ADA UPDATE

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Brian East
Disability Rights Texas
beast@drtx.org

This paper represents a survey of ADA employment cases decided in the last year or so, in the state and federal courts of Texas, plus a few other published appellate cases from outside the Circuit. This paper is not intended to be all-inclusive, but instead focuses on cases reflecting legal trends, and those clarifying the law or providing useful examples. In general, this paper does not include pro se cases, procedural matters like exhaustion, or those portions of cases that address traditional pretext facts.

I. Definition of Disability

For many years the restrictive definition of disability was one of the greatest barriers to effective enforcement of Title I of the Americans with Disabilities Act. This was ostensibly fixed by the passage of the ADA Amendments Act of 2008 (ADAAA). But as reflected below, problems continue, and some courts still go astray even with very specific and targeted statutory language.

A. "Regarded as" disability

The case law suggests two recurring problems here. First, many courts continue to focus on whether the employer perceived the impairment to substantially limit a major life activity. Courts typically make this mistake by relying on pre-ADAAA case law. *See, e.g., Veit v. Lyondell Chem. Co.*, No. CV H-18-576, 2020 WL 1480011, at *10–11 (S.D. Tex. Feb. 25, 2020), *report and recommendation adopted*, 2020 WL 1650786 (S.D. Tex. Mar. 26, 2020); *Pierce v. Patient Support Servs., Inc.*, No. 5:18CV138-RWS-CMC, 2020 WL 2485920, at *24–25 (E.D. Tex. Feb. 3, 2020), *report and recommendation adopted*, 2020 WL 1482341 (E.D. Tex. Mar. 27, 2020).

But the ADA Amendments Act explicitly overruled this standard. Now, a regarded-as disability only requires evidence that an individual was subjected to an adverse action because of an actual or perceived impairment, whether or not the impairment limits or is perceived to limit a major life activity. 42 U.S.C. § 12102(3)(A); 29 C.F.R. §§ 1630.2(g)(1)(iii) and 1630.2(l)(1).

The fact is that under the plain language of the ADAAA, the real or perceived severity of an impairment is irrelevant to a regarded-as disability, as are the concepts of "substantial limitation" and "major life activities." 42 U.S.C. § 12102(3)(A); 29 C.F.R. §§ 1630.2(g)(1)(iii), 1630.2(l)(1); 1630.2(j)(2).

The second "regarded as" problem occurs when the plaintiff leaves out evidence that the employer knew or believed that the plaintiff had a physical or mental *impairment* (often a medical or psychological diagnosis of some type). This has been a particular problem in obesity cases, both pre- and post-ADAAA, in which the plaintiff does not put evidence that the obesity at issue was a "physiological" impairment. *See, e.g., Fabela v. Corpus Christi Indep. Sch. Dist*., No. 2:19-CV-387, 2020 WL 2576175, at *5 and n.5 (S.D. Tex. May 21, 2020) (dismissing complaint but allowing re-pleading, recognizing that obesity can be a disability).

Although the EEOC's regulatory definition of "impairment" remains unchanged after the ADAAA, the statute now requires that the terms used in the definition of disability be construed broadly. 42 U.S.C. § 12102(4)(A).

Though less frequently the focus of reported decisions, a perceived-disability claim also requires evidence that the adverse action was taken "because of" the impairment. 42 U.S.C. § 12102(3)(A). This can be shown in various ways. *See, e.g., Lewis v. City of Union City, Georgia*, 934 F.3d 1169, 1184 (11th Cir. 2019) (causation is also part of the prima facie case, and that evidence should also suffice to prove the causation prong of "regarded as"); *Baum v. Metro Restoration Services, Inc.*, 764 F. App'x 543, 547 (6th Cir. 2019) (although employer claimed that reason for termination was "excessive absenteeism and failure to perform his job," the plaintiff worked remotely while off, employer failed to explain which job duties he failed to perform, and its stated reason for firing was "health issues and doctor's appointments"). *But cf. Williams v. Waste Mgmt., Inc.*, 818 F. App'x 315, 325 (5th Cir. 2020) (although employer was aware of the employee's medical condition, there was no evidence that it discriminated against him on that basis).

Note that an impairment will not support a regarded-as claim if it is both "transitory"—i.e., lasting six months or less—and "minor." 42 U.S.C. § 12102(3)(B). Most courts hold that transitory and minor is a defense, and the burden of proving it is on the employer. *See, e.g., Burns v. Nielsen*, 456 F. Supp. 3d 807 (W.D. Tex. 2020) (no obligation for plaintiff to plead that condition was not transitory), *appeal filed*. But the Fifth Circuit has not yet decided that question. *Lyons v. Katy Indep. Sch. Dist*., 964 F.3d 298, 302–03 and n.14 (5th Cir. 2020). Even if it is a defense, the evidence may establish it as a matter of law. *Id*. at 303 (plaintiff stated that she was off work for 2 weeks, and had restrictions for 6–8 after surgery, and there were no facts offered as to whether or not it was minor).

One last point on "regarded as." Some courts have also held that the impairment must be perceived as currently existing, rather than something the individual may develop or be exposed to in the future. *See, e.g., Shell v. BNSF Railway Co*., 941 F.3d 331 (7th Cir. 2019); *Equal Employment Opportunity Comm'n v. STME, LLC*, 938 F.3d 1305 (11th Cir. 2019). This may be relevant if an employee expresses fear of acquiring COVID-19. But those cases do not foreclose a claim based on the employer's belief that a *current* condition might result in future harm. *See, e.g., Lewis v. City of Union City, Georgia*, 934 F.3d 1169, 1181–82 (11th Cir. 2019) (employer may be liable if it thought that perceived heart condition could result in a future incident of danger at work); *Robson v. Union Pacific Railroad Co*., No. 4:17-cv-00416-BLW, 2019 WL 6833661, at *4–5 (D. Idaho Dec. 13, 2019) (brain injury creating seizure risk).

B. "Actual" disability

Although "regarded as" disability is generally the easiest way to prove disability, it is not enough to support a failure-to-accommodate claim; those claims require proof of an "actual" or a "record of" disability. 42 U.S.C. § 12201(h); *Austgen v. Allied Barton Sec. Servs., L.L.C.*, 815 F. App'x 772, 775 (5th Cir. 2020), *citing Amedee v. Shell Chem., L.P.*, 953 F.3d 831, 837 and n.9 (5th Cir. 2020).

