



The Disability Conundrum – How To Deal With Difficult Accommodation Issues

MidSouth Employment Law Conference

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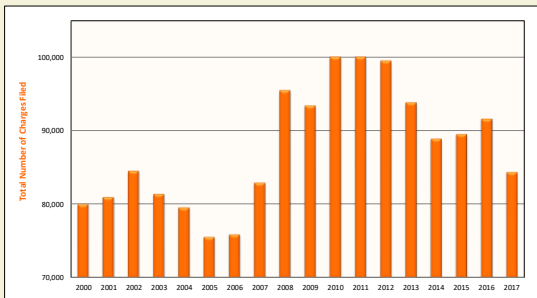
Knoxville Morristown Cookeville Nashville

Background Information



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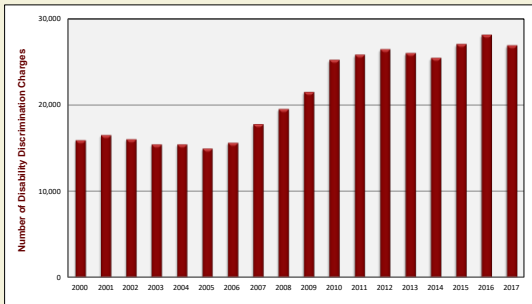
Total Number of Charges Filed



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Disability Discrimination



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Real Life Examples

- EE comments regarding building
- EE asleep onsite during break period
- EE request to intermittently miss work due to use of narcotic medications



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ADAAA - Definition

- A **physical or mental impairment** that substantially limits one or more major life activities;
- A **record of** such an impairment; or
- Being **regarded as** having such an impairment



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Disability – Prima Facie Case

- **Disabled** within the meaning of ADA;
- **Qualified**, with or without reasonable accommodation, to perform the essential functions of the position held or desired;
 - **Skills, training, education, certifications, etc.**
 - Can EE perform essential functions – with or without RA; and
- Has suffered an adverse **action because of his/her disability**



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Defenses

- ****Not Qualified**
- Undue Hardship
- Direct Threat



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EEOC Enforcement

- Generally not interested in arguments over whether EE is disabled;
- Instead, EEOC's focus is on whether ER engaged EE in Interactive Process
- And, basis for ER's decision regarding Reasonable Accommodation



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ADAAA Check-Down List

- Job Description
 - Essential Functions
 - Regular and predictable attendance
 - Ability to work in a cooperative manner with others



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ADAAA Check-Down List

- RA in current position
- RA in open position / same level
- RA in open position / lower level
- LOA **** (ADA and FMLA)

****Individual Assessment**



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Case Where ER Won

- **Huwe v. Brennan** (D. Minn. 2018)
- Christine Huwe developed depression & anxiety. She asked for a new supervisor as a reasonable accommodation under the ADA, but was turned down.



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Case Where ER Won

- She sued, alleging failure to accommodate under the ADA.
- The court dismissed the suit, **explaining that a different supervisor is not a reasonable accommodation**. Other courts agree.



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Case Where ER Won

- An employee may claim that the stress of having a difficult boss creates a mental disability such as major depression. She can ask for another supervisor as a reasonable accommodation—but employers don't have to grant it. Courts don't view such a change as a reasonable accommodation.



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Case where ER Won:

- In 2015, the U.S. 6th Circuit Court of Appeal (which includes Tennessee), held in **Yarberry v. Gregg Appliances, Inc.** that **an employer could terminate the employment of an employee who engaged in misconduct even if it was caused by a disability.**



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Case where ER Won

- In that case, the employer terminated the plaintiff's employment after he exhibited bizarre behavior over the course of two days...



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Case where ER Won:

- ...The plaintiff had an argument with a co-worker and engaged in other disruptive and bizarre behavior. After experiencing a mental breakdown, plaintiff was admitted to a psychiatric hospital.



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Case where ER Won:

- After the employer terminated plaintiff's employment, his doctor submitted a letter stating that plaintiff had experienced a manic episode stemming from his bipolar disorder.



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Case Where ER Won:

- The Sixth Circuit affirmed the district court's granting summary judgment to the employer on the plaintiff's ADA claim.



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Case Where ER Won

- The Sixth Circuit found that "Employers not only have latitude to discipline employees for threats of violence, stealing, or destruction of property, but also may prohibit inappropriate behavior between co-workers".



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Case where ER Won:

- Walz v. Ameriprise Fin., Inc., 779 F.3d 842, 31 A.D. Cas. 573 (8th Cir. 2015)
- Plaintiff fired for spate of erratic and disrespectful actions



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Case where ER Won:

- No disability claim since bipolar disorder wasn't apparent to employer and plaintiff failed to inform the company of her condition or the work limitations it caused her
- Ability to work well with others was essential job function.



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Case where ER Won:

- ***Stevens v. Rite Aid Corp.***, 851 F.3d 224, 33 A.D. Cas. 557 (2d Cir. 2017), *pet. for cert. docketed by* ___ U.S. ___ (Aug. 11, 2017)
- Award of \$2.6 million to terminated pharmacist who had a phobia that prevented him from giving injections reversed
- Giving injections was an essential function of job



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Case where ER Won:

- ...plaintiff suggested that a reasonable accommodation would be de-sensitization therapy – **employers are not obliged to offer medical treatment as a reasonable accommodation** –



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Case Where ER Won

- Plaintiff suggested that other employees could give the injections – **a reasonable accommodation “can never involve the elimination of an essential function,”** 851 F.3d at 230.



