

NATIONAL EMPLOYMENT LAW INSTITUTE

EMPLOYMENT LAW BRIEFING

March 13 – 16, 2005

Key West, Florida

Summary

 **Hunter Hughes, Rogers & Hardin LLP**

Developments in EEO Law

1. *Clackamas Gastroenterology Assocs. V. Wells*, 538 U.S. 440 (2003): This case decided what standards should govern the determination if a physician-shareholder in a professional corporation was an owner or an employee when counting the number of employees for coverage under the Age Discrimination in Employment Act. The six factors held most important about an individual's status are: whether the organization can hire or fire the individual or set the rules of the individual's work; whether and if so to what extent the organization supervises the individual's work; whether the individual reports to someone higher in the organization, whether and to what extent the individual is able to influence the organization, whether the parties intended that the individual be an employee as expressed in written agreements, and whether the individual shares in the profits.
2. *Arbaugh v. Y & H Corp.*, 380 F.3d 219 (5th Cir. 2004): The court examined whether defendant restaurant's delivery drivers and restaurant owners and their wives counted as "employees" for the 15-employee jurisdictional count. It applied the same six factor test used by the Supreme Court in *Clackamas* (above).
3. *Kanida v. Gulf Coast Med. Personnel LP*, 363 F. 3d 568 (5th Cir. 2004): The court held that no reversible error was committed when the district court refused to include a permissive pretext instruction, under which jurors would be told that they are permitted to, but need not, infer that an employer's actions regarding an employee were based on a prohibited motivation from evidence that the employer's reasons for its actions were mere pretext.
4. Pretext can be found based on (a) statistics, (b) comparators similarly situated, (c) written or oral statement(s) indicating bias, or (d) just plain false reason.
5. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003): The court ruled that circumstantial evidence is sufficient to avoid summary judgment, even though proof beyond a reasonable doubt is required to support a criminal conviction.
6. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. June 25, 2004): The 5th Circuit (which includes Texas) found that circumstantial evidence could be used to establish a mixed motive theory in ADEA cases.

7. Cook v. Mississippi Department of Human Services, 108 Fed. App. 852, No. 03-60380, 2004 WL 1834596 (5th Cir. Aug. 17, 2004): A white employee not selected for a director position failed to demonstrate that the county department's reasons for choosing a black applicant were pretext for unlawful "reverse race" discrimination. Her credentials did not "jump off the page and slap us in the face." Thus a reasonable juror could not conclude that her qualifications were blatantly superior to the successful candidate's.
8. Taylor v. Small, 350 F.3d 1266 (D.C. Cir. 2003): A black employee was given erroneously a low performance evaluation which resulted in lower pay. The employer corrected the evaluation and the lower pay before litigation was filed. This rendered the plaintiff unable to establish she was subjected to an adverse employment action. Permitting employers the opportunity to correct workplace wrongs prior to litigation is an objective of EEO laws.
9. Tesh v. U.S. Postal Service, 349 F.3d 1271 (10th Circ. 2003): Employer reasonably believed the employee had been dishonest, and whether this belief was erroneous or not was irrelevant.
10. Frank v. Xerox Corp., 347 F.3d 130 (5th Cir. 2003): Xerox's balanced work force initiative had the stated purpose of ensuring that all racial and gender groups were proportionately represented at all levels of the company. The Houston office set out to match the racial goals that required reduction of the percentage of black employees. This constitutes direct evidence of discrimination under both disparate impact and disparate treatment theories.
11. Storey v. Burns International Security Services, 390 F.3d 760 (3d Cir. 2004): The employee was fired after he refused to cover or remove Confederate flag stickers from his lunchbox and pickup truck. The employee alleged he was terminated based on his national origin, "Confederate Southern-American," and religion, Christian. The court noted that by the employee's own account, he displayed the stickers based on his personal need to share his heritage. This cannot be equated with something endemic to national origin or a religiously mandated observance.
12. Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004): Plaintiff argued that her employer failed to offer her a reasonable accommodation to a conflict between the "no facial jewelry" provision of its dress code and her religious practice as a member of the Church of Body Modification. The district court granted summary judgment, concluding that the defendant reasonably accommodated her by offering to reinstate her if she either covered her facial piercing with a band-aid or replaced it with a clear retainer. The appeals court avoided questions about whether CBM is a bona fide religion, but concluded that Costco had a legitimate interest in presenting a work force to its customers that is reasonably professional in appearance.
13. Pennsylvania State Police v. Suders, 124 S.Ct. 2342 (2004): The Supreme Court officially recognized constructive discharge claims under Title VII. It is not necessary to prove intent.
14. Courts have found a variety of activities to be protected under the opposition clause (retaliation), including informal protests, letters to customers, complaints to management, refusals to engage in unlawful discrimination, resisting a