The ADAAA makes proving an "actual "disability a lot easier, but the plaintiff still has the burden of (a) proving an impairment, (b) identifying the major life activity impacted, and (c) establishing a substantial limitation in at least one such activity. On the other hand, disability is now construed as broadly as the words allow, 42 U.S.C. § 12102(4)(A); assessed without regard to any mitigating measures, 42 U.S.C. § 12102(4)(E); in light of a new group of major life activities related to biological functioning, 42 U.S.C. § 12102(2)(B); and, for conditions that are episodic or in remission, in the condition's "active" state. 42 U.S.C. § 12102(4)(D).

Plaintiffs should take advantage of these changes by explicitly pointing them out, and developing evidence consistent with them. Some of the problem cases may reflect the lack of adequate evidence from the plaintiff. *See, e.g., Lumar v. Monsanto Co.*, 795 F. App'x 293, 294 (5th Cir. 2020) (Mem.) ("[E]ven assuming that Lumar's obesity is a physical impairment, there is no evidence that his weight limits his life activities in any way, and Lumar testified emphatically that it does not."); *Spindle v. CKJ Trucking, LP*, No. 4:18-CV-818, 2020 WL 1283519, at *3 (E.D. Tex. Mar. 18, 2020) (conclusory allegation of shortness of breath, without more, was insufficient; plaintiff failed to provide any examples of his shortness of breath or explain how it substantially limits him).

In *Rodriguez v. Dollar Gen. Corp.*, No. SA-18-CV-00713-JKP, 2020 WL 4434932, at *4–5 (W.D. Tex. July 30, 2020), the court found sufficient evidence that diabetes was an actual disability, because of the foot pain it caused. In another example, the court found sufficient evidence of an actual disability in *Garcia v. City of Amarillo, Texas*, No. 2:18-CV-95-Z-BR, 2020 WL 4208060, at *8 (N.D. Tex. July 22, 2020). The court recognized that the plaintiff's hearing had to be considered without regard to the ameliorative effects of mitigating measures, namely his hearing aids, and it also relied in the fact that the plaintiff had a permanent 33% hearing loss.

Whether expert evidence is required—to prove an impairment, to show the causal connection between the impairment and the manifestations, or to support a substantial limitation in everyday activities—may depend on whether a lay jury is capable of making such an assessment without it. *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 996–99 (10th Cir. 2019) (district court erred in requiring expert testimony here, because a back injury may not be beyond the realm of common experience). On the other hand, plaintiffs may not be able to rely on diagnoses that they only know through inadmissible hearsay. *Spindle v. CKJ Trucking, LP*, No. 4:18-CV-818, 2020 WL 1283519, at *2–3 (E.D. Tex. Mar. 18, 2020).

Note that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. 42 U.S.C. § 12102(4)(D).

Courts also err when they cite pre-ADAAA regulations or case law regarding temporary conditions. These courts failed to acknowledge the EEOC's ADAAA guidance, and the case law, indicating that temporary impairments lasting less than six months may still be substantially limiting. *Hardy v. Oprex Surgery (Baytown) L.P.*, No. CV H-18-3869, 2020 WL 4756868, at *5 (S.D. Tex. Aug. 14, 2020) ("But Altus Baytown argues Hardy's impairment was 'temporary,' and does not qualify as a disability. Yet this question must be resolved by a jury, because '[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.'"), *citing* 29 C.F.R. § 1630.2(j)(1)(ix).

As a general matter, litigants and courts are simply off the mark when they cite pre-ADAAA case law for the definition of disability. *Morrissey v. Laurel Health Care Co.*, 946 F.3d 292, 299 (6th Cir. 2019) ("Coldwater argues that pre-2008 cases are still good law in regard to determining whether a plaintiff was disabled. They are not."); *Burns v. Nielsen*, 456 F. Supp. 3d 807 (W.D. Tex. 2020), *appeal filed*.

The plaintiff should normally identify the specific major life activities at issue. Failure to do so may lead to an assumption that the activity is "working," which remains the activity of last resort, and one requiring extra proof. Litigants and courts should also remember that the ADA lists a new class of major life activities, described in terms of bodily functions. 42 U.S.C. § 12102(2)(B); 29 C.F.R. § 1630.2(i)(1)(ii) (ADA Title I). *See also* 28 C.F.R. § 35.108(c)(1)(ii) (ADA Title II); § 36.105(c)(1)(ii) (ADA Title III).

Finally, some litigants and courts err by relying on the plaintiff's ability to work or do the job as evidence that there was no disability. But that fact is irrelevant. It is easily possible for a person to have a disability even if the condition does not impact the ability to perform the job. *See, e.g.*, *Garcia v. City of Amarillo, Texas*, No. 2:18-CV-95-Z-BR, 2020 WL 4208060, at *7–8 (N.D. Tex. July 22, 2020) (relevant major life activity was hearing, not working).

II. "Qualified"

As predicted, after the ADA Amendments Act, it appears that most ADA cases are not resolved on the issue of disability, but instead on the question of whether or not the plaintiff is "qualified." An ADA plaintiff is "qualified" if he or she is able to perform the essential job functions, with or without a reasonable accommodation. 42 U.S.C. § 12111(8). The assessment is generally made at the time of the adverse action. *Clark v. Champion Nat'l Sec., Inc.*, 952 F.3d 570, 582 (5th Cir. 2020), *pet. for cert. filed*.

A. Identifying essential functions

Identifying the essential functions of the job can be critical, because a person is only qualified if he or she can perform those functions, and an accommodation does not have to *permanently* excuse the performance of functions that are essential. "A job function is essential if its removal would fundamentally alter the position. Put another way, essential functions are the core job duties, not the marginal ones." *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 854 (6th Cir. 2018), *citing* 29 C.F.R. § 1630.2(n)(*1*) (citations and internal quotations omitted).

Determining what functions are essential is "a fact-intensive analysis." *Lewis v. City of Union City, Georgia*, 934 F.3d 1169, 1182 (11th Cir. 2019). The ADA regulations list various kinds of evidence. 29 C.F.R. § 1630.2(n)(3). Although courts give deference to the employer's judgment, such deference is not absolute. *Garcia v. City of Amarillo, Texas*, No. 2:18-CV-95-Z-BR, 2020 WL 4208060, at *9 (N.D. Tex. July 22, 2020) ("[C]ourts should not give blind deference to an employer's judgment, but should instead evaluate the employer's words alongside its policies and practices."), *quoting Credeur v. Louisiana Through Office of Attorney Gen.*, 860 F.3d 785, 794 (5th Cir. 2017).

