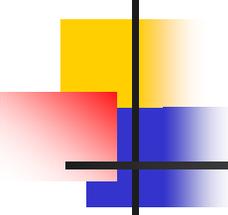


# Disability Discrimination Law Update

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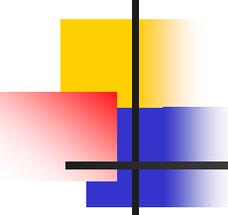
Mark Maxin  
Pete Marksteiner



# Overview

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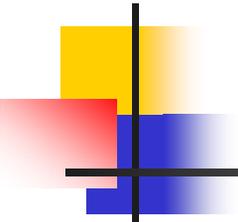
- Background
- Familiarization with materials
- Triaging an ADA Case
  - Disability
  - Qualified – Reasonable Accommodation
- Defenses
  - Undue Hardship
  - Misconduct
  - Direct Threat



# What's So Different About This Law?

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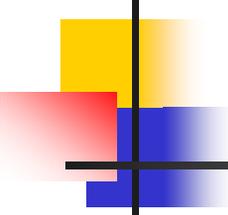
- Goes against common understanding of requirement to avoid treating people “differently”
- Unlike under Title VII, class membership is unpredictable; could apply to *anybody* at any time



# Rehabilitation Act of 1973

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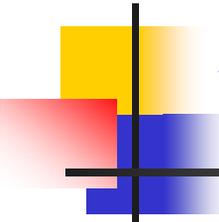
- 29 U.S.C. Sec. 791, as amended
- Forerunner of the Americans With Disabilities Act
- Prohibited discrimination against a qualified individual with a disability by
  - Any program or activity receiving Federal financial assistance
  - Any Executive agency
  - The U.S. Postal Service



# Rehabilitation Act Key Provisions

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- **Section 501** mandates non-discrimination by Fed Government in hiring and requires affirmative action in hiring, placement, and advancement of people with disabilities
- **Section 502** established U.S. Access Board
- **Section 503** requires affirmative action and prohibits discrimination by Fed Government contractors and subs with contracts >\$10K
- **Section 504** says persons with disabilities shall not be excluded from, denied benefits of, or be subjected to discrimination under any program that receives Fed financial assistance or by an Fed agency.
- **Section 508** requires info technology resources of Fed agencies to be accessible by persons with disabilities



# Americans with Disabilities Act

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- 42 U.S.C. 12101 et. Seq.,
- Effective 1992, EEOC regulations implementing Title I of ADA (employment)
  - Title II (provision of public services)
  - Title III (public accommodations and services operated by private entities)
- “Employer” does not include — (i) the United States, or any . . . .”

# Which one applies, the Rehab Act or the ADA?

"The standards used to determine whether this section has been violated in a complaint alleging non-affirmative action employment discrimination under this section shall be the standards applied under Title I of the [ADA provisions that] relate to employment."

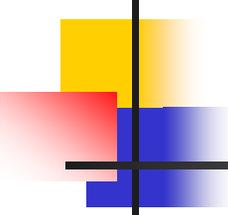
"The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act . . . Are dealt with in a manner that avoids duplication of effort and prevents the imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act

Rehabilitation Act  
29 U.S.C. 791(g)



Americans with  
Disabilities Act  
42 U.S.C. 12117(b)

**THEY BOTH APPLY**



# Federal Regulations

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- Rehabilitation Act – 29 CFR 1614.203
- ADA – 29 CFR 1630 et. Seq.
- Around CY 2000 EEOC started citing 29 CFR 1630 in published decisions
- June 20, 2002, entire text of Rehab Act regulations at 1614.203 replaced with 2 short paragraphs
  - (a) Model employer
  - (b) ADA standards apply

# Single set of rules

Federal Statutes  
ADA & Rehab Act



Federal Regulations  
29 CFR 1630



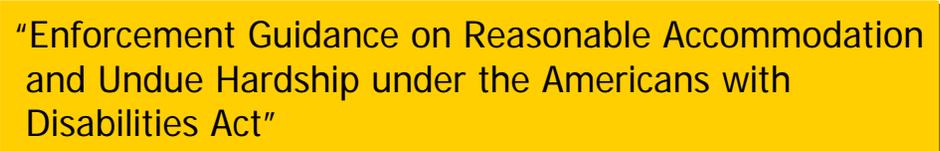
Interpretive Guidance  
29 CFR 1630 App.



Other EEOC Publications

 *Included in SOELR materials*  
*Others on EEOC website*

Compliance Manual Section 902, Definition of the term "Disability"

 "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act"

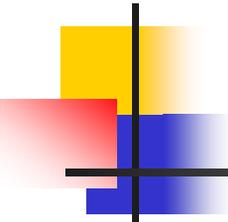
"Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities"

"Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing 'Disability' and 'Qualified'"

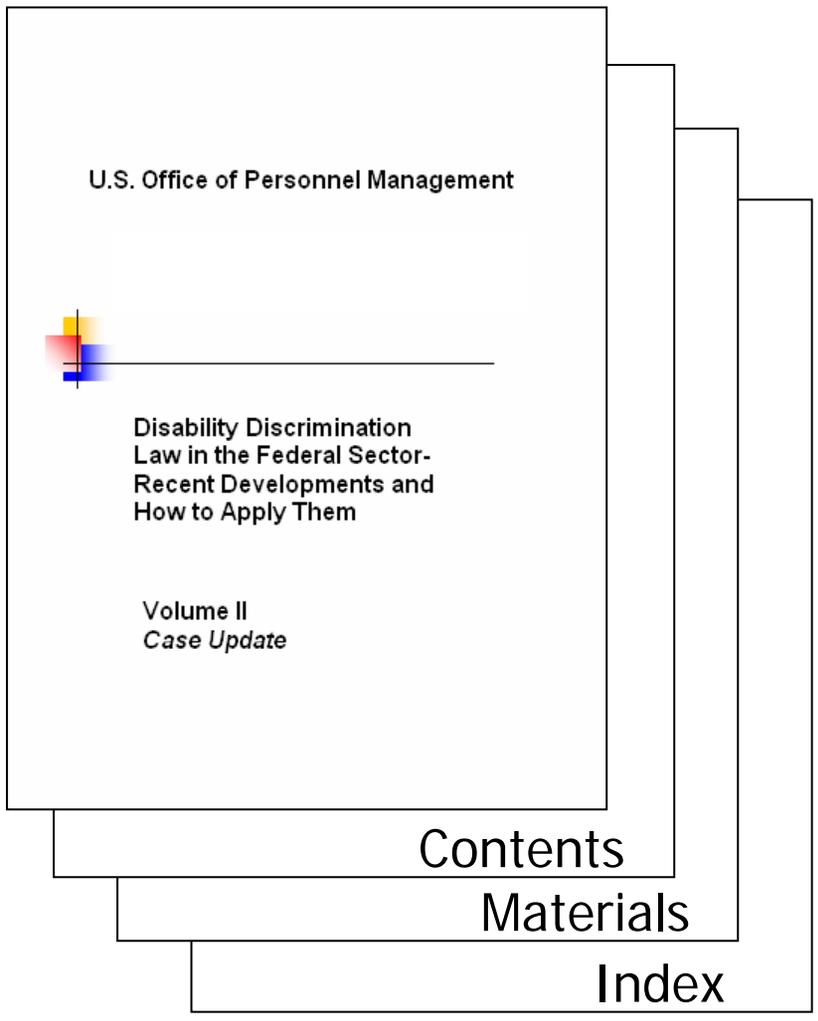
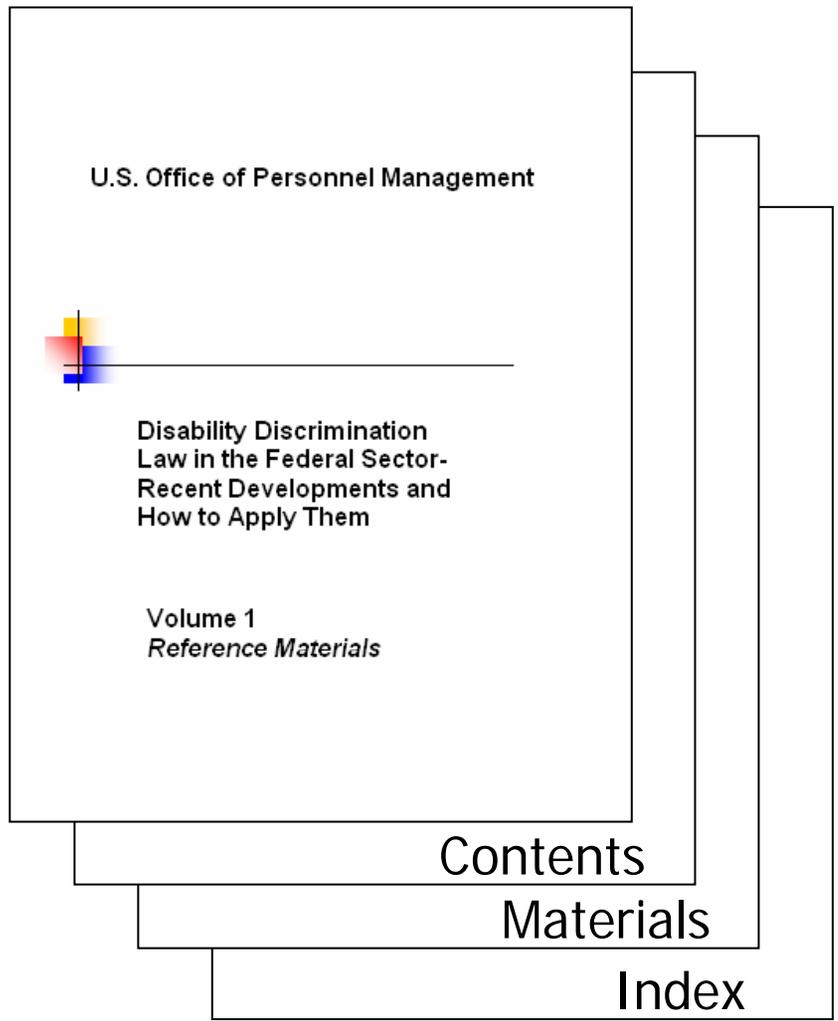
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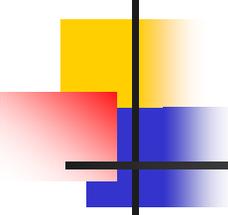
"Enforcement Guidance on Disability-Related Inquiries And Medical Examinations under the ADA"

