

**THE AMERICANS WITH DISABILITIES ACT AND
THE AGE DISCRIMINATION IN EMPLOYMENT ACT:**

*A Guide for Appointed Attorneys
in the Northern District of Illinois*

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**Chicago Lawyers' Committee
for Civil Rights Under Law
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Foreword

The Chicago Lawyers' Committee for Civil Rights Under Law has prepared this manual for use by attorneys appointed by judges in the Northern District of Illinois to represent indigent clients in employment discrimination cases. This manual contains a summary of the Americans with Disabilities Act and the Age Discrimination in Employment Act as well as summaries of employment discrimination cases decided by the Supreme Court and the Seventh Circuit through July 2008. An accompanying manual contains a summary of Title VII of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866, as amended by the Civil Rights Act of 1991. The Title VII/Section 1981 manual contains information about legal standards that may be helpful in ADEA and ADA cases and should also be consulted in conjunction with this manual. Finally, a disclaimer: this manual is intended to be a starting point for research and should not be used as a substitute for original research tailored to the facts of a specific case.

The Chicago Lawyers' Committee has agreed to assist appointed counsel by producing this manual and by conferring with appointed counsel in evaluating settlement offers, drafting pleadings, determining case strategy, and providing other assistance that appointed counsel may need. For assistance, appointed counsel may contact Laurie Wardell at the Chicago Lawyers' Committee for Civil Rights Under Law, 100 N. LaSalle, Suite 600, Chicago, IL 60602, (312) 630-9744, lwardell@clccrul.org. Finally, the Chicago Lawyers' Committee heartily thanks our Summer 2008 Public Interest Law Internship fellow, Brittany Parling, for her hard work on this manual.

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THE AMERICANS WITH DISABILITIES ACT OF 1990
42 U.S.C. § 12101 *et seq.* ("ADA")

I. INTRODUCTION

Generally, the Americans with Disabilities Act of 1990 (ADA) expanded federal rights for persons with disabilities by prohibiting discrimination in employment, public accommodations, public services, transportation and telecommunications. Title I of the ADA governs employment discrimination, and makes it unlawful for a private, state or local government employer with 15 or more employees to discriminate against a qualified individual with a disability in regard to job application procedures or any term, condition or privilege of employment. Title I also imposes an obligation on employers to make reasonable accommodation to qualified individuals with disabilities, unless doing so would impose an undue hardship. 42 U.S.C. §12111-17.

II. INDIVIDUAL WITH A DISABILITY

A. Physical or Mental Impairment

Under the ADA, an individual is considered to have a disability when she: (a) has a physical or mental impairment that substantially limits one or more of the individual's major life activities; or (b) has a record of such an impairment; or (c) is regarded as having such an impairment. 42 U.S.C. §12102(2).

1. **EEOC Regulations:** The EEOC Regulations define "physical or mental impairment" as: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h). *See, e.g., Duda v. Bd. of Educ.*, 133 F.3d 1054 (7th Cir. 1998) (recognizing manic depression as a disability under the ADA).
2. **Perceived Impairment:** Plaintiff need not establish an actual impairment to make a claim based on ADA § 12102(2)(c). An individual may be a protected individual under the ADA if she is perceived as having an impairment. *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987); *Best v. Shell Oil Co.*, 107 F.3d 544 (7th Cir. 1997). However, the employee must be perceived as having an impairment that "substantially limits" a "major life activity" central to daily life (not just work life), terms that are defined at greater length below. *Mack v. Great Dane*

Trailers, 308 F.3d 776 (7th Cir. 2002); *Wright v. Ill. Dep't of Corr.*, 204 F.3d 727 (7th Cir. 2000). Under this standard, it is not enough for the employer to perceive an impairment that the employer does not believe is substantially limiting. *Cassimy v. Bd. of Educ.*, 461 F.3d 932 (7th Cir. 2006); *Amadio v. Ford Motor Co.*, 238 F.3d 919 (7th Cir. 2001). Rather, the employer must have exaggerated views of the limiting nature of the employee's condition. *Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331 (7th Cir. 2004) (insufficient evidence that employer perceived plaintiff as disabled); *Ogborn v. United Food and Commercial Workers Union*, 305 F.3d 763 (7th Cir. 2002).

3. **Record of Disability:** A history of receiving Social Security disability benefits is sufficient to establish a "record" of a disability. *Lawson v. CSX Transp., Inc.*, 245 F.3d 916 (7th Cir. 2001). If an employee claims in an ADA case that she can perform the essential functions of her job but represented in an SSDI application that she is unable to work, she will have to explain the apparent discrepancy, e.g., by showing that she could work with a reasonable accommodation (a factor not considered in the Social Security determination). See *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999).
4. **Disabling Medical Treatment:** An employee may be protected by the ADA even though a medical condition does not rise to the level of a disability, if the prescribed treatment for the condition is disabling. *Christian v. St. Anthony Med. Ctr., Inc.*, 117 F.3d 1051 (7th Cir. 1997). However, the disabling treatment must be truly necessary and not merely an attractive option. *Id.* at 1052.
5. **AIDS and HIV:** The ADA protects persons with currently contagious diseases or infections, including AIDS and HIV, that do not prove a direct threat to the health or safety of others. 42 U.S.C. § 12113(d); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2); *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496 (7th Cir. 2004).
6. **Drug Addiction and Alcoholism:** A person who has participated or is participating in a supervised rehabilitation program and is no longer engaging in the illegal use of drugs is considered disabled under the employment provisions of the ADA. 42 U.S.C. § 12114(b). Therefore, an employer violates the ADA when it suspends an employee who is an alcoholic for failure to appear at work upon return from a treatment program where the employer did not notify the employee when to appear at work. *Conley v. Vill. of Bedford Park*, 215 F.3d 703 (7th Cir. 2000). However, any person "who is currently engaging in the illegal use of drugs" is not a "qualified person with a disability." 42 U.S.C. § 12114(a). An individual who casually used drugs in the past, but did not become

addicted, is not an individual with a disability based on past drug use. *EEOC Technical Assistance Manual on Employment Provisions of the Americans with Disabilities Act, Explanation of Key Legal Requirements* (TECHNICAL MANUAL) § 8.5.

While alcoholism is a recognized disability, an employer does not violate the ADA when it takes adverse employment action against an employee for conduct committed while the employee was under the influence of alcohol or drugs. *See, e.g., Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995) (recognizing alcoholism as a disability, but finding alcoholism did not compel employee to drive under the influence). Even reports of alcohol odor on the breath may lead an employer to believe an employee is under the influence of alcohol and may therefore justify a dismissal. *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662 (7th Cir. 2000).

7. **Obesity:** Under the EEOC regulations, morbid obesity, defined as body weight more than 100 percent over the norm, is "clearly an impairment." EEOC COMPLIANCE MANUAL § 902.2(c)(5). For ADA coverage, the individual must fall within this definition of morbid obesity, and cannot just be too overweight for a specific occupation.
8. **Statutory Exclusions:** The following are specifically excluded from coverage under the ADA: homosexuality, bisexuality, transvestism, transsexualism, pedophilia, voyeurism, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychiatric substance abuse disorders resulting from current illegal use of drugs. 42 U.S.C. §§ 12208 & 12211.
9. **Physical Characteristics and Personality Traits:** Environmental, cultural and economic disadvantages are not "impairments." 29 C.F.R. § 1630.2(j) app. Additionally, an impairment must be more than a simple physical characteristic, such as eye color, left-handedness, or height, weight or muscle tone that are within the "normal" range and are not the result of a physiological disorder. 29 C.F.R. § 1630.2(h). Characteristic predisposition to illness or disease and pregnancy are not qualifying impairments. *Id.* Furthermore, personality traits, such as "poor judgment or a quick temper" are not disabilities where these traits are not symptoms of a mental or psychological disorder. *Id.*

B. Does the Impairment “Substantially Limit” a Major Life Activity?

“Substantially limits” means the individual is unable to perform a major life activity (“MLA”) or is significantly restricted in the manner in or duration for which he can perform such activity as compared to an average person in the

general population. 29 C.F.R. § 1630.2(j). Sleep is a major life activity, but the limitations on sleep must be prolonged, severe and long term. *Squibb. v. Memorial Med. Center*, 497 F.3d 775 (7th Cir. 2007).