Although fact intensive, the question can still be answered as a matter of law if the evidence is one-sided enough. In *McNeil v. Union Pac. R.R. Co.*, 936 F.3d 786, 790–91 (8th Cir. 2019), the court affirmed summary judgment holding that the fact that the employer excused the plaintiff and others from mandatory overtime *for a temporary period* did not mean that it was not an essential function of the job.

On the other hand, various kinds of evidence can suffice to dispute the employer's assertion of essentiality. For example, the employer's job description may be open to challenge. In *Nall v. BNSF Railway Company*, 917 F.3d 335, 343 (5th Cir. 2019) (5th Cir. 2019), the Fifth Circuit relied on the original 'medical status form' that the employer required be given to the plaintiff's doctor (which "did not include any reference to quick movements, balance, or steadiness"), as well as a manager's testimony that working quickly was not essential to the positions of conductor, switchman, or brakeman. The court also noted that pre-dispute documents may be given more weight than post-dispute job descriptions. *Id*. at 343–44. *See also Lewis, supra*, 934 F.3d at 1182–83 (11th Cir. 2019) ("significant evidence" that exposure to OC spray and Taser shocks were not essential functions of the job of police detective; job description did not mention it; officers were previously permitted a choice of what nonlethal weapon to carry; the manufacturer did not require trainees to receive a shock in order to become certified in Taser use); *Siewertsen v. Worthington Indus., Inc*., 783 F. App'x 563, 571 (6th Cir. 2019) (deaf plaintiff had operated forklifts and other machinery for 10 years without any accidents, and was recently recertified); *Noel v. Wal-Mart Stores, E. LP*, 764 F. App'x 17, 20–22 (2d Cir. 2019) (conflicting job descriptions appeared to create a fact issue).

Courts have found factual disputes in various other contexts. *See, e.g., Equal Employment Opportunity Comm'n v. McLeod Health, Inc*., 914 F.3d 876, 881–82 (4th Cir. 2019) (evidence that traveling around campus was a preference rather than essential).

B. Distinguishing between essential functions and legitimate non-discriminatory reasons

It is important to distinguish between essential job functions and legitimate non-discriminatory reasons. For example, in *Garcia v. City of Amarillo, Texas*, No. 2:18-CV-95-Z-BR, 2020 WL 4208060, at *9–10 (N.D. Tex. July 22, 2020), the employer alleged that the plaintiff had refused to sign an acknowledgment of receipt of the packet of employment policies. The court correctly held that this was not an essential function of the job, although it (and other actions) could present a legitimate, non-discriminatory reason for the terminating the plaintiff. Similarly, in *Sandel-Garza v. BBVA Compass Bancshares, Inc*., No. 5:18-CV-128, 2020 WL 2309828 (S.D.

Tex. May 7, 2020), the court held that the question of whether the plaintiff was "qualified" did not depend on complying with the company's deadline for returning a doctor's note. A violation of policy could be a legitimate reason to terminate, but it is irrelevant to the question of whether she was medically able to work. *Id*. at *8.

C. Failure-to-accommodate claims

Federal law defines actionable discrimination as including the failure to make reasonable accommodation to limitations caused by an "actual" or "record of" disability. But accommodation may not be required if there is no showing that the limitations are in fact related to the disability. *See Youngman v. Peoria Cty.*, 947 F.3d 1037, 1042 (7th Cir. 2020) (no evidence that motion sickness for which plaintiff sought accommodation was related to his hypothyroidism, and his own expert rejected the theory).

1. Making a request

The plaintiff must usually request an accommodation to commence an interactive process. *See, e.g., Clark v. Champion Nat'l Sec., Inc*., 952 F.3d 570, 587 (5th Cir. 2020) (plaintiff failed to pinpoint any accommodation requests that were not granted, and made no accommodation request related to the limitations the subject of the lawsuit), *pet. for cert. filed*.

And most courts to consider the issue hold that the employee does not have to use a particular employer form in requesting an accommodation. *See, e.g.*, Sandel-Garza v. BBVA Compass Bancshares, Inc., No. 5:18-CV-128, 2020 WL 2309828, at *12 (S.D. Tex. May 7, 2020) (employer argued that the plaintiff did not properly request an accommodation because she failed to submit her doctor's corrected paperwork by January 5, but the court found that argument "conflates its company policies with federal discrimination law. A request need not take any particular form so long as the employee explains that the accommodation is "for a medical condition-related reason."); *Texas Dep't of Transportation v. Lara*, 577 S.W.3d 641, 648 (Tex. App.—Austin May 9, 2019, pet. filed).

Moreover, an accommodation request can be made by another individual on behalf of the employee. *Iqbal v. City of Pasadena*, No. CV H-19-3608, 2020 WL 411107, at *4 (S.D. Tex. Jan. 24, 2020) (request by employee's father).

Nor are magic words required. *Garrison v. Dolgencorp, LLC*, 939 F.3d 937, 941 (8th Cir. Oct. 3, 2019) ("Garrison repeatedly told Bell that she wanted to take a leave of absence, even if she never referenced the ADA. . . . To be sure, Garrison never used the word accommodation or asked about anything other than leave. But our analysis "is not limited to the precise words spoken by the employee at the time of the request," and an employee need not even suggest what accommodation might be appropriate to have an actionable claim. Here, Bell knew that Garrison suffered from various medical conditions, that those conditions had been worsening and had required regular doctor visits, and that she had repeatedly inquired about a leave of absence to deal with them.") (citation omitted).

2. Timing of the request

The courts are confused as to how to respond to instances of perceived misconduct or poor performance, when those are because of the disability. A full analysis of this issue is beyond the scope of this paper, but one commonly followed "rule" is that an accommodation request that comes after the employer's decision to terminate is too late. Of course, there may be a factual dispute whether the request was made before or after the firing decision. Also, an employer is not supposed to ignore an accommodation request, rush to terminate, and then claim that the interactive process would have been futile. *Iqbal v. City of Pasadena*, No. CV H-19-3608, 2020 WL 411107, at *4 (S.D. Tex. Jan. 24, 2020).

3. Interactive process

"Once an employee makes such a request, however, the employer is obligated by law to engage in an interactive process: a meaningful dialogue with the employee to find the best means of accommodating that disability." *Rodriguez v. Dollar Gen. Corp.*, No. SA-18-CV-00713-JKP, 2020 WL 4434932, at *6 (W.D. Tex. July 30, 2020), *quoting E.E.O.C. v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009). See also 29 C.F.R. § 1630.2(o)(3). "[A]n employer cannot be found to have violated the ADA when responsibility for the breakdown of the 'informal interactive process' is traceable to the employee and not the employer." *Rodriguez v. Dollar Gen. Cor*p., No. SA-18-CV-00713-JKP, 2020 WL 4434932, at *6 (W.D. Tex. July 30, 2020), *quoting Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 224 (5th Cir. 2011). *See also Sandel-Garza v. BBVA Compass Bancshares, Inc.*, No. 5:18-CV-128, 2020 WL 2309828, at *12 (S.D. Tex. May 7, 2020).

