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2009 EXCEL Conference Building Investigator Skills --- Advanced Scenarios ©

The Approach Used By This Training Material

Within the time available to us, we will cover as many as possible of the three types of discrimination complaint you will most likely be required to investigate --- disparate treatment (of which retaliation is a subtype), harassment and failure to offer a reasonable accommodation. In each case, we will begin with a brief overview of the theory behind that type of claim and then jump into scenarios that stretch the theory to some of its margins. Theories get fuzzier and fuzzier as the facts of the scenario reach the margins of the territory the theory tries to describe. Nevertheless, the mental journey to the margins tests and deepens your understanding of the theory making it easier to explore (investigate) less ambiguous complaints.

We'll start with the most frequent type of complaint, a disparate treatment complaint.

DISPARATE TREATMENT: Proof of Motive (THE "WHO" OF THE CASE)

According to the United States Supreme Court:

"Disparate Treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race.... **Proof of discriminatory motive is critical**, although it can in some situations be inferred from the mere fact of differences in treatment..." Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)

"In a disparate treatment case, liability depends on whether the protected trait [race, color, sex, religion, national origin, disability or age] **actually motivated the employer's decision.**" Hazen Paper Company v. Biggins, 123 L Ed 2d 338, 346 (1993)

According to the Third Circuit Court of Appeals (sitting *en banc* or altogether):

"A finding of discrimination is at bottom a finding of intent."

"As the Supreme Court noted, 'there will seldom be 'eyewitness' testimony as to the employer's mental processes.' We have recognized that 'discrimination victims often come to the legal

process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered.' **Cases charging discrimination are uniquely difficult to prove** and often depend upon circumstantial evidence. 'This is true in part... because... discrimination... is often subtle.' 'An employer who knowingly discriminates may leave no written records **revealing the forbidden motive** and may communicate it orally to no one.' " Sheridan v. E.I. DuPont de Nemours and Company 100 F.3d 1061, 1071 (1996)(citations omitted)(emphasis added)

According to Title VII of the Civil Rights Act of 1964:

"Except [with respect to disparate impact allegations], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin **was a motivating factor** for any employment practice, even though other factors also motivated the practice." 42 U.S.C. Section 2000(e-2)(m)(i.e., Sec. 703m) [In an ADEA setting, plaintiff demonstrates that age was a factor that made a difference. Under the ADA, the courts have adopted a variety of standards. For example, the Ninth Circuit has utilized the same "motivating factor" standard in an ADA case. (*Head v. Glacier N.W., Inc.*)(2005)(413 F.3d 1053)]

The Supreme Court did, in passing, offer a definition of the phrase 'motivating factor,' which is, unfortunately, not supported by psychological research.

"In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of its decision what its reasons were and, if we received a truthful response, one of those reasons would be that the applicant was a woman." Plurality Opinion in Price Waterhouse v. Hopkins, 490 U.S. 250.

[The psychological problem with this analysis is that the employer is not an 'it' but a 'who' (i.e., a person making a decision on behalf of the employer) and the person who made the decision that lies at the heart of the complaint is quite capable of acting out of prejudice of which (s)he is unaware. Thus, it is often the case that the decision maker truthfully (relying on the portion of the truth he is aware of) denies having been influenced by an illegal motive when, in fact, such a motive has influenced his decision but has done so below the level of awareness. For those interested in this problem, you might consider reading *Heuristics and Biases: The Psychology of Intuitive Judgment*, edited by Thomas Gilovich, Dale Griffin and Daniel Kahneman (Cambridge University Press, 2002) and *The New Unconscious*, edited by Ran Hassin, James Uleman and John Bargh (Oxford University Press, 2005). The most succinct application of this line of research to the legal assessment of EEO claims is contained in Rebecca Hanner & Linda Hamilton Krieger (Spring, 2001) "Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making," 61 *Louisiana Law Review*, 495-538.]

The Mixed Motive Case: The Proper Evidentiary Standard and Jury Charge

In *Desert Palace, Inc., dba Caesars Palace Hotel & Casino v. Costa* (539 U.S. 90) (June 9, 2003), the Supreme Court considered the following conflict in the lower courts. Based upon a comment by Justice O'Connor in the *Hopkins* decision cited above, a line of cases held that plaintiff had to offer direct evidence of motive to trigger the burden shifting called for in a mixed motive case. The Ninth Circuit (sitting *en banc*) decided that direct evidence was not necessary. The Supreme Court agreed that there was no special evidentiary requirement attached to proof of a mixed motive case. It held:

“In order to obtain an instruction under §2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’ ”

The burden that shifts to defendant in a mixed motive case is characterized in §2000g-2(B) as a demonstration “that the respondent would have taken the same action in the absence of the impermissible motivating factor...” The *Costa* decision also defines the word “demonstrates” as “to meet the burdens of production and persuasion.” Thus, the power of establishing a mixed motive case is twofold: (1) It ensures that plaintiff can be awarded at least attorney’s fees and costs as well as appropriate declaratory and injunctive relief and (2) plaintiff will be awarded all other forms of relief (as appropriate) if defendant fails to persuade the judge or jury that it’s representatives would have made the same decision regardless of the impermissible motive. [Note: The District Court in *Costa* characterized the burden of persuasion here as a demonstration “by a preponderance of the evidence” that it would have made the same decision. There may be later litigation to clarify defendant’s burden. It seems clear that defendant does not have to offer “clear and convincing proof”, a standard that the Supreme Court in *Costa* referred to as a heightened standard inappropriate for either party to the litigation when each is demonstrating its assertions.]

What Does It All Mean?

- Proof of motive is at the center of a disparate treatment investigation.
- ✓ Only people have motives --- not agencies or departments.
- In a disparate treatment case, the investigator has to understand fully how the decision disputed in the charge was made.
- Illegal discrimination can enter the decision making process by way of the recommendation from Person A; the participation of one or more of the persons in a joint decision or the final decision maker.
- Relevance in a disparate treatment case becomes any writing or testimony that helps illuminate the motives of the decision maker(s) at the time the decision was made.

Direct Evidence

Direct evidence establishes directly whether an illegal motive acted as a motivating factor in the decision. It ties the decision maker to the decision and the illegal motive. While rare, a writing or credible testimony like the following would directly illuminate the thought process of the person who made the decision. “There are a lot of sharp-edged objects in this work environment. I had to let her go because of her epilepsy.”

Circumstantial Evidence

In the usual investigation, we end up assessing motive from indirect (also called circumstantial) evidence. The best source of such evidence would be other decisions where the decision maker you are interested in exercised discretion (i.e., had the option of acting in different ways). Is there an EEO pattern to the group of decisions you have gathered in your investigation? To make a correct analysis, you have to select a relevant group of decisions. This is the central challenge of your investigation. What other decisions will you seek out and place in the record?

The general rule is that you seek out persons who were similar in their situation to the complainant and compare their treatment by the decision maker to the complainant's. The first problem is to determine accurately the key features of the complainant's situation. You can find persons similar in situation and make apt comparisons only when you properly understand the complainant's situation. The second problem is that the word 'similar' has no definite meaning. Two persons can be compared who are remotely similar or very, very similar in situation. The persuasiveness of your comparisons lies in the degree of similarity in situation between the two persons you are comparing. **The more similar in situation two people were, the more significance there will be in any differences in treatment you uncover.**

The Scenarios

We this brief overview in mind, we turn to the scenarios.

#1 The Assessment of Similarity in Situation The “nearly identical” standard

Probably the hardest variable in a disparate treatment case to assess is the notion of whether a comparator is an apt comparator. Looking ahead to the possibility of litigation, the willingness or unwillingness of a judge to compare the treatment of one person to another is a wildcard in the agency's estimate of whether the facts of the case will produce a winner or a loser for the organization. Some judges are inclusive in their approach and willing to consider relatively broad comparisons while the majority adopt a narrower view. To me, the simplest way to approach comparisons between people is to ask whether the situation of these two is similar enough to tell you something about the motives of the decision maker. Let's look at one particular case to see the problem in some detail.

I have chosen an appellate decision where the court spent some time explaining its approach to the comparisons cited by the plaintiff, *Holbrook v. Reno* (196 F.3d 255)(DC Cir. 1999). Dawnele Lyn Holbrook was a new agent trainee at the FBI academy who was found unsuitable

to become a Special Agent, was reassigned to her former position and suspended for five days. We will focus on the portion of her allegations alleging sex discrimination.

During her training Holbrook sustained shin splints and was referred for treatment to Joe Palermo, an agent Instructor and physical trainer. Holbrook and Palermo became friends. The two interacted in such a way that Palermo made boxes available to her to use in moving her personal belongings to another location and he at least permitted (and presumably encouraged) her to stay overnight at his house sleeping on a downstairs couch on four occasions. At a party celebrating the end of the training program, Special Agent Kevin Crawford, the primary instructor for Holbrook's class, noticed "eye contact" between the two. Suspecting an improper relationship, he informed the staff counselor who did not report the matter to her superiors.

A week later, Palermo told Crawford that Holbrook was sick and that the nurse had told him that Holbrook should not participate in the training exercises the next day. Questioning the nurse, Crawford learned that the nurse had not told Palermo about Holbrook's illness as Palermo had represented to Crawford. Crawford reported his suspicions as well as Palermo's lie to the chain of command. An investigation ensued.