- 1. Focus on Effect on Person's Life:** The determination of whether an individual is "disabled" depends on the effect the impairment has on the individual's life, not simply on the name or diagnosis of the impairment. 29 C.F.R. § 1630.2(j) app.; See TECHNICAL MANUAL at II-4; *Cassimy v. Bd. of Educ.*, 461 F.3d 932 (7th Cir. 2006); *Furnish v. SVI Sys., Inc.*, 270 F.3d 445 (7th Cir. 2001) (effect on outward behavior, not effect on an organ, is the relevant inquiry). Even some well-known, and serious, conditions have been held not to be substantially limiting, where the effect on the particular plaintiff is insufficiently disabling. See, e.g., *Kampmier v. Emeritus Corp.*, 472 F.3d 930 (7th Cir. 2007) (endometriosis painful but not disabling to plaintiff); *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995) (while medical student suffered vision impairment, it did not rise to the level considered a disability); *Hoeller v. Eaton Corp.*, 149 F.3d 621 (7th Cir. 1998) (plaintiff's bipolar disorder did not substantially limit a major life activity). But see *Nawrot v. CPC Int'l*, 277 F.3d 896 (7th Cir. 2002) (diabetic who must inject insulin three times daily and suffers disorientation on occasion is disabled). A plaintiff who could not sit for more than two hours at a time without experiencing severe pain also did not qualify as disabled under the ADA. *Maclin v. SBC Ameritech*, 520 F.3d 781, 787 (7th Cir. 2008).
- 2. Factors to Consider:** The following factors should be considered in determining whether an individual is substantially limited in a major life activity: (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 resulting or expected to result from the impairment. 29 C.F.R. § 1630.2. Disabilities that present only episodic symptoms can still be considered disabling under the ADA. *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432 (7th Cir. 2000).
- 3. Effect of Mitigating Measures:** In determining whether a person with a physical or mental impairment is "disabled" for ADA purposes, courts will consider the mitigating effects of corrective devices (e.g., glasses, contact lenses, hearing aids) and medication. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (twin sisters who are severely myopic are not disabled because their vision is correctable through the use of corrective lenses); see also *Murphy v. United Parcel Serv., Inc.*, 526 U.S. 1036 (1999) (truck driver with high blood pressure is not "substantially limited" in one or more major life activities because medication controls his high blood pressure). These Supreme Court decisions explicitly reject the EEOC regulations which state that when determining whether an

impairment substantially limits a major life activity, such determinations are to be made "without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. § 1630.2(j) app. However, the treatment for a disabling condition can still leave the employee in a "disabled" state. *Lawson v. CSX Transp., Inc.*, 245 F.3d 916 (7th Cir. 2001).

4. **Substantially Limited in Manual Tasks:** Where the plaintiff claims that the disability limits her ability to perform manual tasks, she must show that she is limited in the activities central to daily life, such as self care, housework, etc. *Toyota Motor Mfrs. Kentucky Inc. v. Williams*, 534 U.S. 184 (2002); *EEOC v. Sears*, 417 F.3d 789 (7th Cir. 2005) (inability to walk a city block). *See also Williams v. Excel Foundry and Machine, Inc.*, 489 F. 3d 227 (7th Cir. 2007) (inability to stand for more than forty minutes not central to daily life).
5. **Substantially Limited in Working:** Factors that may be considered in determining whether an individual is substantially limited in the major life activity of "working" are: (a) the geographical area to which the individual has access; (b) the job from which the individual has been disqualified because of an impairment, and the number of jobs utilizing the same skills and training that the individual is also disqualified from; and/or (c) the job from which the individual has been disqualified, and the number of jobs not utilizing similar skills and training from which the individual is also qualified. 29 C.F.R. § 1630.2(j)(3)(ii). However, lifting restrictions on the job may not constitute a substantial limitation in the major life activity of working. *Contreras v. Suncoast Corp.*, 237 F.3d 756 (7th Cir. 2001).

An argument based on the major life activity of working should be made cautiously, as courts have held that plaintiff must be unable to do a broad category of jobs, not simply the job he or she has been doing. *See, e.g., Squibb v. Memorial Med. Center*, 497 F.3d 775(7th Cir. 2007); *Cassidy v. Bd. of Educ.*, 461 F.3d 932 (7th Cir. 2006); *Rooney v. Koch Air.*, 410 F.3d 376 (7th Cir. 2005); *Moore v. JB. Hunt Transport, Inc.*, 221 F.3d 944 (7th Cir. 2000) (rheumatoid arthritis did not disable plaintiff from an entire class of jobs); *Stein v. Ashcroft*, 284 F.3d 721 (7th Cir. 2002) (heavy lifting restriction that only applies to one job is not substantial limitation in major life activity of working); *Sinkler v. Midwest Prop. Mgmt.*, 209 F.3d 678 (7th Cir. 2000) ("working" is a major life activity, but working at a job with a lot of commuting is not). *But see DePaoli v. Abbott Laboratories*, 140 F.3d 668 (7th Cir. 1998) (plaintiff who is precluded from performing assembly line work has sufficient evidence to defeat summary judgment on issue of whether she is disabled); *Best v. Shell Oil Co.*, 107 F.3d 544 (7th Cir. 1997) (plaintiff with severe knee trouble defeated summary judgment as to whether one who is substantially limited

in truck driving is disabled).

However, no specific quantification is necessary, as long as it is shown that the plaintiff is disabled from "many" or "most" jobs. *EEOC v. Rockwell Int'l Corp.*, 243 F.3d 1012 (7th Cir. 2001).

NOTE: If the plaintiff claims to be substantially limited in a major life activity *other than working*, the plaintiff need not allege she is thereby disqualified from a broad class of jobs. *Mattice v. Mem'l Hosp. of South Bend, Inc.*, 249 F.3d 682 (7th Cir. 2001).

C. What Qualifies as a "Major Life Activity"?

"Major life activities" are the basic activities that average persons can perform with little or no difficulty, "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(I). In addition to the major life activities promulgated in the EEOC's regulations, the Supreme Court recognizes reproduction as a major life activity. *See Bragdon v. Abbott*, 524 U.S. 624 (1998) (individual infected with HIV was substantially limited in major life activity of reproduction). But sexual relations may not be a major life activity. *Squibb v. Memorial Med. Center*, 497 F.3d 775 (7th Cir. 2007). *See also Sinkler v. Midwest Prop. Mgmt.*, 209 F.3d 678 (7th Cir. 2000) (driving).

III. THE SCOPE OF TITLE I

A. Employers Covered by the ADA

Title I of the ADA is applicable to private employers employing 15 or more individuals, and state, and local government bodies. *See* 42 U.S.C. §§ 12202 & 12111(5)(A). The Supreme Court has held that state employees cannot sue their employers under Title I of the ADA. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). But in 2003 the Illinois legislature waived Eleventh Amendment immunity to ADA claims.

The Seventh Circuit has rejected individual liability under the ADA. *EEOC v. AIC Sec. Investigation, Ltd.*, 55 F.3d 1276, 1279 (7th Cir. 1995) ("Individuals who do not independently meet the ADA's definition of 'employer' cannot be held liable under the ADA.").

Federal employees are covered by the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96i.

B. Individuals Protected by the ADA

1. **Qualified Individual with a Disability:** Title I protects any "qualified individual with a disability," meaning an individual with a disability who, with or without reasonable accommodation, can perform the "essential functions" of the job in question. 42 U.S.C. § 12111(8). "Qualified individual" is a term of art, though, a determination by the Social Security Administration that an individual is "totally disabled" is not dispositive of an ADA claim. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999); *Johnson v. Exxon Mobil Co.*, 426 F.3d 887 (7th Cir. 2005). However, the discrepancy must be explained, such as with evidence that (a) the employer refused to reasonably accommodate; (b) plaintiff was but is no longer disabled; (c) plaintiff has received a new, more accurate diagnosis; or (d) SSA presumptions of disability don't apply to the employee. Applying for disability benefits under an employer-provided plan is not dispositive of an ADA claim. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000).

The determination of whether an individual is "qualified" must be made in two steps. First, the individual must satisfy the prerequisites for the position, and second, the individual must be able to perform the essential functions of the job in question with or without reasonable accommodation.

- a. **Prerequisites for the position:** Under the first step of the analysis, the individual must be able to satisfy the prerequisites for the position, such as the necessary educational background, experience, and licenses. 29 C.F.R. § 1630.2(m). There is no requirement that the employer help an individual become qualified. *See Bombard v. Fort Wayne Newspapers*, 92 F.3d 560 (7th Cir. 1996) (plaintiff met the qualifications for his sales representative position because he had the requisite experience, skill, and education). An individual is not qualified if she poses a direct threat to others. The factors that comprise this assessment are (1) the duration of the risk of harm, (2) the nature and severity of the potential harm, (3) the likelihood that harm will occur and (4) the imminence of potential harm. *Emerson v. Northern States Power Co.*, 256 F.3d 506 (7th Cir. 2001).
- b. **Essential functions of the job:** The individual must also be able to perform the essential functions of the job in question with or without reasonable accommodation. The EEOC has stated that the term "essential functions" refers to "fundamental job duties" of the position in question. 29 C.F.R. § 1630.2(n). According to the Seventh Circuit, the "essential" elements of a job include any fundamental duty to that position, even if the duties are reassignable

and have been reassigned in the past. *Basith v. Cook County*, 241 F.3d 919 (7th Cir. 2001). See also *Timmons v. Gen. Motors Corp.*, 469 F.3d 1122 (7th Cir. 2006); *Ammons v. Aramark Uniform Servs., Inc.*, 368 F.3d 809 (7th Cir. 2004) (plaintiff who could perform only half her duties could not perform essential functions); *Amadio v. Ford Motor Co.*, 238 F.3d 919 (7th Cir. 2001) (regular attendance an essential job requirement); *Webb v. Choate Mental Health & Dev. Ctr.*, 230 F.3d 991 (7th Cir. 2000) (where essential element of job was working with violent patients, an inability to do so means not qualified); *Nowak v. St. Rita High Sch.*, 142 F.3d 999 (7th Cir. 1998) (teacher with indefinite absence due to illness not considered "qualified individual" because attendance is an essential function of a teaching position); *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019 (7th Cir. 1997) (blind applicant could not perform essential functions of cashier position, and employer had no duty to create a new position).