"EEOC Policy Guidance on EO 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation"



# What's in your materials

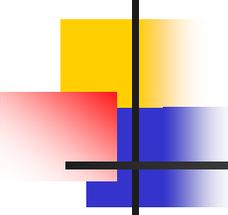




# Disability Discrimination Claim Triage

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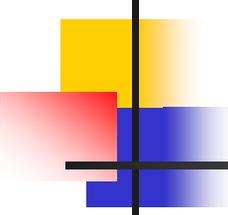
- Three Questions:
  - Does the Person Have a Disability?
  - Is the Person a Qualified Individual with a Disability? (Ability to Perform essential functions with or without Reasonable Accommodation)?
  - Has Agency Properly Considered any Reasonable Accommodation Requests
- Possible Defenses:
  - Undue Hardship
  - Direct Threat



# “Actual” Disability

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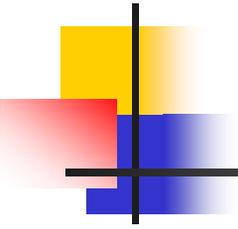
- Definition of Disability: 42 USC 12102(2), 29 CFR 1630.2(g); 29 U.S.C. 705(20)
  - Physical or mental impairment
  - That is substantially limiting
  - In some major life activity



# “Actual” Disability

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- Definition of Disability: 42 USC 12102(2), 29 CFR 1630.2(g)
  - Physical or mental impairment
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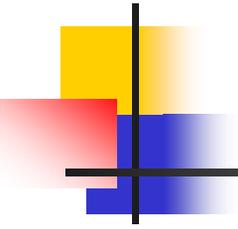


# “Actual” Disability

## Physical or Mental Impairment

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- 29 CFR 1630.2(h) Physical or mental impairment means:  
**Any** physiological disorder, or condition, cosmetic disfigurement or anatomical loss affecting one or more of the . . . body systems... or **any** mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.



# “Actual” Disability

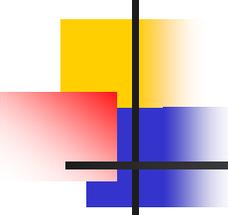
Physical or Mental Impairment

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- Growth Area in ADA claims
- Do not dismiss out of hand
  - What about “stress?”
  - What about “depression?”
- See Enforcement Guidance on ADA and Psychiatric Disabilities

*“Die Schrie”*

*Oil on Canvas, Edvard Munch*

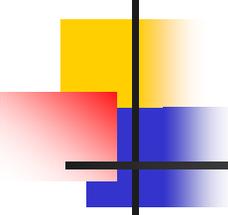


# “Actual” Disability

## Physical or Mental Impairment: Exclusions

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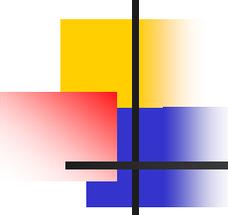
- Homosexuality or bisexuality 1630.3(e)
- Physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within “normal” range and are not the result of a physiological disorder
- Characteristic predisposition to illness or disease
- Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments
- Common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder
- Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments
- Advanced age, in and of itself, is also not an impairment



# “Actual” Disability

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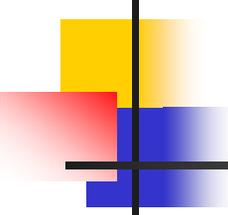
- Definition of Disability
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# “Actual” Disability - Substantially Limiting

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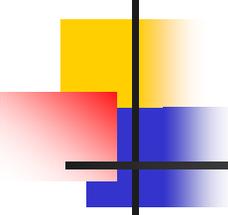
- 29 CFR 1630.2(j) Substantially limits means:
  - unable to perform MLA **average person in general population** can perform
  - Significantly restricted in the condition, manner or duration can perform MLA compared to **average person in the general population**
  - Factors to consider
    - Nature and severity of the impairment
    - Duration or expected duration of the impairment
    - Permanent or long term impact of the impairment
- Interpretive Guidance
  - No laundry lists
  - HIV “inherently substantially limiting”



# “Actual” Disability – Substantially Limiting

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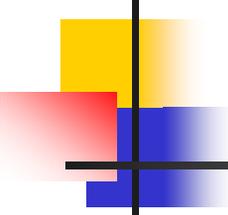
- Int. Guidance: “non-chronic impairments of short duration, with little or no long term or permanent impact . . . may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. . . except in rare circumstances, obesity is not considered a disabling impairment.”



# “Actual” Disability – Substantially Limiting

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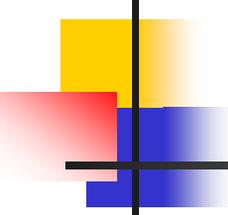
- Int. Guidance: “For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.”



# “Actual” Disability

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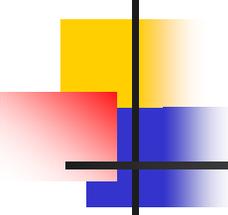
- Definition of Disability
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  - That is substantially limiting
  - In some major life activity



# “Actual” Disability – Major Life Activity

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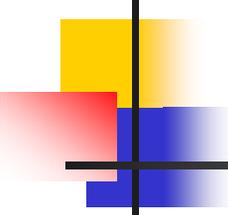
- 29 CFR 1630.2(i) Major Life Activity means: Functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
- Interpretive Guidance:
  - This isn't an exhaustive list. In general, includes “those basic activities that the average person in the general population can perform with little or no difficulty. . .
  - Other major life activities include, but are not limited to sitting, standing, lifting, reaching . . . Mental and emotional processes such as thinking, concentrating, and interacting with others are other examples of major life activities.
- Instructions for Field Offices: Analyzing ADA Charges After Court decisions addressing “Disability” and “Qualified”