For example, a reasonable jury could find that the employer "stymie[d] the interactive process . . . by preemptively terminating the employee before an accommodation [could] be considered." *Sandel-Garcia, supra*, 2020 WL 2309828, at *13. In other cases, courts have upheld a jury verdict for the plaintiff in part because of miscommunication that the employer could easily have resolved. *See, e.g., Garrison v. Dolgencorp, LLC*, 939 F.3d 937, 942 (8th Cir. 2019) (responding to repeated requests for leave by simply referring the plaintiff to the policy handbook is insufficient).

Sometimes there is a factual dispute about what steps the employer took in response to an accommodation request. *See Johns v. Brennan*, 761 F. App'x 742, 746–47 (9th Cir. 2019). For example, in *Morrissey v. Laurel Health Care Co.*, 946 F.3d 292, 302 (6th Cir. 2019), the court found sufficient evidence that, among other things, the employer "had a blanket policy of denying accommodations for all non-work related disabilities," and forced her to work beyond her medical restrictions.

On the other hand, the employee must also participate in the interactive process, and the employer will not be liable if the plaintiff is at fault for the breakdown of the process. *See, e.g.*, *Hoskins v. GE Aviation*, 803 F. App'x 740, 745–46 (5th Cir. 2020), *cert. denied*, No. 19-8369, ___ S. Ct. ___, 2020 WL 3405928 (June 22, 2020) (note from plaintiff's doctor was unclear as to how much time off was required, and although the employer repeatedly requested adequate documentation, the plaintiff failed to provide it); *McNeil v. Union Pac. R.R. Co.*, 936 F.3d 786,

791 (8th Cir. 2019) ("But McNeil knew that the company believed her restriction was a long-term restriction, and she never arranged for a follow-up communication from her doctor.").

Remember, too, that courts have generally held that the employer's failure to engage in the interactive process is not a claim by itself. For example, such a failure generally does not matter if the employer provides a satisfactory accommodation even without the interactive process. *Austgen v. Allied Barton Sec. Servs., L.L.C.*, 815 F. App'x 772, 776 (5th Cir. 2020).

Note, too, that accommodations are not just to assist in performing job functions; they may also be required to ensure that an employee with a disability can enjoy "equal benefits and privileges" of employment. 29 C.F.R. § 1630.2(o)(1). Among other things, this could include providing a means to overcome communication barriers during disciplinary investigation or meeting. *Iqbal v. City of Pasadena*, No. CV H-19-3608, 2020 WL 411107, at *4 (S.D. Tex. Jan. 24, 2020) (allowing family member or other representative to assist employee with known cognitive and social limitations).

4. Proof that accommodation was possible, and would've worked

In *Rodriguez v. Dollar Gen. Corp.*, No. SA-18-CV-00713-JKP, 2020 WL 4434932, at *5 (W.D. Tex. July 30, 2020), the court found sufficient evidence that plaintiff's proposed accommodation—15-minute breaks every two hours to rest his feet—could have worked through a combination of an adjusted break schedule and the use of a scooter.

See also Garrison v. Dolgencorp, LLC, 939 F.3d 937, 942 (8th Cir. 2019) (sufficient evidence that medical leave was reasonable because supervisor testified leave could have been provided if required by the FMLA).[1]

Of course, not all accommodations will work. In *Gonzalez v. United Parcel Service*, 777 F. App'x 735, 738 (5th Cir. 2019), the court found that the proposed accommodations either were not required—creating a new position or making a full-time job part-time—or would not have addressed the plaintiff's limitations, because an ergonomic work station and additional breaks still would not have allowed plaintiff to work full time. And in *Gardea v. JBS USA, LLC*, 915 F.3d 537, 542 (8th Cir. 2019), as noted above, the court found that the proposed lift-assisting devices would not have worked because of the lack of overhead anchor points and the tight quarters involved.

Although the general rule is that excusing the performance of an essential function is not a reasonable accommodation, remember that this rule applies to *permanent* changes. By contrast, excusing an essential function *temporarily* may be a reasonable accommodation (just like a reasonable period of leave is, even though it means excusing the performance of *all* functions for a time).

[1] In *Garrison*, the plaintiff was not entitled to FMLA leave because she failed to submit proper documentation.

III. Types of Accommodations

A. Reasonable periods of leave

1. Leave Approved by TPA

In *Sandel-Garza v. BBVA Compass Bancshares, Inc*., No. 5:18-CV-128, 2020 WL 2309828 (S.D. Tex. May 7, 2020), the employer argued that the plaintiff's 8-month leave period violated its policy against being on leave for more than 180 days. But not only was the company unable to produce anything supporting such a policy, the evidence reflected that the third-party benefits or leave administrator ADP had approved the leave. "While ADP may be a separate company, the record shows that if a leave request is approved by ADP, it is also approved by BBVA, and BBVA employees can rely on a decision by ADP just the same as if it came directly from the bank. It is ironic that BBVA tries to disclaim responsibility for ADP's retroactive approval, given that it relies on ADP's preliminary denial to justify Plaintiff's termination." *Id*. at *10 (internal quotes omitted).

2. Indefinite leave

Courts have repeatedly held that indefinite leave is not a reasonable accommodation, and thus employers do not have to grant it.

In some cases, courts have rejected the employer's argument that the request for leave was indefinite. *See, e.g., Ruiz v. ParadigmWorks Grp., Inc*., 787 F. App'x 384, 386 (9th Cir. 2019) (doctor provided finite estimate of five weeks, and mere fact that a medical leave has been repeatedly extended does not necessarily establish that it would continue indefinitely; further, even if Ruiz ultimately needed to extend her medical leave longer, a broken ankle is the type of injury from which people generally heal in the foreseeable future).