A job function may be considered essential because: (1) the position exists to perform that function; (2) performance of the function can be distributed to only a limited number of employees; or (3) the incumbent is hired for her expertise or ability to perform the function or the consequences of not performing the function are significant to the business. TECHNICAL MANUAL § 2.3(a)(1) *et seq.* The employer's view of what constitutes an essential function of the job in question is considered by the court, but is not determinative. 42 U.S.C. § 12111(8). For a full time job, an essential element is that the plaintiff be able to work full time, at least gradually. *Devito v. Chi. Park Dist.*, 270 F.3d 532 (7th Cir. 2001).

If an employer has a legitimate reason for specifying multiple duties for a particular job classification—duties the employee is expected to rotate through—a disabled employee will not be qualified for the position unless he can perform enough of these duties to enable a judgment that he can perform its essential duties. *Dargis v. Sheahan*, 526 F.3d 981, 986 (7th Cir. 2008) (plaintiff's inability to rotate through the various positions of a correctional officer in the Sheriff's Office meant that he could not perform the essential functions of the job).

- c. **Reasonable Accommodation:** The assessment of whether a disabled individual can perform the essential functions of the job must take into account any reasonable accommodations that would allow the person to perform their functions, as discussed in more detail below.

IV. PROHIBITED DISCRIMINATION

The ADA prohibits discrimination against a qualified individual with a disability because of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).

A claimant under the ADA must be clear whether she is proceeding under a discrimination (disparate treatment or disparate impact) theory or a failure to accommodate theory. *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997). In *Weigel*, plaintiff waived her accommodation argument by arguing in the district court that the employer denied her a benefit (unpaid medical leave) to which she was entitled under its policy. *See also Timmons v. Gen. Motors Corp.*, 469 F.3d 1122 (7th Cir. 2006).

A. Disparate Treatment Discrimination

Employers are prohibited from "limiting, segregating, or classifying a job applicant or employee in such a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee." 42 U.S.C. § 12112(b)(1).

- 1. Prima Facie Case:** To establish a prima facie case of disparate treatment, the plaintiff must: (1) be disabled; (2) be qualified for the job; (3) have been fired or have experienced an adverse job action; and (4) plaintiff's position must have remained open and the employer continued to seek applicants or the plaintiff was replaced by another employee, or similarly situated non-disabled employees were treated more favorably. *Buie v. Quad/Graphics, Inc.*, 366 F.3d 466 (7th Cir. 2004) (plaintiff not similarly situated to nondisabled employee who reported to a different foreman). The employer may raise a legitimate, non-discriminatory reason for the adverse job action which, if not contested, will avoid liability. (See the Title VII/Section 1981 Manual). The Supreme Court has said that an employer who applies a facially neutral rule to a disabled worker (i.e., refusal to rehire a disabled worker who was previously discharged for violating workplace rules) will negate a prima facie disparate treatment case, even if the rule violation was due to the disability. *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003) (drug addicted worker fired for violating workplace rule; refusal to rehire on ground of prior rule violation is not disparate treatment).
- 2. Adverse Action Because of Disability:** The Seventh Circuit has determined that a plaintiff may be able to establish a prima facie case without pointing to similarly-situated non-handicapped employees who were treated more favorably. *Leffel v. Valley Fin. Servs.*, 113 F.3d 787 (7th Cir. 1997). "All that is necessary is that there be evidence reasonably

suggesting that the employer would not have taken adverse action against the plaintiff had she not been disabled and everything else remained the same." *Id.* at 794. In *Leffel*, however, plaintiff offered no evidence to rebut the bank's specific performance criticisms, and the court affirmed summary judgment for the defendant. *Id.* See also *Timmons v. Gen. Motors Corp.*, 469 F.3d 1122 (7th Cir. 2006).

3. **Constructive Discharge:** The Seventh Circuit has suggested that constructive discharge is cognizable under the ADA, and that constructive discharge exists where quitting is the only reasonable option. *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432 (7th Cir. 2000).
4. **Denial of Training:** A disabled employee who is denied training for a task makes out a claim for disparate treatment if (a) she is physically capable of performing the task and (b) the employer has denied the training "because of the disability." *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568 (7th Cir. 2001). This is true even if the denial does not adversely affect her job. *Id.*

B. Disparate Impact Discrimination

1. **Conduct Prohibited:** Employers are prohibited from using standards, criteria, tests or other employment practices that have the effect of discriminating on the basis of disability unless the employer shows that the practices are job-related and consistent with business necessity. 42 U.S.C. §§ 12112(b)(6) & 12113(a). An individual may establish "disparate impact" without the use of statistical evidence by demonstrating exclusion based on his or her own particular disability. See TECHNICAL MANUAL at IV-3.
2. **Employer's Defense:** The employer defense of "job relatedness" requires that the selection criterion relate to the functions of a specific job, rather than to a general class of jobs. The criterion may apply to both essential and marginal functions, so long as the function is job related. Business necessity, however, requires a linkage to essential functions. 29 C.F.R. § 1630.10 app. If a test or other selection criterion "excludes an individual with a disability because of the disability and does not relate to the essential functions of a job, it is not consistent with business necessity." TECHNICAL MANUAL. at IV-3; 29 C.F.R. § 1630.10 app.

Even when a selection criterion meets the requirements of job relatedness and business necessity, an employer is still prohibited from using that criterion to exclude an individual with a disability if the individual could satisfy the criterion with reasonable accommodation. 29 C.F.R. § 1630.15(b)(1), (c), & app.

C. Failure to Make Reasonable Accommodations

- 1. Standard:** It is unlawful to fail or refuse to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer shows that the accommodation would impose an undue hardship on the operation of its business. 42 U.S.C. § 12112(b)(5). An accommodation is any change in the work environment or the way things are usually done that enables an individual with a disability to enjoy equal employment opportunities. 29 C.F.R. pt. 1630 app.; § 1630.2(o). There is no burden-shifting formulation under the duty to accommodate: when the employee demonstrates that the employer has failed to provide a reasonable accommodation, the employer is liable. *Lenker v. Methodist Hosp.*, 210 F.3d 792 (7th Cir. 2000).
- 2. Only Need Accommodate Known Disabilities:** An employer is required to make reasonable accommodations only to the qualified individual's *known* physical or mental limitations. 42 U.S.C. § 12112(b)(5)(a). An employer is not liable under the ADA where she fires an employee for misconduct or performance deficiencies that may be symptoms of a disability *unknown* to the employer. *See, e.g., Hedberg v. Ind. Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995). But where notice is sufficient to inform the employer that an employee may have a covered disability, the employer must request clarification. *EEOC v. Sears*, 417 F.3d 789 (7th Cir. 2005).
- 3. Interactive Process:** Generally, the employer's duty to accommodate is triggered by a request from the applicant or employee. Nevertheless, the regulations require an interactive process and good faith participation by both parties. 29 C.F.R. pt. 1630, app; *EEOC v. Sears*, 417 F.3d 789 (7th Cir. 2005); *Ammons v. Aramark Uniform Servs., Inc.*, 368 F.3d 809 (7th Cir. 2004) (employer not required to meet with plaintiff's attorney); *Lenker v. Methodist Hosp.*, 210 F.3d 792 (7th Cir. 2000); *Bultmeyer v. Fort Wayne Consolidated Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996) ("The employer has to meet the employee half-way and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help.") However, if an employee has trouble clarifying the nature and extent of her medical restrictions, responsibility for the breakdown of the interactive process may fall on the employee. *Jackson v. City of Chicago*, 414 F.3d 806 (7th Cir. 2005); *Steffes v. Stepan Co.*, 144 F.3d 1070 (7th Cir. 1998). Furthermore, the interactive process is not an end in itself; it must result in a failure to accommodate to be actionable. *Mobley v. Allstate Ins. Co.*, (7th Cir. 2008); *Oslowski v. Henderson*, 237 F.3d 837 (7th Cir. 2001); *Rehling v. City of Chicago*, 207 F.3d 1009 (7th Cir. 2000).

4. **Reasonable Accommodations:** Reasonable accommodations include: (1) Modifications or adjustments to the job application and testing process that enable persons with disabilities to be considered for jobs; (2) Modifications or adjustments to the work environment or the manner or circumstances in which the job is customarily performed that enable persons with disabilities to perform the essential functions of the job; and (3) Modifications or adjustments that enable persons with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities. 42 U.S.C. § 12111(9); 29 C.F.R. §§ 1630.2(o) and 1630.9. An employer is not required to re-assign essential job functions as a reasonable accommodation. *Ozowski v. Henderson*, 237 F.3d 837 (7th Cir. 2001). An employer may require medical substantiation of the need for a reasonable accommodation. *McPhaul v. Bd. of Comm'rs*, 226 F.3d 558 (7th Cir. 2000). An employer's showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show that it is "unreasonable;" however, the employee may rebut that showing. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

Examples where reasonable accommodations may be required: Part-time employment can be a reasonable accommodation required of an employer. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000). An employer has failed to reasonably accommodate an employee's need to transfer to another position where openings exist and the employer's only "defense" is that the employee merely failed to comply with transfer request procedures. *Gile v. United Airlines, Inc.* 213 F.3d 365 (7th Cir. 2000). In general, an employee's request for a particular accommodation, and its actual availability, is relevant to whether the employer's offer of another accommodation was reasonable. *Rehling v. City of Chicago*, 207 F.3d 1009 (7th Cir. 2000).