- supervisor's sexual advances, and requests for accommodation. However, not all conduct is protected. *EEOC v. Severn Trent Serv.*, 358 F.3d 438 (7th Cir. 2004): Participation clause of Title VII is applicable to an employer only when the person against whom he is retaliating is an employee or former employee.
15. 5th Circuit has ruled that only "ultimate employment actions" can be considered retaliation; however, other courts have considered the totality of the circumstances.
 16. *Lucas v. Chicago Transit Authority*, 367 F.3d 714 (7th Cir. 2004): A negative evaluation or admonishment by an employer does not rise to the level of an adverse employment act without some tangible job consequence accompanying the reprimand.
 17. *Mitchell v. Vanderbilt University*, 389 F.3d 177 (6th Cir. 2004): Actions taken against plaintiff were "mere inconvenience or an alteration of job responsibilities (and) is not enough to constitute an adverse employment action." Further, mere threats of alleged adverse employment action are not sufficient to satisfy the adverse action requirement. Also, reduction in laboratory space did not materially adversely affect his salary or status of employment.
 18. Generally, action taken within three months of a complaint will establish a prima facie case of retaliation. Although a lack of temporal proximity may make it more difficult to show causation, "circumstantial evidence of a 'pattern of antagonism' following the protected conduct can also give rise to the inference" (*Porter v. California Dept. of Corrections*, 383 F.3d 1018, 9th Cir. 2004).
 19. *General Dynamics Land Sys, Inc. v. Cline*, 540 U.S. 581 (2004): ADEA does not prohibit favoring the old over the young. A collective bargaining agreement provided better benefits for those over the age of 50. Those covered under the ADEA ages 40-50 could not claim age discrimination.
 20. *Torrel v. City of New York*, No. 03-9209-CV, 2004 WL 2434751 (2d Cir. Nov. 1, 2004): All relevant conduct related to alleged sexual harassment occurred outside the limitations period, with the exception of a "smirk." This was insufficiently related to the hostile work environment claim to find a continuing violation.

 ***Steven Hymowitz, Keisewetter Wise Kaplan Prather, PLC***

Privacy and Discovery in the Electronic Workplace

1. The Electronic Communications Privacy Act of 1986 requires the "contemporaneous acquisition" of communication. The Stored Communications Act protects against the unauthorized "access" to electronic communication while it is in electronic storage, defined as (a) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof, and any storage of such communication by an electronic communication service for purposes of backup protection of such communication. However, employers can use the defense of consent if it has in place an interception or disclosure "pop-up" disclaimer, e.g., communications are the property of the

