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Navigating Difficult Disability Scenarios

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Presented by Fred J. Bissinger

Knoxville

Morristown

Cookeville

Nashville

I. Introduction



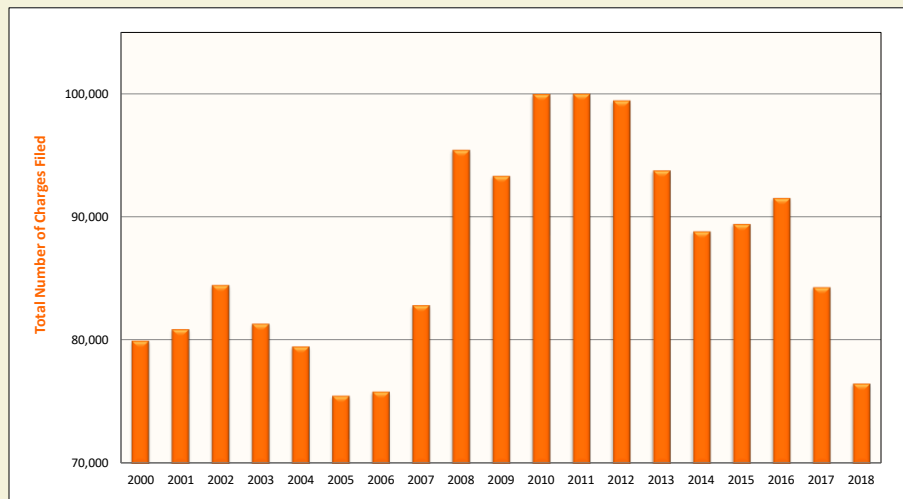


II. Disability Statistics



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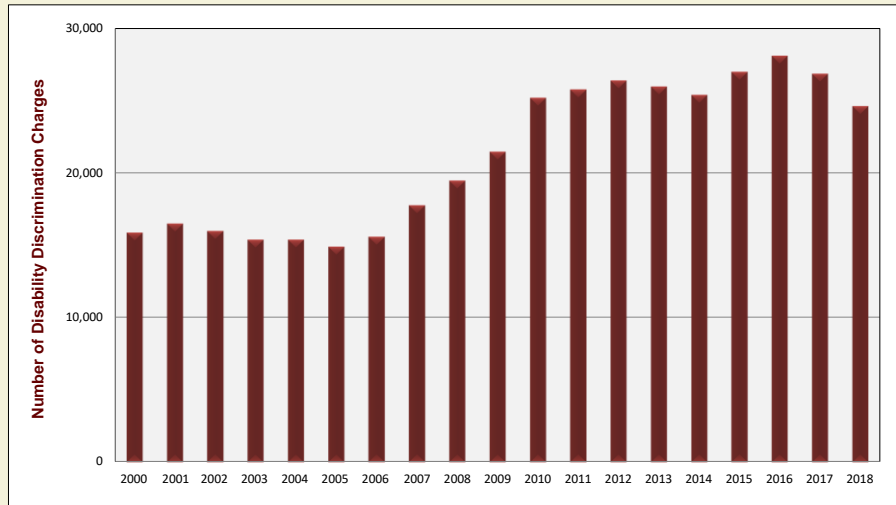
Total Number of Charges Filed



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Disability Discrimination



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III. Disability Fundamentals



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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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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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IV. Interesting Disability Cases



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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

- **Barlia v MWI Veterinary Supply, Inc.**
(6th Cir. 1.9.2018)
 - To prove prima facie case of disability discrimination, EE has to show:
 - Has a disability;
 - Otherwise qualified
 - Suffered an adverse employment action;
 - ER knew of or had reason to know of disability; and
 - Casual connection



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Case Where ER Won

- Medical documentation provided sufficient evidence that EE suffered from Hypothyroidism.
 - Condition is impairment
 - And, it substantially limits one or more “major life activities”
 - So, EE had a protected disability



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Case Where ER Won

- EE had legitimate, non-discriminatory reason for termination
 - Ongoing poor performance



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Case Where ER Won

- EE could not prove pre-text
 - **Honest belief rule:**
 - Reason not equal to pre-text unless it is both that the reason was false and discrimination was the real reason.
 - Even if reason is later shown to be mistaken, foolish, trivial, or baseless.



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Case Where ER Won

- EE could not prove disability retaliation
 - EE must show:
 - Engaged in protected activity
 - ER knew of activity
 - Adverse action
 - Casual connection



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Case Where ER Won

- EE argued nexus in time between protected activity and adverse action = casual connection
 - Nexus must be very close in time to = casual connection
 - 3 or 4 months – too long to establish casual connection



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Case Where ER Won

- **Booth v. Nissan N. America, Inc.**
(6th Cir. 8.17.2018)
 - Denial of transfer to another position at same level:
 - Not a viable failure to promote claim
 - Also, not a viable failure to accommodate claim



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Case Where ER Won

- Re-evaluation and re-configuring of job duties is not Harassment
- No work comp retaliatory discharge claim
 - Because Nissan did not terminate EE



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Case Where ER Won

- *Voss v. Housing Auth. of the city of Magnolia*
(8th Cir. 2.25.2018)
- Fact that Supervisor knew EE taking Hydrocodone not enough to establish “regarded as” claim.



