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

A Guide for Appointed Attorneys in the Northern District of Illinois

J. Cunyon Gordon

Chicago Lawyers' Committee for Civil Rights Under Law
March 2012

Foreword

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. has prepared this manual for use by attorneys appointed by judges in the Northern District of Illinois to represent indigent plaintiffs in employment discrimination cases. This manual contains a summary of the Americans with Disabilities Act (with its 2008 Amendments) and the Age Discrimination in Employment Act as well as summaries of employment discrimination cases decided by the Supreme Court, the Seventh Circuit, and the Northern District of Illinois through February 2012. 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 J. Cunyon Gordon at the Chicago Lawyers' Committee for Civil Rights Under Law, 100 N. LaSalle, Suite 600, Chicago, IL 60602, (312) 630-9744 Ext. 242, cgordon@clccrul.org.

TABLE OF CONTENTS

PAGES

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

I. INTRODUCTION

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. As discussed more fully below, the ADA was amended in late 2008 to expand coverage in several key respects.

PRACTICE NOTE: The 2008 Amendments should not be applied retroactively. *Adams v. City of Chicago*, 706 F.Supp.2d 863 (N.D. Ill. 2010). Therefore, if the matter to which you have been appointed arises out of conduct that pre-dates the Amendments' effective date of January 1, 2009, you must apply the ADA's pre-Amendment language. If, however, the matter arises out of conduct that occurred on or after January 1, 2009, then apply the Amendment language and the corresponding regulations.

II. INDIVIDUAL WITH A DISABILITY

A. Does the Plaintiff have a disability?

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). The 2008 ADA Amendments emphasize that this definition of "disability" is to be interpreted broadly.

1. **Physical or Mental Impairment:** The EEOC Regulations define "physical or mental impairment" as: (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h). *See, e.g., Lawson v.*

CSX Trasnp., Inc., 245 F.3d 916 (7th Cir. 2001) (Plaintiff's insulin-dependent diabetes and related medical conditions were recognized as "physical impairments" within the meaning of the ADA); *But see Branham v. Snow*, 392 F.3d 896 (holding that since the plaintiff "had very good control of his diabetes," it was **not** a physical impairment under ADA); *See also Duda v. Bd. of Educ.*, 133 F.3d 1054 (7th Cir. 1998) (recognizing manic depression as a disability under the ADA).

2. **Record of Disability:** For a plaintiff to establish a disability because of a "record of" an impairment, he or she must have a history of a medical or physical impairment that substantially limits one or more major activities. *Kotwica v. Rose Packing Co.*, 637 F.3d 744 (7th Cir. 2011); *see also Fleishman v. Cont'l Cas. Co.*, No. 09-cv-414, 2011 WL 5866264 (N.D. Ill. Nov. 22, 2011) (Citing 29 C.F.R. § 1602(k)). 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 SSDI determination). *See Cleveland v. Policy Mgmt. Sys. Corp*., 526 U.S. 795 (1999). The passage of time and a concurrent change in the disability can explain an inconsistency between an SSDI application and ADA status. *Butler v. Village of Round Lake Police Dep't,* 585 F.3d 1020 (7th Cir. 2009). The plaintiff's representation that she is disabled for pension purposes may also preclude her ADA claim. *Id.*

3. **Perceived Impairment:** The plaintiff does not need to establish an actual disability to make a claim based on ADA § 12102(2)(c). Under the 2008 ADA Amendments, an individual may be perceived as having an impairment whether or not the impairment limits or is perceived to limit a major life activity. 29 C.F.R. § 1630.2(g)(1)(iii) ("This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both 'transitory and minor.'"); *See, e.g., Brunker v. Schwan's Home Service, Inc.*, 583 F.3d 1004 (7th Cir. 2009) (reprimand for dress code violation suggests employer regarded employee as unable to care for himself). . In order to prove that the defendant regarded plaintiff as having a disability, plaintiff must demonstrate that the employer believed that the plaintiff had an impairment that substantially limited one or more major life activities. *Viramontes v. U.S. Bancorp*, 10-cv-761, 2011 WL 6780644 (N.D. Ill. Dec. 27, 2011). It is important to note that if the condition that is the subject of the employer's belief is not substantially limiting, and the employer does not believe it is, then there is no violation of the ADA under the "regarded as" prong. *Kampier v. Emeritus Corp.*, 472 F.3d 930 (7th Cir. 2006).

4. **Disabling Medical Treatment:** An employee may be protected by the ADA even though her 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); *See also Lesniak v. Quality Control Corp.*, 07-cv-2948, 2009 WL 799487 (N.D. Ill. March 25, 2009) (Holding that treatment for plaintiff's colon condition, which required bi-annual colonoscopies and the surgical removal of polyps at each procedure, amounted to a disability under the ADA). However, such treatment must be truly necessary. *Id.* at 1052.

5. **AIDS and HIV:** Under the pre-2008 Amendments law, the courts consistently held that a plaintiff's HIV-positive status is "*an impairment, not a disability*." *Bragdon v. Abbott*, 524 U.S. 624 (1998); *See also Sanchez v. City of Chicago*, 05-cv-6801, 2007 WL 647485 (N.D. Ill. Feb. 28, 2007);*Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (explaining that "having an impairment does not make one disabled for the purposes of the ADA"). However, the Amendments, and their corresponding regulations explain that 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); *See e.g., Bragdon v. Abbott*, 524 U.S. 624 (1998); *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496 (7th Cir. 2004). It is important to note that being diagnosed as HIV positive does not mean that the plaintiff is disabled per se. *E.E.O.C. v. Lee's Log Cabin*, 546 F.3d 438 (7th Cir. 2008). He or she will still be required to present evidence that his or her status impaired a major life activity. *Adams v. City of Chicago*, 706 F.Supp. 2d 863 (N.D. Ill. 2010). That said, the vast majority of courts now conclude that HIV is a disability under the ADA. *See, e.g., Horgan v. Simmons*, 704 F.Supp.2d 814 (N.D. Ill. 2010).

6. **Drug Addiction and Alcoholism:** Any person who is currently engaging in the illegal use of drugs when his or her employer acts takes an adverse employment action based on such use is not considered "a qualified individual with a disability" under the ADA. 42 U.S.C. § 12114.

   a. **Past "Casual" Drug Use**: 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.

b. **Rehabilitation**: A person who has successfully completed, or is presently 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)(1)-(2). 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). An employer may, however, adopt or administer reasonable policies or procedures that are designed to ensure that an individual described in 42 U.S.C. § 12114(b)(1)-(2) is no longer engaging in the illegal use of drugs. 42 U.S.C. § 12114(b).

c. **Employer Policies:** The Supreme Court has held that an employer's unwritten policy against hiring former employees who were terminated for any violation of its miscoduct rules is a legitimate, non-disability based reason, under the ADA, for refusing to hire an employee that left his or her position after testing positive for illegal drugs. *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

d. **Conduct While Under the Influence**: 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. 42 U.S.C. § 12114(c)(4); *See, e.g., Pernice v. City of Chicago*, 237 F.3d 783 (7th Cir. 2001) (holding city employee's addiction to cocaine did not render his possession of cocaine truly involuntary, and thus his dismissal for violating the city's personnel rule prohibiting possession of controlled substances did not constitute disability discrimination); *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); *Budde v. Kane County Forest Preserve*, 603 F.Supp.2d 1136 (N.D. Ill. 2009). Even reports of alcohol odor on the breath may lead an employer to believe an employee is under the influence of alcohol and may justify a dismissal. *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662 (7th Cir. 2000).

e. **Erroneously "Regarded As":** If an employee is erroneously "regarded as" engaging in illegal drug use, but is not actually engaging in such use, he or she is considered disabled under the ADA. 42 U.S.C. §12114(b)(3).

7. **Obesity:** There is a substantial uncertainty regarding whether a plaintiff's morbid obesity alone can amount to a disability under the ADA if it is not the result of any physiological disorder. Courts seem to be inclined that it is not. *See e.g., EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2007); *Francis v. City of Meridienm*, 129 F.3d 281 (2d Cir. 1997); *Hargett v. Adams*, No. 08-3133, 2010 WL 3834458 (C.D. Ill. Sept. 14, 2010). However, the EEOC regulations indicate that morbid obesity, or body weight that is *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 must demonstrate that the impairment substantially limits a major life activity.

8. **Statutory Exclusions:** The following are specifically excluded from coverage under the ADA: homosexuality, bisexuality, transvestism, transsexualism, pedophilia, voyeurism, gender identity disorders not resulting from physical impairments, other 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. **Environmental and/or Cultural Disadvantages:** Environmental, cultural and economic disadvantages are not "impairments." 29 C.F.R. § 1630.2(j) app.

10. **Physical Characteristics and Personality Traits:** 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. E.E.O.C. COMPLIANCE MANUAL: SECTION 902 DEFINITION OF THE TERM "DISABILITY": 902.2 Impairment. Furthermore, personality traits, such as "poor judgment or a quick temper" are not disabilities when these traits are not symptoms of a mental or psychological disorder. *Id*.

B. Does the Physical or Mental Impairment "Substantially Limit" a Major Life Activity under 42 U.S.C. 12102(2)(a)?

The phrase "substantially limits" means the individual is unable to perform a major life activity or is significantly restricted in the manner in or duration for which he can perform such an activity as compared to an average person in the general population. 29 C.F.R. § 1630.2(j). It is important to note that the "substantially limits" standard is not meant to be a demanding standard. *Id*.

Rather, it should be construed to allow for "expansive coverage, to the maximum extent permitted by the terms of the (ADA)." *Id*. However, not every slight impairment will meet this threshold. For instance, courts generally find that short-term, temporary restrictions to one's major life activities, are not substantially limiting and do not render a person disable for the purposed of the ADA. *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011) (Citing 29 C.F.R. § 1630.2(j)); *See also Waggoner v. Olin Corp.*, 169 F.3d 481 (7th Cir. 1999).