Examples where reasonable accommodations may not be required: Although transfer to another vacant position may be a reasonable accommodation, an employer generally does not need to create a new position to accommodate an employee or bump incumbent employees to accommodate the disabled. *Hansen v. Henderson*, 233 F.3d 521 (7th Cir. 2000); *Jay v. Intermet Wagner Inc.*, 233 F.3d 1014 (7th Cir. 2000) (reasonable for employer to make employee wait 20 months for position to open). Even if an employee occasionally performed the duties of another position, that fact does not establish the availability of that position for purposes of requiring an accommodation. See *Watson v. Lithonia Lighting*, 304 F.3d 749 (7th Cir. 2002) (jobs temporarily available to recovering workers need not be permanently assigned to the disabled); *Ozowski v. Henderson*, 237 F.3d 837 (7th Cir. 2001). If the employer's policy is to reassign the "most" qualified person to a new position, the employer need not reassign a less qualified disabled person as part of a

reasonable accommodation. *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000). This is true even if the disabled employee can become qualified for the new position with special training. *Williams v. United Ins. Co. of Am.*, 253 F.3d 280 (7th Cir. 2001). Reassignment is also not required if doing so would violate the employer's collective bargaining agreement. *Winfrey v. City of Chicago*, 259 F.3d 610 (7th Cir. 2001). An employer's willingness to tolerate an accommodation in the past (such as absences) does not necessarily obligate it to continue to do so. *Amadio v. Ford Motor Co.*, 238 F.3d 919 (7th Cir. 2001). It is unlikely that an employer is required to overlook an employee's irregular attendance as a reasonable accommodation. *Id.*; *but see EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943 (7th Cir. 2001) (Wood, D., dissenting). Likewise, an employee's request to work at a "home office" is generally not a required reasonable accommodation. *Rauen v. U.S. Tobacco Mfg. Ltd. Partnership*, 319 F.3d 891 (7th Cir. 2003); *see also Mobley v. Allstate Ins. Co.*, (7th Cir. 2008) (plaintiff's request to work at home one day per week and work 10-hour days the other days was not a reasonable accommodation, and employer was not required to allow her to stay at work past 5:30 pm to finish her work). An employer does not fail to reasonably accommodate when it does not train an employee for a non-essential part of a job. *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568 (7th Cir. 2001).

5. Undue Hardship: Accommodation is not required when it would result in an "undue hardship." Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of the current circumstances that demonstrate that a reasonable accommodation would cause great difficulty or expense. 29 C.F.R. § 1630.15(d).

a. Factors Defining Undue Hardship: The ADA defines "undue hardship" as "an action requiring significant difficulty or expense," when considered in terms of the following factors: (1) the nature and cost of the accommodation; (2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation on the operation of the facility; (3) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the work force of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity. 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p).

- b. **Excessive Cost:** The cost of an accommodation may be considered an undue hardship if its financial cost is disproportionate to its benefit. *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995). In *Vande Zande*, an employer who had attempted to accommodate an employee who used a wheelchair with ramps, special adjustable furniture, and a modified bathroom, did not violate the ADA when it failed to provide the employee with a desktop computer so she could work at home full-time. *Id.*
 - c. **Unduly Disruptive:** When excessive cost is not an issue, an accommodation may still impose an undue hardship if such accommodation would be unduly disruptive to other employees or to the operation of the business, as long as the disruption is not attributable merely to employee's fears or prejudices. 29 C.F.R. app. § 1630.2(r). A short medical leave of absence may be a reasonable accommodation if the employee adequately informs the employer of her medical leave and other employees can handle the job in the interim. *See Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591 (7th Cir. 1998) (short medical leave requested by employee did not cause undue hardship because employee's position had been open for many months before employee was hired, and employer took six months to fill her position after discharge). The Seventh Circuit has also held that an employee's inability to take medication for a controllable disability may be considered unduly disruptive. *See Siefkin v. Vill. of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995) (giving employee policeman a "second chance" to take his diabetes medicine after he blacked out while driving on duty would be an unduly disruptive accommodation).
6. **"Light-Duty" Jobs:** The ADA does not require an employer to create a "light duty" position unless the "heavy duty" tasks an injured worker can no longer perform are *marginal* job functions which may be reallocated to co-workers as part of the reasonable accommodation of job-restructuring. In the event a light-duty position is already vacant, and a worker qualified for the position gets injured, transfer to the vacant position may be a reasonable accommodation if the worker meets the employer's legitimate job pre-requisites and can perform the essential functions of the job with or without reasonable accommodation. *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667 (7th Cir. 1998). In *Dalton*, plaintiff's requested transfer to a light duty job was not required because the employer's light duty program was only open to employees suffering from temporary disabilities for a maximum of 90 days. *Id.* at 670. *See also Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685 (7th Cir. 1998) (finding sufficient evidence that light duty positions were not temporary to defeat defendant's motion for summary judgment).

D. Discrimination Because of a Relationship to a Person with a Disability

It is unlawful for an employer to exclude "or otherwise deny equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4). For example, an individual whose spouse or child has a terminal illness may not be denied employment or benefits on the basis of that association. 29 C.F.R. § 1630.8; 29 C.F.R. app § 1630.8. *Larimer v. Int'l Bus. Machs. Corp.*, 370 F.3d 698 (7th Cir. 2004) ("association" disability requires showing that employer's decision is based on cost of treatment or association with a disabled person or employer's presumption that employee will be less attentive at work); *see also Dewitt v. Proctor Hosp.*, 517 F.3d 944 (7th Cir. 2008) (holding that the plaintiff established direct circumstantial evidence of association discrimination, creating a genuine issue of material fact for the jury). The EEOC has also noted that "an employer may not treat a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily while also providing care to a relative or other individual with a disability." *Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities* (2007).

E. Retaliation

It is unlawful for an employer, employment agency, or labor organization to discriminate against any person because that person opposed any practices made unlawful under the ADEA, or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation" under the ADA. In addition, no employer shall coerce, threaten or interfere with an employee's exercise of his ADA rights. *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961 (7th Cir. 2004) (1981(a)(2) does not allow compensatory and punitive damages or a jury trial for retaliation claims under the ADA). For more on the structure of proof in retaliation cases, see "Title VII and Section 1981: A Guide for Appointed Attorneys in the Northern District of Illinois."

V. "DIRECT THREAT" QUALIFICATION STANDARDS

A. The Standard

The ADA permits employers to adopt qualification standards to "include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2). This qualification standard must apply to all applicants and employees, not just individuals with disabilities. 29 C.F.R. § 1630.2(r). Moreover, "direct threat" means a *significant* risk of substantial harm to others that cannot be eliminated or reduced by a reasonable accommodation, not just a slight increase in risk. *See, e.g., Palmer v. Circuit Court of Cook County*, 117 F.3d 351

(7th Cir. 1997). *But see EEOC v. Schneider Nat'l, Inc.*, 481 F.3d 507 (7th Cir. 2007) (holding that the employer can determine how much risk it is willing to bear). The Supreme Court has held that this "direct threat" standard also allows employers to disqualify an employee whose work may harm himself. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002). *See also Branham v. IRS*, 392 F.3d 896 (7th Cir. 2004).

B. Factors to Consider

In determining whether an employee constitutes a "direct threat," courts consider (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r). An employer must consider the most current medical knowledge when determining if a condition poses a direct threat, and cannot just rely on a "best guess" or "gut feeling." 29 C.F.R. § 1630.2(r). *See e.g., Darnell v. Thermafiber, Inc.*, 417 F.3d 657 (7th Cir. 2005) (uncontrolled diabetes direct threat). *See also School Board of Nassau County v. Arline*, 480 U.S. 273, 288-89 (1987).

VI. PRE-EMPLOYMENT INQUIRIES

The ADA prohibits an employer from asking about the existence, nature, or severity of a disability until after the employer has extended a conditional employment offer to the applicant. 42 U.S.C. § 12112(d)(2); 29 C.F.R. § 1630.13(a).

A. Protected Inquiries

An employer may ask about the ability to perform job related functions with or without a reasonable accommodation, as long as the inquiries are not phrased in terms of the disability. 42 U.S.C. § 12112(c)(2)(B). For example, an employer may explain the job-related functions and then ask whether the applicant is capable of performing those functions with or without reasonable accommodation.

B. Prohibited Inquiries

Employers may *not* ask: (1) whether an applicant has a disability; (2) about the nature or severity of the disability; (3) whether an applicant has any physical or mental impairment that may prevent the applicant from performing the job; (4) how often an applicant will require leave for treatment or how often the applicant expects to use leave as a result of a disability. 42 U.S.C. § 12112(c)(2)(A); 29 C.F.R. §§ 1630.13 & 1630.14.