Holbrook initially denied ever having gone to Palermo's house "for a date." Soon afterwards, she corrected this to explain that she had been at Palermo's house but not "for a date." Eventually, the Assistant Director in charge of the Academy, George Clow, concluded that Holbrook had lied about her visits to Palermo's house and disobeyed his order not to speak with Palermo during the pendency of the investigation.

The three judge panel considered Holbrook's assertion that Crawford had injected sex discrimination into the decisions affecting her (alleging he made various sexual comments that referred on occasion to her) by finding Crawford's motives irrelevant. Clow "made 'an independent assessment' of Holbrook's conduct and determined that she was unsuitable to become an agent. Nothing in the record indicates either that Crawford had input into Clow's decision or that Crawford discussed Holbrook's credibility with Crawford...."

As to her comparators, the court observed: "To prove that she is similarly situated to a male employee, a female plaintiff must demonstrate that she and the allegedly similarly situated male were charged with offenses of 'comparable seriousness'.... A plaintiff must also demonstrate that 'all of the relevant aspects of her employment situation were *nearly identical* to those of the male' employee...."

The court continued: "With this standard in mind, we turn to Holbrook's evidence. She claims to be similarly situated to three employees: two new agent trainees allowed to become FBI agents despite their misconduct and Palermo himself." The court found the two new agents irrelevant because they were "accused of misconduct of a type that does not involve honesty and forthrightness which is what Ms. Holbrook's case was all about." (quoting the District Court) (They were accused, respectively, of immature behavior and drinking before driving on one occasion.) In other words, regardless of who made the decision to discipline these two males in

a different way, the difference in the nature of their offenses defeated any comparison between either and Holbrook.

The court found: “Palermo’s offense... is comparable to Holbrook’s. Holbrook was disciplined for lying and disobedience; Palermo was disciplined for lying and engaging in an improper relationship with a subordinate. At this point, however, the similarity between Palermo and Holbrook ends. Palermo was a fifteen-year FBI veteran with supervisory responsibilities. Holbrook was a probationary trainee.” [The court reasoned that this difference in seniority and status defeated any notion the two were similar in their situation.]

“Holbrook and Palermo were not similarly situated for another, related reason. As the FBI points out, their different seniorities made it impossible for the FBI to discipline them similarly. Because Palermo had been an Agent for fifteen years, finding him unsuitable to become an Agent (Holbrook’s sanction) was simply not an option. Because Holbrook was a probationary trainee, reassigning her to a different Agent position (Palermo’s sanction) was likewise not an option. And with respect to the sanction that the FBI could impose on both --- suspension --- Palermo’s was more severe (his two weeks versus her five days).” Well, duh! Besides being obvious, these last remarks put the court in the position of saying that the two are not similarly situated but can, after all, be compared --- **but only with respect to the length of suspension.** So, they can’t be compared and can be compared at the same time. Would Holbrook have prevailed had her suspension been greater than Palermo’s? What a mess!

Analyzing the Mess

Let’s see what has happened here. Holbrook alleges disparate treatment. As we noted above, in *Teamsters* the U.S. Supreme Court observed: “‘Disparate Treatment’... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race.... Proof of discriminatory motive is critical, although it can in some situations be inferred from differences in treatment....”

So, the critical inquiry is always proof of motive --- who made the decision disputed in the case and why? The court understood this well when it surgically removed Crawford’s motives from the case on the grounds there was no evidence they played any part in Clow’s assessment of the case. So, Clow becomes the focus of the case if he decided the punishment of both Holbrook and Palermo. If the differing suspensions have any logical link that grounds them and permits comparison, it is in the fact that they reflect Clow’s assessment of which punishment was appropriate in each case. (Clow decided upon a three day suspension for Holbrook which others increased to five days.) **The same logic permits an assessment of the reassignments of Palermo and Holbrook.**

Apparently, Clow decided what punishment to mete out to both. Why did he choose the specific punishment he did for each? Holbrook challenges Clow’s motives and asserts that her sex made a difference in her treatment. As a reasonable person, you might easily have considered that Palermo, who was a supervisor and a seasoned Agent, bore a heavy responsibility to uphold the standards of the FBI. Any difference in status between him and Holbrook could reasonably

serve not to have insulated him from comparison to her but to have weighed against him in the mind of the Assistant Director. After all, Palermo was one of those evaluating Holbrook's performance as a trainee. Either hostility toward her for refusing a relationship or favoritism toward her for consenting to a relationship contradicted his duty to the bureau. He had greater positional authority in the FBI than Holbrook; fifteen years of experience to grasp the duties of his position and held a position of trust. So, it is reasonable to ask the Assistant Director, "Since you concluded their offenses were identical (as to lying) and similarly severe (disobedience for speaking with Palermo during the investigation versus engaging in an improper relationship with a subordinate) explain in detail how the punishment each was given was of nearly identical severity?" Surely, it was not the FBI's contention that it *could* not terminate Palermo or, if feasible, demote him to a position below Agent. At least some non-probationary Agents must be fired from time to time. In other words, the Assistant Director exercised discretion and decided on a punishment for Palermo short of termination or demotion to a non-Agent position (if that were feasible). Why? What were his motives?

If it is appropriate to compare length of suspensions, then it is appropriate to compare the relative severity of each and every aspect of the punishments the two received. Each aspect of the disciplinary decisions made by Clow has the same potential to illuminate his reasoning and facilitate a judgment as to whether sex made a difference to him.

The court, however, does not compare the two except as to the length of suspension. If the standard for comparison is near identity of situation, then the standard for comparing disciplinary outcomes should surely be that the two outcomes are nearly identical. The court allows a difference in seniority and status to defeat such a comparison when a reasonable person (that is, a member of the jury) might well expect the bureau to exact a harsher penalty on Palermo precisely because of his experience and his higher status and, thus, be quite willing to compare the relative severity of the two punishments in order to possibly find that Clow's decision favored the male employee who, if anything, could be held to a higher standard than Holbrook because of his position of trust, superior authority and lengthy experience.

In *Holbrook*, we seem to have one decision maker evaluating two linked cases and deciding upon apparently lenient treatment for the male offender. Doesn't this raise a reasonable suspicion as to the decision maker's motives for doing so? Can this suspicion really be dispelled by the difference in status and seniority of the two offenders? Why would courts fail to pursue an assessment of motive rigorously and proceed in such a formulaic fashion?¹ The answer is that many courts (the District of Columbia Court of Appeals being one) do not want to act as a kind of personnel department of last resort and are loathe to appear to be weighing the factors in a situation by their own standards. The court would ask: Who are we to treat Palermo's

¹ In the same way, it is unnecessary to compare the seriousness of the behavior of the two male Agents in training if Clow did not personally assess their behavior and decide to allow them to become Agents. The court does this with the first male (finding that Clow made the decision to allow him to pass the training program) but, as to the second male, it writes: "The second trainee admitted to drinking before driving. Although the FBI reprimanded the agent for poor judgment, it allowed him to graduate." But the FBI is a government agency, not a person. "It" has no motives. Only some human being representing the agency has motives and decided how to deal with the lapse in judgment of the second trainee. If this human being was not Clow, then the second male's treatment is irrelevant to proof of motive because it does not illuminate how Clow assesses discipline.

punishment as more lenient? Who are we to hold Palermo to a higher standard because of his status as a supervisor in a position of trust who lied to his investigators? And so on.

A second fundamental problem with the decision is that the court uses factors like Palermo's seniority and status as obstacles to comparison when they would be used more logically as factors to be weighed when assessing Clow's asserted reasons for treating Holbrook and Palermo differently. Suppose Clow had agreed that he was somewhat lenient with Palermo but balanced his years of valuable service, training and potential for being an asset in the future with the seriousness of his abuse of the trust placed in him by the Bureau and determined that stripping Palermo of all supervisory authority as well as transferring him to East Gblip where he was assigned to relatively menial duty and rehabilitation (supposing this is what he had done) was an option more appropriate than discharge. That type of inquiry would lead the court to the heart of the matter which refusing to make logical comparisons fails to do.

A third problem with the decision is the court's requirement that the situation of persons being compared must in all the relevant aspects be nearly identical. Logically, the degree of similarity in situation is a factor that goes to the weight to be given to any differences in treatment not to whether the two persons can be compared. Any two persons can be compared as long as their employment opportunities were assessed by Clow. In other words, any situation where Clow exercised discretion (i.e., chose one course of conduct not another) have the potential to illuminate and enable a court to judge Clow's asserted motives for the difference in Holbrook's treatment by him. The weight to be given to such a comparison would rise with the degree to which the two comparators were identical in their employment situations. This is what in fact happened with the first male Agent in training as Clow explained why he viewed the trainee's behavior as more like immaturity (and, thus, less serious than Holbrook's conduct), calling for a more lenient approach to discipline. It was not that the trainee and Holbrook were not comparable but that the comparison did not create an inference of discrimination because of an illegal motive.

A fourth problem arises from the few Clow decisions before the court. The panel found itself trying to discern a pattern to Clow's exercise of discretion and confined itself to three decisions he made. Clow has a rich history of decisions affecting male and female FBI employees. Holbrook failed to bring all but three of these to the court's attention.