1. **Focus on Effect on Person's Life:** The determination of whether an plaintiff is "disabled" depends on the effect the impairment has *on the individual plaintiff'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; *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Kampier v. Emeritus Corp.*, 472 F.3d 930 (7th Cir. 2007) (noting that "whether or not a medical condition rises to the level of a disability is to be made on an *individualized* basis."); *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). For example, some very 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); *Squibb. v. Mem'l Med. Center*, 497 F.3d 775 (7th Cir. 2007) (limitations on sleep may be disabling but must be "prolonged, severe, and long-term"); *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995) (vision impairment); *Hoeller v. Eaton Corp.*, 149 F.3d 621 (7th Cir. 1998) (bipolar disorder). Plaintiff must provide very specific evidence of the extent of the limitation. *Fredericksen v. UPS, Co.*, 581 F.3d 516 (7th Cir. 2009).

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. The plaintiff is not required to prove medical evidence of his or substantial limitations to satisfy the terms of the ADA. *E.E.O.C. v. AutoZone, Inc.*, 630 F.3d 635 (7th Cir. 2010); *Wallace v. McGlothan*, 606 F.3d 410 (7th Cir. 2010) (recognizing that expert testimony is unnecessary to establish causation in cases where a lay person can understand an injury or condition).

3. **Episodic Symptoms:** The 2008 ADA Amendments clarify that disabilities that present only episodic symptoms can still be considered

disabling if they substantially limit a major life activity when active. 29 C.F.R. § 1630.2(j)(1)(vii); *See also EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432 (7th Cir. 2000); *Haschmann v. Timer Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998) (holding that "episodic flares" characteristic of lupus were a disability under the ADA).

3. **Effect of Mitigating Measures:** The 2008 ADA Amendments state that mitigating measures (other than eyeglasses or contact lenses) **shall not** be considered in determining whether a person with a physical or mental impairment is "disabled" for ADA purposes, which effectively overruled *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999).

4. **Substantially Limited in Manual Tasks:** Where the plaintiff claims that the disability limits her ability to perform manual tasks, he or she must show that he or 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); *See also EEOC. v. AutoZone, Inc.*, 630 F.3d 635 (7th Cir. 2010); *Brunker v. Schwan's Home Service*, 583 F.3d 1004 (7th Cir. 2009) (inability to dress oneself constituted evidence of a limitation on a major life activity); *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); *EEOC v. Sears*, 417 F.3d 789 (7th Cir. 2005) (inability to walk a city block).

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. Suncast Corp.*, 237 F.3d 756 (7th Cir. 2001).

    a. **Broad Category of Jobs:** 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., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Toyota Motor Mfg. Inc. v. Williams*, 534 U.S. 184 (2002); *Powers v. USF South Holland, Inc.*, ---F.3d--- (7th Cir. 2011), (*available at* 2011 WL 6287918) (7th Cir. Dec. 15, 2011)); *Squibb v. Mem'l Med. Center*, 497 F.3d 775 (7th Cir. 2007); *Cassimy v. Bd. of Educ.*, 461 F.3d 932 (7th

Cir. 2006); *Rooney v. Koch Air.*, 410 F.3d 376 (7th Cir. 2005). No specific quantification is necessary, as long as it is shown that the plaintiff is disabled from "many" or "most" jobs. *See, e.g., Powers v. USF South Holland, Inc.*, ---F.3d--- (7th Cir. 2011) (*available at* 2011 WL 6287918 (7th Cir. Dec. 15, 2011)) (plaintiff did not present evidence that his infirmities prevent(ed) him from other jobs or that most jobs required the specific type of work that he could not perform); *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).

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

6. **Pregnancy & Pregnancy Complications/Disorders:** Pregnancy itself is not a disability because it is not the result of physiological disorder. Therefore, a plaintiff that is seeking to prove that her employer discriminated against her simply because she is or was pregnant should bring her claims under Title VII's prohibition against sex discrimination. 42 U.S.C. § 2000e. If, on the other hand, an employer takes an adverse employment action based on complications arising out of the pregnancy, the ADA may cover the employee's discrimination claim. *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011). Unfortunately, plaintiffs seeking to bring such a claim face a significant uphill battle because many courts have been unwilling to extend the ADA's protections to complications arising out of pregnancy because of the limited duration of such complications. *See, e.g., Id.* (explaining that complications are rarely considered to have a substantial effect on a major life activity due to their limited duration); *See also Muska v. AT&T Corp.*, 96-cv-5952, 1998 WL 544407 (N.D. Ill. Aug. 25, 1998); *But see Gabriel v. City of Chicago*, 9 F.Supp.2d 974 (N.D. Ill. 1998) (holding plaintiff's swollen feet that prohibited her from walking for a duration of nearly 6 months was sufficient to establish a "substantial limitation" to a major life activity).

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. These "include, *but are not limited to*: Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working."

29 C.F.R. § 1630.2(i)(1)(i) (Emphasis added). They also include "(t)he operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system." 29 C.F.R. §1630(i)(2)(ii). It is important to note these are both non-exhaustive lists. For example, 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). A number of seemingly every day activities may not be a major life activity. *See, e.g., Squibb v. Memorial Med. Center*, 497 F.3d 775 (7th Cir. 2007) (sexual relations); *Winsley v. Cook County*, 563 F.3d 598 (7th Cir. 2009) (driving); *But see 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).

III. THE SCOPE OF TITLE I

A. Employers Covered by the ADA

Title I of the ADA applies to private employers employing 15 or more individuals, and state, and local government bodies. *See* 42 U.S.C. §§ 12202 & 12111(5)(A).

1. **State employers:** 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). In 2003, the Illinois legislature waived Eleventh Amendment immunity to ADA claims.

2. **Supervisors:** The Seventh Circuit rejected individual liability under the ADA finding that the ADA imposes respondeat superior liability on an employer for the acts of its agents. *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir. 1999) (noting that "Our case law is clear that a supervisor cannot be held liable in his individual capacity under the ADA or under Title VII."); *DeVito v. Chicago Park Dist.*, 83 F.3d 878 (7th Cir. 1996); *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."); *Krause v. Turnberry Country Club*, 571 F. Supp. 851 (N.D. Ill. 2008).

3. **Federal Employees:** 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); *see also Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011).

    a. **Discrepancies with SSA Determinations:** If a plaintiff is seeking to prove that he or she is a "qualified individual with a disability despite a determination by the Social Security Administration ("SSA") that he or she is "totally disabled"for the purposes of receiving Social Security benefits, the discrepancy must be explained using 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. *See Cleveland v. Policy Mgmt. Sys. Corp*., 526 U.S. 795 (1999) (explaining the plaintiff's discrepancy arose because because the SSA's determination did not take into account the possibility of a "reasonable accommodation" into account); *See also Johnson v. Exxon Mobil Co.*, 426 F.3d 887 (7th Cir. 2005); *Coleman v. Cook County*, No. 09-cv-739, 2010 WL 725322 (N.D. Ill. Feb. 25, 2010).

    b. **Discrepancies with ERISA Plan Determinations:** Similarly, discrepancies between applications for ERISA benefits and ADA claims must also be explained. *Opsteen v. Keller Structures, Inc.*, 408 F.3d 390 (7th Cir. 2005) (holding that the discrepancy between the plaintiff's ERISA application and his ADA complaint "forbid" plaintiff from proceeding with his case). Such discrepancies are much harder to overcome, however, because many ERISA plans withhold benefits unless the employee cannot work even with a reasonable accommodation. *Id*. That being said, merely 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).*

2. **"Qualified Individual":** 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). As a practical matter, the employer is entitled to define the job, in terms of both its essential scope and the qualifications required for it; the employer then must decide whether the employee meets those criteria. *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667 (7th Cir. 1998). The employer may not, however, change such criteria to exclude a disabled employee. *Id*.

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 of 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)*; Perkins v. Ameritech Corp.*, 161 Fed.Appx. 578 (7th Cir. 2006) (A plaintiff's failure to regularly appear for work may remove him or her from the class of "qualified individuals" protected by the ADA); *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).

i. **"Essential":** 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.* Federal regulations instruct courts to examine the following categories of evidence when determining whether the job function in question was in fact "essential": (1) The

employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time actually spent on the job performing that particular function; (4) the consequences of not requiring the plaintiff to perform the function; (5) the terms of a collective bargaining agreement if one exists; (6) the work experience of past individuals holding the job; and/or (7) the current work experience of individuals holding similar jobs. 29 C.F.R. § 1630.2(n)(3); *See, e.g., Miller v. Illinois Dep't of Transp.*, 643 F.3d 190 (7th Cir. 2011).

ii. **The Employer's Determination:** 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); *See, e.g., Miller v. Illinois Dep't of Transp.*, 643 F.3d 190 (7th Cir. 2011). The ADA definitely does not give employers unfettered discretion to decide what is reasonable when determining whether something is an essential function of the job in question. Employers must, at a minimum, consider the possible modifications of jobs, processes, or tasks so as to allow an employee with a disability to work, even where established practices or methods seem to be the most efficient or serve otherwise legitimate purposes in the workplace. *Miller v. Illinois Dep't of Transp.*, 643 F.3d 190 (7th Cir. 190). 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).

iii. **Multiple Duties:** 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. *Miller v. Illinois Dept. of Transp.*, 643 F.3d 190 (7th Cir. 2011); *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).

iv. **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). The term "discriminate against a qualified individual on the basis of disability includes: (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee; (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs); (3) utilizing standards, criteria, or methods of administration (a) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control; (4) excluding or otherwise denying 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; (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity or (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant; (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure)." 42 U.S.C. § 12112 (b).

