



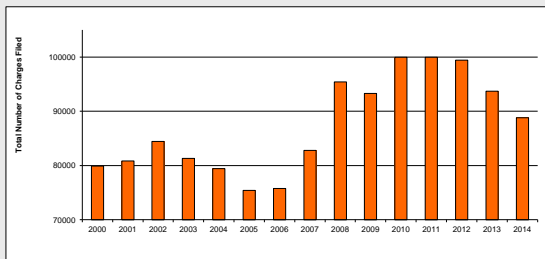
Tackling Tough ADAAA Reasonable Accommodation Challenges

October 16, 2015

Fred J. Bissinger

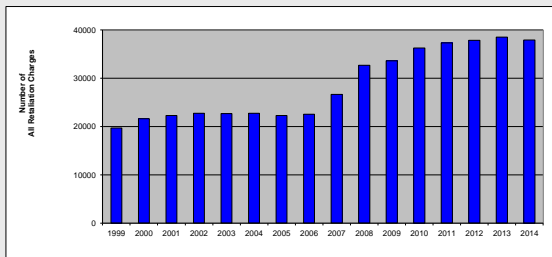
Knoxville Morristown Cookeville Nashville Chattanooga

Total Number of Charges Filed



2

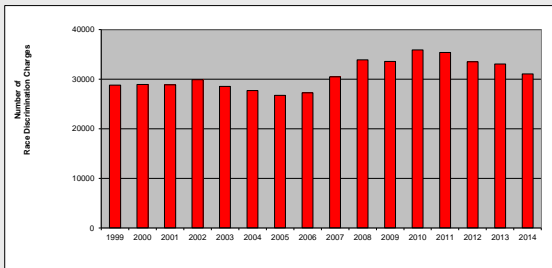
Retaliation Charges



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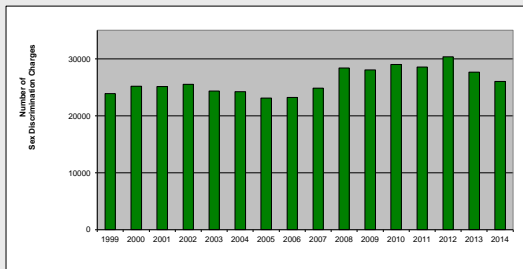


Race Discrimination



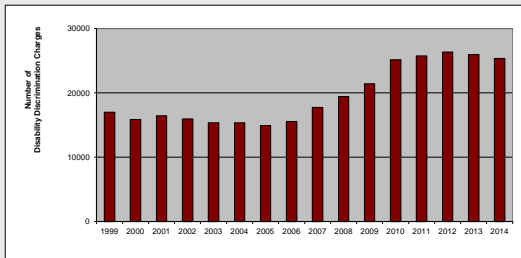
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Sex Discrimination



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Disability Discrimination



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Disability under ADA

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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ADAAA Check Down List

1. **Disability**
2. **Reasonable Accommodation Analysis**
 - Interactive Process
 - Individualized Assessment
 - Job Progression Analysis
 - Same Job
 - Different Job; Same Level
 - Different Job; Lower Level
 - Leave as a form of RA



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ADAAA Check Down List

3. **Defenses**
 - Undue Hardship
 - Direct Threat
4. **Fitness for Duty Exams**
5. **Documentation**
6. **Common Sense**
7. **No Assumptions**



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Types of MHDs

- Depression
- Obsessive-Compulsive Disorder (OCD)
- Post Traumatic Stress Disorder (PTSD)
- Anxiety
- Schizophrenia
- Attention Deficit Disorder (ADD)
- Attention Deficit/Hyperactive Disorder (ADHD)
- Intellectual/Learning Disability
- Autism
- Brain Injury
- Bipolar
- Frontal Lobe Injury



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Conduct Related to Disability

– **RULE:** Employee cannot be terminated for conduct resulting from disclosed disability.

– *Gambini v. Total Renal Care*, No. 05-35209
(9th Cir., Apr. 24, 2007)

• Facts:

- Employee diagnosed with bipolar disorder that affected her concentration and made her increasingly irritable.
- Employee informed her employer.
- Employer developed written improvement plan, enraging employee.