# “Actual” Disability - Major Life Activity: Working

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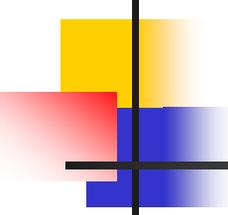
- “Working” Not in Federal Statute
- 29 CFR 1630(j)(2) “significantly restricted in the ability to perform either a **class of jobs** or a **broad range of jobs** in various classes as compared to the **average person** having **comparable training, skills and abilities.**”
- Relevant Factors
  - Geographical Area
  - Jobs requiring similar skills from which excluded
  - Jobs not requiring similar skills from which excluded
- The inability to perform a single, particular job **does not constitute a substantial limitation in the major life activity of working.**



# “Actual” Disability - Review

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- Definition of Disability
  - Physical or mental impairment
  - That is substantially limiting
  - In some major life activity

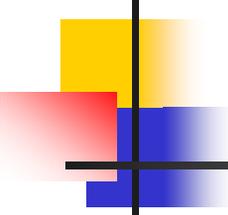


# Williams v. Toyota

## 534 U.S. 184 (2002)

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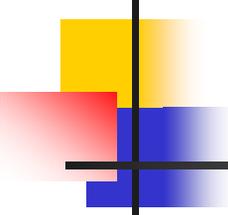
- Assembly line worker in Toyota plant
  - Carpal tunnel, muscle, tendon, and nerve irritation
  - Claimed SL in MLA of “performing manual tasks.”  
Caused her to avoid sweeping, to quit dancing, to occasionally seek help dressing, and to reduce how often she gardened, played with her children, and drove long distances.
  - She was not prevented or severely restricted from doing activities that are of central importance to most people’s daily lives.



## Issues & Cases

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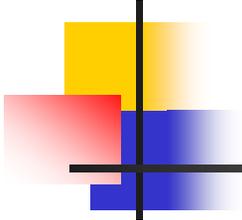
- Sullivan v. Neiman Marcus, 358 F.3d 110 (1<sup>st</sup> Cir. 2004). (NM employee fired for alcohol-related misconduct; alcoholism clearly an impairment, but he failed to show disability)
- Rakity v. Dillon Companies Inc., 302 F.3d 1152 (10<sup>th</sup> Cir. 2002)(lifting activities in which plaintiff restricted not the sort of manual tasks central to most people's daily lives; series of light duty restrictions & other factors—not disabled)
- Pollard v. Highs of Baltimore, 281 F.3d 462 (4<sup>th</sup> Cir. 2002)(prohibition on lifting >25lbs or repetitive bending not SL in MLA. If recurrent, may rise to level of disability.)



## Issues in & Cases

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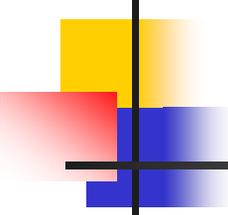
- *Rinehimer v. Cemcolift*, 292 F.3d 375 (3<sup>rd</sup> Cir. 2002) (Complainant not a person with a disability because pneumonia was a temporary condition.)
- *Bragdon v. Abbot*, 118 S.Ct. 2196 (HIV positive person was substantially limited in the MLA of reproduction) compare,
  - *Contreras v. Suncoast Corp.*, 84 FEP 1273 (7<sup>th</sup> Cir. 2001)(back injury that limited frequency with which plaintiff could engage in intercourse did not substantially limit a MLA)
  - *Blank v. Southwestern Bell*, 310 F.3d. 398 (5<sup>th</sup> Cir. 2002)(HIV found not to sub limit MLA where plaintiff and his wife wanted no more children).



# Major Life Activity of Working

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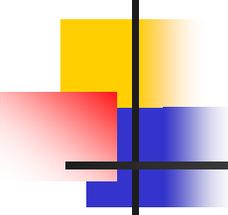
- Sullivan v. Neiman Marcus, 38 F3d 110 (1<sup>st</sup> Cir. 2004)(taking another job rebuts assertion that person is substantially limited in the MLA of working)
- Pollard v. Highs of Baltimore, 281 F.3d 462 (4<sup>th</sup> Cir. 2002)(siting Sutton, 4<sup>th</sup> Circuit declined to address whether working is MLA)
- Rakity v. Dillon Companies Inc., 302 F.3e 1152 (10 Cir. 2002)(Court raises apparent conflict in plaintiff's pursuit of SSA disability benefits at the same time his ADA claims were pending.)
- 3<sup>rd</sup> Cir (Rinehimer) and 4<sup>th</sup> Cir. (Pollard), seem to suggest that employees who take alternative employment are by definition not substantially limited in the MLA of working)
- Swanson v. Univ. of Cinn., 368 F.3d 307 (6<sup>th</sup> Cir. 2001)(Rejected ML of Working argument when plaintiff got other job considerably after alleged discrimination took place, after medication began ameliorating his condition.)



## “Mitigating Measures?”

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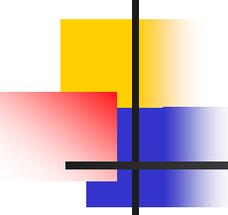
- Assistive Technology
  - Medication
  - Body's Own Means of Overcoming Effects of Impairment
- \* Things that make an Impairment not so limiting*



# Mitigating Measures Trilogy

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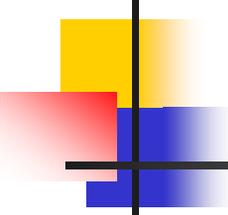
- If mitigating measures render an impairment no longer substantially limiting, it's NOT A DISABILITY.
  - Assistive technology - Sutton 119 S.Ct. 143
  - Medication - Murphy 119 S.Ct. 2133
  - Body's Own Means of Adapting - Kirkingburg, 119 S.Ct. 2162
- Clarified/narrowed "substantially limited in the Major Life Activity of Working"



# Sutton Standard

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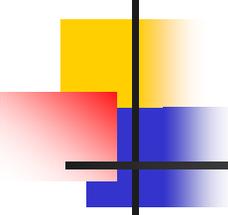
- Substantially Limits: as compared to average person in general population... ~~without~~ **considering** mitigating measures



# Mitigating measure is available, but individual doesn't use it

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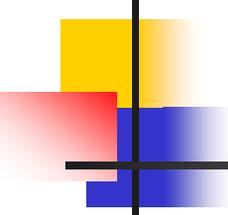
- 29 CFR 1630.9(d); Interpretive Guidance; Question number 11 of the EEOC's October 2002 Enforcement Guidance on Reasonable Accommodation:
- Employee can't be compelled to accept or use an accommodation.
- However, if employee refuses, and as a result can't perform the essential functions, he will no longer be "qualified."



## What about Voluntariness?

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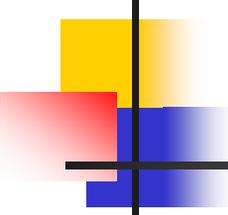
- Compliance Manual Section 902.2(e):
  - “The fact that some apparently volitional act of the individual may have caused the impairment . . . has no effect on whether that condition is an impairment.”
- There’s no “deserved it” doctrine.



# “Record of” Disability

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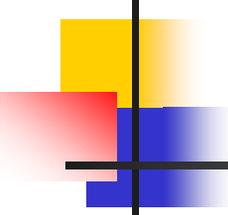
- 42 USC 12102(2)(b), 29 USC 705(20)(B); 29 CFR 1630.2(I)
- Interpretive Guidance: “The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability.”
  - Former cancer patient
  - Mis-classified as having a learning disability
- Same basic requirements as “Actual” Disability in that the record must disclose some
  - Physical or mental impairment
  - That is substantially limiting
  - In some major life activity



# “Record of” Disability – What Sort of Records?

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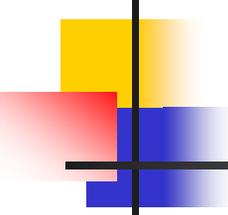
- Interpretive Guidance: “[I]n order for an individual who has been classified in a record as “disabled” for some other purpose to be considered disabled for purposes of part 1630, the impairment indicated in the record must be a **physical or mental impairment** that **substantially limits** one or more of the individual's **major life activities.**”



# “Record of” Disability – What Sort of Records?

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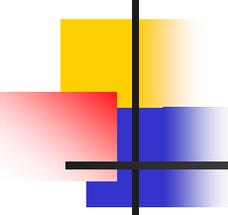
- EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a “Qualified Individual with a Disability under the ADA” Guidance Number 915.002 February 1997.
- “Because of the fundamental differences between the ADA and other statutory and contractual disability benefits programs, representations made in connection with an application for benefits **may be relevant to --but are never determinative** of -- whether a person is a “qualified individual with a disability.”