In short, the kinds of comparisons you and your organization are willing to make when evaluating the merits of a disparate treatment complaint are likely to resemble the reasoning of the average juror rather than the average judge. This is not a bad practice because (a) your goal in the investigation is to get at the truth of the matter and resolve the situation in a way which is seen as fair by your employees and (b) you don't know whether the complaint, if it goes to court, will reach a jury. If it does, the jury is much more likely to reason like a layperson not a judge.

***#2 I Lacked Knowledge
(And so could not have an illegal motive)***

Sometimes the decision maker denies having essential knowledge. This can happen where the formal decision maker who did, in fact, make the disputed decision asserts he was not even aware of the complainant's race or sex or whatever. Since a decision maker cannot have an illegal motive about a person's EEO group without knowing that person's EEO group, such an absence of knowledge would be a sufficient defense to the complaint if credited. This defense is most often raised in two settings: (1) where the decision maker asserts the complainant never told him/her about a disability (or, at most, said something vague about not being well) and (2) where, in a retaliation complaint investigation, it is clear that at least some persons in the organization were aware of the complainant's earlier EEO complaint but the decision maker in the retaliation matter might plausibly have had no awareness of the earlier complaint.

Your task then becomes gathering sufficient evidence to determine whether the decision maker more likely than not did in fact know the complainant's relevant EEO characteristics. This can take many forms. For example, it is sometimes true that the formal decision maker does not in fact know the complainant's relevant EEO group yet there is still possible liability for the organization. These cases are referred to as "poisoned fruit" cases. They arise when the formal decision maker carries forward the bias of a subordinate by relying on information from the subordinate (none of which referenced the complainant's EEO group) where the subordinate does know the complainant's EEO group and where the information the subordinate provided is biased by an illegal motive. In such a case, the source of the biased information becomes the focus of your investigation not the formal decision maker.

Another way to approach this defense is to document who knew what when. Any contact or any contact that standard procedure would tend to generate between the decision maker and someone in the organization who did know the complainant's EEO group status might be sufficient to question the credibility of the defense.

As to the type of knowledge required, remember that, in a complaint of age bias, it is not necessary that the decision maker knew the complainant's exact age but only his general or approximate age. In a complaint of national origin or disability bias, the decision maker might have *thought* the complainant had a disability or was from a given ethnic group (when, *in fact*, (s)he was not), and it is his or her perception that is central to the investigation rather than the complainant's true national origin or medical condition. In a race case, the decision maker might not know the complainant's race directly but did know the complainant attended a historically black college, was a member of a black fraternity, resided in a certain section of the city or otherwise might well have inferred the complainant's race.

If, however, there is no credible inference supported by the record that the decision maker knew or probably knew the complainant's race, sex, disability, and so forth, then lack of such knowledge would prevent the possibility that an illegal motive was part of the decision making process.

#3 Multiple Decision Makers

Sometimes, you will need to assess the motives of more than one person. Many employment decisions involve a group of decision makers. How do you keep track of relevant motives in situations like this? Let's first take a situation where a series of persons are involved. Suppose the complainant had been interviewed by Y, passed on to Z who interviewed her and passed her on to the Boss for an interview and a final decision. While courts are naïve about the dynamics of such a situation and, thus, prone to mis-analyze this scenario, if you think about it, it is very easy for one person in the series of interviews to dominate the process. If I am the first interviewer, I might be keenly aware of the kind of person The Boss likes to hire. Or, the second and third interviewers might well be very influenced by the fact that the first interviewer sent just one or two persons for further consideration from the larger group of applicants, creating a bias toward selecting the applicant. In other words, in cases like this, you will need to interview all the persons involved in the decision making process to weigh whether you have a situation where multiple people independently preferred one particular applicant (a situation that most courts would view as fair and unlikely to be illegally biased) or a situation where one person's opinion was amplified by the process, by his level of authority or by some other factor such that his motives are really of paramount importance.²

The same dynamic is present in cases where a panel made a decision. A close analysis of the power relations among members of the panel or the manner in which the panel reached a decision may reveal that one person on the panel made a decision the others merely concurred in. For example, you may well find that the highest ranking person on the panel (in terms of level of management authority) did not let each member score his/her interview(s) independently but, instead, initiated a discussion before final scoring in which she revealed who her number one candidate was or revealed how she assessed all the candidates or a given candidate. In short, you find that she used her authority to influence the other members of the panel. Her motives then become the focus of the investigation while the motives of the other panel members have little relevance to the assessment of the merits of the complaint. If she is biased, the panel is biased.

In general, for a panel to be independent, each member should separately score each portion of the interview responses (assuming the interview is made up of clusters of questions focusing on a specific topic) and then give the applicant/ interviewee an independent total score before discussion. You can then examine the separate scores to see whether the discussion involved one person steering the panel to one candidate (making the motives of that panel member the focus of your investigation) or whether there was a real consensus favoring a given candidate, a sign (**in the absence of some form of shared, open bias**) that the person selected was likely the number one candidate.

In some cases, the exact panel or exact sequence of interviewers might have carried out other selections. In such cases, you can assemble comparative evidence by seeing what happened on these earlier occasions. Pay close attention to any deviations from the standard operating procedure the panel or sequence of interviewers followed in the past and to those instances where there were candidates from both sexes, more than one race and so forth --- to see whether

² Four different reviews of cases where performance evaluation systems were at issue in the litigation have been published and all found courts to be favorably impressed by inter-rater agreement, considering it a sign of not only fairness (judges are human too) but of freedom from illegal bias.

members of the complainant's EEO group were ever selected over members of the other group(s) by the same panel members/interviewers. [It is ordinarily not useful to look at other panels where the composition of the panel was not identical unless the panel in your case was really dominated by one member. Other panels (s)he served on might show the same pattern of control and be used to illuminate the dominant member's exercise of discretion on other occasions.]

#4 The Decision Maker Is of the Same EEO Group As the Complainant

Sometimes the decision maker is of the same sex, race or other EEO group as the complainant. For example, is it possible for a female to discriminate against another female? Yes, although a court would likely look for clear evidence that the shared EEO group status nevertheless was accompanied by bias against members of that group by the decision maker. In a promotion case, the evidence might show that the female decision maker was of the opinion that the males who would be reporting to the person selected to fill the vacancy would not accept a female supervisor. In this situation, the decision maker could very well have denied a female applicant the job because of her sex though both are female. By way of examples, there is a lawsuit involving a black manager who was accused of discharging a black subordinate because she dyed her hair blond and wore conservative, business dress while the manager wanted her to be more Afrocentric in her appearance. In that case, the manager (the employer was a department of public welfare) apparently believed an Afrocentric appearance would be more effective with the clientele of the agency. In another case, a Korean business owner was accused of firing a Korean employee because he failed to work as hard as Koreans are supposed to work (non-Korean employees being held to a different standard). So, what drives this type of complaint investigation is evidence that the decision maker used a biased standard to assess the value of the complainant, even though both shared the same key EEO characteristic.

#5 The Subjective Decision How to Evaluate It

Generally Accepted Principles

- Basing an employment decision on a mixture of subjective and objective reasons or purely subjective reasons is not inherently discriminatory.
- Courts recognize that many types of jobs require the person doing the job to possess intangible qualities not reducible to purely objective terms.
- In a litigation involving an allegation of disparate treatment, where no direct evidence of illegal motive is accepted, indirect evidence of illegal motive must be offered by plaintiff.
- Since only people have motives, where the decision maker explains his or her decision making process and cites to subjective perceptions about the applicant's or employee's abilities or personal attributes, courts will require that "the defendant's explanation of its legitimate reasons must be clear and reasonably specific" so that "the plaintiff be afforded a full and fair opportunity to demonstrate pretext." *Texas Department of Community Affairs v. Burdine* (450 U.S. 248, at 258)(1981)
- This standard poses a problem for the courts because subjective perceptions can be

expressed in terms that are so vague the plaintiff does not have a full and fair opportunity to show they are untrue or incredible.

So, the question arises: What weight should a court give a subjective defense to an allegation of disparate treatment?