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Conduct Related to Disability

Gambini v. Total Renal Care, No. 05-35209
(9th Cir., Apr. 24, 2007)

• Facts:

- Employee leaves in outburst, makes alleged threat, and suicidal. Request for FMLA Leave granted.
- Employee terminated by phone after other employees complain regarding outburst.



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Conduct Related to Disability

- *Gambini v. Total Renal Care*, No. 05-35209 (9th Cir., Apr. 24, 2007)
- Holding:
 - Court held that lower court had erred in not delivering instruction that conduct resulting from disability is part of disability—NOT separate basis for termination.
 - **“Thus a decision motivated *even in part by the disability* is tainted and entitles a jury to find that an employer violated antidiscrimination laws”**



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Conduct Related to Disability

- *Walz v. Ameriprise Financial, Inc.*, No. 14-2495 (8th Cir., Mar. 9, 2015)
- Facts:
 - Employee diagnosed with bipolar disorder that caused erratic and disruptive workplace behavior.
 - Employee was given a written warning.
 - Employee filed for, and was granted, FMLA leave without disclosing reason.



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Conduct Related to Disability

- Walz v. Ameriprise Financial, Inc.*, No. 14-2495 (8th Cir., Mar. 9, 2015)
- Facts:
 - Employee returns from leave and signs a policy acknowledging the procedure for requesting a reasonable accommodation; still doesn't disclose disorder.
 - Negative employee behavior continues after repeated offers of help by supervisor.
 - Employee ultimately terminated due to repeated misconduct.



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Conduct Related to Disability

- *Walz v. Ameriprise Financial, Inc.*, No. 14-2495 (8th Cir., Mar. 9, 2015)
- Holding:
 - 8th Cir. Court of Appeals affirms summary judgment for employer because employee could not perform essential job functions without an accommodation and did not notify employer of disability or need for accommodation even after repeated offers of help by employer



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Conduct Related to Disability

- *Walz v. Ameriprise Financial, Inc.*, No. 14-2495 (8th Cir., Mar. 9, 2015)
- Key Take Aways:
 - Employee behavior coupled with an FMLA request and a doctor's note does not put employer on notice that a reasonable accommodation for disability is needed; Employee must request
 - Employer has no duty to guess an employee's disability and force them to take leave
 - Termination of an employee after employee rejects repeated offers for help and does not disclose disability does not violate ADA



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Employer Defenses: Direct Threat

- **RULE:** ADA does not protect direct threats or violence related to disability.
- *Wills v. Superior Court* 195 Cal App.4th 143 (May 12, 2011)
 - Facts:
 - Employee diagnosed with bipolar disorder.
 - Employee fired for violating written policy against verbal threats, threatening conduct, and violence.
 - Employee sued saying wrongful termination because her conduct related to her mental disability.



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Employer Defenses: Direct Threat

- ***Wills v. Superior Court* 195 Cal App.4th 143 (May 12, 2011)**
 - Holding:
 - Court held that employer may reasonably distinguish between disability caused misconduct and disability itself when misconduct includes threats/violence against coworkers.
 - **“ADA does not require employer to retain employee who threatens/commits acts of violence against coworkers, even if the employee’s disability caused the misconduct”**



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Employer Defenses: Direct Threat

- ***Walton v. Spherion Staffing LLC Civil Action No. 13-6896* (E.D. PA Jan 13, 2015)**
 - Facts:
 - Employee suffering from depression/homicidal thoughts.
 - Sent note to boss with direct threat.
 - Employer does not respond to note for *three weeks*



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Employer Defenses: Direct Threat

- ***Walton v. Spherion Staffing LLC Civil Action No. 13-6896* (E.D. PA Jan 13, 2015)**
 - Facts:
 - During three weeks, employee asks for accommodation/help from employer
 - Employer terminates employee
 - Employee sued claiming reason for termination was disability/need for urgent care.