# “Record of” Disability Not a Settled Issue

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- *Rakity v. Dillon Companies Inc.*, 302 F.3d 1152 (10 Cir. 2002)(simultaneously claiming he could perform essential functions for King Soopers, he was claiming in SSA disability claim that he was incapable of performing any meaningful work.)
- *Smart v. Dept of the Navy* 92 MSPR 120 (Aug 6, 2002)(Illustrates Board’s deference to OWCP determinations of suitable employment for persons with disabilities)
- *Robertson v. Potter, U.S. Postal Service*, 2003 WL 137912 (EEOC)(OWCP-related “disability” determinations are not determinative of disability determinations under the Rehabilitation Act’s “very different standards . . . .”)



# “Regarded as” suffering from a Disability

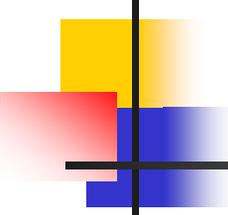
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42 U.S.C. 12102(2)(c); 29 U.S.C.

705(20); 1630.2(3)(g): **Is regarded**

as suffering from such a disability

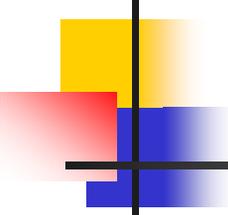
- Potentially very expansive category
  - impairment doesn't substantially limit MLA but agency treats person like it does
  - impairment substantially limits MLA but only as result of attitudes of others
  - no impairment, but agency treats person like he or she has an impairment



# Regarded As Cases

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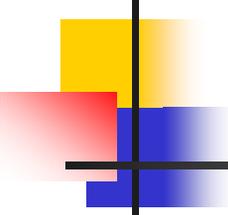
- *McGeshick v. Principi*, 357 F.3d 1146 (10<sup>th</sup> Cir. 2004) (Employer's belief that plaintiff's Miniere's disease prevented him from being able to perform job did not amount to "regarded as" discrimination)
- *Rakity v. Dillon Companies Inc.*, 302 F.3e 1152 (10 Cir. 2002) (fact that physician placed him on zero to ten pounds lifting restriction may have demonstrated physician regarded him ... but no evidence employer shared that perception – not disabled)
- *Rinehimer v. Cemcolift*, 292 F.3d 375 (3<sup>rd</sup> Cir. 2002) (coworkers' and managers' perceiving plaintiff as "sick, wheezing, and [having] difficulty breathing" didn't establish they "regarded" him as disabled. Furthermore, employer couldn't have regarded him as limited in working because assigned to him to other jobs.)
- *Jewell v. Reid's Confectionary Co.* 172 F.Supp 2d 212 (DC Maine 2001) (Employer voiced concerns about plaintiff's pacemaker, never offered position despite plaintiff's physicians statement that plaintiff could perform all duties except driving, amounted to regarding plaintiff as disabled.)



# Disability Discrimination Claim Triage

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- Three Questions:
  - Does the Person Have a Disability?
  - Is the Person a Qualified Individual with a Disability? (Ability to Perform essential functions with or without Reasonable Accommodation)?
  - Has Agency Properly Considered any Reasonable Accommodation Requests
- Possible Defenses:
  - Undue Hardship
  - Direct Threat

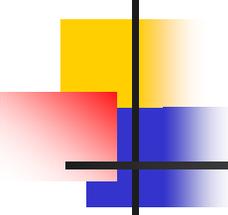


## Question 2 “Qualified Individual With a Disability?”

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42 U.S.C. 12102(8); 29 CFR 1630.2(m): “individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”

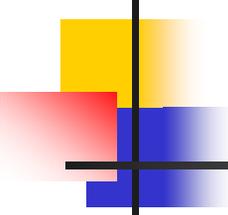
*“I’m O.K. with everything except the part about being up high....”*



# “Qualified Individual With a Disability?” – “Essential Functions”

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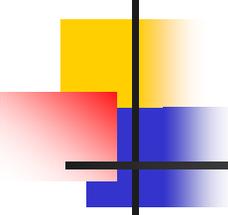
- 42 U.S.C. 12102(8): “essential functions of . . . . For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.
- Interpretive Guidance 29 CFR 1630.2(n): “The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential.”



# “Qualified Individual With a Disability?” – “Essential Functions”

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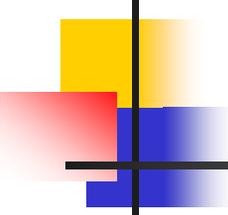
- 29 CFR 1630.2(n): Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.
- means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential functions” does not include the marginal functions of the position.



# “Qualified Individual With a Disability?” – “Essential Functions”

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- 29 CFR 1630.2(n): reasons a function may be considered essential:
  - Reason position exists
  - Limited number of employees
  - Highly specialized
- Evidence function is essential may include:
  - Employer’s judgment
  - Written job descriptions
  - Amount of “on the job time” function consumes
  - Consequences if function not performed
  - Terms of collective bargaining agreements
  - Experience of past and current employees
- Interpretive Guidance introduces term “fundamentally alter”

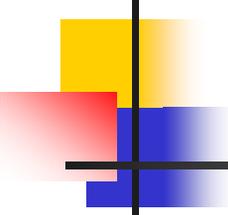


# Issues & Cases

## Essential Functions

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- Brickers v. Cleveland Board of Education (6th Cir 1998) (bus driver--ability to lift no more than 30 pounds)
- Pesterfield v. TVA (6th Cir 1991)(ability to accept criticism)
- Bolstein v. Dept of Labor (MSPB 1992) (ability to work independently)

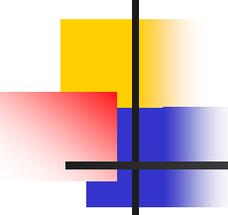


# Issues & Cases

## Essential Functions

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- *Dropinski v. Douglas County*, NE 298 F.3d 704 (8<sup>th</sup> Cir. 2002) (Heavy Equip Operator—physical aspects of job)
- *Collins v. Raytheon*, 2003 U.S. Dist. LEXIS 1148 (employee with back impairment couldn't perform essential functions of aircraft assembler position)
- *Ammons v Aramark*, 2002 U.S. Dist. LEXIS 23487 (Northern Dist. IL 2002) (industrial laundry maintenance worker not able to perform physical aspects of his job couldn't perform essential functions)

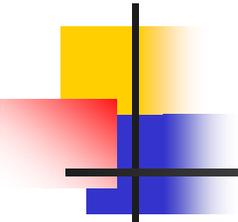


# Reasonable Accommodation

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One of the most misunderstood pieces of  
This area of the law because it affirmatively  
Requires employers to treat people differently.

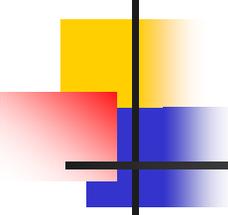
See 42 U.S.C. 12112(b)(5); 29 CFR 1630.9:  
failure to reasonably accommodate amounts  
to unlawful discrimination under the ADA.



# Reasonable Accommodation

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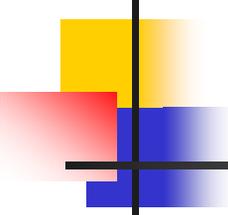
- 12111(9); 29 CFR 1630(2)(o); EEOC's Oct 2002 Guidance on Reasonable Accommodation: may include but is not limited to:
  - (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
  - (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.