The Controversy: How to Weigh the Value of a Subjective Defense

- ❑ A rather exhaustive analysis of this problem (and one which collects cases for your further research) is contained in *Chapman v. AI Transport* (Eleventh Circuit, 2000)(*en banc*)(229 F.3d 1012)(Alleged denial of promotion because of age and disability).
- ❑ The majority in this 8-3 decision holds: “A subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion.” (*id.at.1034*) “[E]mployment decisions may legitimately be based on subjective criteria as long as the criteria are capable of objective evaluation and are stated with a sufficient degree of particularity.” (*EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1280, n.17) (11th Cir. 2000)
- ❑ In the *Chapman* case, the court treated the first defense as to why Chapman was not selected for a certain job as an objective defense. This first defense was that Chapman had been employed in three different jobs over a three year period which led the two persons who interviewed him (separately) to view him as a “job-hopper.” Chapman was expected to show either that he did not hold three jobs during this period or that alleged reliance on this reasoning was incredible because of the way similarly situated applicants with similar job-hopping behavior were treated by the decision makers.
- ❑ The second defense in *Chapman* was treated as a subjective defense. This second defense was that Chapman did not interview well. He was not concise in his answers, did not aggressively seek to determine (through questioning the interviewers) what defendant’s plans for the position were and was not clear as to why he had gone from job to job in the last three years. The majority treated these three examples of his behavior during the interview as sufficiently objective bases for the overall subjective perception that Chapman did not interview well. Plaintiff was expected to argue either that these assertions were not true or were incredible in light of similar behavior from others interviewed who were, nonetheless, hired.
- ❑ The dissent argues that two principles apply to subjective defenses which were not properly addressed by the majority. “First, courts have examined and should continue to examine subjective reasons with higher scrutiny than objective reasons.”(*Id.* at 1044) The second principle endorsed the majority’s demand that the subjective defense be clear enough to give the plaintiff a full and fair opportunity to refute it. In connection with this principle, the dissent was concerned that “perceived aggressiveness” is persistently and stereotypically associated with age. It argued that the proper standard for weighing a subjective defense should be: “Thus, a subjective reason that is clear and specific, is capable of objective evaluation, is not premised on a stereotype, is consistent with clear criteria that preexisted the adverse employment action and was documented at the time of the adverse employment action and before litigation is initiated should be accorded more

weight than a subjective reason that does not meet all these factors.”(*Id.* at 1048) Indeed, “[s]ome subjective reasons, those which cannot be objectively evaluated and/or are vague, should be accorded no weight.” (*Id.* at 1048)

- The dissent’s position mirrors that of various other courts and thus represents the competing point-of-view. The points made by the dissent above about being ‘consistent with clear criteria that preexisted the adverse employment action’ and ‘documented at the time of the adverse employment action’ are worth thinking about. Since subjectivity will never be removed from the majority of employment decisions and since all employers interested in eliminating illegal discrimination from their workplace must, therefore, find a way to employ subjectivity in a manner which avoids such discrimination, the prudent employer will always try to

(A) determine what attributes it seeks in a candidate for a given position,

(B) determine likely actions/behaviors which would indicate that the person possesses the desired attributes,

(C) train its decision makers to elicit behavioral evidence that an attribute is possessed by a candidate,

(D) train its decision makers to document their judgments contemporaneously with the decision making itself, and

(E) monitor, through review of the contemporaneous documentation, any patterns indicating EEO-biased subjectivity in one or more of its decision makers.

#6 A Note on Two Psychologically Difficult Scenarios

Two important areas in which the psychological naïveté of the courts causes a failure to recognize discrimination when it has taken place are **the same decision maker defense and unconscious biased motive**. Taking them one at a time: There is by now a long line of cases where the court is faced with a situation where the same person who acted favorably toward a plaintiff also acted unfavorably toward the same person at some other time. For example, suppose the decision maker hired plaintiff six months before firing him and knew he was 65 when he hired him. How likely is it that the age of the employee made a difference to the decision maker six months after it apparently did not make a difference? It depends on the facts. It might be that the decision maker hired the plaintiff only after pressure from the Human Resource Department and spent six months looking for a plausible basis to get rid of him. But the real problem with the same decision maker defense is that it assumes human beings possess a consistent character when there is abundant evidence that people behave in reaction to the situation they are in. At the same time as I am generally law abiding, I might speed along the turnpike until I see a bunch of flashing red and blue lights and promptly slow down. And so forth.

Here is a case from my own experience, in which the following set of facts was found. Supervisor “A” interviewed and hired a black female whom he placed into the payroll department where she was one of 5 persons and the only black employee. He supervised her for over four years, awarding her favorable performance reviews and salary increases. The two interacted on a friendly basis day after day. In this company, salary information was closely guarded. Supervisor “A” also supervised a large group of data entry personnel. One day while at work, an employee from data entry came to “A’s” office and thanked him for the sizable merit increase she had been granted by him for the coming year. This disturbed “A” somewhat because next year’s increases were not disseminated yet to staff but he returned to work because he was so busy. A few minutes later, a second staffer from data entry came to his office to complain about the meager increase he had been awarded. “A” was by now quite upset. How did these people know about their merit increases already? He decided to investigate the matter and asked the second person, “How did you know what your increase would be?” He answered, “Jimmy told me.” He then spoke with the first person and was told again, “Jimmy told me.” [Jimmy was a data entry employee reporting to “A”.]

Supervisor A then swung into investigator mode by demanding that the sole black employee in payroll come to his office. When she arrived, he asked her why she was giving out privileged information in violation of company rules. She was quite confused and denied ever having done so. However, her obvious agitation convinced “A” she was lying and he fired her. She made a charge of race discrimination. Is there anything you might have done differently? Of course, you would have asked Jimmy where he got his information from. Jimmy would have told you that he did not like to eat his lunch in the bullpen area where his desk was located. Because he had an unusual shift, for part of the day he was present when “A” was absent and he had a habit of eating his lunch in “A’s” office (which had floor-to-ceiling walls). One night, while doing so, he noticed a pile of papers in “A’s” out box. The papers contained the merit increases for the coming year for all the employees. He wrote down the information and passed it out.

Why did “A” proceed as he did? Well, you need to know that the person who was spreading the information (Jimmy) is black. Supervisor “A” reasoned that the information had to have come from payroll. There was only one black employee in payroll. Therefore, this employee was very likely (in his mind) to have been the source of the information. Initially, the company defended by asserting the same decision maker defense. After all, Supervisor “A” had hired her, knowing her race. It made no difference to him at that time. He supervised her for years without incident. He awarded her favorable performance evaluations. They were friendly with each other. They argued that it was not logical to believe her race all of a sudden made a difference to him.

The problem with this defense is that it underestimates the situational nature of prejudice and gives too much weight to the idea that a human being has a certain character or disposition which will not vary with circumstances. In the exact situation Supervisor “A” found himself, the course of his investigation veered away from logic into a course of action grounded in a biased assumption about how the payroll data must have been disseminated. Race made a difference to the way he proceeded but did so unconsciously. It is not that he suddenly became a racist but that factors in the situation stimulated race-based assumptions in his mind. While this is not a process well understood by the courts, it is a factor in much employment discrimination.

#7 Hiring/Promotion as a Special Case

One final point. Technically, in the absence of direct evidence of motive, the investigator does not always have to gather data about other decisions the decision maker has made. For example, some plaintiffs in selection cases have been able to prevail by comparing their qualifications to those of the person selected. Where the qualifications of the complainant are plainly superior to the person selected, a violation may be found.³ Even so, it is better technique to look for and consider evidence beyond a comparison of qualifications of the complainant and person selected. Favoring the less qualified candidate certainly indicates that a poor decision was made but it may not indicate that an illegal decision was made. A pattern of such illogical decision making by the same person which demonstrates, in addition, that race or some other illegal factor is also a part of the pattern will give the organization a surer basis for making its decision about the merits of the complaint.

Common Patterns Derived From Published Decisions

I describe for you some patterns in the thousands of decisions applying disparate treatment theory to particular cases. While the law develops and changes over time, these patterns will endure.

Spoliation --- Where a court finds credible evidence that records relevant to a case have been intentionally concealed or destroyed, not only might an adverse inference be made that the content of the missing records would damage the defendant's position were they made available but the entire credibility of the defense might be affected. [If the court believes the loss of the records to be inadvertent or merely negligent, it will acknowledge the difficulties the missing information creates but will probably not make an adverse inference.]

Shifting Defense --- In a typical litigation, key decision makers will have stated their reasons for the decision in dispute at the time of the internal investigation, in a later deposition and on other occasions.(principally in memoranda or other writings at the time they took the decision or later.) While some differences in emphasis or detail might reasonably creep into these statements over time, shifts in important points (especially, in response to developing evidence in the case) are viewed as a reasonable basis for doubting the defense.

Inter-rater Differences --- Just as concurrence among different persons who evaluated plaintiff's performance over time tends to support the absence of illegal bias, variance (especially

³ The Supreme Court in *Ash, et al. v. Tyson Foods, Inc.* (126 S.Ct. 1195)(2006) considered a lower court ruling that set out how superior the complainant's qualifications had to be in order to prevail. Without stating a definite preference, it rejected the wording of the lower court and cited to three other decisions at the appellate level with different formulations which it found acceptable. *Cooper v. Southern Co.* (disparities in qualifications must be of such weight and significance that "**no reasonable person**" could have chosen the selectee)(11th Cir. 2004)(390 F.3d 695, 732); *Raad v. Fairbanks North Star Borough School District* (qualifications are "**clearly superior**") (9th Cir. 2003)(323 F.3d 1185, 1194) and *Aka v. Washington Hospital Center* (**significantly better qualified**)(D.C. Cir. 1998)(156 F.3d 1284, 1294). Where plaintiff offers evidence of a different sort indicating illegal bias in addition to the comparison of qualifications, the difference in qualifications does not have to be so striking.

sharp variance) tends to cast doubt on the credibility of the variant evaluation(s). The classic pattern is for the plaintiff to be viewed by other managers, customers, peers as a successful performer (often over several years) but to be judged a much less successful performer by a new supervisor or by the same supervisor after the filing of an EEO complaint.