- employer and employees have no expectation of privacy. Consent may be expressed or implied.
2. Some states restrict consent to one party only; others require both parties to consent.
 3. The provider of the service can monitor its own server.
 4. *Steve Jackson Games, Inc., v. U.S. Secret Service*, 36 F.3d 457 (5th Cir. 1994): The court held that seizure of plaintiff's computer containing unread private e-mail was not an unlawful "intercept" under the Federal Wiretap Act. Congress did not intend for "intercept" to apply to "electronic communication" when the communications are stored and not reviewed contemporaneously with their transmission.
 5. *Wesley College v. Pitts*, 974 F. Supp. 375 (D. Del. 1997): An inadvertent glimpse of a computer screen could not constitute "interception" of e-mail because a computer screen was a medium for information rather than an "electronic device" capable of being used to "intercept" e-mail within the meaning of the ECPA.
 6. Anonymous postings can be difficult to acquire legally. *Dendrite International v. Doe*, 775 A.2d 756, 760 (N.J. Super. Ct. 2001): A party seeking the identity of anonymous posters must first notify the posters to let them know they are the subject of a subpoena or an application for an order of disclosure and then "withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application." Courts should weigh, on a case-by-case basis, the First Amendment rights of the posters against the strength of plaintiff's case and need for requested information to proceed properly. Plaintiff must prove damages, e.g., defamation.
 7. Once a dispute merely ripens to the point where litigation is "reasonably anticipated," there is a "duty to suspend any routine document purging system...and to put in place a litigation hold to ensure the preservation of relevant documents" (*Rambus, Inc. v. Infineon Technologies AG, Inc.*, 222 F.R.D. 280, 288 (E.D. Va. 2004). Once the heightened duty kicks in, the "destruction of evidence raises (a) presumption that disclosure of the materials would be damaging" (*Arista Records v. Sakfield Holding*, 314 F. Supp. 2d 27, 34 (D.D.C. 2004).
 8. *Zubulake v. UBS Warburg LLC* (S.D. NY 2003): The court divided the world of electronic information into two distinct broad categories: (a) data that is kept in an accessible format (e.g., active, online data—hard drives, near-line data—optical disks, offline storage/archives which lack the coordinated control of an intelligent disk subsystem) and (b) electronic data that is relatively inaccessible (e.g., back-up tapes, erased, fragmented or damaged data). Responding party must bear all costs of producing the accessible data; some cost-shifting to the requesting party could be appropriate for relatively inaccessible data.

ADA Developments: “Disability” and “Qualified”

1. *Rebarchek v. Farmers Cooperative Elevator and Mercantile Association*, 2000 U.S. App LEXIS 277 (10th Cir. 2000): The plaintiff must articulate with precision the impairment alleged and the major life activity affected by that impairment.
2. *Colwell v. Suffolk County Police Department*, 158 F.3d 635 (2d Cir. 1998): Activities such as driving, working on cars, basic chores, shopping in a mall, skiing, golfing, yard work, painting, plastering, and shoveling snow are not major life activities.
3. The EEOC has stated that, in determining whether an individual is substantially limited in a “major life activity,” a court must look at (a) the nature and severity of the impairment, (b) the duration or expected duration of the impairment, and (c) the permanent or long-term impact, or the expected permanent or long-term impact, resulting from the impairment. You must also look at what the individual can do, as well as what he or she can’t do, compared to an “average” person.
4. Use “short” or “long” term, not “temporary” or “permanent.” The best standard for “long” term is three months or more.
5. *Guzman-Rosario v. UPS*, LEXIS 1730 (1ST Cir. 2005): 6 – 24 months could be considered “short term;” however, this is an extreme case.
6. Also consider if the disorder is episodic; how frequent and how severe? As a general standard, it must occur at a minimum once a month.
7. Working is a loser as far as a major life activity according to the Supreme Court; many lower courts have disagreed. Can you do other jobs? If so, you’re not substantially limited. Must show you can’t do a class or broad range of jobs, not just one particular job. However, if you can’t do a class or broad range of jobs (including the one in question), are you qualified?
8. Some courts have held that if an individual continued to perform his/her job despite a medical condition, s/he will not be considered substantially limited in working (e.g., *Benoit v. Technical Manufacturing Corp.*, 331 F. 3d 166 (1st Cir. 2003)).
9. EEOC, in informal guidance, has taken the position that Multiple Chemical Sensitivity is an impairment, but the critical issue is whether, for the particular individual, it substantially limits a major life activity. Even if there is no physical cause, it could be considered a mental disability.
10. In “record of a disability” cases, was the prior condition a “disability” as defined in the ADA? Did it substantially limit a major life activity?
11. In “record of” cases, an individual may claim disparate treatment; however, s/he is not entitled to a reasonable accommodation.
12. Employers have the right to change job functions (unless they are trying to get rid of someone because of a disability).
13. It is critical to determine whether something really is a function, or whether it is simply a way of performing a function; and secondly, if something is a function, whether it is essential or marginal.