# Reasonable Accommodation Defined

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- 29 CFR 1630(2)(o); Interpretive Guidance; EEOC's Oct 2002 Guidance on Reasonable Accommodation
  - Modifications or adjustments to job **application** process,
  - Modifications or adjustments that enable a qualified individual with a disability **to perform the essential functions** of his or her position
    - Int. Guidance: "in general... equal employment opportunities"
  - Modifications or adjustments that allow employees with disabilities to **enjoy equal benefits and privileges** of employment
    - EEOC's Oct 2002 Guidance: training, services (e.g., employee assistance programs (EAP's), credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), and (3) parties or other social functions (e.g., parties to celebrate retirements and birthdays, and company outings)

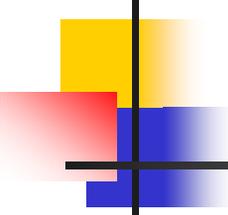


# Issues & Cases

## Reasonable Accommodation

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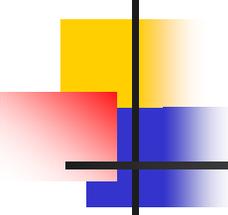
- Breen v. Dept. of Transportation, 282 F3d 839 (D.C. Cir. 2002)(Employer failed to articulate how employee's requested AWS proposed accommodation was not reasonable)
- Desiree Nanette v. Dept of Treasury, 93 MSPR 127, Aug 2, 2002 (agency's failure to provide her with a "chemical free environment" not unreasonable)



# Required to Provide Accommodation to “Regarded As” Employee

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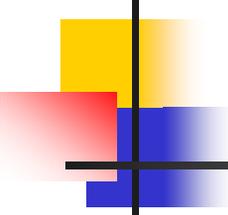
- Jewell v. Reid’s Confectionary Co. 172 F.Supp 2d 212 (DC Maine 2001)(Court found Reid’s regarded Jewell as disabled, and Reid’s claimed it only had a duty to reasonably accommodate if plaintiff was “actually” disabled.
    - Weber v. Strippit, 186 F.3d 907 (8<sup>th</sup> Cir. 1999)(It would be unfair to give a non disabled employee an advantage based on that erroneous assumption)
- Held:** D.C. Court rejected other circuit holdings, noting ADA’s intent to address fears, misperceptions, and stereotypes. Court pointed out it would be bizarre to allow an employer who incorrectly regards a person as disabled to mistreat the person based on that incorrect assumption without being accountable for it.



# Required to Provide Accommodation to “Regarded As” Employee

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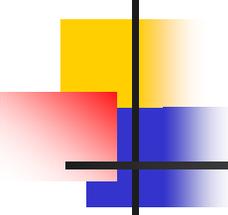
- *Buskirk v. Apollo Metals*, 307 F.3d 160 (3<sup>rd</sup> Cir. 2002)(Employer declined to place employee in certain jobs based on its belief about his ability to perform them; acknowledged split, but declined to answer)
- *Jewell v. Reid’s Confectionary Co.* 172 F.Supp 2d 212 (DC Maine 2001)(Court found Reid’s regarded Jewell as disabled, and Reid’s claimed it only had a duty to reasonably accommodate if plaintiff was “actually” disabled.
- *Weber v. Strippit*, 186 F.3d 907 (8<sup>th</sup> Cir. 1999)(It would be unfair to give a non disabled employee an advantage based on that erroneous assumption)



# What's Not a Reasonable Accommodation?

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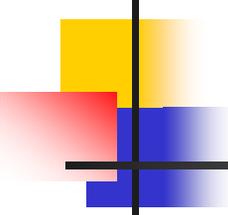
- Int Guidance to 2630.2(o); EEOC's 2002 Guidance on Reasonable Accommodation: "An employer never has to reallocate essential functions as a reasonable accommodation, but can do so if it wishes."
- EEOC's RA Guidance Question 9: Employee entitled effective accommodation, not accommodation of choice



# Disability Discrimination Claim Triage

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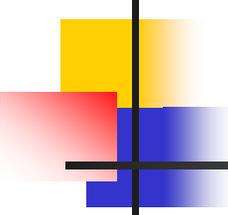
- Three Questions:
  - Does the Person Have a Disability?
  - Is the Person a Qualified Individual with a Disability? (Ability to Perform essential functions with or without Reasonable Accommodation)?
  - Has Agency Properly Considered any Reasonable Accommodation Requests
- Possible Defenses:
  - Undue Hardship
  - Direct Threat



# Interactive Process & Flexibility: Crux of Reasonable Accommodation

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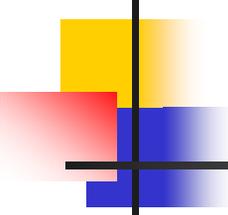
- 29 CFR 1630.2(o)(3): “To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an **informal, interactive process** with the qualified individual with a disability in need of the accommodation.” *See also* Interp. Guidance, and EEOC’s Oct 2002 Guidance on Reasonable Accommodation.
- Int. Guidance Introduction: “Neither the ADA nor this part can supply the ‘correct’ answer in advance for each employment decision concerning an individual with a disability. Instead, the ADA simply establishes parameters to guide employers in how to consider, and take into account, the disabling condition involved.”



# Issues & Cases

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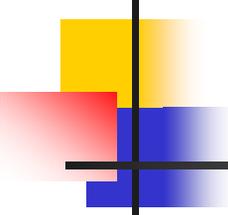
- Shapiro v. Township of Lakewood, 292 F.2d 356 (3d Cir. 2002) (By filling several vacancies for which plaintiff would've qualified, while plaintiff's accommodation reassignment requests were pending, employer failed to engage in interactive process.)
- Humphrey v. Memorial Hospital Association, 239 F.3d 1128 (9th Cir 2001) cert denied 535 U.S. 1011 (2002) (Obsessive Compulsive Disorder – routinely tardy employee requested accommodation - agency did not engage in good faith-interactive dialogue - when it was prepared to grant leave of absence as an accommodation but did not offer it in dialogue where employee did not specifically request it-remand-jury could find discrimination)
- Holly v. Dept of Health and Human Services, 92 MSPR 601 (2002) (MSPB affirmed arbitrator's finding that request for detail does not constitute reasonable accommodation under the Rehabilitation Act.)



# Issues & Cases

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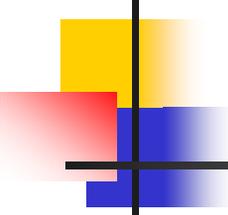
- Estate of Theresa M. Trujillo v. Roche, Secretary of the Air Force, 2003 WL 214518 (EEOC, January 27, 2003)(Employer's request for medical documentation of non obvious disabilities of forger employee found reasonable)
- Haggard v. Potter, U.S. Postal Service, 2003 WL 137899 (EEOC) (Agency's failure to provide sign interpreter at various events violated Rehabilitation Act)



# Issues & Cases

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- Roberts v. DOT Session (EEOC 2000)(MCS employee not entitled to fragrance free environment, but agency's provision of inoperative air purifier, two-year delay in requesting medical documentation and failure to engage in timely good faith discussion constituted error)

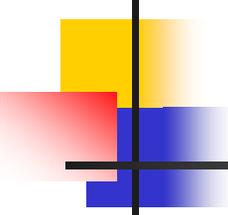


# Reasonable Accommodation

## “Atrocity”

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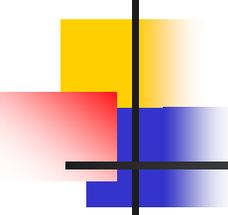
Lukowski v. Henderson  
(EEOC 2001)(flexibility  
required in scheduling  
training kidney failure-  
dialysis-training-short  
notice training dates-no  
calls to schedule  
treatment-threatened  
discipline if didn't attend)



# Executive Order 13164

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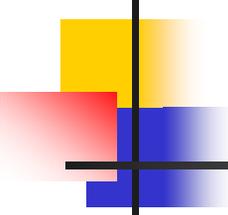
- Written procedures for processing Reasonable Accommodation Requests
- Procedures were to be submitted to EEOC for review by 26 July 2001



# Executive Order 13164 Minimums

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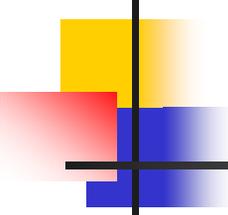
- Procedures must be flexible
  - Written in plain language
  - Designed to expand opportunities for people with disabilities
  - Must enable agency to meet its responsibilities under the Rehabilitation Act
- \* Request denials will be in writing



# Reasonable Accommodation *Process* Requirements

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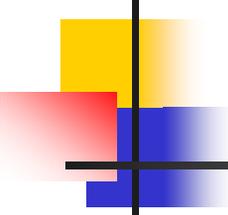
- Evidence of interactive dialogue
- Act promptly upon receipt of RA request
- Manager should never play doctor
- Employees can be required to sign a medical release
- Be careful when requesting additional medical documentation
- Be Creative



# Question

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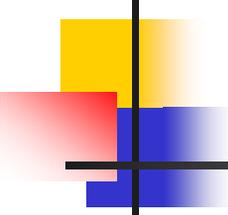
Assume despite all reasonable accommodation efforts, employee cannot perform the essential functions of his or her position. Is he or she a qualified individual with a disability?