Clash Between the Objective and the Subjective Data --- Where the objective data supports the contentions of the plaintiff (for example, quantity of production, number of new accounts, number of errors, prior awards, quantity and/or variety of experience and so forth) and the basis for the decision disputed in the case is subjective in nature and contrary to the objective data, the defense appears less credible. A classic pattern would be one where the years of experience, level of education, and/or proven ability of the plaintiff is objectively superior to that of the person selected and the rationale for selecting the apparently less qualified person is subjective in nature. (“He interviewed well.” “She did not seem to be a good fit for the position.” “His potential was greater.” “He demonstrated leadership ability superior to hers.”)

Departures from Established or Official Procedure --- Prior decisions made by the same person and/or official policy may establish the process normally used to make decisions of the kind disputed in the case. Deviations from this norm that are not transparently reasonable are cause for suspicion. For example, suppose a governmental agency advertises a position and states the key qualifications for the job. People apply. The vacancy is withdrawn and later re-advertised but with an added qualification that fits a given applicant to a tee or with some qualification dropped that the person later selected does not possess.

Suspicious Timing --- The timing of events can affect the case as well. Interviewing the plaintiff (a candidate for an apparently open job) after someone else has already been selected can be interpreted as an attempt to create the appearance of fairness (and deceive the plaintiff). However, the classic timing issue is the relatively speedy change in the plaintiff’s employment situation after the defendant became aware of an EEO complaint by the plaintiff. Some changes are ludicrously crude (switching the person’s work location to a noisy, disruptive and unusual place; taking away the company car and so forth).

HARASSMENT: More Focus on Behavior, Less on Motive

The second most frequent type of charge is an allegation by an individual that he or she was subjected to illegal harassment. In the law, there is a world of difference between simple harassment and illegal harassment but, in reality, given the fact that many people use the word “harassment” loosely and the fact that human beings manage to look down upon each other for thousands of reasons which don’t happen to be illegal but are just as disruptive, you are more likely to be faced with the job of sorting out the merely abrasive from the truly illegal when investigating an internal complaint of harassment than with any other form of complaint. A further complicating factor is that some agencies don’t distinguish well between their internal harassment complaint process (if they have one) and the more formal and resource-intense EEO complaint process. As a result, persons who should have used the informal process use the EEO complaint process to complain about matters not severe enough to be legally actionable (more on this below).

Illegal harassment is a form of intentional discrimination for which damages can be claimed. In addition, however, whether illegal or not, harassing behavior is toxic behavior which every reasonable organization should do its utmost to eliminate. So, hopefully, your organization’s anti-harassment policy prohibits all forms of harassment, not just those which happen to be illegal, and your investigation of all harassment complaints will be done with an eye toward not just legal liability but, also, toward good human resource management techniques.

As to what is, in fact, more than unfair but also illegal, every employer covered by Federal law has a duty to maintain a working environment free from harassment caused or motivated by race, color, sex, religion, national origin, age (if the recipient is 40 or older), disability or the fact that the recipient either made a complaint or participated in a proceeding about a complaint alleging a violation of EEO law.⁴ Whenever the employer fails to meet this duty, a violation has occurred.

The person claiming harassment has to establish two key ingredients: illegal motive and actionable behavior. Frequently, the content of the jokes, e-mails, cartoons, graffiti, gestures and so forth establish the illegal motive. However, in some cases, you uncover a series of hostile acts but are unsure of the motive(s) behind the acts. In such cases, proof of motive is just as important as it is in a disparate treatment investigation. Sometimes, in order to show the connection between the hostility and the illegal motive, you are able to show that, even though the words or actions used to harass the complainant do not reference an illegal motive, the behavior is directed at just the complainant and/or members of her group. This is normally sufficient to infer an illegal motive for the hostility.

Where there is a mix of acts clearly motivated by an illegal motive and acts whose motive is ambiguous, all the hostile acts are considered as one course of conduct in order to weigh the severity of the conduct.

⁴ Technically, as in Disparate Treatment theory, the harassers might believe the target of their harassment was of a certain national origin or was a witness in a proceeding (and so on) though the person was actually of a different national origin or was not a witness (and so forth). A violation will still be found as long as the reason for the harassment was illegal and the conduct was actionable.

The word “actionable” merely means serious enough to alter the recipient’s terms and conditions of employment and create an abusive working environment. The goal of your investigation is to determine what happened (the behavior of the persons involved). The agency will assess the severity of the behavior. In general, many plaintiffs have lost in court because either a judge or a jury did not consider the conduct complained of to be severe enough to be actionable.

The U.S. Supreme Court has even encountered and evaluated such a case. In *Clark School District v. Breeden* (121 S.Ct. 1508)(2001), the Court addressed a situation where Shirley Breeden brought suit alleging she was retaliated against in violation of §704(a) of Title VII. She alleged that, in a meeting to discuss the psychological evaluations of four applicants for a job, one such evaluation stated that the applicant once told a coworker, “I hear making love to you is like making love to the Grand Canyon.” The comment was read aloud at the meeting and the two males present chuckled over the comment. Ms. Breeden complained internally and later made external charges. She alleged that, as a result of these charges, she was retaliated against.

The Court had remarked in earlier decisions that “simple teasing, offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in ‘the terms and conditions of employment’.” In *Breeden*, it held, “No reasonable person could have believed that the single incident recounted above violated Title VII’s [severity] standard.”⁵

Management Harassment: The employer fails to meet this duty when one of its agents abuses his or her authority as a member of management by demanding that the recipient of the harassment, as a condition of employment, agree to a sexual relationship or agree to accept the severe sexualization of the working environment by means of jokes, touching, gestures and so forth. Even where there is no sexual element to the situation, a member of management can create liability for the organization whenever he/she is part of a pattern of severe, harassing behavior for any illegal reason (as, for example, a pattern of pervasive racial or ethnic ridicule).

Harassment by Non-Managers: The employer also fails to meet its duty when non-managers engage in a course of conduct that is severe enough to alter the recipient’s terms or conditions of employment and affect his or her ability to perform work and the employer fails to take *prompt and effective action* to stop the harassing behavior and remedy its effects once it gains knowledge of the behavior.

As to liability, liability attaches whenever a member of management is the harasser or one of the harassers, and the complainant suffers a tangible employment action as a consequence of the demand for a sexual relationship or the demand that she or he go along with the sexualization of the workplace or other harassing behavior. The phrase “tangible employment action” has no exact meaning. Examples given by the Supreme Court are a demotion, discharge, promotion, loss of full-time status (with attendant loss of benefits) as well as transfer to a hazardous duty

⁵ Similarly, the Court observed in *Harris v. Forklift Systems, Inc.* 510 U.S. 17,21 (1993): “As we pointed out in *Meritor [Savings Bank FSB v. Vinson (477 U.S. 57,67)(1986),]* ‘mere utterance of an... epithet which engenders offensive feelings in a employee,’ *ibid.* does not sufficiently affect the conditions of employment to implicate Title VII.”

assignment. In general, the phrase means “any significant change in a person’s employment status”.

When a member of management is involved in the severe harassment but no tangible employment action is taken, it is possible for the organization to avoid liability where it can persuade the court that it has an effective anti-harassment policy and complaint procedure which the plaintiff nevertheless unreasonably failed to take advantage of before going to court.⁶

Of course, since you will be investigating a complaint, the affirmative defense will not apply to your investigation. However, in order to understand this aspect of the law, you will need to understand what an affirmative defense is and how it is established. First, an affirmative defense is one which must be introduced by the organization on its own initiative and proved by the organization or liability will attach. Second, there are two elements to the defense --- that the organization has an effective anti-harassment policy, well publicized to the relevant workforce, and that the complainant unreasonably failed to take advantage of this policy and its associated complaint procedure. The characteristics of an effective policy (and complaint procedure) probably include that it is in writing, that it is written using diction and in a language suitable for the workforce it applies to; that it provides multiple avenues of complaint (e.g., to the supervisor, other management, human resources staff); that it does not threaten complainers with punishment for an “unfounded” complaint (as opposed to a complaint intended to harm the target of the complaint in a malicious manner) and that it clearly opposes retaliation against a complainer. In the Supreme Court case where this defense was outlined, the City of Boca Raton had an anti-harassment policy but at the site of the alleged harassment (a beach removed several miles from the City) the policy was not well publicized and, therefore, not as effective.

To determine whether the complainant’s refusal to utilize the internal complaint procedure before litigation was unreasonable, the plaintiff offers a full explanation of his or her reasons and the evidence with respect to each of those reasons. For example, some policies require an employee to come forward within 30 or so days of being harassed. The complainant might have experienced harassment over a six-month period and, while there were incidents in the allowed 30 day period, other incidents were beyond the 30 day limit. The complainant might reasonably have believed the policy was no longer available to her for this reason. Similarly, complainant might be aware of or have reasonably believed that others who utilized the policy’s complaint procedure were retaliated against and, thus, she argues she was intimidated into avoiding an internal complaint. A common instance of this arises when someone else filed a complaint and was transferred (allegedly for her own good but, in fact, to a location where she had to learn a new job, journey farther to work or experienced some other negative difference in status) in order to separate her from the alleged harasser. If, in the judgment of the organization, either party to a harassment complaint should be temporarily transferred to a different work assignment, it would be well-served strongly to consider transferring the alleged harasser, not the complainant. Employees can be quick to read something negative into the transfer. So, the

⁶ Where the harasser is so highly placed in an organization that he is the organization’s “alter ego,” then liability will attach whether a tangible employment action has been taken or not. Examples would be the president of a company, commanding officer, CEO, COO, or CFO.

transfer of the complainant can quickly be seen as an attempt to retaliate against him or her for complaining.⁷

As noted above, where non-management is doing the severe harassment for the illegal reason, liability attaches only where management gains knowledge of what is happening and fails to take prompt and effective remedial action.