14. *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir. 2001): Although “regular and predictable job performance” may be an essential function, “regular and predictable attendance” might not be essential if the job could be performed at home.
15. *Ross v. Indiana State Teacher’s Association Insurance Trust*, 159 F.3d 1001 (7th Cir. 1998): The employee’s essential functions included meetings outside of his office, including school visitations. The court concluded the employee was not qualified since he could not perform such travel.
16. If the employee’s doctor has stated the employee is unable to return to work, or where the doctor has suggested that the employee will need some job modification, this may be evidence that the employee is not qualified for the job.

 ***Gary R. Siniscalco, Orrick, Herrinton & Sutcliffe LLP***

Affirmative Defenses

1. Employers generally bear the burden of demonstrating the necessity of “bona fide occupational qualifications.” The U.S. Supreme Court has established a two part test for employers (*TWA v. Thurston*, 469 U.S. 111, 1985, and *Western Airlines v. Criswell*, 472 U.S. 400, 1985). First, the qualification must be reasonably necessary to the particular business. Furthermore, the employer must be compelled to rely on the BFOQ as a proxy for the particular skill or ability at issue. The latter element can be established by a showing by the employer that (a) it had reasonable cause to believe that all or substantially all persons not meeting the qualification would be unable to safely perform the duties of the job or (b) it would be highly impractical to make determinations on an individualized basis.
2. Employers may also claim business necessity or undue hardship as affirmative defenses.
3. Affirmative defenses in equal pay cases include (a) bona fide seniority system, (b) merit or performance, (c) quality or quantity of work, and (d) any other reasonable factor (compensation policies, market, retention, incentives). While there are no legal requirements for equity adjustments, they may be good management policy.
4. Another affirmative defense is “action in conformity with EEOC regulations;” e.g., official EEOC opinion letters, written interpretations, good faith reliance.
5. To use affirmative action plans as a defense, the employer must show they stand up to strict scrutiny. In particular, the employer must establish that there is valid evidence (usually statistical) to support its conclusion that racial discrimination makes affirmative action necessary. Second, employers must show the objectives of the plan correspond to the relevant area’s labor pool (*City of Richmond v. Croson*, 488 U.S. 469, 1989, and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 1986).
6. *Ellerth/Faragher Defense*: The employer has the burden of showing (a) that it exercised reasonable care to prevent and promptly correct any sexually harassing

behavior and (b) that the employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer or to otherwise avoid harm. This applies to hostile job environment sexual harassment only.

7. A majority of states now allow employers to establish a good faith affirmative defense in actions brought by employees discharged for misconduct.
8. After-acquired evidence is evidence of an employee's misconduct that is discovered after an employee has been fired, but that would have independently led to the employee's discharge. The employer must prove it would have (and not simply could have) fired the employee based on the evidence acquired after the employee's termination.

 **Steven Hymowitz, Keisewetter Wise Kaplan Prather, PLC**

Recent Significant Developments at OFCCP

1. OFCCP is hiring more specialists, e.g., statisticians at central and district offices.
2. It is looking almost exclusively for systemic discrimination.
3. Who is an applicant? OFCCP and EEOC impasse continues. According to the Uniform Guidelines, it depends on the employer's selection procedures.
4. Time in grade may be factored into compensation analyses.
5. Pay equity is the issue, not equal pay.
6. Comparator – an employee who is in a nearly identical circumstance.
7. While OFCCP wants employers to aggregate, there are reasons to disaggregate below job title or grouping. While employees may have equal work, they may not be similarly situated (e.g., general lawyers vs. specialized lawyers). Look for same work under similar circumstances.
8. New hire v. incumbents, retention, and competition may be compensation factors.
9. OFCCP's proposed guidelines to adapt regression analyses to its compensation evaluations are generally lauded, but the contractor community feels it is inappropriate to impose on them the kind of out-of-pocket costs required for full-scale regression analyses.
10. Approximately 40% of compliance officers and senior managers may retire in the next year.
11. Jobs for Veterans Act regulations are “in process.”
12. Contractors do not have to turn over adverse impact analyses, but they do have to turn over the basic data.