# Reassignment Obligation

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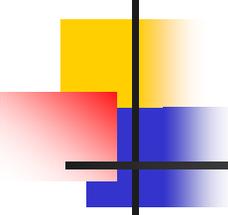
- 29 CFR 1630.2(o)(2)(ii); Int. Guidance; EEOC's Oct 2002 Guidance on Reasonable Accommodation question 23 discuss "reassignment to a vacant position" as a potential accommodation
- Not the same as the old reassignment standard under 29 CFR 1614.203. See question 27
  - Deletes "same commuting area" and "same appointing authority" language
  - Employee may be required to pay relocation expenses, unless employer routinely pays
  - Undue hardship now the standard – *See Barnett*



# Issues & Cases

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- AOC v. Johnson, 361 F.3d 633 (Fed Cir. 2004)(Reassignment to higher graded position reasonable where AOC had flexibility in such reassignments)
- Ramsey v. Potter, USPS, 2003 WL171746 (EEOC)(Makes clear new ADA reassignment standard applies after June 20, 2002)(Clarification about applicability of 1614.203 and 1630)
- Wise v. Potter, U.S. Postal Service, 2003 WL171758 (EEOC)(Agency attempted to accommodate employee via reassignments, but employee turned them down based on “nothing beyond her own opinion to support her declination – agency satisfied its burden)
- McCintosh v. Potter, U.S. Postal Service, 2003 WL 137871 (EEOC)(Agency’s refusal to reassign employee into position inconsistent with her medical restrictions not violative of Rehabilitation Act; case also contains good explanation of burdens of proof when “failure to reassign” allegations are involved) See also Broussard v. Potter, Postmaster General, 2003 WL 137878 (EEOC)

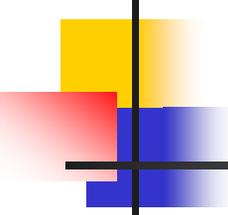


# Reasonable Accommodation Sum Up

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- Does the person have a disability?
- Is he or she qualified?
  - Essential Functions
  - Can perform them with or without accommodation
- Have you opened the dialogue?
- Have you considered reassignment?

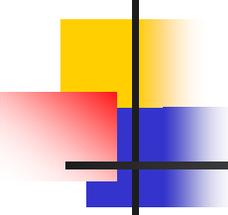
See EEOC's 2002 Reas Accom Guidance  
Appendix "Instructions for Investigators"



# Disability Discrimination Claim Triage

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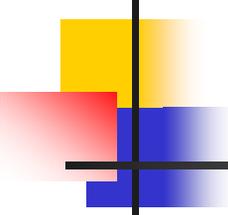
- Three Questions:
  - Does the Person Have a Disability?
  - Is the Person a Qualified Individual with a Disability? (Ability to Perform essential functions with or without Reasonable Accommodation)?
  - Has Agency Properly Considered any Reasonable Accommodation Requests
- Possible Defenses:
  - Undue Hardship
  - Direct Threat



# Undue Hardship

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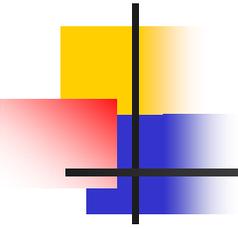
- 42 U.S.C. 12111(10); EEOC's 22 Oct 02 Guidance on RA: means an action requiring significant difficulty or expense, when considered in light of:
  - Nature, cost, and impact (financial & personnel) on operation of facility providing accommodation;
  - Nature, cost, and impact (financial & personnel) on operation of overall business entity providing accommodation (considers location of multiple facilities);
  - the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity
- See also 29 CFR 1630.2(p): adds "tax credits, deductions and outside funding..."



# Undue Hardship “Not Enoughs” from EEOC’s 2002 Guidance

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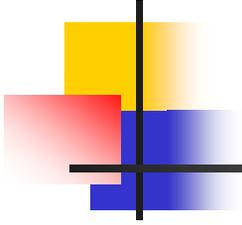
- Other employee’s or customers’ attitudes
- Cost comparison to employee’s salary, position, or status
- Lease or contract terms re: facility
- Not the same as religious accommodation requirements
- Impact of *Barnett*
- Impact of other contractual arrangements,
  - What about “outsourced” work/functions?



# U.S. Airways Inc. v. Barnett

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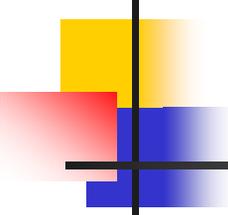
S.Ct's definition of "reasonable" also referenced in EEOC's Oct 2002 guidance: A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases."



## Undue Hardship Limitation

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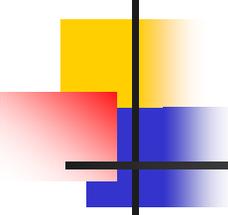
- Burnett v. Potter, U.S. Postal Service, 22 EEO PUB LEXIS 6664, Sep 26, 2002 (Illustrates limits of Barnett. Agency may not hold up seniority system as reason it refused reassignment, where that system appeared specifically to address/contemplate these sorts of reassignments.)



# Standards of Conduct

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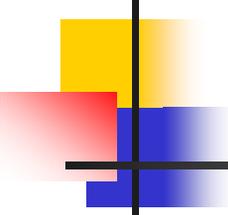
Must an employer withhold discipline or termination of an employee who, because of a disability, violated a rule of conduct?



# Misconduct

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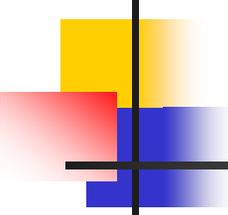
- EEOC's 2002 Reasonable Accommodation Guidance Question 35: An employer never has to excuse a violation of a uniformly applied conduct rule that is **job-related and consistent with business necessity.** This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.



# Standards of Conduct

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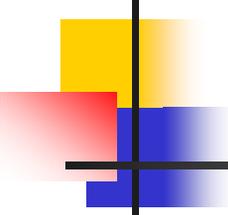
- General Rule: “Neither the Rehabilitation Act nor the ADA immunizes disabled employees from being disciplined for misconduct, provided the employer would impose the same penalty on a nondisabled employee” *Williams* (MSPB 2000)
  - Rule is job-related re: the position
  - Rule is consistent with business necessity
  - Rule is uniformly applied
- \* May be required to accommodate to allow employee to meet conduct rule(s) in the future



# Misconduct Cases

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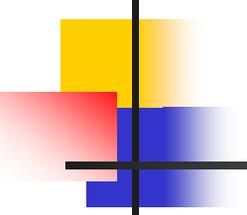
- *McCrea v. John E. Potter*, 2002 U.S. Dist. LEXIS 6977 (Dist. IL Apr 2002) Postmaster General (Employer need not overlook threatening behavior/misconduct)
- *Bailey v. DoD*, 92 MSPR 59 (July 2002)(Accounting technician who was discharged for threatening coworkers and being disruptive alleged that since her behavior was caused by her bipolar disorder, agency's dismissal amounted to disability discrimination. MSPB held not discrimination.)
- *Laniewicz v. VA* (MSPB 1999)(sent emergency medical team to wrong location then chewed out a volunteer - disability not an excuse - but given considerable weight as a mitigating factor)
- *Waterstat v. Barram* (EEOC 1997)(poor performance & tardiness - last minute revelations about disabilities - reasonable accommodation is always prospective)



# Exclusions from Coverage - Drugs

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- 42 U.S.C. 12114; 29 U.S.C. 705(C); 29 CFR 1630.3: excludes current illegal use of drugs
  - Still protects former users (no longer illegally using) who either completed or are enrolled in rehab program (regarded as)
- Interpretive Guidance: “The term ‘currently engaging’ is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct.”