As to the meaning of the key terms above, note that “manager” means a person with, at a minimum, the authority to direct another person’s daily work activities (whether or not the person’s title seems to be a management title); “tangible employment action” means an action (generally memorialized by some official act) which significantly alters a person’s employment situation; “severe” means severe as perceived by a reasonable person of the same sex, race or other EEO characteristic as the recipient of the harassment in the facts of the situation; “prompt” means as quickly as the circumstances of the case permit and “effective” means reasonably likely to deter actions of a similar sort.

The Scenarios

With this brief overview in mind, we turn to the harassment scenarios.

#1 Was the Alleged Behavior Unwelcome? Some apparently compromising behavior by the complainant

You will commonly find the defense that the alleged behavior must have been welcome to the complainant based on certain behavior she has engaged in with one or two trusted coworkers (e.g., telling bawdy jokes privately with these friends) or certain behavior after hours (e.g., nightclubbing in a sexy outfit) outside the workplace while still complaining about broadly similar behavior in his or her working environment. Neither behavior will necessarily be relevant to the merits of the complaint. Relevance has to be established. For example, sexual conversations with one or two trusted coworkers normally tell us little about whether a pervasive pattern of bawdy jokes and gestures was welcome behavior to a complainant but a second job as an exotic dancer at a local gentlemen’s club might.

#2 Evaluating The Effect of Harassment on The Complainant’s Performance

One of the complexities of a harassment investigation can be the proper weight to be given to the complainant’s performance during a period of time when harassment was allegedly taking place. Suppose you receive a harassment complaint for investigation where the allegation is that the

⁷ That still leaves the problem of dealing with the way your management team views the transfer of their fellow manager. Managers have a right to fair treatment just as well as other employees. Care should be taken by an organization to tell its managers how fairness will be maintained in harassment investigations but that, when temporary transfer is appropriate, the first option will be to transfer the manager even though this is generally more burdensome for the organization. Explain the importance to your legal interests of avoiding even the appearance of retaliation.

complainant was fired because she refused her supervisor's sexual advances. The alleged harasser did, in fact, fire the complainant but asserts that his decision was justified by the complainant's unacceptable performance. Your investigation will not only gather evidence to compare her performance to others under the scope of authority of the alleged harasser (in order to determine whether a decision to terminate seems inconsistent with the alleged harasser's other decisions when addressing performance issues) but you will gather evidence to determine what portion (if any) of the complainant's performance deficits can be attributed to distress caused by the harassment. For example, complainant may allege that the harassing behavior caused her to be reluctant to report to work and to experience various medical symptoms. Documenting that the harassment occurred as well as documenting the presence of medical problems possibly attributable to stress will help the organization come to a true assessment of the complainant's performance during the period she was apparently being harassed.

#3 Part of Harassing Conduct Occurs After Hours, Off Premises

In a way peculiar to harassment issues, behavior by the harasser after hours (and off the premises) can be relevant to an assessment of the complaint. Suppose the allegations in the complaint include an assertion that the recipient received numerous late-night telephone calls of a sexual nature from the harasser and, in addition, the alleged harasser allegedly parked his automobile outside the recipient's house for hours. All this happened off your premises and after hours. Still, it is relevant to your assessment of whether harassment occurred as long as there is a sufficient connection to the employment situation of the complainant. For example, where the complainant will physically have to meet or work with the alleged harasser during business hours with some significant frequency or in a way significant to her employment opportunities, the conduct off the premises and after hours is relevant to the investigation.

#4 Agreeing to Work in a Sexually Charged Environment v. The 'Blue Collar' Environment Defense

Earlier, I mentioned a complainant who worked in a so-called gentlemen's club. Note that it is possible for a person to apply at a place of business like such a club and agree to take a job which requires her to wear a revealing costume and regularly subjects her to behavior that would normally be considered offensive. By accepting such a job willingly, she may well be limiting her ability to claim that various incidents at work are actionable harassment. Clearly, there are limits to this notion. Physical assault by her supervisor is not transformed into an acceptable act by her acceptance of the job but petting and suggestive comments from customers might be considered part of the expected environment where selling sexual excitement is the essence of the business.

The argument has been made, however, in other contexts that a person, by agreeing to work in the environment of a particular employer, gives up her right to complain about that environment.

It is true that the Supreme Court famously referred to the difference between a football coach patting a player on the buttocks and an office manager doing the same and it did state that the severity of any alleged harassment must be judged in light of the social mores of American

workers and workplace culture. (*Oncale v. Sundowner Offshore Services, Inc.* (523 U.S. 75)(1998) But nothing in *Oncale* even hints at the idea that prevailing mores in a given workplace can excuse discriminatory behavior. “There is no assumption-of-risk defense to charges of workplace discrimination.” (*Smith v. Sheahan*)(Seventh Circuit 1999)(189 F3d. 529, 535)(female guard at county jail physically assaulted by male co-worker who repeatedly assailed his female co-workers with verbal abuse and threats of physical harm) “There is no merit to the City’s argument that it was entitled to a jury instruction that the firefighters’ conduct should be evaluated in the context of a blue-collar environment.... ‘where crude language is commonly used.’” (*O’Rourke v. City of Providence, Rhode Island*)(First Circuit 2001)(235 F3d. 713, 735)(“We do not believe that a woman who chooses to work in the male-dominated trades relinquishes her right to be free from sexual harassment....”)

#5 The Equal Opportunity Harasser

The argument has also been made that a supervisor does no illegal thing where he sexually harasses persons of both sexes. (the ‘equal opportunity harasser’ defense) If the evidence shows that the supervisor was truly an **indiscriminately** vulgar and offensive supervisor, there is unlikely to be any legal liability for your organization. (*Lack v. Wal-Mart Stores, Inc.*)(Fourth Circuit 2001)(240 F.3d 255). But, as the Ninth Circuit observed in *EEOC v. National Education Association, Alaska* (2005)(422 F.3d 840, 844-45) “The main factual question is whether [the supervisor’s] treatment of women differed sufficiently in quality and quantity from his treatment of men to support a claim of sex-based discrimination.... Indeed, this case illustrates an alternative motivational theory [not lust or a desire to drive out female employees] in which an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men.”

Another facet of the proper evaluation of this defense occurred in *Petrosino v. Bell Atlantic* (Second Circuit 2004)(385 F.3d 210). In that case, there was evidence of the pervasive presence of comments and sexual visuals that ridiculed both men and women but not alike. The court concluded that the insults directed at men were confined to certain men while those directed at women were more global in purpose and had the effect of making women appear to be suitable objects for sexual exploitation.

The *Petrosino* court’s assessment is savvy because it goes to differences in perception and, by extension, effect. Research has shown that females tend to perceive the sexualization of their workplace as more threatening to their status as an employee than do males. Thus, even where sexual jokes are cracked frequently and males as well as females are the butt of such jokes, the impact of such a sexualization of the work environment may well be different on females. To see this more clearly, it might help to imagine a work environment where racist jokes are frequent and there are jokes about white men’s ability to jump or dance and so forth as well as jokes about African Americans. Such jokes might well be perceived as more threatening by blacks and as more likely to trivialize their contribution to the company’s productivity and harm their promotional opportunities while having little or no effect on how whites are evaluated in the company.

Harassment is a difficult issue for some to investigate because they have experienced harassment during their careers which they dealt with forcefully and effectively. Having done so, they find it hard to avoid judging a complainant who was less able to react forcefully to the behavior she was allegedly exposed to. Judging the complainant to be weak-willed, indecisive and so forth, such investigators are likely to proceed in a manner that will undermine a full investigation of the complaint. As an investigator from a different culture, you might be put off by how the recipient responded to the alleged behavior. Recipients from foreign cultures are prone to handle sexual harassment in a way that conforms to the norms of their culture, which may seem strange to you. A well prepared investigator will be sensitive to these issues.⁸

#6 Harassment Based on Religion as a Special Case

There are two basic kinds of complaints of religious harassment. The traditional complaint is brought by someone who alleges that (s)he was subjected to an actionable course of conduct motivated by animus toward him/her because of religion. The investigation and analysis is traditional. The only twist one sees is the amount of latitude a given court might be willing to give an employer who has strong religious beliefs. For example, in *Chemers v. Minar Ford, Inc.* (D.Minn. 2001)(2001 WL 951366), “Christian beliefs permeated the atmosphere at the car dealership.... Minar is a devout Christian who held optional daily prayer sessions for employees.... At the start of management meetings, Minar conducted a Christian prayer.... Minar encouraged his employees to attend the daily prayer sessions and convert to Christianity....”⁹ Chemers (Jewish) was fired within a week of the owner saying, “I want everyone in this organization to be a Christian.” Nevertheless, the court was not satisfied any of the above was a motivating factor in Minar’s decision to fire Chemers. The court observed: “Neither Title VII nor the MHRA require Minar, as owner of the business, to abandon his religious beliefs.... The Constitution prohibits Title VII, and other anti-discrimination laws, from restricting an individual’s proselytizing, witnessing or counseling, whether in the workplace or elsewhere.... Minar’s prayer sessions [are] not an illegal practice.”