 **Hunter Hughes, Rogers & Hardin LLP**

Developments in the Law of Harassment

1. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993): The Supreme Court stated that a hostile workplace exists when “the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’...that is sufficiently severe or

- pervasive to alter the conditions of the victim's employment and create an abusive working environment.”
2. *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721 (8th Cir. 2000): The conduct has to be unwelcome; if plaintiff used same language, it was not unwelcome. A contrary case (*Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 476 (7th Cir. 2004)) is on shaky ground.
 3. Causal connection – plaintiff must also prove that the unwelcome conduct was motivated by membership in a protected class. If the harasser treated individuals in other protected categories in the same manner, it is less likely that plaintiff can prove illegal motivation.
 4. *Kahn v. Objective Solutions Int'l*, 86 F. Supp. 2d 377 (S.D.N.Y. 2000): Participation in a consensual office affair did not constitute actionable gender discrimination when the termination of the affair resulted in discharge.
 5. *Ocheltree v. Scollon Prods. Inc.*, 335 F. 3d 325 (4th Cir. 2003): Female plaintiff was the victim of workplace harassment because the conduct was directed at her. It was not relevant that men in the workplace were also offended.
 6. *Petrosino v. Bell Atlantic*, 03-7366 (2d Cir. 2004): The depiction of women in offensive jokes and graphics was uniformly sexually demeaning and communicated the message that women as a group were available for sexual exploitation by men. The fact that much of this offensive material was not directed specifically at plaintiff does not preclude a jury from finding that the conduct subjected plaintiff to a hostile work environment based on her sex.
 7. *EEOC v. Reynolds Metals Co.*, 212 F. Supp. 2d 530, 535 (E.D. Va. 2002): The alleged harasser's conduct toward his ex-companion (consensual affair), including the use of profanity, name-calling, leaving notes on her car, taking her personal property, grabbing, and closing doors on her, flowed from his failed relationship and not gender bias.
 8. *Pergrine v. Penmark Mgmt. Co.*, 314 F. Supp 2d 486 (E. D. Pa. 2004): A relationship that is consensual at its inception does not necessarily preclude a quid pro quo claim by an employee, if the employee later attempts to break off the relationship and suffers and adverse employment action as a result.
 9. *Clark Co. School District v. Breeden*, 532 U.S. 268 (2001): The Supreme Court ruled that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'
 10. *Knox v. Neaton Auto Products Manufacturing*, 375 F.3d 451 (6th Cir. 2004): The evidence was insufficient to support a finding that the various comments and behavior complained of by plaintiff, although crass and offensive, were severe or pervasive enough to create an objectively hostile work environment.”
 11. *Romaniszaksanchez v. Int'l Union of Operating Engineers, Local 150*, No. 04-1083, 2005 WL 103054 (7th Cir. Jan. 13, 2005): Title VII does not impose a legal duty to purify the language of the workplace of profanity. Plaintiff's conduct demonstrated that the comments were not the type of unwelcome verbal approaches that create a hostile sexual environment.
 12. *Dawson v. County of Westchester*, 373 F.3d 265 (2d Cir. 2004): Claims must be based on the cumulative effect of the conduct. The crucial question is not