3. Forced leave

It is also important to note that forcing a period of leave may be a failure to accommodate, when a reasonable accommodation exists that would allow the employee to continue working, without an undue hardship to the employer. *See Rodriguez v. Dollar Gen. Corp*., No. SA-18-CV-00713-JKP, 2020 WL 4434932, at *7–8 (W.D. Tex. July 30, 2020) (rather than accommodating worker by allowing the use of a scooter, the employer first said they would not accommodate him and would let him go, then it required that he use up his personal leave, go on short-term disability, and apply for LTD before ultimately firing him). On the other hand, placing an employee on temporary leave for a few weeks while awaiting his doctor's recommendations on his ability to work may be a reasonable accommodation, if its response was timely and it ultimately granted the requested accommodation of reassignment. *Austgen v. Allied Barton Sec. Servs., L.L.C.*, 815 F. App'x 772, 775 (5th Cir. 2020).

B. Teleworking

The most important lesson from most telework cases, both inside and outside this circuit, is that they are fact-specific, and courts have reached contrary results. *Compare Yochim v. Carson*, 935 F.3d 586, 591–93 (7th Cir. 2019), and *Bruncкhorst v. City of Oak Park Heights*, 914 F.3d 1177, 1182–83 (8th Cir. 2019) (no showing that telework was required, and certain physical tasks could only be performed in the office), with *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595 (6th Cir. 2018) (sufficient evidence that attorney could have been performed job remotely, based on testimony of several co-workers and also on the tasks that the plaintiff actually performed).

A word about "attendance" as an essential function. Courts continue to repeat the statement that attendance is an essential function of "all," "almost all," or "most" jobs. But this seems more "sound bite" than legal analysis. There is typically neither a need, nor the supporting evidence, to make such a broad statement. And it is inconsistent with the recognized accommodations of medical leave or teleworking. The origin of this statement in many circuits is case law concerning indefinite leave, and it may make sense in that context, but courts have drifted from that application.

C. Reassignment

Although the employee need not know of a vacant position when making an initial request for reassignment, once the matter is in litigation, the plaintiff normally has to burden of identifying a vacant, non-promotion position that the plaintiff was qualified for. *Gonzalez v. United Parcel Service*, 777 F. App'x 735, 738 (5th Cir. 2019). *See also McGuire v. United Parcel Serv., Inc.*, 763 F. App'x 890, 897 (11th Cir. 2019) ("there were no full-time positions available on which he could bid based on seniority"); *Smith v. Sweeny Indep. Sch. Dist.*, No. CV G-17-0123, 2018 WL 5437762, at *8 (S.D. Tex. Oct. 29, 2018) (no showing that reassignment position was available).

The Circuits are split on whether reassignment requires the employer to place the plaintiff in the vacant (or soon to be vacant) position (which is the EEOC's position), or just means that the plaintiff can compete for the job along with all others (and the employer can choose the person it thinks 'best qualified'). The issue is currently before the Fifth Circuit in *Equal Employment Opportunity Comm'n v. Methodist Hosps. of Dallas*, 218 F. Supp. 3d 495 (N.D. Tex. 2016), *appeal pending*, No. 17-10539 (5th Cir.).

D. Accommodations frequently found unreasonable

There are certain accommodations that the weight of authority finds unreasonable, and therefore courts generally will not require. They include indefinite leave, but also include converting a full-time job into a part-time one, or creating a new position. *Gonzalez v. United Parcel Service*, 777 F. App'x 735, 738 (5th Cir. 2019) ("His request for part-time work would require UPS to essentially create a new position for him. That is not a reasonable accommodation required by the ADA."). *But cf. Rodriguez v. Dollar Gen. Corp.*, No. SA-18-CV-00713-JKP, 2020 WL 4434932, at *7 (W.D. Tex. July 30, 2020) (employer claimed that the plaintiff sought to convert his position to a desk job, but there was no evidence of that).

Likewise, forgiveness of prior misconduct otherwise warranting termination is generally not a reasonable accommodation. *Iqbal v. City of Pasadena*, No. CV H-19-3608, 2020 WL 411107, at *3 (S.D. Tex. Jan. 24, 2020). And reasonable or not, some accommodations could pose an "undue hardship." *See* Part XII below. Note, however, that the employer's financial costs may be avoidable if the accommodation can be provided by TWC's Vocational Rehabilitation Services.[2] Such costs may also be offset by the federal tax credit and tax deduction available to businesses that provide workplace accommodations.[3]

IV. "Because of" Disability in Disparate-Treatment Cases

The typical disparate-treatment case—in which the plaintiff must show that employer too adverse action because of disability—requires proof that the employer knew about the disability. *See Lee v. Accenture LLP*, No. CV H-18-2422, 2019 WL 4694144, at *2 (S.D. Tex. Sept. 25, 2019) (no showing that decisionmaker knew that plaintiff was HIV-positive, or that he had read the application on which it was disclosed).

But that does not require a detailed understanding. *See, e.g., Garrison v. Dolgencorp, LLC*, 939 F.3d 937, 941 (8th Cir. 2019) (sufficient evidence that employer knew of anxiety and depression, and that plaintiff was seeing a doctor and was requesting leave); *Caplan v. Fluor Enterprises, Inc.*, No. CV H-17-2083, 2019 WL 1512395, at *7 (S.D. Tex. Apr. 8, 2019) (sufficient that decision-makers were aware that plaintiff had a medical condition that necessitated FMLA leave, STD, testing, and hospitalization).

Note that current ADA law in the Fifth Circuit only requires proof that disability was a motivating factor. But other circuits disagree, requiring "but for" cause, *e.g., Murray v. Mayo Clinic*, 934 F.3d 1101 (9th Cir. 2019) (collecting case law and overruling earlier circuit precedent), so the Fifth Circuit standard could change.[4] The Supreme Court has recently explained the "but for" standard, clarifying that it is not an onerous burden. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1739–40 (2020)

On the other hand, the Fifth Circuit has held that sole cause is required for claims brought under Sec. 504, and the circuits are split on this as well. *See Natofsky v. City of New York*, 921 F.3d 337, 344–46 (2d Cir. 2019) (holding that although sole cause is required for some Sec. 504 cases, only but-for cause is required for Sec. 504 *employment* claims, as a result of 29 U.S.C. § 794(d)).

V. Medical Exams

The ADA rules regarding medical exams depend on the context. Prior to an offer of employment, a prospective employer may not ask a job applicant to undergo a medical

[2] For more information about the vocational-rehabilitation services available from the state, see https://twc.texas.gov/jobseekers/vocational-rehabilitation-adults.

[3] For more information about the available tax advantages, see https://www.ada.gov/taxcred.htm.