Under the ADA, a claim of discrimination is **separate and distinct** from a claim for failure to accommodate a known disability. A discrimination claim under the ADA is based on the premise that an adverse employment action based on the employee's actual

or perceived disability. A reasonable accommodation claim, on the other hand, looks at an employer's failure to make accommodations to the known physical or mental limitations of an otherwise qualified individual. *Warmack v. Windsor Park Manor,* ---F.Supp.2d--- (N.D. Ill. 2011). 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. *Timmons v. Gen. Motors Corp.*, 469 F.3d 1122 (7th Cir. 2006); *See also Weigel v. Target Stores,* 122 F.3d 461 (7th Cir. 1997) (Holding the 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).

A. ADA Discrimination Claims

1. **In General**: Discrimination claims under the ADA can take one of the following two forms: (1) disparate treatment discrimination or (2) disparate impact discrimination (See further discussion of each below). In either case, a disabled plaintiff can prove disability discrimination by using either the direct or indirect method of proof. *Dickerson v. Bd. of Trustees of Cmty. Coll. Dist. No. 522*, 657 F.3d 595, 601 (7th Cir. 2011) (citing *Robin v. Espo Eng'g Corp.*, 200 F.3d 1081, 1088 (7th Cir. 2000)).

2. **Direct Method**: Under the direct method, a plaintiff can present either direct or circumstantial evidence to meet its burden. *Id*. (citing *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 503 (7th Cir. 2004) and *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 670 (7th Cir. 2000). Direct evidence requires an admission by the decision maker that his or her actions were based on the prohibited animus. *Id*. However, since employers are usually careful to avoid such remarks, cases proceeding under the direct method are more likely to turn on circumstantial evidence that allows a jury to infer intentional discrimination. *Luster v. Ill. Dep't of Corr.*, 652 F.3d 726 (7th Cir. 2011). The types of circumstantial evidence that a plaintiff may produce to survive summary judgment includes, but is not limited to, the following: (1) suspicious timing, (2) ambiguous statements or behavior towards other employees in the protected group; (3) evidence, statistical or otherwise, that similarly situated employees outside of the protected group systematically received better treatment; and (4) evidence that the employer offered pretextual rationale for an adverse employment action. *Dickerson* at 601; *See also Burnell v. Gates Rubber Co.*, 647 F.3d 704, 708 (7th Cir. 2011); *Diaz v. Kraft Foods Global, Inc.*, 653 F.3d 582, 586-587 (7th Cir. 2011).

3. **Indirect Method**: The indirect method mirrors the test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

a. **Prima Facie Case** Under the indirect method of proof, a plaintiff must establish a *prima facie* case of discrimination by showing that (1) he is disabled under the ADA; (2) he was meeting his employer's legitimate employment expectations; (3) he suffered an adverse employment action; and (4) similarly situated employees without a disability were treated more favorably. *Dickerson* at 601 (citing *Lloyd v. Swifty Transp., Inc.*, 552 F.3d 594 (7th Cir. 2009) and *McDonnell Douglas* at 802.).

i. **Facially Neutral Rules:** If an employer 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 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).

ii. **Adverse Employment Actions:** Adverse employment actions come in three general forms under the ADA: (1) termination or reduction in benefits or financial terms of employment; (2) transfers or changes in job duties that diminish an employee's skills, thereby reducing future job prospects; and (3) unbearable changes in conditions, such as a hostile work environment or conditions amounting to constructive discharge. *Jackson v. Fed. Exp. Corp.*, No. 10-cv-5837, 2012 WL 171336 (N.D. Ill. Jan. 20, 2012). An employment action may not be sufficiently adverse to be actionable. (*See* Title VII Manual for extensive discussion.) *See, e.g., Lloyd v. Swifty Transp. Inc.*, 552 F.3d 594 (7th Cir. 2009) (explaining a written reprimand without any change in the terms of employment is not actionable); *But see Hoffman v. Caterpillar, Inc.*, 256 F.3d 568 (7th Cir. 2001) (explaining that denying a disabled employee 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," regardless of whether the denial adversely affects the employee's job.).

iii. **Similarly Situated Individuals (The *Leffel* Modification):** 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 (Emphasis added). 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). More recent Seventh Circuit discrimination decisions have discarded *Leffel*'s modified version of the fourth prong choosing to apply the unadulterated version, which requires the court to reject a discrimination claim where a plaintiff cannot show that his or her employer treated similarly situated employees outside of his or her protected class more favorably. *See, e.g., Egonmwan v. Cook County Sheriff's Dep't*, 602 F.3d 845, 849 (7th Cir. 2010); *Antonetti v. Abbott Labs.*, 563 F.3d 587, 592 (7th Cir. 2009) (holding "Without a similarly situated employee, Plaintiffs cannot present a prima facie case and their claim must fail."); *Jackson v. J.P. Morgan Chase Nat. Corp. Servs., Inc.*, No. 09-cv-3608, 2010 WL 2574217 (N.D. Ill. June 22, 2010).

b. **Employer's Burden:** Once a plaintiff has established a prima facie case, the defendant must identify a legitimate non-discriminatory reason for its employment discrimination. *Dickerson* at 601. (citing *Rooney v. Koch Air, LLC*, 410 F.3d 376, 381 (7th Cir. 2005).

c. **Pretext:** If the employer satisfies this requirement, the plaintiff must prove by a preponderance of the evidence that the defendant's reasons are "pretextual." *Dickerson* at 601 (citing *Lloyd* at 601); *See also Germano v. International Profit Ass'n, Inc.*, 544 F.3d 798 (7th Cir. 2008) (evidence that defendant withdrew interview offer immediately after learning that plaintiff was deaf and evidence that defendant gave shifting explanations for challenged decision suffices to show pretext for summary judgment purposes). Plaintiff is entitled to discovery on any potential nondiscriminatory explanation, and is not limited to the reasons asserted by defendant in the litigation. *Brunker v. Schwan's Home Service, Inc.*, 583 F.3d 1004 (7th Cir. 2009).

4. **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). 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).

5. **Mixed Motive Cases Prohibited:** Following *Gross v. FBL Financial Services, Inc*., 129 S. Ct. 2343 (2009), the Seventh Circuit has held that a plaintiff cannot bring a *Price Waterhouse* mixed motive claim under the ADA. *Serwatka v. Rockwell Automation, Inc*., 591 F.3d 957 (7th Cir. 2010). It is important to note that, in *Serwatka*, the Seventh Circuit was considering a pre-Amendment claim. Therefore, that decision technically has not been extended to claims arising after the 2008 Amendments. *See Id.* at 962 n. 1 (explaining "Pursuant to the ADA Amendments Act of 2008, Congress has made substantial changes to the ADA which took effect on January 1, 2009. Among other revisions, the language of the statute has been modified to prohibit an employer from discriminating against an individual "*on the basis of* disability." 42 U.S.C. § 12112(a) (2009) (emphasis supplied). Whether "on the basis of" means anything different from "because of," and whether this or any other revision to the statute matters in terms of the viability of a mixed-motive claim under the ADA, are not questions that we need to consider in this appeal.").

6. **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). To establish a claim for constructive discharge, a plaintiff must show his or her working conditions were so unbearable that she was forced to resign. *Jackson v. Fed. Exp. Corp.*, No. 10-cv-5837, 2012 WL 171336 (N.D. Ill. Jan. 20, 2012) (citing *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679 (7th Cir. 2010)); *See also Ekstand v. Sch. Dist. of Somerset*, 583 F.3d 972 (7th Cir. 2009). A constructive discharge theory requires a level of intolerableness that exceeds that of a hostile wok environment because under the latter, an employee is generally expected to remain employed while seeking redress. *Id.*; *See also DeJesus v. Contour Landscaping, Inc.*, 763 F.Supp.2d 1029 (N.D. Ill. 2011). Whether the work environment will meet the constructive discharge standard is determined from the viewpoint of a reasonable employee. *Id.* (citing *Roby v. CWI, Inc.*, 579 F.3d 779, 785 (7th Cir. 2009)). A transfer to an undesirable and/or unsafe location is not enough to mount a claim for constructive discharge. *Id.* (dismissing plaintiff's claim

after defendant employer removed plaintiff from the "Gold Coast Route" and placing her on the "Hyde Park Route"); *See also Anzaldua v. Chicago Transit Authority*, No. 02-cv-2902, 2002 WL 31557622 (N.D. Ill. Nov. 15, 2002) (dismissing a constructive discharge claim based on CTA employee's transfer to the city's southwest side).

8. **Disparate Impact Discrimination**: 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. TECHNICAL MANUAL at IV-3.

a. **Employer's Defense—Job Relatedness & Business Necessity:** The employer may have a defense to a charge of discrimination under the ADA relating to an alleged application of qualification standards, tests, or selection criteria that screen out, tend to screen out, or otherwise deny a job or benefit to an individual with disability if the employer demonstrates that such application is *job-related* and consistent with *business necessity*. 42 U.S.C. § 12113(a). The employer's 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. 29 C.F.R. § 1630.10 app. Business necessity, however, requires a linkage to essential functions. *Id*. Therefore, if a test or any 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.

b. **Reasonable Accommodation**: 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.

B. 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)(A). Likewise, it is unlawful to deny employment opportunities to a job applicant or employee who is an otherwise qualified individual, if such denial is based on the potential employer's need to make a reasonable accommodation for the employee/applicant. 42 U.S.C. § 12112(b)(5)(B). An accommodation can be any of the following: (1) a change in the job application process that enables a qualified applicant with a disability to be considered for the position; (2) a change in the work environment or in the way things are usually don that enables a qualified applicant with a disability to perform the essential functions of the position, or (3) any other changes that enable a qualified individual with a disability to enjoy equal employment opportunities. 29 C.F.R. § 1630.2(o)(1).