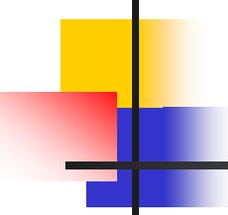


# Drugs – Disparate Treatment vs. Disparate Impact

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**Raytheon v. Hernandez**, 124 S. Ct. 513 (2003) (Former employee who had been fired for violating workplace no drug rule alleged company's "**no rehire**" policy was tantamount to disability based discrimination)

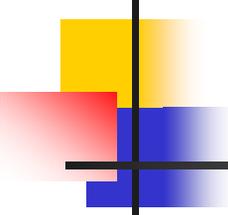
- Seemed to squarely meet "completed drug rehab program" requirement
- Argued he had a "**record of**" being disabled (drug addict,)
- Argued he was "**regarded as**" disabled (drug addict).
- Court held that a "**no rehire**" **policy**, when applied to people who had been discharged for workplace misconduct, constitutes a legitimate nondiscriminatory reason for refusing to rehire under a **disparate treatment** theory, but left open the question of whether such a policy would withstand analysis under a **disparate impact** theory of discrimination.



# Direct Threat

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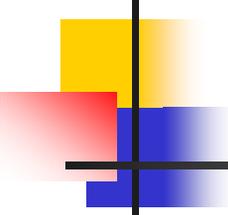
- 42 U.S.C. 12112(3): Direct threat: The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.
- 42 U.S.C. 12113(b): The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.
- 29 CFR 1630.2(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.
- 29 CFR 1630.15(B)(2) Direct threat as a qualification standard. The term "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace



## Question

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- What if the only person who would be at risk of being harmed is the Employee with a disability and no one else? May an employer rely on the “direct threat” defense in such situations?

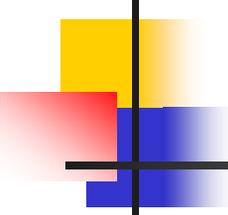


# Echazabal v. Chevron

## 532 U.S. 925 (2002)

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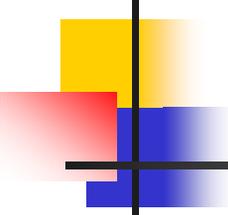
- Contract employee at a Chevron oil refinery wanted to work for Chevron.
  - Twice failed company physical – he suffered from Hepatitis C,
  - Following second failure, Chevron directed contractor to move him to area without exposure to dangerous fumes etc or remove him from the refinery; the contractor laid him off.
  - Echazabal argued ADA says “threat to others” not “threat to self.”
- Court held Chevron reasonably followed EEOC’s “self or others” language and found no violation.
- Direct threat may be threat to self or others.



# Direct Threat Factors

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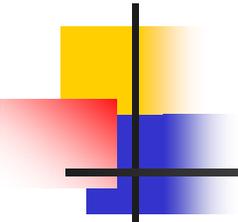
- 29 CFR 1630(r): the determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job. This assessment shall be based on:
  - Duration of the risk
  - Nature and severity of potential harm
  - Likelihood potential harm will occur
  - Imminence of the potential harm
- Interpretive Guidance:
  - Employer must consider reasonable accommodation would eliminate risk or reduce risk to an acceptable level
  - Risk only considered when “significant”, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient



# Direct Threat Factors

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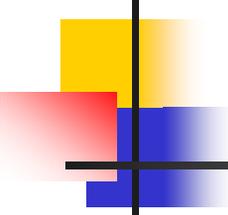
- Interpretive Guidance: When evaluating direct threat factors: “such consideration must rely on objective, factual evidence--not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes--about the nature or effect of a particular disability, or of disability generally.”
- Relevant evidence may include:
  - input from the individual with a disability,
  - experience of the individual with a disability in previous similar positions,
  - opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.



# Direct Threat

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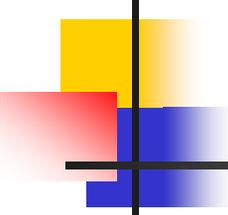
- McGeshick v. Principi, 357 F.3d 1146 (10<sup>th</sup> Cir. 2004)(Where solid medical evidence supported employer's election not to hire employee with condition that would have made him unsafe on the job—vertigo & dizziness—court found neither ADA nor Rehab Act required hiring that would endanger prospective employee or others)



# Direct Threat

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- Waddell v. Valley Forge Dental Associates, 276 F.3d 275 (11<sup>th</sup> Cir. 2002)(thorough application of direct threat factors. Court found him not qualified based on “direct threat” noting, even though risk is unlikely, it is possible. And if it did happen, the risk is “death itself.”
  - Nature of risk (transmission)
  - Duration of risk
  - Probability of harm
  - Severity of risk

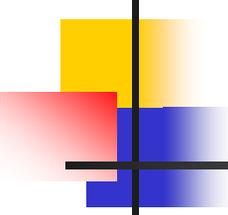


# Agency Knowledge

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Generally, employer has no obligation to accommodate a disability of which it is unaware

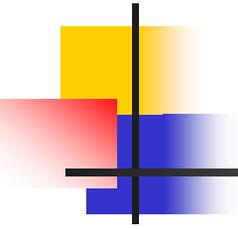
- Raytheon v. Hernandez (employer could not have intentionally discriminated where responsible official was unaware of disability)
- Rinehimer v. Cemcolift, 292 F.3d 375 (3<sup>rd</sup> Cir. 2002)(employer's knowledge of "respiratory sensitivities" and prior pneumonia, not the same as knowing he had asthma. No knowledge = impossible to intentionally discriminate.)



# Recap

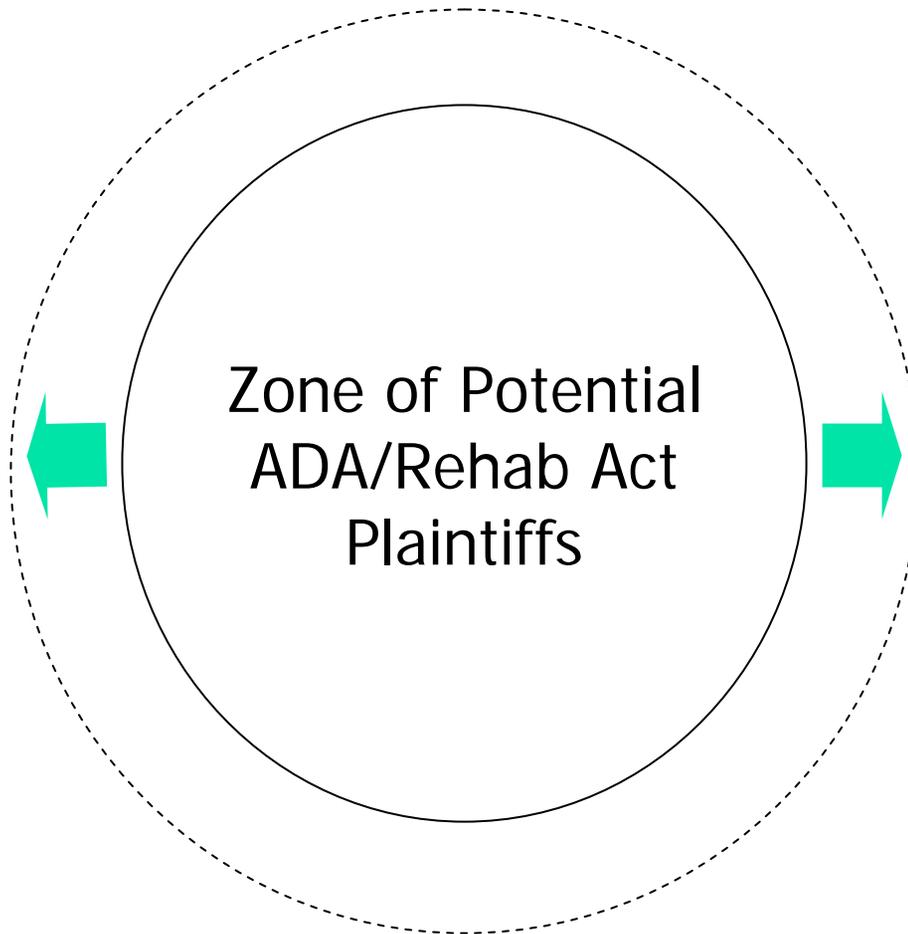
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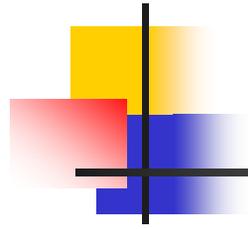
- Background
- Familiarization with materials
- Triaging an ADA Case
  - Disability
  - Qualified – Reasonable Accommodation
- Defenses
  - Undue Hardship
  - Misconduct
  - Direct Threat
- Inquiries and Exams (Time Permitting)