VII. MEDICAL EXAMINATIONS AND INQUIRIES

A. Pre-Offer Stage

The ADA provides that "a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." 42 U.S.C. § 12112(d)(2); 29 C.F.R. § 1630.13(a). *EEOC Enforcement Guidance on Pre-Employment Inquiries under the ADA* (EEOC GUIDANCE).

- 1. Medical Examinations:** An employer may not conduct a medical examination until a conditional offer of employment has been extended. The EEOC defines a "medical examination" as a procedure or test that seeks information about an individual's physical or mental impairments or health. An employer may require job applicants to take physical agility tests to demonstrate their ability to perform actual job functions, but if an employer measures an applicant's physiological or biological response to performance, the test becomes a medical examination. EEOC GUIDANCE.
- 2. Current Illegal Drug Use:** Because current illegal drug use is not a protected disability under the ADA, a drug test may be given by an employer at the pre-offer stage. 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.16(c).

B. Post-Offer Stage

The ADA states that "a covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination if; (1) all entering employees are subjected to such an examination regardless of disability; (2) if information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record; and (3) the results of such examination are used only in accordance with this subchapter." 42 U.S.C. § 12112(d)(3).

- 1. Exclusionary Criteria:** If an examination is given to screen out an individual with a disability as a result of the disability, the exclusionary criteria must be job-related and consistent with business necessity, and the employer must demonstrate that the essential job functions could not be performed with reasonable accommodation. 42 U.S.C. § 12112(d)(3); 29 C.F.R. app. § 1630.10.
- 2. Incumbent Employees:** For incumbent employees, an employer may only mandate a medical exam if it is job-related and supported by a business necessity. 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.14(c). *See Krocka v. Bransfield*, 969 F.Supp. 1073, 1093 (N.D. Ill. 1997) (requiring blood test of employee to determine level of Prozac violated ADA if

employee found to be disabled); *but see Spath v. Hayes Wheels Int'l-Indiana, Inc.*, 211 F.3d 392 (7th Cir. 2000) (employer may require a medical certification that an employee is fit to return to work, even where it has not been required in the past); *Bay v. Cassens Transp. Co.*, 212 F.3d 969 (7th Cir. 2000) (an employer may rely on medical assessment that an employee is no longer qualified to work as long as it is reasonable and in good faith; furthermore, employer may rely on federal regulations setting forth employee qualification standards as support for its assessment).

VIII. INSURANCE BENEFITS

A. Prohibited Discrimination

The ADA prohibits discrimination in the provision of health and life insurance and other benefits. 42 U.S.C. § 12112(a). Thus, an employer may not discriminate against a qualified individual with a disability with respect to job opportunities or terms, conditions, and privileges of employment, including fringe benefits. 29 C.F.R. § 1630.4(f); TECHNICAL MANUAL §7.9. Fringe benefits include "medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment." 29 C.F.R. § 1604.9. However, employees who "retire" because they have become totally disabled are not protected by the ADA and need not be treated the same as "natural" retirees. *Morgan v. Joint Admin. Bd.*, 268 F.3d 456 (7th Cir. 2001).

An employer may observe the terms of a bona fide benefit plan, including life and health insurance, even though such plans may result in limitations on the coverage of certain individuals with disabilities, if those limitations are based on risk classifications that are consistent with state law and the plan is not a "subterfuge" to evade the purposes of the ADA. 29 C.F.R. app. § 1630.16(f); TECHNICAL MANUAL § 7.9.

B. "Bona Fide Benefit Plan" Exception

Nothing in Titles I through III of the ADA shall be construed to prohibit or restrict: (1) any entity that administers benefit plans from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law; (2) a person or organization covered by the ADA from establishing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law; or (3) a person or organization covered by the ADA from establishing or administering the terms of a bona fide benefit plan that is not subject to state laws that regulate insurance. 42 U.S.C. § 12201(c). Again, the ADA permits employers to offer benefit plans containing exclusions for

preexisting conditions as long as the provisions are not being used as a subterfuge to evade the ADA. TECHNICAL MANUAL § 7.9.

C. Who May be Liable?

Because the ADA prohibits employers from engaging in a contract or other arrangement that subjects its employees to prohibited discrimination, courts generally hold that the employer, and not the insurer or benefit plan administrator, is liable for any disability discrimination in health insurance or other benefits. 42 U.S.C. §§ 12112(a), 12112(b)(2); Interim Guidance § II, COMPLIANCE MANUAL at pg. 5353. However, there have been cases where the court has held the board administering pension funds liable under the ADA. *See United States v. Illinois*, 1994 WL 562180 (N.D. Ill. 1994); *Holmes v. City of Aurora*, 1995 WL 21606 (N.D. Ill. 1995). *But see Rodriguez v. City of Aurora*, 887 F.Supp. 162 (N.D. Ill. 1995).

IX. EEOC PROCEEDINGS

Title I of the ADA incorporates the procedural scheme of Title VII of the 1964 Civil Rights Act. *See* 42 U.S.C. § 12117(a). Thus, the EEOC investigates charges of employment discrimination based on disabilities just as it does with charges alleging discrimination based on race, religion, sex and national origin. For a discussion of EEOC Proceedings, see "Title VII and Section 1981: A Guide for Appointed Attorneys in the Northern District of Illinois."

X. REMEDIES

A. Equitable Remedies for Disparate Treatment

If the court finds that the defendant has intentionally engaged in or is intentionally engaging in an unlawful employment practice, the court may enjoin the defendant from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, including, but not limited to, reinstatement or hiring of employees, with or without back pay, or any other equitable relief the court deems appropriate.

1. Back pay may be awarded.
2. A back pay award will be reduced by the amount of interim earnings or the amount earnable with reasonable diligence. It is defendant's burden to prove lack of reasonable diligence. *Gaddy v. Abex Corp.*, 884 F.2d 312, 318 (7th Cir. 1989). *See also Flowers v. Komatsu Mining Sys., Inc.*, 165 F.3d 554 (7th Cir. 1999) (within court's discretion to determine if plaintiff's back pay award should be reduced by interim Social Security disability payments).

3. Back pay and/or reinstatement/order to hire will only be granted if the court determines that but for the discrimination, the plaintiff would have gotten the promotion/job or would not have been suspended or discharged.
4. A district court can order demotion of somebody whose promotion was the product of discrimination. *Adams v. City of Chicago*, 135 F.3d 1150 (7th Cir. 1998).

B. Compensatory and Punitive Damages

Compensatory and punitive damages are available in disparate treatment cases, but not in disparate impact cases. Compensatory and punitive damages are unavailable in retaliation cases brought under the ADA. *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961 (7th Cir. 2004).

1. Compensatory damages may be awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. 42 U.S.C. § 1981a(b). *See, e.g., Riemer v. Ill. Dep't of Transp.*, 148 F.3d 800, 808 (7th Cir. 1998).
2. Punitive damages may be awarded when the defendant is found to have engaged in discriminatory practices with malice or with reckless indifference. 42 U.S.C. § 1981a(b)(1). *See, e.g., Gile v. United Airlines, Inc.* 213 F.3d 365 (7th Cir. 2000); *Slane v. Mariah Boats, Inc.*, 164 F.3d 1065 (7th Cir. 1999). The question of whether an employer has acted with malice or reckless indifference ultimately focuses on the actor's state of mind, not the actor's conduct. An employer's conduct need not be independently "egregious" to satisfy § 1981(a)'s requirements for a punitive damages award, although evidence of egregious behavior may provide a valuable means by which an employee can show the "malice" or "reckless indifference" needed to qualify for such an award. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). The employer's "malice" or "reckless indifference" necessary to impose punitive damages pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. *See id.* Punitive damages may be awarded even when back pay and compensatory damages are not. *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998).

An employer is not vicariously liable for discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). Punitive damages may not be awarded against an employer even in cases of intentional discrimination when the employer made a good-faith effort to reasonably accommodate the person

with the a disability. 42 U.S.C. § 1981a(a)(3). Punitive damages are not available against state, local, or federal governmental employees. 42 U.S.C. § 1981a(b)(1).

3. For those claims that do qualify, the sum amount of compensatory and punitive damages awarded for each complaining party shall not exceed: (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000; (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000; (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000. 42 U.S.C. § 1981a(b)(3). Backpay and front pay do not count toward these caps. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000)
4. The court shall not inform the jury of the cap on damages. 42 U.S.C. § 1981a(c).

C. Front Pay and Lost Future Earnings

Both front pay and lost future earnings awards are ADA remedies. Front pay is an equitable remedy and is a substitute for reinstatement when reinstatement is not possible. An award of lost future earnings compensates the victim for intangible nonpecuniary loss (an injury to professional standing or an injury to character and reputation). An award of lost future earnings is a common-law tort remedy and a plaintiff must show that his injuries have caused a diminution in his ability to earn a living. The two awards compensate the plaintiff for different injuries and are not duplicative. *Williams v. Pharmacia*, 137 F.3d 944 (7th Cir. 1998).

D. Attorney's Fees

In ADA cases, the court, in its discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses. 42 U.S.C. § 12205.