2. Prima Facie Case: Claims alleging that an employer failed to provide a reasonable accommodation under the ADA require direct proof and may not proceed through the indirect method (see above). *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1283-1284 (7th Cir. 1996); *See also James v. Hyatt Regency Chicago*, 09-cv-7873, 2011 WL 6156825 (N.D. Ill. Dec. 12, 2011). In order establish a *prima facie* case of failure to accommodate, a plaintiff must show that (1) he is a qualified individual with a disability, (2) the employer was aware of his disability, and (3) the employer failed to reasonably accommodate the disability. *Kotwica v. Rose Packing Co.*, 637 F.3d 744, 747-748 (7th Cir. 2011). It is important to note that 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. *Id.; See also Lenker v. Methodist Hosp.*, 210 F.3d 792 (7th Cir. 2000).

3. 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); *See also Nicholson v. Allstate Ins. Co.*, No. 10-cv-629, 2012 WL 182216 (N.D. Ill. Jan. 23, 2012). 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); *Auer v. Allied Air Conditioning and Heating Corp.*, No. 10-cv-5285, 2012 WL 182222 (N.D. Ill. Jan. 23, 2012). 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).

4. **Interactive Process:** Generally, the employer's duty to accommodate is triggered by a request from the employee. *Hansen v. Henderson*, 233 F.3d 521, 523 (7th Cir. 2000). Once the employer's duty to accommodate is triggered, 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 Consol. 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."). The "interactive process" must be "a process;" courts have interpreted this to mean "a continuous activity and not simple a discrete action taken by the employer." *Ammons v. Metro. Water Reclamation Dist. of Greater Chicago*, No. 08-cv-5663, 2011 WL 5507370 (N.D. Ill. Nov. 9, 2011). 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).

a. **Failure to engage in Interactive Process**: However, an employer's failure to engage in the interactive process or causing the process to breakdown by itself is insufficient to support liability. *Emerson v. Northern States Power Co.*, 256 F3d. 506, 515 (7th Cir. 2001). The only consequence of the employer's failing to consult with the employee concerning a possible accommodation of the employee's disability is to shift the burden of production [of evidence] concerning the availability of a reasonable accommodation from the employee to the employer. *Mays v. Principi*, 301 F.3d 866 (7th Cir. 2002). Moreover, the Seventh Circuit will give very little credence to claims brought where an employer provided a reasonable accommodation despite its failure to engage in the interactive process. *See, e.g., Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000) (holding "The ADA seeks to ensure that qualified individuals are accommodated in the workplace, not to punish employers who, despite their failure to engage in an interactive process, have made reasonable accommodations.").

b. **Breakdowns in the Interactive Process:** The Seventh Circuit is quite cautious of ADA claims that allege breakdowns in the interactive process in situations where an employer nevertheless offers some form of reasonable accommodations to the disabled

employee. *Ammons v. Metro. Water Reclamation Dist. of Greater Chicago*, No. 08-cv-5663, 2011 WL 5507370 (N.D. Ill. Nov. 9, 2011). Additionally, 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).

c. Medical Substantiation of a Disability: 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). The disabled employee must corroborate non-obvious accommodations with a doctor's note or other evidence. *Ekstrand v. School Dist.of Somerset*, 583 F.3d 972 (7th Cir. 2009).

5. 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. The reasonableness of a requested accommodation is generally a question of fact. *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591 (7th Cir. 1998); *Owens v. Quality Hyundai*, No. 05-cv-4325, 2007 WL 495248 (N.D. Ill. Feb. 15, 2007). However, the Seventh Circuit has provided the following legal standard to guide the analysis: "An accommodation is reasonable if it is both efficacious and proportional to the costs to implement it. An accommodation is unreasonable if it imposes undue financial or administrative burdens or requires a fundamental alteration in the nature of the program." *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002).

a. 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). A transfer to a work station with natural light may be required for an employee with seasonal affective disorder. *Ekstrand v. School Dist. of Somerset,* 583 F.3d 972 (7th Cir. 2009). 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). Additionally, employers *may* be required to (1) make existing facilities readily accessible; (2) restructure a disabled employee's job, (3) reassign a disabled employee to vacant position for which the employee is qualified, (4) acquire or modify equipment, and (5) provide qualified readers or interpreters. 29 C.F.R. § 1630.2 (o)(2).

b. **Examples where reasonable accommodations may not be required:** An employer is not required to re-assign essential job functions as a reasonable accommodation. *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190, 199 (7th Cir. 2011); *See also Ozlowski v. Henderson*, 237 F.3d 837 (7th Cir. 2001). 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. *Dargis v. Sheahan*, 526 F.3d 981 (7th Cir. 2008); *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 e.g., Delgado v. Certified Grocers Midwest, Inc.*, 282 Fed.Appx. 457 (7th Cir. 2008); *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); *Ozlowski 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. *See, e.g., E.E.O.C. v. United Airlines, Inc.*, --- F.3d--- (7th Cir. 2012) (*available at*: 2012 WL 718583 (7th Cir. Mar. 7, 2012)); *See also E.E.O.C. v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000); *See also King City v. Madison*, 550 F.3d 598 (7th Cir. 2008); *Craig v. Potter*, 90 Fed.Appx 160 (7th Cir. Feb. 20, 2004). 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). 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). Reassignment is also not required if it would violate the employer's collective bargaining agreement or other legitimate employer policy. *King v. City of Madison*, 550 F.3d 598 (7th Cir. 2009); *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). An employer is not 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).

6. **Undue Hardship:** Accommodation is not required when it would result in an "undue hardship." *E.E.O.C. v. AutoZone, Inc.*, 630 F.3d 635 (7th Cir. 2010). 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); *See also E.E.O.C. v. United Airlines, Inc.*, ---F.3d--- (7th Cir. 2012) (*available at*: 2012 WL 718583 (7th Cir. Mar. 7, 2012)) (citing *US Airways, Inc. v. Barnett*, 535 U.S. 391, 403) (explaining "Once the plaintiff has shown he seeks a reasonable method of accommodation, 'the defendant/employer then must show special (typically case-specific circumstances that demonstrate undue hardship in the particular circumstances.").

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 the 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 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. See also Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002); *Coleman v. Cook County*, No. 09-cv-739, 2010 WL 725322 (N.D. Ill. Feb. 25, 2010).

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 the employees' 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). 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). It is important to note that in *Siefken* and the cases that have followed it, the plaintiffs' failure to control their controllable disabilities had led to conduct that clearly constituted a failure to meet legitimate job expectations. *See Siefken,* 65 F.3d at 665-66 (plaintiff's uncontrolled diabetes led to erratic driving of a squad car at high speeds); *Nunn v. Illinois State Bd. of Educ.*, 448 F.Supp.2d 997, 1001 (C.D. Ill. 2006) (plaintiff's uncontrolled bipolar disorder caused her to act in an egregiously unprofessional manner); *Brookins v. Indianapolis Power & Light Co.*, 90 F.Supp.2d 993, 1006 (S.D. Ind.2000) (employee's uncontrolled depression led to his failing to report to work and failing to call in sick. The plaintiffs were therefore barred from recovery under the ADA not simply because they had not controlled their illnesses, but *because this failure to control led to a failure to satisfy one of § 12112's threshold requirements*).

7. **"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. *Gratzl v. Office of Chief Justices of 12th, 18th, 19th, & 22nd Judicial Circuits*, 601 F.3d 674 (7th Cir. 2010) (employer need not create a new job or reassign disabled employee to permanent light duty.) 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 Bellino v. Peters*, 530 F.3d 543 (7th Cir. 2008); *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).

8. **Conduct:** There is no legal obligation for an employer to accommodate conduct, as opposed to a disability. *See Bodenstab v, County of Cook*, 569 F.3d 651 (7th Cir. 2009). The plaintiff in *Bodenstab* was a doctor and made threats to kill several employees at the Cook County Hospital. The Hospital fired him in reaction to those threats. Despite the plaintiff's argument that his mental condition caused the threats, the Seventh Circuit ruled for the employer. *See also Spath v, Hayes Wheels Intern.-Indiana, Inc.*, 211 F.3d 392 (7th Cir. 2000).

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). This is a rarely litigated section of the ADA, but the Seventh Circuit concluded that three types of situations are intended to be within this section's scope and labeled them as follows: (1) "expense," (2) "disability by association," and (3) "distraction." *Larimer v. Int'l Bus. Machines Corp.*, 370 F.3d 698, 700 (7th Cir. 2004) (holding that an individual whose spouse or child has a terminal illness may not be denied employment or benefits based on that association); 29 C.F.R. § 1630.8.

1. **Expense:** The "expense" situation is one where an employee is fired or suffers some other adverse personnel action because his spouse, relative, etc. has a disability that is costly to the employer because the disabled individual is covered by the company's health plan. *Id.; See, e.g., Dewitt v. Proctor Hosp.*, 517 F.3d 944 (7th Cir. 2008).

2. **Disability by Association:** The "disability by association" situation is one where an employee's spouse is infected with a disease such as HIV and the employer fears that the employee may have contracted the disease as well or where one of the employee's blood relatives has a disabling ailment with a genetic component and the employee is likely to develop the disability as well. *Id.*

3. **Distraction:** The "distraction" situation is one where the employee is somewhat inattentive at work because his spouse or child has a disability that requires his or her attention, yet not so inattentive that he or she would need an accommodation to perform to his or her employer's satisfaction. *Id*. The EEOC has noted, "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).

4. **The "Tweaked" *McDonnell Douglas* Test:** The *McDonnell Douglas* test is not easily adaptable to claims brought under the association section of the ADA. Therefore, the Seventh Circuit reformulated the test as follows: (1) the employee was qualified for his or her job at the time of the adverse employment action; (2) the employee was subjected to an adverse employment action; (3) the employer knew that the employee had a relative or associate with a disability; and the employee's case falls into one of the three relevant categories of expense, distraction, or association. *Larimer v. Int'l Bus. Machines Corp.*, 370 F.3d 698, 701-702 (7th Cir. 2004); *But see Dewitt v. Proctor Hosp.*, 517 F.3d 944 (7th Cir. 2008) (holding that the plaintiff established direct circumstantial evidence of association discrimination using the traditional *McDonnell Douglas* test, creating a genuine issue of material fact for the jury).