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Case where ER Won:

- ***Stern v. St. Anthony’s Health Ctr.***, 788 F.3d 276, 31 A.D. Cas. 1149 (7th Cir. 2015) - Terminated chief psychologist unfit for position-subordinates noted cognitive problems similar to Alzheimer’s – independent third party concluded that plaintiff “definitely had cognitive issues” typical of early Alzheimer’s – ...



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Case where ER Won:

- ...court bothered by termination without interactive process –
- However, plaintiff did not demonstrate how disabilities could be accommodated



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Case where ER Won:

- Not sufficient to suggest delegating essential job functions - summary judgment affirmed.



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Case Where ER Did Not Win

- *Hostettler v. College of Wooster* (6th Cir. 2018)
- Plaintiff, an HR Generalist at Wooster College, alleged that the college discriminated against her based on her pregnancy under the ADA.



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Case Where ER Did Not Win

- College terminated her employment when she asked to extend her part-time work schedule due to postpartum depression and separation anxiety.
- College explained that it terminated Plaintiff because a full-time presence at work was an essential function of her position.



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Case Where ER Did Not Win

- The 6th Circuit Court of Appeals found that the case should go to trial.
- **There was a dispute about whether working full-time was really an essential function of Plaintiff's position, and whether the college engaged in an interactive process on this issue after Plaintiff raised it.**



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Case Where ER Did Not Win

- The court stated, "[F]ull-time presence at work is not an essential function of a job solely because an employer says that it is **An employer cannot deny a modified work schedule as unreasonable unless the employer can show why the employee is needed on a full-time schedule.**"



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Case Where ER Did Not Win

- Lesson: Although some jobs, by their nature, do require full-time work, not every job does. This requires job-by-job analysis.



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Bottom Line

- **1) Unless you know or should know about an employee's disability, you don't have to treat the employee any differently with respect to discipline.**



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Bottom Line

- You should, however, document when you first learned of the disability and, in some instances, request an explanation from the employee if you reasonably suspect performance issues are caused by a disability.



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Bottom Line

- **2) You should engage in an interactive process with all employees, including disciplined employees, to identify reasonable accommodations that could prevent future misconduct.**



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Bottom Line

- 3) If you later become aware that misconduct was caused by a disability, you don't have to retract an otherwise proper disciplinary action.



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Bottom Line

- You still may move forward with discipline if the misconduct violates a job-related rule that applies to all employees, such as requirements that employees deal appropriately with customers or work cooperatively with others.



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Bottom Line

- 4) Document all stages of the process.



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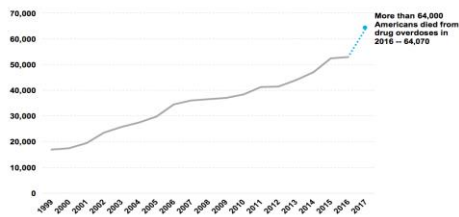


Opioid/Heroin Addiction Epidemic



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Total U.S. Drug Deaths

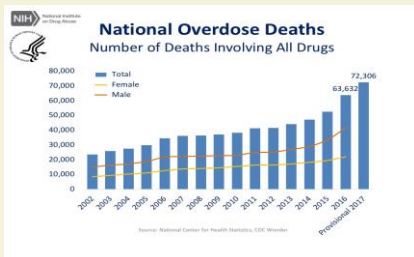


Total U.S. Drug Deaths* - More than 64,000 Americans died from drug overdoses in 2016, including illicit drugs and prescription opioids—nearly double in a decade. Source: CDC WONDER
* Provisional counts for 2016 are based on data available for analysis as of 8/2017. Counts through 2015 are based on final annual data.



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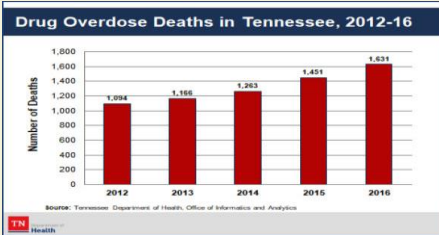
National Statistics



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TENNESSEE STATISTICS



**** The Tennessee Department of Health data shows 1,776 Tennesseans died from drug overdoses in 2017, the highest annual number of such deaths since reporting began.**



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VA's Change of Direction Regarding Opioids



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Drug Addiction and the ADA/FMLA

- **ADA:**
 - Disability does not include illegal drug use
 - Current use v. someone who is sober
- **FMLA: Need for LOA for treatment**



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Drug Addiction and the ADA/FMLA

29 CFR 1630.16(b) Regulation of alcohol and drugs. A covered Entity:

- (1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
- (2) May require that the employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace; and



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Drug Addiction and the ADA/FMLA

29 CFR 1630.16(b) Regulation of alcohol and drugs. A covered Entity:

- (May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism. 4)



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Drug Addiction and the ADA/FMLA

29 CFR 1630.16(c) Drug Testing

- (1) General Policy - For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination.



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Drug Addiction and the ADA/FMLA

29 CFR 1630.16(c) Drug Testing

- However, this part does not encourage, prohibit, or authorize a covered entity to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.



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Conclusion



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