In this court’s language we see the elements of the second type of religious harassment complaint --- one based upon attempts to proselytize in the workplace. [This will be discussed again below in connection with the undue hardship defense to a request for religious accommodation.]

Governmental organizations have special concerns when receiving a complaint of religious harassment based upon proselytizing behavior. These spring from the First Amendment’s reference to the free exercise of religion and its requirement that government refrain from

⁸ Lilia Cortina has published a series of research studies on this point. See, e.g., Cortina, L.M. & Wasti, S.A. (2005) “Profiles in Coping: Responses to Sexual Harassment Across Persons, Organizations and Cultures” 90 *Journal of Applied Psychology* 182-192; Wasti, S.A & Cortina, L.M. (2002) “Coping in Context: Sociocultural Determinants of Responses to Sexual Harassment,” 83 *Journal of Personality and Social Psychology* 394-405 and Cortina, L.M. (2004) “Hispanic Perspectives on Sexual Harassment and Social Support,” 30 *Personality and Social Psychology Bulletin* 570-584.

⁹ Please note the prayer sessions were **optional**. [The court found them to be optional in fact as well as appearance.] The plaintiff must show that the optional nature of the sessions is a sham. De facto or openly requiring attendance with punishment for non-attendance would violate Title VII.

establishing or sponsoring any particular religion (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”) and the “free speech” portion of the amendment. In general, it is not wise for government to base any criticism of an employee’s speech on the religious content of the speech. However, government can focus on the consequences of the proselytizing behavior on others. In other words, the employees or members of the public who are made to undergo whatever behavior the religiously motivated employee engages in have a competing right to be free from unwelcome behavior that a reasonable person of the same religious persuasion would find actionable. So, the free exercise and anti-establishment duties create a tension for the governmental employer which, on the one hand, must try to permit personal religious expression to the greatest extent possible, consistent with the requirements of law, and, on the other, avoid doing something that would create the appearance that it is favoring any particular religion.¹⁰ For practical purposes, this means the agency must avoid a zero tolerance policy where religious harassment based upon proselytization is concerned and, instead, balance its competing duties to decide whether it needs to limit the one employee’s speech in order to effectively address the interference with the ability of the target of the proselytization to work in an environment free from illegal harassment or to have equal access to the public service the agency provides.

#7 Is It Retaliation or More Harassment?

Retaliation is a basis that applies to harassment in a way that requires judgment by the organization. Consider a situation where the complainant is trying to establish actionable severity by describing the events that led up to her complaint about the behavior she was allegedly subjected to and by asserting a series of events that occurred after her complaint became known to the alleged harasser or her coworkers. Are these two separate series of events (one relating to harassment and the other to retaliation) which should be analyzed separately and judged separately for severity or should they be considered together as a continuing course of hostile conduct with dual motives that are interrelated? Clearly both series of events are alleged to be unwelcome and harmful. To me, it seems inappropriate to separate them out merely because two different (but jointly illegal) motives were the cause of each series of events.

Retaliation can also arise in a way that many employers are not on the lookout for. Most employers are aware that an alleged harasser might be so upset by a complaint against him or her that he or she engages in retaliatory behavior. However, it is also true that many an alleged harasser is popular or is friendly with various other employees in the organization. These persons can be upset on behalf of the alleged harasser and take action against the one who filed the complaint. It is possible for the organization to fail to react appropriately to allegations of retaliation where the behavior is carried out by persons other than the target of the original complaint.

¹⁰ See the 8/14/1997 Guidelines on Religious Exercise and Religious Expression in the Federal Workplace which expresses the Federal government’s approach to these issues.

REASONABLE ACCOMMODATION: Religion-Based

Failure to Accommodate for Religious Reasons: Scope and Limitation

Next we consider a complaint where the allegation is a failure to accommodate an applicant or employee's religious practices. This is an allegation of intentional discrimination and a claim for damages is available. Proof of motive is irrelevant.

Title VII of the 1964 Civil Rights Act places a burden on an employer to accommodate the religious practices of an applicant or employee in so far as they are in conflict with some employer job requirement and up to the point where the process of accommodation creates an undue hardship for the employer. [In practice, labor organizations are considered to have the same obligation to accommodate.] I start again with some definitions.

Title VII at section 701(j) states that the term "religion" includes all aspects of religious observance and practice. It is the religious **practice** that concerns the employer, not the religious **belief**. Absent a request for help (that is, accommodation), the employer has no business scrutinizing a person's religious beliefs unless the employer is a religious organization with a policy of hiring only persons of a certain faith. On the other hand, "all" aspects of a belief that lead to some practice are covered by 701(j).

The term "religion" is expansive also in the sense that persons with no adherence to a formal religion or no belief in a Supreme Being may still invoke the protections of Title VII if a conflict arises between a belief they hold with the **force and sincerity** of a religious belief and a job requirement. In this way, for example, an atheist who was required to attend a daily Christian prayer service at work may object to the requirement and have standing to request an accommodation.

The sincerity of a person's allegedly religious belief can become an issue but it is usually a difficult issue to investigate. First of all, the Supreme Court has drawn some fine lines around religious issues. In 1953, the Court held: "It is no business of courts to say..., what is a religious practice or activity." (*Fowler v. Rhode Island*)(345 U.S. 67, 70) Yet, in 1965, it observed: "The threshold question of sincerity... must be resolved in every case." (*United States v. Seeger*)(380 U.S. 163, 185) So, it is technically possible to investigate the question of whether (for example) a person is sincere when he says he wishes to avoid joining a union for a religious reason or whether it is more likely he objects based on a philosophical commitment to a belief in a person's "right to work" in a non-union shop.

One factor complicating the sincerity question is the idea that people might engage in behavior that is inconsistent (e.g., they work on their Sabbath from time-to-time) but defensible. In this kind of case, the complainant, when faced with behavior that conflicts with his stated practice concedes that he is weak and has sinned from time-to-time or is an occasional backslider. Still, your task may include gathering evidence to assess the issue if it is raised as a defense by the

person who made the decision to deny the request for accommodation. In general, you can anticipate that courts will look for evidence of insincerity that is as clear as it can be. Evidence of specific intent to use 701(j) as a subterfuge to gain accommodation would be ideal.

The Investigative Process

Religious practices come in wide variety. One person's life-anchoring belief is another's laughable delusion. So, the first important source of poor investigations arises from the investigator's willingness to judge the content (as opposed to the sincerity) of the complainant's religious practices. "You mean to say you actually put your arm in a bucket of live rattlesnakes?" Don't go there. It will harm the accuracy of your investigation.

Since normally only the complainant will know that there is a conflict between his religious practices and some requirement of the job, the duty to attempt to accommodate kicks in only when the employer is made aware of the conflict by the complainant. However, once aware, the employer must *attempt* to accommodate. If you find that the employer had sufficient notice of a religion-based conflict and made no attempt to accommodate (even if it later turns out that every effective accommodation would impose an undue hardship), you have found a violation.

Assuming an attempt to accommodate has been made what facts establish undue hardship? The Supreme Court in *TWA v. Hardison* (432 U.S. 63) (1977) considered this question. Hardison was a Sabbatarian airplane mechanic who was assigned to a job where, because of rotating shifts, he was required to work about nine times a year on his Sabbath. It was suggested that his supervisor could cover the few shifts he would have to miss for religious reasons. Alternatively, two mechanics could be assigned four hours of overtime each to cover the full shift. If that was deemed inappropriate, Hardison might be transferred to a tool crib attendant job where he would not have to work on his Sabbath (though he lacked the competitive seniority to be transferred without violating the collective bargaining agreement).

The Court held: "[W]e will not construe the statute to require an employer to discriminate against some employees to enable others to observe their Sabbath." (85) In the facts of the case, the Court held that it was an undue hardship to require TWA to deny the shift and job preference or the contractual rights of any employees in order to prefer the religious needs of others. (81) So, in a conflict between the requirements of 701(j) and those of the collective bargaining agreement (CBA), the CBA will prevail. Moreover, paying premium pay (estimated to amount to \$150 a year in 1977 wages) would create a cost for TWA that was more than minimal and assigning employees to cover his shift raised concerns about the loss of the supervisor's ability to do his regular job or the possible effect on safety of having mechanics work on airplane motors for 12 hours. "To require TWA to bear more than a *de minimis* cost... is an undue hardship.... [T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off they want would involve unequal treatment of employees on the basis of religion." (84) [Note: The concept of "cost" here includes more than economic cost but extends to loss of safety or efficiency and the like.]