1. Although the language of the statute does not distinguish between prevailing plaintiffs and prevailing defendants, in Title VII and ADA cases, attorney's fees are only awarded to prevailing defendants upon a finding that the plaintiff's action was "frivolous, unreasonable or groundless" or that the plaintiff continued to litigate after it clearly became so. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). *See also*

Adkins v. Briggs & Stratton Corp., 159 F.3d 306 (7th Cir. 1998). However, a ruling that a plaintiff's suit is frivolous does not entitle a defendant to fees. *Adkins*, 159 F.3d at 307. A court may still exercise its discretion in determining if fees should be awarded to defendant or not. *Id.*

XI. ARBITRATION

- A. The Gilmer Decision:** In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court held that an Age Discrimination in Employment Act claim could be subject to compulsory arbitration. This Supreme Court did not decide in *Gilmer* whether this rule applied generally to all employment relationships. However, the Court held that the employee retains the right to file a charge with the EEOC and obtain a federal government investigation of the charge. *Id.* at 28. In *EEOC v. Waffle House*, 534 U.S. 279 (2002), the Supreme Court held that the EEOC may pursue a claim on behalf of a charging party notwithstanding the charging party's agreement to arbitrate her individual case with her employer.
- B. The Circuit City Decision:** In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Supreme Court resolved the question unanswered in *Gilmer* and held that any employment agreement containing an agreement to arbitrate an employment discrimination claim is subject to compulsory arbitration.
- C. Collective Bargaining Agreements:** In the Seventh Circuit, collective bargaining agreements cannot compel arbitration of statutory rights. *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997). However, in the limited context of railway and airline employees who work under collective bargaining agreements, *Haw. Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994), requires arbitration of employment disputes that involve interpretation of the applicable collective bargaining agreements. *Brown v. Ill. Central R.R. Co.*, 254 F.3d 654 (7th Cir. 2001). In that context, when the collective bargaining agreement is potentially dispositive of a discrimination claim, the plaintiff must arbitrate before proceeding to court. *Tice v. Am. Airlines, Inc.*, 288 F.3d 313 (7th Cir. 2002).
- D. Fact-Specific Defenses to Arbitration:** Courts treat agreements to arbitrate like any other contract. *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 130 (7th Cir. 1997). For example, in *Gibson*, the court held that the arbitration agreement was unenforceable because the employer did not give the employee any consideration for her agreement to arbitrate. *Id.* at 1131. Possible consideration could have been an agreement by the employer to arbitrate all claims or a promise that it would continue employing plaintiff if she agreed to arbitrate all claims. *Id.* at 1131-32. Likewise, in *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001), an arbitration agreement was held invalid because the promisor (the provider of arbitration services) made no definite promise to the employee.

In *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677 (7th Cir. 2002), the arbitration agreement was unenforceable because it forced the employee to forfeit a substantive right – attorneys’ fees. By contrast, in *Tinder v. Pinkerton Sec.*, 305 F.3d 728 (7th Cir. 2002), continued employment after the employer published notice of implementation of a mandatory arbitration policy was sufficient consideration to enforce the policy (even where the employee denied receiving notice).

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967
29 U.S.C. §§ 621 - 634 et. seq. ("ADEA")

I. INTRODUCTION

A. In General

The ADEA prohibits discrimination in hiring, promotion, termination, or any other term, condition, or privilege of employment because of a person's age. See 29 U.S.C. §623.

B. Protected Class

The ADEA prohibits discrimination on the basis of age. This category includes individuals ages 40 and above. The ADEA does not protect the young as against the older. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004).

C. Covered Employers

The ADEA applies to federal, state, and local governments, as well as to private employers, employment agencies, and labor organizations. Employees may not bring ADEA claims against state entities in federal court. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000). But in 2003 the Illinois legislature waived Eleventh Amendment immunity to ADEA claims. A covered employer must engage in an industry affecting commerce, who has 20 or more employees for every working day in each of 20 or more weeks in the current or preceding year. See 29 U.S.C. §630(b). Exemptions exist for bona fide executive or high policy-making employees, and certain other employees.

1. Exemptions

- a. Bona Fide Executives or High-Level Policy Makers:** Executives and high-level policy makers who have reached the age of 65 may be required to retire if they have served in that position for two years immediately before retirement. Also, the employee must be entitled to an immediate, non-forfeitable, annual retirement benefit arising from a pension, savings, deferred compensation, or profit-

sharing plan, or any combination of such plans of the employer which equals at least \$44,000. *See* 29 U.S.C. §631(c)(1). To qualify as a bona fide executive the employee's duties must include having substantial executive authority over a significant number of employees. The employee must be a top-level executive with authority to hire, fire, and promote at least two or more employees. *See* 29 C.F.R §§541.1(a)-(e) and §1625.12(d)(2). The EEOC has defined a high policy-making employee as one who has "little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof." *See* 29 C.F.R. §1625.12(e).

- b. Certain Federal Employees:** An exemption to the no-mandatory retirement age for federal employees is allowed for any employee as to whom a specific retirement statute exists. (Examples include foreign service officers and FBI agents). The exemption previously included any elected public official in any state or person chosen by the official to be on the official's personal staff. *See* 29 U.S.C. §630(f). The Civil Rights Act of 1991 now provides the rights and remedies under the ADEA to these previously exempted employees. *See* 2 U.S.C. §1220.

II. PROHIBITED PRACTICES

A. Employer

It is unlawful for an employer to refuse to hire or discharge any person, or discriminate against any person, with respect to his compensation, terms, conditions, or privileges of employment, because of such person's age. It is also unlawful to limit, segregate, or classify one's employees in a way which would deprive any person of opportunities, or otherwise adversely affect one's status as an employee because of such person's individual age. *See* 29 U.S.C. §623(a).

B. Employment Agency

It is unlawful for an employment agency to fail or refuse to refer for employment, or to discriminate against, any person because of such persons age, or to classify or refer for employment any individual on the basis of age. Also, even if an employment agency has less than the requisite 20 employees, if it services an employer with 20 or more employees, it is still covered. *See* 29 C.F.R. §1625.3(b).

C. Labor Organization

It is unlawful for a labor organization to exclude from membership, cause an

employer to discriminate against someone, or discriminate in referring for employment someone based on age. *See* 29 U.S.C. §623(c). *See Maalik v. Int'l Union of Elevator Constructors*, 437 F.3d 650 (7th Cir. 2006) (union liable for refusing to take steps to encourage its members to train plaintiff, a black woman).

D. Retaliation

It is unlawful for an employer, employment agency, or labor organization to discriminate against any person because that person opposed any practices made unlawful under the ADEA, or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation" under the ADEA. *See* 29 U.S.C. §623(d). Post-employment retaliation is also prohibited. *Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632 (7th Cir. 2004). 29 U.S.C. § 633a(a), which prohibits discrimination against federal employees on the basis of age, also prohibits retaliation against a federal employee who complains of age discrimination. *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008).

III. EXCEPTIONS UNDER THE ADEA

Certain age-related practices are lawful under the ADEA. Most are treated as affirmative defenses to charges of age discrimination.

A. Bona Fide Occupational Qualification Defense (BFOQ)

It is not unlawful for an employer, employment agency, or labor organization to consider age alone when age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. *See* 29 U.S.C. §623(f)(1). The EEOC's regulations state that the BFOQ defense will have a limited scope and application since it must be narrowly construed. *See* 29 C.F.R. §1625.6(a).

Since the BFOQ is an affirmative defense, the burden of establishing the exception lies with the employer, employment agency, or labor organization. The employer must prove that the age qualification is reasonably necessary to the essence of its business. The employer must also prove that it has reasonable cause to believe that all, or substantially all, people disqualified by the age requirement would be unable to perform the duties of the job, **or**, that it is impossible, or highly impractical to deal with older employees on an individualized basis. *See Western Air Lines v. Criswell*, 472 U.S. 400 (1985) (airline's claim that the mandatory retirement age of 60 for pilots was for safety concerns does not qualify as a BFOQ since individual testing of pilots is not impractical and the process of psychological and physiological degeneration caused by aging varies with each individual). *See also Minch v. City of Chicago*, 363 F.3d 615 (7th Cir. 2004) (city can impose age 63 retirement age on firefighters and police).

B. Reasonable Factors Other Than Age

It is lawful for an employer, employment agency, or labor organization to take actions otherwise prohibited by the ADEA where the differentiation is based on reasonable factors other than age. *See* 29 U.S.C. §623(f)(1). When an employer's action(s) are based on factors other than age, like, for example, years of service with the company, it is not an impermissible consideration of age just because the motivating factor may be correlated with age. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (termination of employee because his pension was about to vest violates ERISA laws but not ADEA, even though pension vesting is correlated with age.) The Supreme Court has held that disparate impact claims may be brought under the ADEA, but that the employer can escape liability under that theory by showing that the challenged practice is reasonable. *Smith v. City of Jackson*, 544 U.S. 228 (2005). This is an affirmative defense for which the employer bears both the burden of production and persuasion. *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008).

C. Benefit Plans

It is not unlawful for an employer, employment agency, or labor organization to take any action prohibited by the ADEA if it is observing the terms of a bona fide employee benefit plan, as long as the plan is not intended to evade the purposes of the ADEA. Also, no employee benefit plan shall require or permit the involuntary retirement of any person because of age.