[4] Note that Sec. 501 does not apply to uniformed members of the military. 29 C.F.R. §§ 1614.103(d)(1). But such individuals may have some protection from disability discrimination under the Constitution or under the federal Administrative Procedure Act. *See Roe v. Dep't of Def.*, 947 F.3d 207 (4th Cir. 2020) (not reaching the Equal Protection claim but granting preliminary injunctive relief under the APA to service members with HIV).

examination or make inquiries as to whether he or she is an individual with a disability. On the other hand, physical fitness tests are permitted but to lawfully screen out an applicant, such a test must be job-related for the position in question, and is consistent with business necessity. *Sorber v. Sec. Walls, LLC*, No. A-18-CV-1088-SH, 2020 WL 2850227, at *7 (W.D. Tex. June 1, 2020). There may be a fact issue whether an exam, or a portion of an exam, was "medical" or "physical." *Id*. at *9–10.

Once a conditional offer of employment has been made, employers may require medical exams as long as all entering employees are subject to them equally, and again, if a medical examination screens out an individual with a disability, the employer must show that the screening criteria is job-related and consistent with business necessity. *Id*. at *8. Sometimes there is a dispute as to whether a conditional offer has been made. *Id*. at *9 (court held that just because the plaintiffs knew of their right of refusal, that did not equate to a conditional offer, and any alleged oral conditional offers were not "real" for the purposes of the ADA because Defendant had not evaluated all other hiring information and had not completed all non-medical portions of the application process).

Finally, current employees can only be subjected to medical inquiries and exams if they are job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A); *West v. Union Pac. R.R. Co.*, No. 4:18-CV-3340, 2020 WL 1446908, at *6 (S.D. Tex. Mar. 24, 2020); *Burns v. Nielsen*, 456 F. Supp. 3d 807 (W.D. Tex. 2020), *appeal filed*. The "business necessity" defense may be satisfied, among other ways, by the employer's showing that it had reliable information giving rise to a reasonable belief that the employee's ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition. This often presents a question of fact. *West*, *supra*, 2020 WL 1446908, at *7; *Burns*, *supra* (citing evidence that safety concerns regarding employee's tower climbing were manufactured, or had no basis in fact).

Note, too, that a plaintiff need not have a disability to bring a claim based on an unlawful medical examination or disability inquiry, but must be able to show an injury. *Sorber*, *supra*, 2020 WL 2850227, at *8; *Burns*, *supra*.

VI. Associational Claims

The ADA expressly provides protection against discrimination because an employee has an association with a person with a disability. 42 U.S.C. § 12112(b)(4).[5] Note, however, that this does not require an employer to provide reasonable accommodations. *Gomez v. Office Ally, Inc*., No. SA-18-CV-1101-XR, 2019 WL 2774367, at *7 (W.D. Tex. July 1, 2019) (same result under state law). On the other hand, just because an employee seeks an accommodation for a family member (which is not required) does not mean that the employer is free to fire the person; there may still be protection from disparate treatment. *See Kelleher v. Fred A. Cook, Inc*., 939 F.3d 465,

[5] Despite the clarity of the statutory language, one unpublished opinion states that "[t]he Fifth Circuit has not explicitly recognized a cause of action for discrimination based on association with a handicapped individual, nor ha[s it] described what such a claim requires." *Grimes v. Wal–Mart Stores Tex., LLC*, 505 F. App'x 376, 380 n.1 (5th Cir. 2013) (per curiam). But Congress has recognized the cause of action, so it is hard to imagine how the courts can avoid doing so.

469–70 (2d Cir. 2019) (motion to dismiss denied; employee who sought leave had missed one day, and was 15-minutes late on another, but that may have been common workplace behavior).

Also, although one federal district court has held that there is no similar association claim under the Texas antidiscrimination law, *Gomez, supra*, 2019 WL 2774367, at *8, the Fifth Circuit affirmed on other grounds. *Gomez v. Office Ally, Inc.*, 796 F. App'x 224, 225 (5th Cir. 2020) ("Assuming arguendo that an associational disability discrimination claim exists under Texas law, Gomez has not produced enough evidence to allow it to reach a jury.").

VII. Harassment Claims

The Fifth Circuit and other appellate courts have recognized claims of disability-based harassment, and the analysis generally tracks that for Title VII claims. *See, e.g., Clark v. Champion Nat'l Sec., Inc.*, 952 F.3d 570, 586 (5th Cir. 2020) ("Even assuming that the alleged harassment was based on Clark's disability, it was not severe or pervasive and did not create an abusive working environment."), *pet. for cert. filed*; *Burns v. Nielsen*, 456 F. Supp. 3d 807 (W.D. Tex. 2020) (despite being based on disability and resulting in lost pay, the actions complained of—including possibly improper medical exams and unsupported safety fears—were insufficient to support a harassment claim), *appeal filed*.

VIII. Using *McDonnell Douglas* Pretext Analysis Inappropriately

Most of the circuits recognize that the *McDonnell Douglas* formula is inapplicable to claims for failure to accommodate. Instead, a plaintiff must prove the following statutory elements to prevail in a failure-to-accommodate claim: (1) the plaintiff is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered employer; and (3) the employer failed to make 'reasonable accommodations' for such known limitations. *Amedee v. Shell Chem., L.P.*, 953 F.3d 831, 837 (5th Cir. 2020); *Hardy v. Oprex Surgery (Baytown) L.P.*, No. CV H-18-3869, 2020 WL 4756868, at *5 (S.D. Tex. Aug. 14, 2020).

McDonnell Douglas is applicable to cases in which the employer's purported reason for the adverse action is unrelated to the employee's disability. Although pretext may be relevant in cases in which there is an asserted reason for the adverse action that has nothing to do with disability, both *McDonnell Douglas* and pretext are irrelevant to many ADA claims, including those for failure to accommodate. But courts are familiar with traditional *McDonnell Douglas*, perhaps overly so, and it is important to explain when it is inappropriate, or should be modified.