# Developments

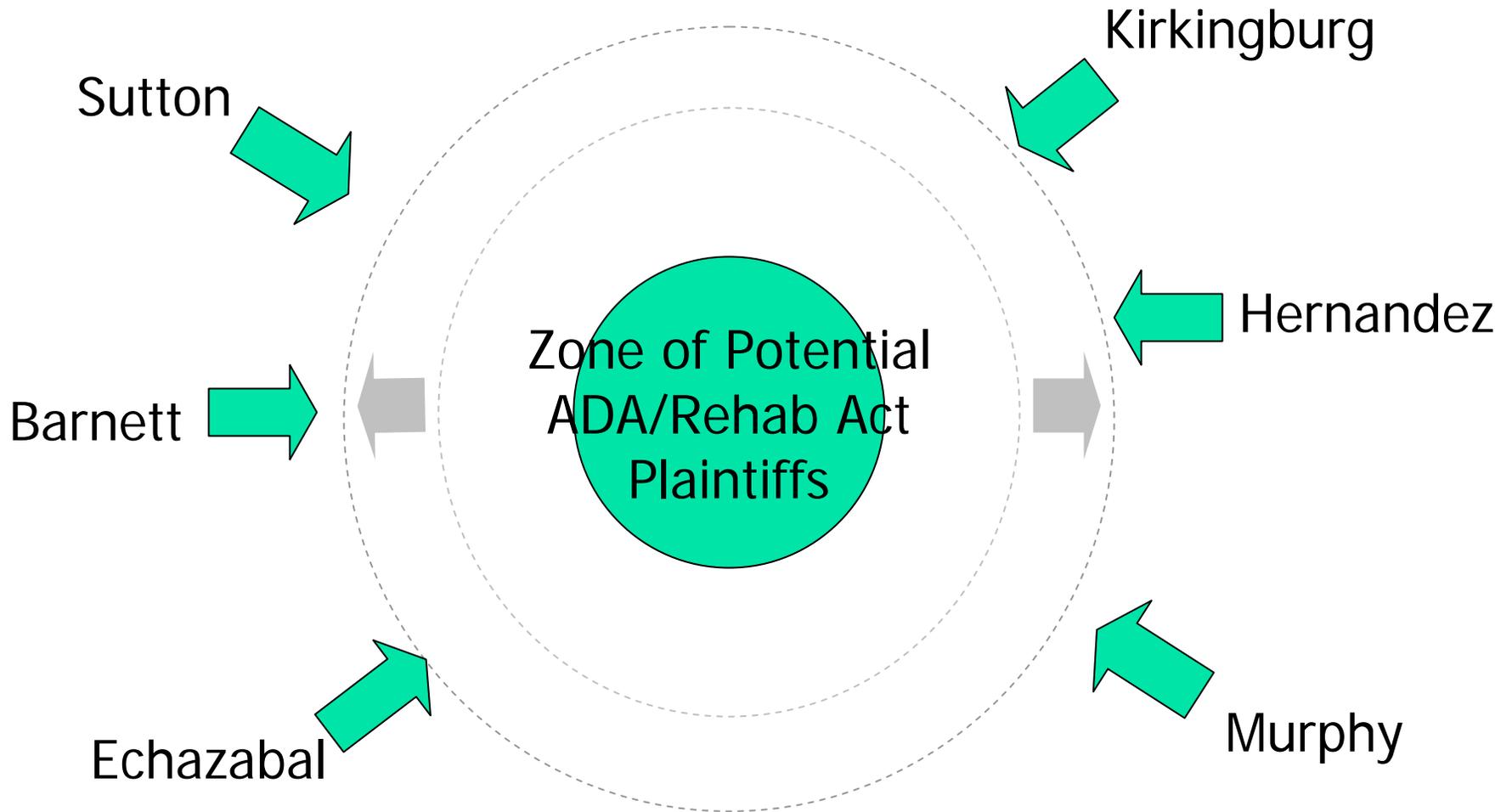
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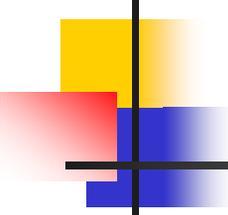




# Developments

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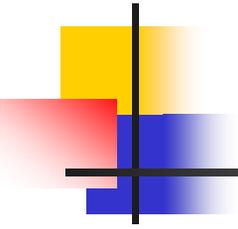




# EEOC Guidance Must Reads

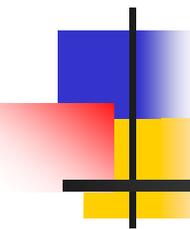
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- Policy Guidance on EO 13164, Oct 2000
- Enforcement Guidance on EO Disability Related Inquiries and Medical Examinations, July 2000
- Instructions for Field Offices Analyzing ADA charges after Sutton Decision
- Enforcement Guidance on Reasonable Accommodation and Undue Hardship, March 1999
- Enforcement Guidance on ADA and Psychiatric Disabilities, March 1997



Y'all Come Back...

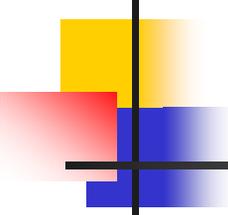
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# Additional Slides on Exams and Inquiries

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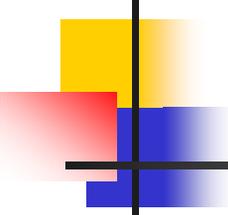
Provided for additional reference



# Exams & Inquiries

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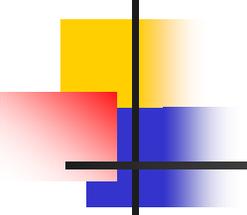
- 42 U.S.C. 12112(d)
  - “Except [for employment entrance exams] . . . Shall not conduct a medical exam or make inquiries of a job applicant as to whether such applicant is an individuality or as to the nature or severity of such disability...[But]
  - May make pre-employment inquiries into the ability of an applicant to perform job-related functions.”



# Entrance Exams & Inquiries

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- 12112(d)(3); 29 CFR 1630.13/14: may require medical exam after offering job, if:
  - All employees have them regardless of disability;
  - Information segregated and closely held, except:
    - Supervisors & managers if related to RA
    - Inform safety & first aid personnel, and
    - Govt officials investigating compliance with ADA
  - Results used only in accordance with this chapter...

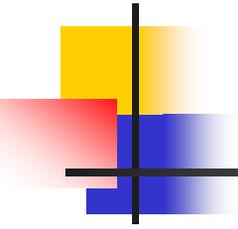


# Other Exams & Inquiries

## (Fitness for Duty for example)

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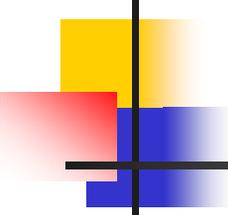
- 12112(d)(4)(A): no exams or inquiries about disabilities unless exam or inquiry is shown to be **job-related and consistent with business necessity**
- (B) May provide voluntary exams etc. that are part of health program to employees, and may inquire about employee's ability to perform job-related functions
- (C) Same restraints on how information is used.



# Entrance Exams & Inquiries

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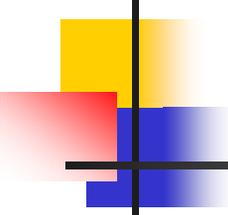
Direction to undergo Fitness for Duty Exam not an Adverse employment action *Bunyon v. Henderson*, USPS, 206 F. Supp 2d 28 (DC 2002)



# Exams & Inquiries Clarification

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- While 29 CFR 1630.14(b) says entrance exams need not be “job related and consistent with business necessity, the interpretive guidance, for all intents and purposes adds that requirement back. If exam disclosed employee does not meet employer’s criteria, either:
  - Criteria must not screen out or tend to screen out person or class of individuals with disabilities, or
  - Criteria must job related and consistent with business necessity (no reasonable accommodation that will enable . . . performance of essential functions...)



# Exams & Inquiries Sum Up

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- May not ask about disabilities
- May ask how person will perform job
- May require post-offer entrance physical exam, if required of all employees
- May require exam during employment if
  - Required to determine ability to perform essential functions
  - Required as part of federal, state or local law consistent with the ADA
    - Bus & Truck Driver
    - Pilots & other air transport personnel
    - OSHA, Coal Safety & Health Act Compliance etc.