E. Retaliation

1. **General:** 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 ADA, or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation" under the ADA. 42 U.S.C. § 12203(a). In addition, no employer may coerce, threaten or interfere with an employee's

exercise of his ADA rights. 42 U.S.C. § 12203(b). *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961 (7th Cir. 2004).

2. **Informal Complaints, Sufficient:** An informal complaint of discrimination is sufficient to trigger retaliation protection. *Casna v. City of Love's Park*, 574 F.3d 420 (7th Cir. 2009) (spontaneous query, "aren't you being discriminatory?") Where the adverse action comes on the heels of the protected complaint, timing may be enough to get the plaintiff over summary judgment. *Id.*

3. **Prima Facie Case:** A plaintiff can show retaliation through the direct method or the indirect method. *Hilt-Dyson v. City of Chicago*, 282 F.3d 456 (7th Cir. 2002).

    a. **The Direct Method:** To establish a *prima facie* case under the direct method, a plaintiff can prove his or her case by demonstrating the following: (1) that he or she engaged in a statutorily protected activity; (2) that he or she suffered an adverse employment actions; and (3) that there was a causal connection between the two. *Squibb v. Mem'l Med. Ctr.*, 497 F.3d 775, 786 (7th Cir. 2007).

    b. **The Indirect Method:** The indirect follows the *McDonnell Douglas* format. Therefore, the employee must establish a *prima facie* case for retaliation under the ADA. To establish a *prima facie* case for retaliation under the indirect method, the plaintiff must show (1) that she engaged in a statutorily protected activity; (2) that he or she was meeting her employer's legitimate expectations; (3) that he or she suffered a materially adverse employment action; and (4) that he or she was treated less favorably that a similarly situated employee. *Ollan v. Bd. of Educ. of City of Chicago*, 631 F.Supp.2d 953 (citing *Hilt-Dyson* at 465). The employer is then given the opportunity to proffer a nonretaliatory reason for the adverse employment action. *Id*. Thereafter, the employee must meet the ultimate burden of persuasion by demonstrating that the employer's proffered reason is pretextual. *Id*.

4. **No Jury Trial:** The Seventh has held that because only equitable remedies, such as back pay, are available to plaintiffs claiming retaliation in violation of the ADA, such plaintiffs are not entitled to a jury trial at all. *Kramer v. Banc of America Securities, LLC*, 355 F.3d 961, 968 (7th Cir. 2004).

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). The phrase "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., Emerson v. Northern States Power Co.*, 256 F.3d 506 (7th Cir. 2001) (holding that an employee who suffered panic attacks at work, which required an interdeterminate recovery time amounted to a direct threat); *Palmer v. Circuit Court of Cook County*, 117 F.3d 351 (7th Cir. 1997). The employer can generally determine how much risk it is willing to bear in such a situation. *See, e.g., EEOC v. Schneider Nat'l, Inc.*, 481 F.3d 507 (7th Cir. 2007). The employer's determination must have been based on medical or other objective evidence, and not simply on its good-faith belief that a significant risk existed. *Bragdon v. Abbott*, 524 U.S. 624 (1998). The 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.*, *Bragdon* at 649; *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 288-89 (1987); *See also Darnell v. Thermafiber, Inc.*, 417 F.3d 657 (7th Cir. 2005) (uncontrolled diabetes direct threat). The Supreme Court has held that this "direct threat" standard 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

The employer has the burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation. *Bodenstab v. Cook County*, 569 F.3d 651 (7th Cir. 2009). The key inquiry when determining whether an employee is a direct threat is **not** whether a risk exists but whether it is significant. *Bragdon v. Abbott*, 524 U.S. 624 (1998). 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).

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); *Tomao v. Abbott Labs., Inc.*, No. 04-cv-3470, 2006 WL 2425332 (N.D. Ill. Aug. 16, 2006). 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. *Id*.

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)(A); 29 C.F.R. § 1630.13(a). However, "a covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions." 42 U.S.C. § 12212(d)(2)(B).

1. **Medical Examinations:** An employer may not conduct a medical examination until a conditional offer of employment has been extended. 42 U.S.C. § 12112(d)(3); *Connolly v. First Personal Bank*, 623 F.Supp.2d 928 (N.D. Ill. 2008). 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); *Connolly v. First Personal Bank*, 623 F.Supp.2d 928 (N.D. Ill. 2008).

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, except that—(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatmentl and government officials investigating compliance with (ADA) shall be provided relevant information on request; and (3) the results of such examination are used only in accordance with this subchapter." 42 U.S.C. § 12112(d)(3). The final prong simply means, "as long as the employer does not discriminate on the basis of the applicant's disability." *Connolly v. First Personal Bank*, 623 F.Supp.2d 928 (N.D. Ill. 2008) (citing *O'Neal v. City of New Albany*, 293 F.3d 998, 1010 (7th Cir. 2002)).

1. **Exclusionary Criteria:** If an examination is given to screen out an individual with a disability, or a class of individuals with disabilities, 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 Coffman v. Indianapolis Fire Dep't*, 578 F.3d 559, 565 (7th Cir. 2009) (holding the department's decision to require a firefighter to submit to fitness for duty evaluations amidst multiple reports from fellow firefighters expressing concern over her mental state was supported by business necessity); *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). The Seventh Circuit has explained that "a medical examination is job-related and consistent with business necessity when *an employer has a reasonable belief based on objective evidence that a medical condition will impair an employee's ability to perform essential job functions or that the employee will pose a threat due to a medical condition*." *Coffman v. Indianapolis Fire Dep't*, 578 F.3d 559, 565 (7th Cir. 2009) (Emphasis added). Additionally, the ADA allows inquiries "into the ability of an employee to perform job-related functions." 42 U.S.C. § 12112(d)(4)(B); *See, e.g., Coffman v. Indianapolis Fire Dep't*, 578 F.3d 559, 565 (7th Cir. 2009).

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 available by virtue of employment, *whether or not administered by the covered entity*." 29 C.F.R. § 1630.4(f)(vi) (Emphasis added); 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, 457-458 (7th Cir. 2001) (citing *E.E.O.C. v. CNA Ins. Co.*, 96 F.3d 1039 (7th Cir. 1996)); *See also Jackson v. City of Chicago*, No. 02-cv-9113, 2004 WL 2958771 (N.D. Ill. Nov. 19, 2004).

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) an insurer, hospital, or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations 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, sponsoring, observing, 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. *King v. City of Chicago*, No. 02-cv-2608, 2003 WL 22508173 (N.D. Ill. Nov. 4, 2003). It is important to note that the "subterfuge exception only applies to subchapters I and III of the ADA." *Id*.

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 is no express requirement (in the ADA) that the covered entity be an employer of the qualified individual" so there have been cases where the court has held the board administering pension funds liable under the ADA. *See United States v. Illinois*, No.93-cv-7741, 1994 WL 562180 (N.D. Ill. Sept. 12, 1994); *See also Holmes v. City of Aurora*, No. 93-cv-0835, 1995 WL 21606 (N.D. Ill. Jan. 18, 1995) (citing *Doe v. St. Joseph's Hopital of Fort Eayne*, 788 F.2d 411, 422-424 (7th Cir. 1986)) (explaining that "an 'employer' for the purposes of claims under Title VII and the ADA may be any party who significantly affects access of any individual to employment opportunities, regardless (of) whether that party may technically be described as an 'employer' of an aggrieved individuals as that term has generally been defined at common law). *But see Rodriguez v. City of Aurora*, 887 F.Supp. 162 (N.D. Ill. 1995). This is especially the case where an administering board is created solely for the purpose of allowing the employer to delegate its responsibility to provide benefits to its employees. *Holmes v. City of Aurora*, No. 93-cv-0835, 1995 WL 21606 (N.D. Ill. Jan. 18, 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 disability discrimination 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

The ADA expressly incorporated the enforcement provisions set forth by Title VII. 42 U.S.C. § 12117(a). Therefore, "if the court finds that 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, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, or any other equitable relief the court deems appropriate. 42 U.S.C. § 2000e-5(g)(1). Any equitable remedies such as backpay, reinstatement, and/or an order to rehire 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. Additionally, 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. Backpay

1. **General:** Back pay may be awarded, but "shall not accrue from a date *more than two years* prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g)(1) (Emphasis added). The district court has broad equitable discretion to fashion back pay awards to make a victim of discrimination whole. *David v. Caterpillar, Inc.*, 324 F.3d 851, 865 (7th Cir. 2003).

2. **Mitigation & Interim Earnings:** A back pay award will be reduced by the amount of interim earnings or the amount earnable with reasonable diligence. 42 U.S.C. § 2000e-5(g)(1); *Doe v. Oberweis Dairy*, 456 F.3d 704, 714-715 (7th Cir. 2006). A plaintiff is only required to make an "honest good faith effort" in seeking other employment. *N.L.R.B. v. Midwestern Personnel Serv. Inc.*, 508 F.3d 418, 423 (7th Cir. 2007). It is defendant's burden to prove lack of reasonable diligence. *Id.; 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); *Smith v. Great*

Am. Rest., Inc., 969 F.2d 430, 438 (7th Cir. 1992); *Gaddy v. Abex Corp.*, 884 F.2d 312, 318 (7th Cir. 1989).

C. 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:** 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:** 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) (Emphasis added); *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).

3. **Vicarious Liability:** 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 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).

4. **Caps on Punitive and Compensatory Damages:** 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). The court shall not inform the jury of the cap on damages. 42 U.S.C. § 1981a(c).

D. Front Pay and Lost Future Earnings

Both front pay and lost future earnings awards are ADA remedies. However, the two awards compensate the plaintiff for *different injuries* and are not duplicative. *Williams v. Pharmacia*, 137 F.3d 944 (7th Cir. 1998).

1. **Front Pay:** Front pay is "money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001). "Front pay is an appropriate remedy…when reinstatement is not available or not advisable because of workplace incompatibility." *Schick v. IDHS*, 307 F.3d 605, 614 (7th Cir. 2002).