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Case Where ER Won

- No evidence that ER requested that EE produce letter from Dr. because of concern disability prevented him from performing job.
- Only reasonable inference is that ER was concerned about whether medication interfered with EE's ability to safely perform job.



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



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Case Where ER Did Not Win

- **Mosby-Meachem v. MLG&W**
(6th Cir. 2.21.2018)
 - Is telecommuting a form of RA?
 - Prior Cases:
 - EEOC v. Ford Motor Co. (6th Cir. 2015)
 - Williams v. AT&T Mobility Services LLC (6th Cir. 2017)



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Case Where ER Did Not Win

- Questions for analysis:
 - Is the Job Description accurate?
 - When last updated
 - What duties does EE actually perform?
 - How often?
 - Is in-person attendance truly required
 - If yes, at all times or just certain times?
 - Have you conducted a valid “interactive process”?



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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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V. Wrap – Up Thoughts



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Threats of Violence



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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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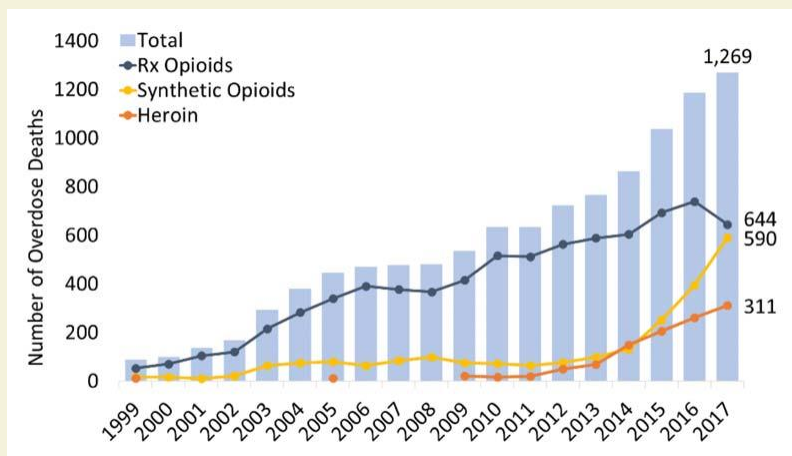


VI. Opioid/Heroin Addiction Epidemic



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Number of Overdose Deaths Involving Opioids in Tennessee



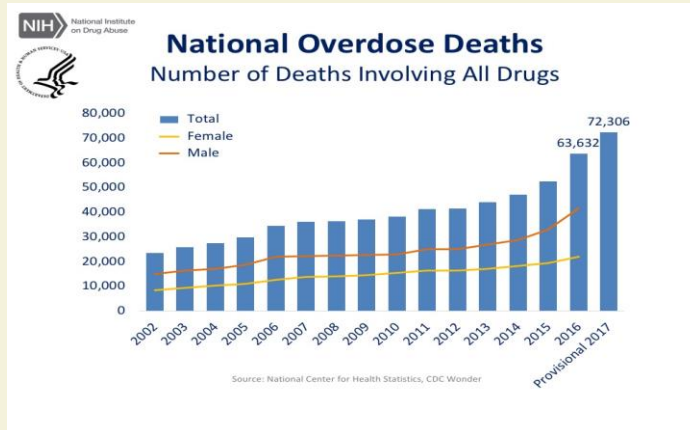
Source: : Centers for Disease Control and Prevention, National Center for Health Statistics, Multiple Cause of Death 1999-2017 on CDC WONDER Online Database, released December, 2018



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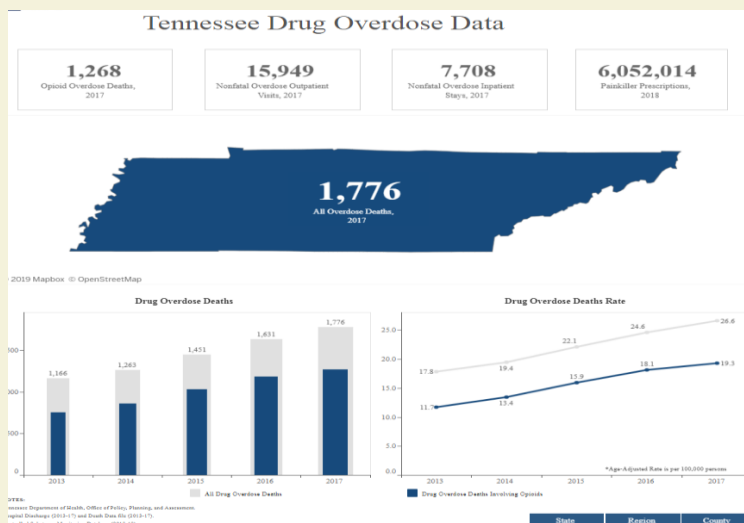


National Statistics



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TENNESSEE STATISTICS



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- Drug and Alcohol Addiction
- Protected Disabilities?



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VII. Conclusion



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