Age-based reductions in employee benefit plans are allowed on the basis of actuarially "significant cost considerations." *See* 29 C.F.R. §1625.10(a)(1) However, they are allowed only when the actual amount of the payment made or cost incurred on behalf of an older worker is not less than those made or incurred on behalf of a younger worker for each benefit. *See* 29 C.F.R. §1625.10 and 29 U.S.C. §632(I). Therefore, as long as the amount of payment made or incurred on behalf of an older worker is equal to that of a younger worker, even though that may mean the older worker receives a lesser amount of benefits or insurance coverage, the plan does not violate the ADEA.

Also allowed are voluntary early retirement plans that are consistent with the purposes of the ADEA. *Cerutti v. BASF Corp.*, 349 F.3d 1055 (7th Cir. 2003). However, none of the qualifying employer benefit plans, or voluntary early retirement plans, will excuse the employer for a failure to hire **or** for an involuntary retirement plan because of the age of an individual.

1. Definitions

- a. "Employee Benefit Plan":** A plan such as a retirement, pension or insurance plan which gives employees fringe benefits, not wages or

salary in cash. *See* 29 C.F.R. §1625.10(b).

- b. **"Bona Fide Plan":** A plan is considered bona fide if its terms have been accurately described in writing to all employees and if benefits are provided in accordance with the terms of the explained plan. *See* 29 C.F.R. §1625.10(b). If a plan is going to provide lower benefits to older workers because of age, those benefits must be prescribed by the terms of the plan. *See* 29 C.F.R. §1625.10(b). Also, if the employer is going to provide lower benefits for older employees on account of age, the employer must have data showing the actual cost of providing the benefit. *See* 29 C.F.R. §1625.10(d)(1).

D. **Bona Fide Seniority System**

- 1. It is lawful for an employer, employment agency, or labor organization to observe the terms of a bona fide seniority system, as long as that system is not intended to evade the purposes of the ADEA. However, no such seniority system shall require or permit the involuntary retirement of any individual because of age. The EEOC states that any bona fide seniority system must be based on length of service as the primary component for allocating opportunities amongst workers of all ages. If a seniority system's essential terms and conditions have not been communicated to affected employees and/or are not applied to all affected employees regardless of age, it is not bona fide. *See* 29 U.S.C. §623(f)(2)(A).
- 2. **Perpetuation of past effects of discrimination.** Seniority systems which use facially neutral criteria but have the effect of perpetuating past (and time-barred) discriminatory effects are not necessarily discriminatory or illegal. *Ameritech Benefit Plan Comm. v. Communication Workers of Am.*, 220 F.3d 814 (7th Cir. 2000).

E. **Waiver of ADEA Claim**

For a waiver of one's ADEA claim to be valid, the waiver must be "knowing and voluntary." The ADEA identifies criteria that are required to make the waiver "knowing and voluntary" if it is signed before a charge is filed with the EEOC or in court. *See* 29 U.S.C. §626(f). The waiver must, at a minimum, meet the following criteria:

- a. the waiver is a part of an agreement between the individual and the employer that is written in a manner calculated to be understood by the individual, or by the average individual eligible to participate;
- b. the waiver specifically refers to rights or claims arising under the

ADEA;

- c. the individual does not waive rights or claims that may arise after the date the waiver is executed;
- d. the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
- e. the individual is advised in writing to consult with an attorney prior to executing the agreement;
- f. Either:
 - (i) the individual is given a period of at least 21 days within which to consider the agreement; **or**
 - (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;
- g. the agreement provides that for a period of at least 7 days following the execution of such an agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;
- h. if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period described in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to-
 - (i) any class, unit, or group of individuals covered by such a program, and any time limits applicable to such program; and
 - (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organization unit who are not eligible or selected for the program. *See* 29 U.S.C. §626(f)(1)(A-H).

If a charge has already been filed, either with the EEOC or a court, a waiver will not be considered "knowing and voluntary" unless conditions (a)-(e) are met and the employee is given a reasonable amount of time to consider the settlement agreement. *See* 29 U.S.C. §§626 (f)(2)(A) & (B).

IV. EEOC PROCEEDINGS

A. Scope of these materials

This manual is intended for use by attorneys appointed to represent plaintiffs in employment discrimination cases in the Northern District of Illinois. At the time of such appointment, proceedings before the EEOC have terminated. Therefore an extensive discussion of EEOC proceedings is beyond the scope of this manual.

B. Summary of Proceedings

For more, see "Title VII and Section 1981: A Guide for Appointed Attorneys in the Northern District of Illinois."

- 1. Filing of a Charge:** In addition to an allegation and the name of the charged party, a charge must also be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee. *See Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008).
- 2. Conciliation Prerequisite:** Section 7(b) of the ADEA requires the EEOC to attempt to achieve compliance with the terms of the ADEA "through informal methods of conciliation, conference, and persuasion." *See* 29 U.S.C. §626(b).
- 3. Time Requirements for Charges:** Sections 7(c) and (d) of the ADEA, 29 U.S.C. §§626(c) & (d), require the filing of an ADEA charge within 180 days of the alleged discrimination or within 300 days if the state (like Illinois) in which the alleged discrimination occurred has a state law prohibiting age discrimination and an administrative agency empowered to achieve relief. Once an EEOC charge has been filed, the employee must wait 60 days before proceeding with a civil suit. 29 U.S.C. §626 (d). The plaintiff does not need a right to sue letter from the EEOC in order to proceed. If a right to sue letter is issued, plaintiff has 90 days from receipt of the notice to file suit. 29 U.S.C. §626(e). If the charge is not filed within the designated time, the court is allowed to make equitable modifications that allow a plaintiff to proceed if necessary. *See Zipes v. Trans World Airlines*, 455 U.S. 385 (1982).

V. ELEMENTS OF A CASE AND BURDENS OF PROOF

A. Introduction

The courts follow the Title VII structure of proof in ADEA litigation. There are two different theories that a plaintiff may advance. The first is disparate treatment, which is where the plaintiff was treated less favorably because of his or her age. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). The second theory is disparate impact, which is where the defendant utilizes some practice or policy that adversely impacts people over 40. *Smith v. City of Jackson*, 544 U.S. 228 (2005).

B. Disparate Treatment

Using the *McDonnell Douglas* framework, an ADEA plaintiff must first establish a prima facie case by showing four different factors. For a more detailed explanation, see "Title VII and Section 1981: A Guide for Appointed Attorneys in the Northern District of Illinois."

1. **The Prima Facie Case:** The plaintiff must prove the following:
 - a. that he/she is a member of the protected group (40 years of age or older)
 - b. that he/she was qualified for the position in question
 - c. that he/she was denied hire [promotion, raise, etc.] **and**
 - d. someone younger, with similar or lesser qualifications, was hired, or received the promotion, raise, etc.

The plaintiff must be compared to other similarly situated employees. *See Filar v. Bd. of Educ.*, 526 F.3d 1054, 1061 (7th Cir. 2008). Whether two employees are similarly situated is a "common sense inquiry that depends on the employment context." *Id.* A plaintiff "need not present a doppelganger who differs only by having remained in the employer's good graces," but the employee must still be "similar enough to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel." *Id.* Differences in seniority will usually preclude a finding that two employees are similarly situated, unless "seniority is unmoored from everything but the discretion of the employer." *Id.* *See also Faas v. Sears, Roebuck & Co.*, 532 F.3d 633 (7th Cir. 2008) (holding that plaintiff was not similarly situated because she had an "idiosyncratic set of failings" that distinguished her from the other store managers).

The 7th Circuit has ruled that the term "someone younger" applies only when the employer favors someone substantially younger, ten years or more. *See Radue v. Kimberly Clark Corp.*, 219 F.3d 612 (7th Cir. 2000); *Hoffman v. Primedia Special Interest Publ'ns*, 217 F.3d 522 (7th Cir. 2000) (three year difference in age insufficient absent direct evidence of age animus). However, the "ten-year" requirement only applies when both the plaintiff and the comparative employee are over forty. *Bennington v. Caterpillar, Inc.*, 275 F.3d 654 (7th Cir. 2001). Stray remarks that show age bias can also help establish a prima facie case, but some Seventh Circuit panels have held that the bias must be explicit. *See Luks v. Baxter Healthcare Corp.*, 467 F.3d 1049 (7th Cir. 2006) ("good old boys" remark is not age-hostile); *Cerutti v. BASF Corp.* 349 F.3d 1055 (7th Cir. 2003) ("out with old, in with new" remark not age-hostile).

The power of "stray remarks" was given some new life after the Supreme Court ruled in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), that a lower court of appeals erred by discounting evidence of decision maker's age-related comments ("you must have come over on the Mayflower"), merely because not made "in the direct context of termination." *See Olson v. Northern FS, Inc.*, 387 F.3d 632 (7th Cir. 2004) (supervisor's remark that plaintiff's age was hurting him in the industry sufficient, with other evidence, to withstand summary judgment).