2. **Lost Future Earnings:** 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.

E. 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. **Prevailing Defendants:** 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. The 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. Moreover, the ADA itself expressly encourages parties to make use of alternative means of dispute resolution such as arbitration. 42 U.S.C. § 12212.

C. **Collective Bargaining Agreements:** See section on arbitration of ADEA claims, below.

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; *See also, O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *Barton v. Zimmer, Inc.*, 662 F.3d 448, 453 (7th Cir. 2011).

B. Protected Class

The ADEA prohibits discrimination on the basis of age. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). This category includes individuals ages 40 and above. 29 U.S.C. § 631(a); *Martino v. MCI Communications Services, Inc.*, 574 F.3d 447, 452 (7th Cir. 2009). This includes situations where an individual within the protected class is not hired in favor of a younger person that is also within the protected class. *Kralman v. Illinois Dep't of Veterans' Affairs*, 513 U.S. 948 (7th Cir. 1994) (explaining the fact that the person ultimately hired for the position was also in the class protected by ADEA did not preclude a showing of employment discrimination where the plaintiff (age 71) was of an entirely different generation than the employee (age 46) who was hired). The ADEA does not protect the young as against the older. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004) (holding the employer did not impermissibly discriminate against workers 40-49 in violation of the ADEA by implementing a collective bargaining agreement that eliminated employer's retiree health insurance benefits program for workers then under 50 but retained the program for workers then over 50 because the ADEA's prohibition against discrimination "because of age" targeted discrimination against the relatively old, not the relatively young.); *See also Rabinovitz v. Pena*, 905 F.Supp. 522 (N.D. Ill. 1995).

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). **NOTE:** In 2003 the Illinois legislature waived Eleventh Amendment immunity to ADEA claims. State Lawsuit Immunity Act, 745 ILCS 5/1.5. A covered employer must engage in an industry affecting commerce, and must have 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 provided 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 fail or refuse to hire or discharge any individual, or discriminate against any individual, with respect to his or her compensation, terms, conditions, or privileges of employment, because of such person's age. 29 U.S.C. §623(a). 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. 29 U.S.C. §623(a). Lastly, it is unlawful for an employer to reduce the wage rate of any employee in order to comply with the ADEA. 29 U.S.C. §623(a). It is important to note that the ADEA does not mandate that employers must treat

employees over the age of 40 better than younger employees; it merely prohibits employers from taking adverse actions against such employees. *See, e.g., Wolf v. Buss (America) Inc.*, 77 F.3d 914 (7th Cir. 1996) (holding that nothing in the ADEA provides tenure to competent, older workers; older workers can be let go for any reason, or no reason, provided only that the reason is not their age); *Skagen v. Sears, Roebuck & Co.*, 910 F.2d 1498 (7th Cir. 1990) (explaining that a person does not have a meritorious claim simply because he or she is over the age of forty and has experienced an adverse employment action (i.e. he or she has been demoted, transferred, or discharged)).

B. Employment Agency

It is unlawful for an employment agency to fail or refuse to refer for employment, or to otherwise discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age. 29 U.S.C. § 623(b). 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 or expel from its membership, or otherwise discriminate against, any individual because of his or her age. 29 U.S.C. § 623(c)(1). It is also unlawful to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant, because of such individual's age. 29 U.S.C. § 623(c)(2). Finally, it is unlawful to cause an employer to discriminate against an individual because of such individual's age. 29 U.S.C. §623(c)(3). *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, an African American woman).

D. Retaliation

It is unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under (the ADEA). 29 U.S.C. §623(d). Post -employment retaliation is also prohibited. *See, e.g., 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*, 553 U.S. 474 (2008).

III. EXCEPTIONS UNDER THE ADEA

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

A. Bona Fide Occupational Qualification Defense (BFOQ)

1. In General: 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); *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). The EEOC's regulations state that the BFOQ defense will have a limited scope and must be narrowly construed. *See* 29 C.F.R. §1625.6(a). For instance, economic factors cannot be the sole basis for arguing age is a bona fide occupational qualification. *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743 (7th Cir. 1983).

2. Burden of Proof: 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) (mandatory retirement age for pilots does not qualify as a BFOQ since individual testing of pilots is practical 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).

3. Examples of BFOQ under ADEA

a. Transportation Companies: Some transportation companies may use age as a hiring restriction based on the safety concerns associated with older drivers. *See Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974) (explaining that in view of vigorous physical and mental demands of extra-board work

assignment system to which all new bus drivers between ages of 40 to 65 would be assigned under seniority system, evidence that human body undergoes physical and sensory changes beginning at around age 35 and that such degenerative changes have a detrimental impact on driving skills and other statistical evidence that elimination of maximum hiring age would increase risk of harm to its passengers, intercity bus carrier's policy of refusing to consider applications for intercity bus drivers from those 35 years of age or older was within exception to this section for bona fide occupational qualifications reasonably necessary to normal operation of the particular business).

b. **Airline Pilots:** Airlines have successfully argued that only hiring young pilots is not a violation of ADEA under the BFOQ exception. *See Bartsh v. Northwest Airlines*, 831 F.2d 1297 (7th Cir. 1987) (holding the airline's desire that those who operated airplanes be proficient in their operation was sufficiently job-related to overcome disparate impact claim against airline, which was based on high failure rate for persons over age 60 in second officer training program); *But see, Monroe v. United Air Lines, Inc.*, 736 F.2d 394 (7th Cir 1984).

c. **Firefighters and Law Enforcement Officers:** It is not unlawful for a local government to refuse to hire someone as a firefighter or law enforcement officer on the basis of age. *Kopec v. City of Elmhurst*, 193 F.3d 894 (7th Cir. 1999); *See also Roche v. City of Chicago*, 24 F.3d 882 (7th Cir. 1994); *But see, Orzel v. City of Wauwatosa*, 697 F.2d 743 (7th Cir. 1983) (explaining simply labeling 55 as a "normal retirement date" for purposes of determining pension eligibility did not establish that 55 was a BFOQ for local firefighters); *Equal Employment Opportunity Commission v. City of Janesville*, 630 F.2d 1254 (7th Cir. 1980). In the case of mandatory retirement ages, the burden is on the plaintiffs to establish that the mandatory retirement of firefighters and police officers constitutes a subterfuge (see subterfuge discussion below) to evade the purposes of the ADEA. *Minch v. City of Chicago*, 363 F.3d 615 (7th Cir. 2004).

B. Reasonable Factors Other Than Age (RFOA)

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 (RFOA). *See* 29 U.S.C. §623(f)(1); *Smith v. City of Jackson,* 544 U.S. 228 (2005); *E.E.O.C. v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994); *Johnson v. Cook, Inc.*, 587 F.Supp.2d 1020 (N.D. Ill. 2008).

Reasonableness is an affirmative defense for which the employer bears both the burden of production and persuasion. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008). When an employer's action(s) are based on an employee's years of service with the company, it is permissible regardless of the fact that the motivating factor may be correlated with age. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (holding age and years of service are analytically distinct, so that an employer could take account of one while ignoring the other, and the decisions based on years of service is thus not necessarily age-based; moreover, the termination of an employee because his pension was about to vest violates ERISA laws but not ADEA, even though pension vesting is correlated with age.); *E.E.O.C. v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994); *Metz v. Transit Mix, Inc.*, 828 F.1202, 1220 (7th Cir. 1987) (Easterbrook, J., dissenting).

C. Causation Standard for Disparate Treatment Claims: In *Gross v. FBL Financial Services, Inc*., 129 S.Ct. 2342 (2009) the Supreme Court held ADEA does not authorize a mixed-motives age discrimination claim, since ordinary meaning of ADEA's requirement that employer took adverse action "because of" age is that age was the "reason" that employer decided to act. Therefore, to establish disparate-treatment claim, plaintiff must prove that age was "but-for" cause of employer's adverse decision, and burden of persuasion does not shift to employer to show that it would have taken the action regardless of age, even when plaintiff has produced some evidence that age was one motivating factor in that decision. *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *See also Hnizdor v. Pyramid Mouldings, Inc.*, 413 Fed.Appx. 915 (7th Cir. 2011); *Lindsey v. Walgreen Co.*, 615 F.3d 873 (7th Cir. 2010); *Mach v. Will County Sheriff*, 580 F.3d 495 (7th Cir. 2009). It is important to note that there has been a significant uptick in the filing of disparate treatments claims over the past few years in light of the costs associated with employing older employees. YUKI NOGUCHI, *Age Discrimination Suits Jump, but Wins are Elusive*, Feb. 16, 2012, *available at* http://www.npr.org/2012/02/16/146925208/age-discrimination-suits-jump-but-wins-are-elusive. However, district courts have frequently granted summary judgment for the employer based on the *Gross* rationale. *See e.g. Roeder v. Battistoni*, No. 11-cv-4111, 2012 WL 502956 (N.D. Ill. Feb. 15, 2012); *Onafuye v. JP Morgan Chase NA*, 09-cv-5100, 2012 WL 401035 (N.D. Ill. Feb. 7, 2012); *Nicholson v. Allstate Ins. Co.*, No. 10-cv-629, 2012 WL 182216 (N.D. Ill. Jan. 23, 2012).

D. **Disparate Impact:** 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). In *Smith*, the Supreme Court compared the availability of disparate impact claims under the ADEA to the availability of such claims under Title VII because both contain prohibitory language. It helf that both authorize recovery in disparate-impact cases. However, it emphasized that disparate-impact liability under the ADEA is quite narrower than under Title VII

for two reasons. First, the ADEA allows for the RFOA defense (see discussion above). Second, when Congress chose to expand Title VII's coverage by passing the Civil Rights Act of 1991, it did not do so for the ADEA. *Zamudio v. HSBC N.Am. Holdings Inc.*, No. 07-cv-4315, 2008 WL 517138 (N.D. Ill. Feb. 20, 2008). The Court suggested that age, unlike race or other classifications protected by Title VII, frequently has relevance regarding an individual's capacity to engage in certain types of employment. *Smith* at 229. The Court further declared, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, *the employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed (and/or) statistical disparities.*" *Id*. (Emphasis Added).