- whether the remarks to which plaintiffs were subjected were of an explicitly sexual nature, but rather whether the workplace atmosphere, considered as a whole, undermined plaintiffs' ability to perform their jobs, compromising their status as equals to men in the workplace.
13. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004): A female Presbyterian minister could sue the church for sexual harassment and recover damages. While she could not contest her discharge as a minister and the fact that she was barred from ever being a minister again because of the ministerial exception to Title VII, a suit for sexual harassment does not implicate the ministerial exception.
 14. ADA harassment – the complainant must establish disability.
 15. As a general rule, employers are not liable for sexual harassment or other conduct of employees in off-duty encounters in locations like private bedrooms and hotel rooms outside the workplace, and thus, a “hostile work environment” cannot exist. An exception could be if it involves a supervisor and a non-supervisor.
 16. *Williams v. Conagra Poultry Company*, 03-2976 (8th Cir. August 6, 2004), amended (August 11, 2004): Because a subjectively hostile environment is one that by definition the plaintiff must be aware of, a plaintiff cannot recover for harassment of which he or she is unaware (second hand incidents).
 17. *Indest v. Freeman Decorating, Inc.* 164 F.3d 258 (5th Cir. 1999): The court ruled for the employer when after the employee complained, the employer promptly censured the alleged harasser by issuing verbal and written reprimands and suspended him for seven days.
 18. EEOC Guidance states that a tangible employment action, among other things, “is usually documented in official company records,” “may be subject to review by higher level supervisors,” and “often requires the formal approval of the enterprise and use of its internal procedures.”
 19. Constructive discharge - the only way to prove “tangible employment action” is to show the supervisor used power in an official way.
 20. *Lucas v. Chicago Transit Authority*, 367 F.3d 714 (7th Cir. 2004): A negative evaluation or admonishment by an employer does not rise to the level of an adverse employment act absent some tangible job consequence accompanying the reprimand.
 21. *Stewart v. Mo. Pac. RR Co.*, No. 04-20365, No. 04-20470, 2005 U.S. App. Lexis 1841 (5th Cir. Jan. 27, 2005): Employees who were placed on a year’s probation for disciplinary reasons did not suffer an adverse employment decision; “The adverse employment action required...must be an ultimate employment decision along the lines of hiring, granting leave, discharging, promoting, or compensating.” The employees received the same pay and held the same job responsibilities.
 22. Employers should have at least three specific places to submit complaints; Hughes does not recommend using “any supervisor or manager.”
 23. Any time the employee fails to use the complaint procedure before the alleged harassment becomes severe or pervasive, it is presumed to satisfy the employer’s burden under the second element of defense under Faragher/ Ellerth.

24. *Conatzer v. Medical Professional Building Services Corp.*, 95 Fed. App. 276, 281 (10th Cir. 2004): Plaintiff's three-week delay in registering her complaint was unreasonable because she knew the defendant's handbook prohibited sex discrimination, she understood that harassment was illegal, and she had received training in the complaint process.
25. An employer is liable for co-worker harassment only where the employer knew or was on notice of the alleged harassment and failed to take reasonable steps to address the conduct. An employer is on notice of harassment if the harassing employee has "practiced widespread sexual harassment" in the office, even though the employer was not aware that a particular employee was a victim of the harasser.

 **David K. Fram, Director, ADA and EEO Services, National Employment Law Institute**

ADA Developments: "Reasonable Accommodation"

1. Reasonable accommodation means preferential treatment.
2. *Rauen v. U.S. Tobacco*, No. 01-3973 (EEOC brief filed in 7th Cir., 8/9/02): The EEOC has taken the position that an employer may need to provide a reasonable accommodation even if the individual does not need the accommodation to perform the job's essential functions. In this case, the EEOC argued that even though an employee was able to perform her essential functions as a Software Engineer, the employer still had to consider letting her work at home because her doctor felt this would be "advisable" in light of her complications from cancer surgery.
3. EEOC also states that an employer may have to provide a reasonable accommodation for any limitation flowing from a disability, not just the major life activity affected (e.g., limitations related to chemotherapy when cancer is the disability). A contrary case is *Wood v. Crown Redi-Mix, Inc.*, 2003 U.S. App. LEXIS 16137 (8th Cir. 2003), in which the court held that there "must be a causal connection between the major life activity that is limited and the accommodation sought."
4. Don't argue "undue hardship;" argue "unreasonable." Don't say "it's not in my budget."
5. Employers don't have to provide personal use items, such as prosthetic limbs, wheelchairs, or eyeglasses if those items are used off the job; however, it might be the cheapest solution.
6. Employers can't force an accommodation on an individual; however, get it in writing that they didn't want it.
7. "Reasonable" used to mean effective; then it meant cost v. benefit; the Supreme Court has now decided that "reasonable" means "reasonable" on its face (*Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254 (1st Cir. 2001)). However, an employer can still use cost v. benefit as a means of determining reasonableness.

