding Scale
  - Documentation



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## VII. Conclusion

- Reasonable Accommodation Process
  - Input from Employee
  - Analyze Job Description(s)
  - Analyze Various Resources Available regarding How to Accommodate
  - Remember Leave of Absence as form of Reasonable Accommodation
  - Documentation



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## VII. Conclusion

- Do Not Permit Harassment/Discrimination
- No Retaliation
- Do Not Forget Associational Claims
- Common Sense is Highly Under-Rated in Dealing with ADA Issues
- Document, Document, Document
- Seek Advice of Counsel



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## **Tackling Tough ADAAA Reasonable Accommodation Challenges:** *Mental Disorders, Obesity, Back and Neck Injuries, and Pregnancy Related Conditions*



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