E. Benefit Plans

1. **In General:** It is not unlawful for an employer, employment agency, or labor organization to take any action otherwise prohibited by the ADEA pursuant to the terms of a bona fide employee benefit plan, as long as the plan is not intended to evade the purposes of the ADEA. 29 U.S.C. § 623(f)(2)(B); *See, e.g., Kentucky Retirement Systems v. E.E.O.C.*, 554 U.S. 135 (2008) (holding where employer adopts pension plan that includes age as a factor, and then treats employees differently based on pension status, employee subject to plan, in order to state disparate-treatment claim under ADEA, must adduce sufficient evidence to show that differential treatment was actually motivated by age, not by pension status.). The burden is on the employer, employment agency, or labor organization to show that the plan is not intended to evade the purpose of ADEA. 29 C.F.R. § 1625.10(a)(1).

2. **Age-Based Reductions**: Age-based reductions in employee benefit plans are allowed on the basis of "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. 29 C.F.R. § 1625.10(a)(1). An employer may not make age-based reductions to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. 29 C.F.R. § 1625.10(a)(1).

3 **Early Retirement Plans:** No employee benefit plan may require or permit the involuntary retirement of any person because of age. 29 U.S.C. § 623(f)(2)(B)(ii). However, voluntary early retirement plans that are consistent with the purposes of the ADEA are allowed. *Cerutti v. BASF Corp*., 349 F.3d 1055 (7th Cir. 2003). 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.

4. **"Observe the terms" of the Plan:** This exception only applies when the employer, employment agency, or labor organization follows terms that are *actually prescribed by the terms of a bona fide employee benefit plan*. If the plan does not actually require the entity to provide lesser benefits to older workers, the exception does not apply. 29 C.F.R. 1625.10(c).

5. **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). Notifying employees promptly of the provisions and changes in an employee benefit plan is essential if they are to know how the plan affects them. An employer may simply adhere to ERISA's notification rules to meet this requirement. 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).

6. **Subterfuge:** In order for a bona fide employee benefit plan which prescribes lower benefits for older employees on account of age to be within the exception, it must not be "a subterfuge to evade the purposes of the" ADEA. 29 C.F.R. § 1625.10(d); *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989); *Minch v. City of Chicago*, 363 F.3d 615 (7th Cir. 2004); *Bell v. Purdue Univ.*, 975 F.2d 422, 430 (7th Cir. 1992). The term "subterfuge" should be given its ordinary meaning, i.e. "a scheme, plan, stratagem, or artifice of evasion." *Betts* at 167. "Thus, when an employee seeks to challenge a plan as a subterfuge to evade (the

ADEA's) purposes, the employee bears the burden of providng that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some non-fringe benefit aspect of the employment relation." *Betts* at 181; *See also Minch v. City of Chicago*, 363 F.3d 615, 629 (7th Cir. 2004); *Bell v. Purdue Univ.*, 975 F.2d 422, 430 (7th Cir. 1992). In *Betts*, the Supreme Court described two scenarios in which an employee benefit plan might be considered a subterfuge. In the first scenario, an employer might implement a provision in a benefit plan that has the effect of penalizing an employee in retaliation for speaking out against practices that are unlawful under the ADEA. *Betts* at 180. In the second scenario, the employer reduces the salaries of all workers while substantially increasing fringe benefits for younger employees, which in effect would provide higher wages to younger employees than older workers based solely on age. *Id*. Generally, however, a plan or provision is not considered a "subterfuge" so long as it is justified by age-related cost considerations. 29 C.F.R. § 1625.10(d); *Betts* at 169-172. There are other, more specific, requirements that must be met with regard to cost considerations in order for a plan not to be a subterfuge. They are as follows:

a. **Cost Date (General):** Any cost data used to justify an age-based reduction must be *valid and reasonable*. The entity can meet this standard if they can point to cost data, which show the actual cost to it of providing the particular benefit in question over a representative period of years. 29 C.F.R. § 1625.10(d)(1).

b. **Cost Data—Benefit-by-Benefit vs. Benefit Package:** Cost comparisons must be made on either a benefit-by-benefit basis or with regard to the entire benefit package. 29 C.F.R. § 1625.10(d)(2). Under the first approach, employers must make adjustments with regard to the amount or level of a specific form of benefit for a specific event or contingency. 29 C.F.R. § 1625.10(d)(2)(i). Under the second approach, cost comparisons can be made in the aggregate. 29 C.F.R. § 1625.10(d)(2)(ii). Most employers follow this approach because it provides greater flexibility. However, should an employer use this approach to either reduce the cost to the employer or reduce the favorability of benefits for older employees, then it would be considered a subterfuge under the ADEA. *Id*.

c. **Cost Data (Five-Year Maximum):** The cost data must be made on the basis of age brackets of no more than 5 years. So, an employer may only reduce particular benefit to a specific 5-year bracket by an amount no greater than that, which could be justified by the additional cost to provide them with the same level of benefit as

younger employees within the specified 5-year bracket immediately preceding theirs. 29 C.F.R. § 1625.10(d)(3).

d. Employee Contributions

i. Condition of Employment: An older employee within the protected group may not be required as a condition of employment to make greater contributions than a younger employee in support of an employee benefit plan. 29 C.F.R. § 1625.10(d)(4)(i).

ii. Condition of a Voluntary Employee Benefit Plan: An older employee within the protected age group may be required to make a greater contribution to a voluntary employee benefit plan than a younger employer only if the older employee is not required to bear a greater proportion of the total premium cost (employer-paid and employee-paid) than the younger employee because such a requirement would impose less favorable terms of employment by essentially denying compensation to the older employee. 29 C.F.R. § 1625.10(d)(4)(ii)

iii. As an option to receive an unreduced benefit: An older employee may be given the option to make an additional contribution as an individual to receive the same level of benefits as a younger employee. 29 C.F.R. § 1625.10(d)(4)(iii).

e. Forfeiture Clauses: Forfeiture clauses in any plan are unlawful under the ADEA's retaliation provisions. 29 C.F.R. § 1625.10(d)(5).

f. Refusal to Hire Clauses: Any provision of an employee benefit plan, which requires or permits the refusal to hire an individual on the basis of race is a subterfuge to evade the purposes of the ADEA. 29 C.F.R. § 1625.10(d)(6).

g. Individual Voluntary Retirement Clauses: Any provision of an employee plan which requires or permits the involuntary retirement of an individual on the basis of age is a subterfuge to evade the purposes of the ADEA. 29 C.F.R. § 1625.10(d)(7)

F. Bona Fide Seniority System

1. **In General:** 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. 29 U.S.C. § 623(f)(2)(A). However, no such seniority system may require or permit the involuntary retirement of any individual because of age. *Id.* 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. 29 C.F.R. § 1625.8(a). However, other secondary factors such as merit, capacity, or ability may also be taken into account. *Id.* 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. 29 C.F.R. § 1625.8(c).

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).

G. Waiver of ADEA Claim

For a waiver of one's ADEA claim to be valid, the waiver must be "knowing and voluntary." 29 U.S.C. § 626(f). 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:

1. 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;

2. The waiver specifically refers to rights or claims arising under the ADEA;

3. The individual does not waive rights or claims that may arise after the date the waiver is executed;

4. The individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

5. The individual is advised in writing to consult with an attorney prior to executing the agreement;

6. Either:

a. The individual is given a period of at least **21 days** within which to consider the agreement; or

b. 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;

7. 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;

8. 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--

a. Any class, unit, or group of individuals covered by such a program, and any time limits applicable to such program; and

b. 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).

9. 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*, 552 U.S. 389 (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:** An employee is required to file 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. 29 U.S.C. §626(c)-(d). 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. *See Zipes v. Trans World Airlines*, 455 U.S. 385 (1982).

V. ADEA DISCRIMINATION CLAIM: ELEMENTS OF A CASE AND BURDENS OF PROOF

A. Introduction (In General)

As with the ADA, discrimination claims under the ADEA can take one of the two following forms: (1) disparate treatment discrimination or (2) disparate impact discrimination. Under the disparate treatment theory, the plaintiff alleges that he or she was treated less favorably because of her age. Under the disparate impact theory the plaintiff alleges that the defendant utilizes some practice or policy that adversely impacts people over 40. *Smith v. City of Jackson*, 544 U.S. 228 (2005). Regardless of which theory the plaintiff pursues, he or she may show discrimination either directly or indirectly. *Van Antwerp v. City of Peoria*, 627 F.3d 295, 297 (7th Cir. 2010); *See also Fleishman v. Cont'l Cas. Co.*, No. 09-cv-414, 2011 WL 5866264 (N.D. Ill. Nov. 22, 2011).

1. **Direct Method:** Under the direct method, the plaintiff can meet his or her burden of proof "by offering direct evidence of animus…or circumstantial evidence, which establishes a discriminatory motive on the part of the employer through a longer chain of inferences." *Van Antwerp v. City of Peoria*, 627 F.3d 295, 297-298 (7th Cir. 2010). "Under the direct method, the inference that the employer acted based on prohibited animus must be *substantially strong*." *Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1118 (7th Cir. 2009) (Emphasis added). Should the plaintiff choose to proceed by proffering circumstantial evidence, he or she may present any of the three following broad types of circumstantial evidence: "(1) evidence of suspicious timing, ambiguous statements, behavior toward or comments directed at other employees over the age of 40, and other bits and pieces from which an inference of discriminatory intent might be drawn; (2) evidence showing that Continental systematically treated other, similarly situated employees under 40 years old better; and (3) evidence that (the plaintiff) suffered an adverse employment action and that (the employer's) justification is pretextual." *Fleishman v. Cont'l Cas. Co.*, No. 09-cv-414, 2011 WL 5866264 (N.D. Ill. Nov. 22, 2011). It is important to note that the ADEA does not allow for a mixed motive case. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). Therefore, "whatever circumstantial is offered, however, must point *directly* to a discriminatory reason for the employer's action." *Silverman v. Bd. of Educ. of City of Chicago*, 67 F.3d 729, 734 (7th Cir. 2011); *See also Petts v. Rockledge Furniture*, 534 F.3d 715, 720 (7th Cir. 2008). Additionally, such evidence must be more than merely a series of conclusory allegations without evidentiary support in order to establish a triable claim. *See Hall v. Bodine Elec. Co.*, 276 F.3d 345, 354 (7th Cir. 2002); *Phillps v. Argosy Univ.*, No. 09-cv-6836, 2012 WL 469966 (N.D. Ill. Feb. 13, 2012).