There is a related, and important, point in Judge Costa's special concurrence in *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 351–52 (5th Cir. 2019): *McDonnell Douglas* is inappropriate when the employer admits that disability was the basis for the allegedly adverse action. Judge Costa stated:

> To be sure, Nall also tried to prove discrimination with direct evidence. But in doing so, he relied on the comments of certain supervisors, which itself requires recourse to another complicated multipart test. . . . There is a simpler and more convincing direct evidence route. To use a modern phrase, the firing "is what it is": the railroad

has all along acknowledged that it fired Nall because of concerns about his Parkinson's. That's discrimination on the basis of a disability.[6]

IX. "Honest Belief"

Courts have found the "honest belief" defense persuasive in certain circumstances involving alleged misconduct, if the belief is in fact honest, and if there were in fact misconduct. *Compare Hardy v. Oprex Surgery (Baytown) L.P.*, No. CV H-18-3869, 2020 WL 4756868, at *6 (S.D. Tex. Aug. 14, 2020) (although plaintiff proved that the alleged misconduct was false, there was no evidence that the employer's beliefs at the time of termination were not in good faith); *Garcia v. City of Amarillo, Texas*, No. 2:18-CV-95-Z-BR, 2020 WL 4208060, at *14 (N.D. Tex. July 22, 2020) (no evidence that employer's belief was not honestly held); *Burns v. Nielsen*, 456 F. Supp. 3d 807 (W.D. Tex. 2020) ("Because there is a fact dispute as to whether Molinar ever said to Apodaca what he claims she said, there is at least a fact dispute as to whether Apodaca acted in a bad faith pretext for discrimination."), *appeal filed*.

But regardless of whether the defense applies in misconduct cases, the defense should be inapplicable to cases in which the employer claims to rely on its "honest but mistaken" belief that an employee did not have a covered disability, or could not perform the job because of a disability. That argument would insulate the employer from liability for uninformed stereotyping, which the ADA is designed to combat.

X. Retaliation Claims

Of course, a finding that the plaintiff did not have an ADA disability does not foreclose a retaliation claim. *Garcia v. City of Amarillo, Texas*, No. 2:18-CV-95-Z-BR, 2020 WL 4208060, at *11 (N.D. Tex. July 22, 2020) ("Unlike the requirements for establishing a case of disparate treatment under the ADA, a plaintiff does not need to show that he suffers from an actual disability; rather, he only needs 'a reasonable, good faith belief that the statute has been violated.'"), *quoting Tabatchnik v. Cont'l Airlines*, 262 F. App'x 674, 676 (5th Cir. 2008).

Various actions may constitute protected activity for purposes of ADA retaliation claims. *See, e.g., Garcia v. City of Amarillo, Texas*, No. 2:18-CV-95-Z-BR, 2020 WL 4208060, at *12 (N.D. Tex. July 22, 2020) (notice of intent to file a charge is protected activity, even if the charge was ultimately not filed until after termination). *But cf. Austgen v. Allied Barton Sec. Servs., L.L.C.*, 815 F. App'x 772, 776 (5th Cir. 2020) (placing an employee on temporary unpaid leave until his doctor can determine his ability to work is not so harmful that it could dissuade a reasonable worker from participating in protected activity under the ADA).

The great weight of authority states that requesting an accommodation is protected activity under the ADA. *See, e.g., Haley v. Tiger Trailers, Inc.*, No. 5:18CV16-RWS-CMC, 2018 WL 1722394, at *2 (E.D. Tex. Mar. 19, 2018), *report and recommendation adopted*, 2018 WL 1718559 (E.D. Tex. Apr. 9, 2018) (collecting authorities). *See also Mestas v. Town of Evansville, Wyoming*, 786 F. App'x 153, 157 (10th Cir. 2019) (sufficient request for accommodation to

[6] Judge Elrod, writing for the majority, did not disagree, but pointed out that the plaintiff did not make this argument below. *Id*. at 341 n.3.

support retaliation claim even though no "magic words" were used). Note, too, that the ADA also prohibits interference with accommodations, 42 U.S.C. § 12203(b), as well as adverse actions taken because of the need for accommodation. 42 U.S.C. § 12112(b)(5)(B); 29 C.F.R. Part 1630 App. §1630.9(b).

On the other hand, at least one court has relied on the language of Tex. Lab. Code § 21.055 to reject federal authority, holding that requesting an accommodation is not protected activity in a state-law retaliation claim. *Texas Dep't of Transportation v. Lara*, 577 S.W.3d 641, 650–52 (Tex. App.—Austin May 9, 2019, pet. filed).

Also, the Fifth Circuit has expressly held that a request for FMLA leave is not a request for a reasonable accommodation under the ADA. Therefore, a request for FMLA leave may not be protected activity under the ADA, without a showing that the plaintiff asked for any additional accommodation aside from taking FMLA leave. *Willard v. Friendswood ISD*, No. 3:18-CV-00233, 2019 WL 2906294, at *3 (S.D. Tex. June 11, 2019), *report and recommendation adopted*, 2019 WL 2905132 (S.D. Tex. July 5, 2019).

XI. Direct Threat Defense

In *Nall v. BNSF Ry. Co*., 917 F.3d 335, 342 (5th Cir. 2019), the Fifth Circuit confirmed that direct threat depends on the objective reasonableness of the employer's actions, and those actions "must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, and upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job." (internal quotes and brackets omitted). The Court found sufficient evidence that the employer did not meet this standard, based on statements made by supervisors, factual disputes about the outcome of the fitness-for-duty exam, and dueling experts. *Id*. at 344.

The *Nall* court refused to address which party has the burden of proof in such cases,[7] finding that regardless, the plaintiff survived summary judgment. *Id*. at 343 n.5.[8] In *Goode v. BNSF Ry., Inc.*, No. 4:18-CV-319-Y, 2020 WL 1527864, at *5 (N.D. Tex. Mar. 20, 2020), the court seemed to favor the 10th Circuit's position on the burden of proving direct threat—it is normally on the defense, but the plaintiff has the burden if the essential job duties necessarily implicate the safety of others. But the court did not need to decide the issue because it found direct threat as a matter of law.

[7] According to the majority in *Nall*, 917 F.3d at 343 n.5, this was an issue that the en banc court refused to resolve in *Rizzo v. Children's World Learning Ctrs., Inc*., 213 F.3d 209, 213 & n.4. (5th Cir. 2000) (en banc).

[8] On a related point, in *Equal Employment Opportunity Comm'n v. McLeod Health, Inc*., 914 F.3d 876, 881 n.6 (4th Cir. 2019), the court rejected the employer's framing that an essential job function was to "safely" navigate the company's campuses. According to the Fourth Circuit, "adding the qualifier 'safely' to the job function at issue muddles the analysis." It also places the burden on the plaintiff to disprove the defense of direct threat. Instead, the correct analysis "is to begin by asking: does the relevant job function (here, navigating to and within McLeod's campuses) qualify as essential? If the answer is yes, we then ask whether the employee is medically capable of performing the function without posing a direct threat to herself or others—i.e., whether the employee can perform the function safely."