8. No accommodation is necessary in “regarded as” cases; however, one court has disagreed (*Williams v. Philadelphia Housing Authority Police Dept.*, 380 F.3d 751 (3rd Cir. 2004)).
9. EEOC has taken the position that reasonable accommodation is required in “record of” cases. Fram argues accommodations are only required when there are limitations still flowing from the previous disability.
10. Generally, the employee has to ask for an accommodation; i.e., give employer notice of the disability, unless the employer knew about the disability and had reason to believe the employee needed something because of it.
11. EEOC has written that if the individual “states that s/he does not need a reasonable accommodation, the employer will have fulfilled its obligation.” DOCUMENT IT.
12. *Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999): The “futile gesture doctrine.” If the individual knows that the request would be futile, s/he might not need to initiate the interactive process. For example, if the individual knows of an employer’s discriminatory policy against reasonable accommodation, he need not ignore the policy and subject himself “to personal rebuffs” by making a request that will surely be denied.
13. New case - *Collins v. Prudential Investment*, 2005 U.S. App. LEXIS 148 (3rd Cir. 2005): While the 3rd Circuit has recognized that ADHD/ADD can rise to the level of a disability, in this case plaintiff offered little by way of medical proof. In fact, the plaintiff’s diagnoses post-dated her termination.
14. Always look for a quick and easy fix – how can I help you? – without going to ADA land.
15. How quickly must the accommodation be provided? EEOC states the employer’s response to a request should be “expeditious.” However, in *Selenke v. Medical Imaging of Colorado*, 248 F.3d 1249 (10th Cir. 2001), the court states that in assessing claims of delay, it would look at factors such as “the length of delay, the reasons for the delay, whether the employer has offered any alternative accommodation while evaluating a particular request, and whether the employer has acted in good faith.”
16. EEOC states that an employer may require documentation “to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation.” However, since the employer cannot ask for unrelated information, “in most situations, an employer cannot request a person’s complete medical records.” In cases where a disability is not obvious, an employer “may ask the employee for documentation describing the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee’s ability to perform the activity or activities.” EEOC has also stated that an individual “can be asked to sign a limited release allowing the employer to submit a list of specific questions” to the individual’s “health care or vocational professional.” Further, an employer may require the individual to go to the health professional of the employer’s choice if the individual provides insufficient information. However, in such a case, the employer “should explain why the documentation is insufficient,” “allow the individual to provide the missing

- information,” and “pay all costs associated with the visit(s)” to the employer-chosen health professional.
17. Failing to cooperate in the interactive process can be fatal to an individual’s ADA claim for reasonable accommodation. Cooperation can include a number of things, such as being willing to try an accommodation, being willing to discuss alternatives, and providing needed documentation (Vawser v. Fred Meyer, Inc., 2001 U.S. App. LEXIS 21804, 9th Cir. 2001; Steffes v. Stepan Col, 144 F.3d 1070, 7th Cir. 1998; Collier v. Milliken & Company, 2002 U.S. App. LEXIS 20358, 4th Cir. 2002). EEOC has stated that during the interactive process, the individual “does not have to be able to specify the precise accommodation” needed, but “s/he does need to describe the problems posed by the workplace barrier.”
 18. In an employee turns down a less effective accommodation, the employee may win; if s/he turns down the most effective accommodation, the employee loses.
 19. Employers may provide leave unless and until it becomes an undue hardship. However, consider how long will it take to replace the employee. An employer must leave the job open to justify undue hardship. If forced to argue undue hardship, the employer can include FMLA leave.
 20. EEOC has stated that the employer has to give indefinite leave unless undue hardship; however, courts have disagreed (Vice v. Blue Cross and Blue Shield of Oklahoma, 2004 U.S. App. LEXIS 21375, 10th Cir. 2004; Wood v. Green, 323 F.3d 1309, 11th Cir. 2003; Crano v. Graphic Packaging Corp., 2003 U.S. App. LEXIS 11286, 10th Cir. 2003).
 21. A third or fourth extension of leave request could be considered indefinite.
 22. Employers do not have to continue to give away an essential function indefinitely. Document that it is temporary; have the employee sign it; document it in the employee’s evaluation (without giving medical information).
 23. Employers do not have to turn temporary transitional jobs into permanent jobs.
 24. Reassignment should be a last resort. Keep the employee in the original job if possible.
 25. EEOC has stated that employers do not have to rescind discipline as an accommodation, even if the disability played a role in causing the conduct that is worthy of discipline.
 26. Don’t argue cost for undue hardship; argue adverse effect on other employees.