2. **Indirect Method:** Under the indirect method, the plaintiff must proceed under the *McDonnell Douglas* framework. The plaintiff must first establish a prima facie case for discrimination. If the plaintiff establishes the prima facie case, the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action. If the employer meets that burden, the plaintiff must demonstrate that the reasons offered were pretextual. *Naik v. Boehringer Ingelheim Phamaceuticals, Inc.*, 627 F.3d 596 (7th Cir. 2010) (citing *Hildebrandt v. Illinois Dep't of Natural Resources*, 347 F.3d 1014, 1030 (7th Cir. 2003)).

    a. **Prima Facie Case:** A plaintiff establishes a prima facie case of discrimination by showing that (1) he or she is part of a protected class (i.e. he or she is over the age of 40); (2) he or she was either qualified for the position for which he or she was applying or he or she was performing well enough to meet his or her employer's legitimate expectations; (3) he or she suffered an adverse

employment action; and (4) similarly situated employees under the age of 40 were treated more favorably (i.e. someone younger, with similar or lesser qualifications, was hired, or received the promotion, raise, etc.). *Naik v. Boehringer Ingelheim Phamaceuticals, Inc.*, 627 F.3d 596, 599-600 (7th Cir. 2010).

i. **Similarly Situated Employees** 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.*; *See also Naik v. Boehringer Ingleheim Pharmaceuticals, Inc.*, 627 F.3d 596, 600 (7th Cir. 2010) (holding that the *Patterson v. Indiana Newspapers, Inc.*, 589 F.3d 357, 365-366 (7th Cir. 2009) (explaining that similarly situated employers must be "directly comparable to the plaintiff in all material respects, which includes showing that the coworkers engaged in comparable rule or policy violations.). 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).

ii. **Someone Younger:** 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).

iii. **Stray Remarks:** Stray remarks that show age bias can also help establish a *prima facie* case, but comments made a manager who was not involved in the challenged decision are not necessarily probative. *See Martino v. MCI Communications Services, Inc.*, 574 F.3d 447 (7th Cir. 2009) Some age-related comments can be innocuous. *Id.* ("old timer" not inherently offensive); *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).

b. **Burden Shift:** 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); *See also Naik v. Boehringer Ingleheim Pharmaceuticals, Inc.*, 627 F.3d 596, 600 (7th Cir. 2010); *Sembos v. Philips Components*, 376F.3d 696 (7th Cir. 2004).

c. **Employee's Burden of Persuasion ("Pretext"):** 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. *See Atanus v. Perry*, 520 F.3d 662 (7th Cir. 2008) (citing *Bahl v. Royal Indem. Co.*, 115 F.3d 1283, 1290 (7th Cir. 1997) (explaining "the main inquiry in determining pretext is whether the employer 'honestly acted' on the stated reason rather than 'whether the reason for the [adverse employment action] was correct business judgment.' "). Even though the burden of production shifts to the defendant after the plaintiff establishes the *prima facie* case, the ultimate burden of persuasion stays 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); *But see, Van Anterp v. City of Peoria*, 627 F.3d 295 (7th Cir. 2010) (holding police department's legitimate reason for rescinding the plaintiff's transfer to a position that did not become available as anticipated was not pretext for age discrimination); *Senske v. Sybase, Inc.*, 588 F.3d 501 (7th Cir. 2009) (holding that the employer's reasons for terminating 58-year-old high ranking sales manager, who had been company's top earner for North America the previous year, including his failure to act as team player, complete required paperwork, or correct his persistent tardiness, as well as client complaints, were not pretext for discrimination); *Sembos v. Philips Components*, 376 F.3d 696 (7th Cir. 2004) (Employer presented evidence of legitimate, non-discriminatory reason for its refusal to hire prospective employee, in employee's lawsuit ADEA, namely hiring managers' belief that employee was not viable candidate given his credentials and work experience, and employee failed to present any evidence that those asserted reasons were pretextual.); *Rummer v. Illinois Bell Telephone Co.*, 250 F.3d 553 (7th Cir. 2001); *Johnson v. Cook, Inc.*, 587 F.Supp.2d 1020 (N.D. Ill. 2008). 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).

d. **Discrimination by Other Supervisors:** 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*, 552 U.S. 379, 388 (2008).

3. **The Same Actor 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., Martino v. MCI Communications Services, Inc.* 574 F.3d 447(7th Cir. 2009); *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); *See also Ritter* at 1044; *Chiaramonte* at 399; *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1147 (7th Cir. 1994). However, the inference may not always apply. *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").

B. 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. 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 (i.e. 40 or older);

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 e.g, Jennings v. Illinois Dep't of Corrections*, 496 F.3d 764,767 (7th Cir. 2007); *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); *See also Barcenas v. Molon Motor & Coil Corp.*, 700 F.Supp.2d 994 (N.D. Ill. 2010); *Berger v. The Art Institute of Chicago*, No. 08-cv-4023, 2009 WL 3462495 (N.D. Ill. Oct. 21, 2009). 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." *Hemsworth v. Quotesmith Com, Inc.*, 476 F.3d 487, 492 (7th Cir. 2007). In those circumstances, the prima facie case is established by showing that the discharged employee's duties were absorbed by someone under age 40. *Id.; See also Merillat v. Metal Spinners, Inc*., 470 F.3d 685 (7th Cir. 2006); Krchnavy v. Limagrain Genetics Corp., 294 F.3d 871, 875 (7th Cir, 2002); *Michas v. Health Copst Controls of Ill., Inc.*, 209 F.3d 687 (7th Cir. 2000).

3. **Employer Defenses:** An employer may justify a RIF 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

1. **Back 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.

2. **Front Pay:** Front pay may be available where reinstatement is not viable, and the amount is to be decided by the judge, not the jury. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001); *Barton v. Zimmer, Inc.*, 662 F.3d 448, 455 (7th Cir. 2011); *Fortino v. Quassar Co.*, 950 F.2d 389, 298 (7th Cir. 1991). It is important to note that an award of

"lost future earnings" is not available under the ADEA. *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 771 (7th Cir. 2006).

C. Compensatory Damages

The majority of courts, including the Seventh Circuit, have not allowed recovery for damages for pain and suffering under the ADEA. *Barton v. Zimmer, Inc.*, 662 F.3d 448, 454 (7th Cir. 2011); *See also 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 liquidated damages clause in the ADEA is meant to be punitive in nature. *Id.* Therefore, if an employer incorrectly, but in good faith and nonrecklessly, believes that the statute allows a particular age-based decision, then liquidated damages should not be imposed. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 616 (1993). 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. *See EEOC v. Bd. of Regents of the Univ. of Wis. Sys.*, 288 F.3d 296 (7th Cir. 2002) (explaining "[G]iven the length of time the ADEA has been with us, a finding of nonreckless ignorance is rare."); *See also Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771 (7th Cir. 2001).

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). However, it is important to note that the 10% rule is merely one factor to be considered in deciding whether to award fees. *Id.; See also Telewizja*

Polska USA, Inc. v. Echostar Satellite Corp., No. 02-cv-3293, 2007 WL 3232498 (March 30, 2007).

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. *See, e.g., Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50 (7th Cir. 1995); *Wright v. Washington Mut. Home Loans, Inc.*, No. 08-cv-4423, 2009 WL 2704577 (N.D. Ill. Aug. 20, 2009). 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 employment agreements containing an agreement to arbitrate an employment discrimination claim are subject to compulsory arbitration.

B. Collective Bargaining Agreements: In *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), the Supreme Court held that a collective bargaining agreement that clearly and unmistakably requires members to arbitrate statutory discrimination claims is enforceable. *See e.g., St. Aubin v. Unilever HPC NA*, No. 09-cv-1874, 2009 WL 1871679 (N.D. Ill. June 26, 2009) (holding the arbitration clause contained in the collective bargaining agreement did not meet the "clear and unmistakable" requirement set forth in *Pyett*). The Seventh Circuit had previously held that collective bargaining agreements cannot compel arbitration of statutory rights. *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997).

C. Fact-Specific Defenses to Arbitration: A plaintiff can assert contract defenses to an arbitration agreement. *See 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); *Milnes v. Aimco/Bethesda Holdings, Inc.*, 805 F.Supp.2d 525, 527-528 (N.D. Ill. 2011) (holding employer's unilateral act of removing arbitration policy from updated employee handbook did not have any effect on the continuing validity of the arbitration between employer and employee because the arbitration agreement could only be amended by the mutual agreement of the employer and employee). . *But see Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131 (7th Cir. 1997) (arbitration agreement was unenforceable because the employer did not give the employee any consideration for her agreement to arbitrate). In order to proceed, the plaintiff must identify a triable issue of fact concerning the existence of the arbitration agreement in order to obtain a trial on the merits of the contract. *Ashland Jewelers, Inc. v. NTR Metals, LLC*, No. 10-cv0-4690, 2011 WL 1303214

(N.D. Ill. March 31, 2011) (citing *Tinder v. Pinkerton Sec.*, 305 F.3d 728 (7th Cir. 2002)). 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.