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Employer Defenses: Direct Threat

- **Walton v. Spherion Staffing LLC Civil Action No. 13-6896 (E.D. PA Jan 13, 2015)**
- Holding:
 - Court calls this “outer bounds of ADA”
 - ADA does not protect against direct threat
 - *However*, Employer waited three weeks, so discovery needed to determine real reasoning for firing.
- **RULE: While ADA does not protect against direct threats, response to threats must be quick and appropriate.**



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Drug and Alcohol Issues

- What is current?
- Alcohol
- The Heroin epidemic
- Weed



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Psychologist with Memory Loss

- Can he perform essential functions?
- Use of IME
- Employer did not try to reasonably accommodate



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Police Officer with Stroke

- First stroke – reasonable accommodation via reduced schedule
- Doctor recommended same
- Employer accommodated
- Employee asked for light duty – no doctor recommendation
- Employer declined; no light duty available



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Police Officer with Stroke

- Second Stroke
- Subsequently resigned
- Officer pursued failure to accommodate claim
- Court ignored employer's failure to engage interactive process



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Application for SSA Benefits

- Does not preclude ADA/FMLA claims
- Conflicting statements?



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Failure to Appear for Random Drug Test

- Employee fails to appear for required random test
- Did not appear on required day
- Appeared next day
- Passed test
- Removed from job based on "refusal to take test"
- Employer wins because employee no longer Qualified for Safety-Sensitive job



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TECHNIQUES TO FACILITATE EMPLOYEES WITH MHDS



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Interaction Techniques

Phrases **to say**:

- "How can we help you do your job?"
- "You're not your usual self."
- "Do you want to talk about it."
- "It's always OK to ask for help."

Phrases **not to say**:

- "How's your health?"
- "You seem depressed."
- "Snap out of it."
- "Think positive."
- "I know exactly what you're going through."



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Accommodation Strategies

Problem: **Time Management**

- Divide large assignments into small tasks
- Use timers for ample time to conclude tasks
- Checklists
- Plan and structure transition/shifts in activities
- Provide organizer and/or use wall calendar to emphasize dates



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Accommodation Strategies

Problem: **Memory**

- Provide written instructions/checklists
- Allow use of recorder
- Allow additional training time/offer training refresher
- Provide minutes of meetings/trainings
- Provide verbal/pictorial cues
- Color coding schemes to prioritize in notebooks/planners/sticky notes



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Accommodation Strategies

Problem: **Concentration**

- Provide noise cancelling headset
- Hang sound absorption panels
- Provide white noise machine
- Relocate employee's office space from distraction
- Install cubicles
- Reduce clutter in employee's work environment
- Reorganize/restructure day for mental breaks



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Accommodation Strategies

Problem: **Organization/Prioritization**

- Color-code system for files to prioritize
- Use weekly chart to identify daily work activities
- Use job coach to teach/reinforce organization
- Assign mentor to employee
- Use electronic organizers
- Assign new project only after completion of current project
- Organize work space and schedule organization time



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Accommodation Strategies

Problem: **Multi-tasking**

- Separate tasks to be completed one at a time
- Provide individualized training to help employee learn multi-tasking
- Identify tasks that must be performed simultaneously versus those performed individually
- Provide specific feedback to help employee target areas of improvement
- Reduce distractions



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Accommodation Strategies

Problem: **Paperwork**

- Automate paperwork through electronic files
- Use speech recognition software for text entry
- Save time filling out paper forms by completing in advance using pre-filled forms
- Use checklists in place of writing text
- Provide letter/email templates
- Re-design commonly used forms with larger font, double spacing, etc.



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Accommodation Strategies

Problem: **Social Skills**

- Job coach to help understand social cues
- Identify areas of improvement for employee in fair/consistent manner
- Use of training videos to demonstrate appropriate behavior
- Encourage employees to minimize personal conversation
- Provide sensitivity training
- Allow employee time to work from home



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Accommodation Strategies

Problem: **Attendance**

- Flexible work environment-scheduling, break schedules, work from home
- Routine of putting and keeping things in place
- Prepare for next day's work night before
- Create checklist for yourself/others
- Sticky notes to remind before leaving house
- Turn off distractions - cell phones
- Set a timer/watch to pace yourself



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Conclusion

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