2. **The Burden Shifts:** After the plaintiff has established the prima facie case, the burden of rebutting that case shifts to the defendant(s); however it is a burden of production, not of proof. The defendant is required to merely produce evidence that the employment decision was based on a legitimate, non-discriminatory reason, not prove that it was based on such a reason. *See Burdine*, 450 U.S. at 248 (1981).
3. **The Burden Shifts Back:** After the defendant has met his/her burden of producing a legitimate, non-discriminatory reason for the employment decision, the burden shifts back to the plaintiff to prove that the proffered reason is a pretext for discrimination. Even though the burden of production shifts to the defendant after the plaintiff establishes the prima facie case, the ultimate burden of persuading the trier of fact lays with the plaintiff at all times. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. Mary's v. Hicks*, 509 U.S. 502 (1993). *See e.g., Ezell v. Potter*, 400 F.3d 1041 (7th Cir. 2005) (plaintiff established pretext for summary judgment purposes with evidence that younger workers had not been fired and with evidence of age-biased remark); *Burger v. Int'l Union of Elevator Constr.*, 498 F.3d 750 (7th Cir. 2007) (lack of written policy

supporting employer's explanation for challenged decision suggests pretext). A pattern where the protected-class members "sometimes do better" and "sometimes do worse" than their comparators is not evidence of age discrimination. *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633 (7th Cir. 2008).

Evidence of discrimination by other supervisors may be relevant to proving discrimination. The Supreme Court has recently held that such a question is "fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008).

4. **The "Inference of Nondiscrimination."** In age discrimination cases, courts may infer that no discrimination has occurred when the plaintiff is already over 40 when hired and the same person does the hiring and firing. *See, e.g., Ritter v. Hill 'N Dale Farm, Inc.*, 231 F.3d 1039, 1045 (7th Cir. 2000); *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 399 (7th Cir. 1997). The inference is especially strong where there is a relatively short time span between the hiring and firing. *Filar v. Bd. of Educ.*, 526 F.3d 1054, 1065 n.4 (7th Cir. 2008). However, the inference may not apply in certain circumstances. *See id.* (holding that the inference of nondiscrimination was not controlling where the plaintiff's hiring and displacement were seven years apart, and also noting that "placing too strong a reliance on an inference of nondiscrimination may go too far at the summary judgment stage").

C. **Reduction in Force**

Unlike a typical ADEA claim, the plaintiff in a RIF case has not been replaced by another employee. The Seventh Circuit has established a different prima facie case framework to be utilized in RIF cases. The plaintiff must establish the four prongs of the new test, but failure to establish the fourth prong is not "a sine qua non for recovery." *See Kralman v. Ill. Dep't of Veterans' Affairs*, 23 F.3d 150, 154 (7th Cir. 1994).

1. **Prima Facie Framework for RIF Cases:** Plaintiff must show that he/she:
 - a. was within the protected age group;
 - b. was performing according to his/her employer's legitimate expectations;
 - c. was terminated or demoted; and

- d. was treated less favorably than similarly situated workers not in the protected class. *See Sauzek v. Exxon Coal USA, Inc.* 202 F.3d 913 (7th Cir. 2000) (employee may show bias by establishing that younger employees were transferred to other jobs to which the older workers applied and for which they were qualified); *Miller v. Borden*, 168 F.3d 308, 314 (7th Cir. 1999) (older employee treated less favorably when his sales territory, the largest in the company, was taken away from him and divided between two younger employees). The Seventh Circuit requires that plaintiff be similarly situated to the comparable worker. *Kreischer v. Fox Hills Golf Resort & Conference Ctr.*, 384 F.3d 912 (7th Cir. 2004); *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324, 1332 (7th Cir. 1995) (former sales representative was not treated less favorably than younger employee when he was replaced by younger representative with lower sales figures because comparing sales figures in Chicago to sales in other territories is like comparing apples and oranges, especially without additional evidence regarding the nature and size of the other sales territories). Note that it is possible to establish a prima facie case even when the manager responsible for firing the plaintiff is age-protected himself, and even older than the plaintiff. *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001).
2. **Mini-RIFs:** Where the employer's reduction in force results in the duties of the discharged employees being absorbed by the remaining workers (as opposed to those duties being abandoned entirely), the Seventh Circuit regards the RIF as a "mini-RIF." In those circumstances, the prima facie case is established by showing that discharged employee's duties were absorbed by someone under age 40. *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685 (7th Cir. 2006); *Michas v. Health Copst Controls of Ill., Inc.*, 209 F.3d 687 (7th Cir. 2000).
3. **Employer Defenses:** An employer may justify its RIF decisions by keeping those employees most likely to contribute the most to the company over the long haul. This standard does not necessarily work against older employees since they tend to be less mobile than younger employees. *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383 (7th Cir. 2000).

D. Hostile Work Environment

The Seventh Circuit has never determined whether claims of a hostile work environment based on age are cognizable under the ADEA. *Racicot v. Wal Mart*, 414 F.3d 675 (7th Cir. 2005); *Bennington v. Caterpillar, Inc.*, 275 F.3d 654 (7th Cir. 2001).

VI. REMEDIES UNDER THE ADEA

A. Equitable Relief

Sections 626(b) and (c) of the ADEA provide jurisdiction to grant any relief that is appropriate. Examples include: reinstatement, hiring, and promotion.

B. Back Pay and Front Pay

Back pay may include lost wages, pension benefits, insurance coverage, and other economic benefits of employment. Plaintiff has a duty to mitigate her damages by seeking other employment. The actual interim amount earned by the plaintiff should be deducted from any back pay award plaintiff receives. Front pay may be available where reinstatement is not viable, and the amount is to be decided by the judge, not the jury. *See Fortino v. Quassar Co.*, 950 F.2d 389, 298 (7th Cir. 1991).

C. Compensatory Damages

The majority of courts, including the Seventh Circuit, have not allowed recovery for damages for pain and suffering under the ADEA. *See Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684 (7th Cir. 1982).

D. Punitive Damages

Punitive damages are not available under the ADEA. *See Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684 (7th Cir. 1982).

E. Liquidated Damages

Liquidated damages in the amount of back pay are awarded for “willful” violations of the ADEA. A willful violation is one in which the employer “knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.” *Trans World Airlines v. Thurston*, 469 U.S. 111, 126 (1985) The Seventh Circuit has held that willfulness is reckless indifference, which exists when an employer hires managers who are unaware of the illegality of discrimination in employment. *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771 (7th Cir. 2001). “[G]iven the length of time the ADEA has been with us, a finding of nonreckless ignorance is rare.” *EEOC v. Bd. of Regents of the Univ. of Wis. Sys.*, 288 F.3d 296 (7th Cir. 2002).

F. Attorneys' Fees

The ADEA incorporates by reference §16 of the Fair Labor Standards Act, 29 U.S.C. §216(b), which provides that a court shall allow reasonable attorneys' fees and costs to the prevailing plaintiff. Plaintiffs who are successful in their ADEA

claim will routinely be awarded these fees, while a defendant will only be awarded fees if the plaintiff's claim is frivolous. *See Monroe v. Children's Home Ass'n of Ill.*, 128 F.3d 591, 594 (7th Cir. 1997). A rule of thumb is that a plaintiff should recover at least 10% of the plaintiff's claimed damages to obtain an award of attorneys' fees. *Tuf Racing Prods., Inc. v. Am. Suzuki Motor Corp.*, 223 F.3d 585 (7th Cir. 2000).

VI. ARBITRATION

- A. The Gilmer Decision:** In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court held that an Age Discrimination in Employment Act claim could be subject to compulsory arbitration. The Court held that the employee retains the right to file a charge with the EEOC and obtain a federal government investigation of the charge. *Id.* at 28. In *EEOC v. Waffle House*, 534 U.S. 279 (2002), the Supreme Court held that the EEOC may pursue a claim on behalf of a charging party notwithstanding the charging party's agreement to arbitrate her individual case with her employer. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Supreme Court resolved the questioned unanswered in *Gilmer* and held that any employment agreement containing an agreement to arbitrate an employment discrimination claim is subject to compulsory arbitration.
- B. Collective Bargaining Agreements:** In the Seventh Circuit, collective bargaining agreements cannot compel arbitration of statutory rights. *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997). However, in the limited context of railway and airline employees who work under collective bargaining agreements, *Haw. Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994), requires arbitration of employment disputes that involve interpretation of the applicable collective bargaining agreements. *Brown v. Ill. Central R.R. Co.*, 254 F.3d 654 (7th Cir. 2001). In that context, when the collective bargaining agreement is potentially dispositive of a discrimination claim, the plaintiff must arbitrate before proceeding to court. *Tice v. Am. Airlines, Inc.*, 288 F.3d 313 (7th Cir. 2002).
- C. Fact-Specific Defenses to Arbitration:** Courts treat agreements to arbitrate like any other contract. *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 130 (7th Cir. 1997). For example, in *Gibson*, the court held that the arbitration agreement was unenforceable because the employer did not give the employee any consideration for her agreement to arbitrate. *Id.* at 1131. Possible consideration could have been an agreement by the employer to arbitrate all claims or a promise that it would continue employing plaintiff if she agreed to arbitrate all claims. *Id.* at 1131-32. Likewise, in *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001), an arbitration agreement was held invalid because the promisor (the provider of arbitration services) made no definite promise to the employee.

In *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677 (7th Cir. 2002), the arbitration agreement was unenforceable because it forced the employee to forfeit a substantive right – attorneys’ fees. By contrast, in *Tinder v. Pinkerton Sec.*, 305 F.3d 728 (7th Cir. 2002), continued employment after the employer published notice of implementation of a mandatory arbitration policy was sufficient consideration to enforce the policy (even where the employee denied receiving notice).