Similarly, in *West v. Union Pac. R.R. Co*., No. 4:18-CV-3340, 2020 WL 1446908, at *5–6 (S.D. Tex. Mar. 24, 2020), the employer argued that the plaintiff's past suicide attempt meant that the train conductor would pose a direct threat. The court denied summary judgment on the issue, finding that some of the employer's arguments were not supported by its own expert's report. More importantly, the defense expert's report did not satisfy the requirements, described in *Nall*, that direct threat be based on a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence, and upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job.

See also Lewis v. City of Union City, Georgia, 934 F.3d 1169, 1184–85 (11th Cir. 2019) ("The definition of the direct threat defense requires an analysis of the individual's ability to perform safely the 'essential functions of the job.' 29 C.F.R. § 1630.2(r). As we have held that there is a genuine dispute of material fact on what the essential functions of a UCPD detective are, we certainly cannot resolve the question of whether she can perform those as-yet-undefined essential functions safely."); *Siewertsen v. Worthington Indus., Inc*., 783 F. App'x 563, 571 (6th Cir. 2019) (reasonable juror could have found that deaf plaintiff did not pose a direct threat based on his testimony that described his daily safety protocols, the fact that he had driven a forklift for over ten years without an accident, and expert support, even though it was disputed).

On the contrary, in *Goode v. BNSF Ry., Inc.*, No. 4:18-CV-319-Y, 2020 WL 1527864 (N.D. Tex. Mar. 20, 2020), the court found that the plaintiff, a train conducor, posed a direct threat as a matter of law because he used an implantable cardioverter-defibrillator (ICD), which shocked his heart back into a normal heart rhythm if he had cardiac arrest; that had happened in the past, and it would cause him to collapse.

XII. Undue Hardship

The ADA requires reasonable accommodations unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A).[9] Undue hardship is defined as "an action requiring significant difficulty or expense, when considered in light of ... the nature and cost of the accommodation needed." 42 U.S.C. § 12111(10). The inquiry includes consideration of the entity's financial resources, the effect on expenses and resources, and the impact of a proposed accommodation upon the operation of the facility. 42 U.S.C. § 12111(10)(B)(i–iv). *See also Rodriguez v. Dollar Gen. Corp*., No. SA-18-CV-00713-JKP, 2020 WL 4434932, at *6 (W.D. Tex. July 30, 2020).

In *Rodriguez v. Dollar Gen. Corp*., supra, the court found a fact dispute whether the plaintiff's proposed accommodation—use of a scooter—would have caused undue hardship. *Id*. at *7. And in *Texas Dep't of Transportation v. Lara*, 577 S.W.3d 641, 649 (Tex. App.—Austin May 9, 2019, pet. filed) (fact issue on undue hardship because even though defense affidavit said that absence placed mounting strain on the office, part of that was due to the failure to fill other open positions, the plaintiff was able to provide some assistance remotely, and co-workers expressed support for plaintiff).

[9] For information on the tax credit and tax deduction available to offset the financial costs of a workplace accommodation, see https://www.ada.gov/taxcred.htm.

One other point should be made. The Supreme Court has held that the plaintiff's burden is to put on some evidence that the accommodation sought was facially reasonable, and the employer has the burden of showing any "case-specific" evidence that it would pose an undue hardship. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002). But courts (and litigants) sometimes confuse these burdens. For example, in *Gardea v. JBS USA, LLC*, 915 F.3d 537, 542 (8th Cir. 2019), the court found that the lift-assisting devices at issue were not a reasonable accommodation because of the lack of overhead anchor points and the tight quarters involved. But that would seem to be the kind of "case-specific" facts that should be part of the undue-burden defense under *Barnett*, rather than a part of the plaintiff's burden to prove reasonableness. Facial (or "run of cases") reasonableness would seem to be satisfied, especially given the statutory definition that includes the "acquisition or modification of equipment or devices." 42 U.S.C. § 12111(9)(B). And "facial" reasonableness seems particularly clear in cases in which the accommodation sought is one listed in the statute. *See* 42 U.S.C. § 12111(9)(B) (modification of training materials).

XIII. Immunity

Several recent cases confirm the state's immunity from ADA employment claims for monetary relief. *See, e.g., Daniel v. Univ. of Texas Sw. Med. Ctr.*, 960 F.3d 253 (5th Cir. 2020) (UTSMC was "arm of the state" entitled to Eleventh Amendment immunity). But there *are* ways to sue governmental entities for disability-based employment discrimination. Among the points to consider are:

A. State-law claims

State law has waived sovereign immunity, so claims can be brought under Chapter 21 of the Texas Labor Code against state agencies, cities, counties, etc. Note, however, that any such claims against a *state agency* under state law must be commenced in state court.

B. ADA Claims

Cities, counties, and other political subdivisions are not immune from ADA claims.

A state agency and any "arm of the state" have immunity from employment claims under the ADA. So consider whether the defendant is actually an arm of the state under the applicable analysis. *Compare McAdams v. Jefferson Cty. 911 Emergency Commc'ns Dist., Inc*, 931 F.3d 1132 (11th Cir. July 24, 2019) (emergency communications district did not act as an "arm of the state" when it demoted employee).

If the employer is a state agency or arm of the state, it is still possible to add an ADA claim under the *Ex parte Young* framework. This requires naming the agency head in her/his official capacity, rather than naming the agency itself. It also requires limiting the remedies sought under the ADA to prospective injunctive relief (e.g., reinstatement), plus attorney fees and costs.

C. Section 504 Claims

Disability-discrimination claims under Sec. 504 can be brought against any entity that is a recipient of "federal financial assistance," even if it is a state agency or an arm of the state.

XIV. Distinguishing GINA Claims

Under the employment provisions of the Genetic Information Non-Discrimination Act (GINA), an *employee's* protected "genetic information" includes information about the employee's genetic tests, but it does not include simply the fact of a manifested condition (even if the condition is genetic). 42 U.S.C. § 2000ff-9.

That differs with regard to the employee's family members—for them, "genetic information" includes both tests and manifested conditions.

Therefore, there can be a GINA discrimination claim if there is evidence of an adverse action because of:

- the employee's genetic test results; or
- a family member's genetic test results; or
- a family member's diagnosis with a genetic condition.

For example, in *Munnerlyn v. Installed Building Products, LLC*, No. 1:20-CV-225-LY, 2020 WL 2528547 (W.D. Tex. May 18, 2020), the court held that a plaintiff with active epilepsy may have claims under the ADA and Chapter 21, but not under GINA. The court stated that, in short, "GINA prohibits discrimination based on genetic information and not on the basis of [the employee's] manifested condition, while the ADA prohibits discrimination on the basis of manifested conditions that meet the definition of disability." *Id*. at *2.