The practical effect of *Hardison* and related cases was to expand the definition of undue hardship such that the duty to accommodate was limited to instances where there is no economic cost that is more than minimal, no violation of the seniority provisions of a CBA (or any seniority plan whether initiated by an employer or negotiated), no loss of efficiency that is more than minimal and no unequal treatment of other employees because of religion. Of course, with respect to the facts of the individual case you are investigating, the decision maker who denied the complainant an accommodation is free to assert additional factors which are claimed to be an undue hardship. These can be as varied as the facts of the case. Your task is to elicit each and every reason for denying the requested accommodation and all evidence that would corroborate the hardship the employer would experience if the requested accommodations were put in place.

You should be aware that the Equal Employment Opportunity Commission has consistently held the position that cost to the employer should be measured in terms of the resources of the employer. Thus, for EEOC, the concept of minimal cost would expand with the resources of the employer and fewer accommodations would be considered too costly. Given the fact that the cost to TWA (a billion dollar airline even in 1977) was approximately \$150 when the *Hardison* opinion was decided and that such a cost was considered by the Court to be more than minimal, the EEOC's position has little acceptance in the courts.

In general, you should always attempt to determine the actual (not the speculative) effects of a particular accommodation. Not every effect has to be actually experienced to be given weight but it should at least be shown to be a probable if not an actual effect. So, for example, some decision makers will speculate that, were the organization to grant the complainant's request, many similar requests will be made which would be an undue hardship. Clearly, this is merely speculative unless and until additional requests are/have been received. Even then, undue hardship exists only when the burden of providing a particular accommodation for a particular person is an undue one.

Bear in mind that courts will give careful consideration to any defense which asserts a hardship related to compromising an employer's business needs, corporate image or legitimate corporate objectives. In *Cloutier v. Costco Wholesale Corporation* (First Circuit 2004)(390 F.3d 126), for example, Costco imposed a new dress and appearance policy on certain types of employees. The First Circuit found the policy was intended to cultivate a "neat, clean and professional image," and concluded it was an undue hardship to require Costco to modify this policy in order to accommodate Ms. Cloutier. In a similar vein, in *Peterson v. Hewlett-Packard Co.* (Ninth Circuit 2004) (358 F.3d 599), Peterson, a self-described fundamentalist Christian, objected to a poster the company displayed as part of its diversity program because it featured a gay employee (a person in Peterson's reckoning who engages in sinful behavior). He prominently displayed several biblical scriptures condemning homosexuality in opposition to the poster that offended him. When he refused to take the display down, he was fired. Among other findings, the court held that removing the poster would place an undue hardship on Hewlett-Packard "because it would have infringed upon the company's right to promote diversity and encourage tolerance and goodwill among its workforce." (608) Of course, the government does not have a corporate image but it does have an obligation to provide its services without regard to race, sex, and other prohibited characteristics. So, where there is a conflict between an agency policy and an

individual employee's religious practices, be careful to examine the purpose(s) for the policy, how effectively the policy links up with or serves its purposes (as actually administered) and the impact of accommodation on the accomplishment of the purpose(s).

When investigating a religious accommodation complaint, be sure to consider the actual hardship experienced by the organization when the complainant failed to meet a job requirement *prior to the decision to deny the requested accommodation*. Some employers take months to decide what to do about a given request for accommodation. While the organization deliberates, it experiences most aspects of the hardship it would face were the request to be approved. Similarly, a given supervisor will sometimes undo an accommodation formally or informally provided for some time by another supervisor. (usually his or her predecessor) Take a look at the actual hardship experienced by the organization when the accommodation was in place. A third opportunity to measure actual hardship occurred in *Vetter v. Farmland Industries* (N.D. Iowa 1995) (884 F.Supp. 1287). Vetter was denied a request that he be allowed to live outside his sales territory in order to live in a city with a Jewish synagogue. The company had a policy of requiring its salespersons to live in the territory where they worked in order to promote the frequency of social interactions between the salesperson and the farmers who were his potential customers. It speculated that permitting Vetter to live in a town outside his territory would compromise sales. However, Vetter was a convert who had established a performance benchmark prior to conversion. So it was clear what he was accomplishing while living in his territory. He had already moved to the city he sought permission to live in and it was only after living in that city for some time that he revealed to the company he was not living in his territory. In this setting, he could demonstrate that there had been no drop off in sales after he moved outside his territory. Thus, no hardship was evident by granting him an exception to the policy.¹¹

The Scenarios

With this background in mind, we turn to the religious accommodation scenarios.

#1 How Unusual Can a Practice Be and Still Covered?

Is every practice asserted to be a religious practice automatically covered? There are limitations on how personal a practice might be but note that, whatever a person's formal religious affiliation, he or she may have adopted a practice that many others of the same formal religion have not adopted. Nevertheless, this individual interpretation of some tenet of the religion (and the practice associated with it) is still protected. As to limitations on what is covered, you might adopt as a mental rule of thumb the idea that, for a practice to be religious, it normally involves a belief about the ethical or moral dimensions of being a human being. Consequently, an employee who cites to his membership in the Klan (without more, this is normally considered a political affiliation not a religion) or to a religious devotion involving worship of the playmate of the month (whose picture is placed on the wall of the work area) is not likely to be engaging in protected activity if he were to request an accommodation. On the other hand, an example of the

¹¹ In addition, two other salespersons had been granted exceptions for nonreligious reasons, thus calling into question whether the decision in response to Vetter's request was based on his particular religion. **Always be alert to the fact that a company policy and an individual manager's practice are two different things.**

wide scope of the term “religion” is found in *Storey v. Burns International Security Services* (Third Circuit 2004)(390 F.3d 760, 763) where Storey claimed that he had a right to display the Confederate battle flag in his work area (on his lunch box and via two bumper stickers on his truck) because the flag contained the cross of Saint Andrew (a symbol he venerated as a Christian) and because the flag contains a cross which could be interpreted as the Greek letter “chi,” an ancient symbol for Christ.¹²

#2 Personal Preference v. Religion-Based Need

Personal preference can create conflict with the employer’s job requirements which can be distinguished from religion-based conflict. Suppose complainant desires to hold a particular position in a religious organization. Being Director or other officer of a choir might be time-consuming and create conflicts with job requirements. The complainant would have to link his or her office within the organization to his or her religious beliefs. (i.e., explain how a religious belief requires the complainant to hold the position) Otherwise, the conflict would arise from the personal desire to be more than ordinarily active in a church organization and may well not be protected.

#3 Ya Shoulda Told Me Before Ya Showed Up For Work

Ben Dare applies for a job for which he seems well qualified. He is offered the position and told to report for work the following Monday. During his first week of employment, he tells his supervisor, Don Zat, he is unable to work the evening shift this Friday as he observes a religious Sabbath which begins at sundown on Friday. Zat is upset because he believes Dare had an obligation to inform him of the situation when he was interviewed before hire. The whole thing would be a scheduling nightmare and so Zat fires Dare who complains. **Does an applicant have an obligation to explain any reasonably foreseen need for accommodation before hire? What if Dare had been asked outright, “Are you able to meet the scheduling requirements (including rotating shift work) I have described?” He replied, “Yes” and then later asked for accommodation. Can he be fired for lying at the time of application? [When you answer, remember the possibility of disparate treatment.]**

#4 The Relevance of Employee Morale

In an accommodation investigation, the decision maker might cite to the effects of accommodation on the morale of coworkers. While, technically, employee morale is not supposed to weigh in the process, courts frequently refer to it and so it may become a factor in any assessment of hardship. This would clearly be true where the organization can show it would suffer resignations or other cost-related effects from a given accommodation. Still, it is

¹² Another example drawn from contemporary culture arose in the *Cloutier* case referenced above. Cloutier claimed to be a member of a religion (the Church of Body Modification) with no churches or ministers which was organized around internet communication and a religious belief in the value of wearing exposed adornments attached to the body via piercings of various kinds. See also *Peterson v. Wilbur Communications, Inc.* (205 F.Supp.2d 1014) (E.D. Wis. 2002) where Peterson was an adherent of the World Church of the Creator, a religion “established for the Survival, Expansion and Advancement of [the] White Race exclusively.” (1015)

not established by mere speculation. Your task would be to ascertain what the likely effects of the requested accommodation would be on the actions of coworkers and determine whether there is a cost link. Of course, resignations or turnover can affect the provision of service to the public as well so be sure to cover with the decision maker all the hardship aspects related to morale that played a role in the decision to deny the reasonable accommodation request.

#5 Interaction of Free-Exercise and Establishment Clauses

Governmental organizations have special concerns (in assessing what would constitute an undue hardship). These spring from the First Amendment's reference to the free exercise of religion and its requirement that government refrain from establishing or sponsoring any particular religion ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...") and the "free speech" portion of the amendment. It is not possible in this advice to explore the many issues that are connected with these three concepts. However, it is necessary to note that they create a tension for the governmental employer which, on the one hand, must try to permit personal religious expression to the greatest extent possible, consistent with the requirements of law, and, on the other, avoid doing something that would create the appearance that it is favoring any particular religion.¹³ For practical purposes, this means you should be alert to the effect(s) on the public which accommodation of a particular religious belief might create.¹⁴ Religious expression that either does not have or only remotely has a public dimension will normally be permitted and/or accommodated.

#6 Objections to Job-Related Assignments

Ima Wright is a counselor at a medical center. She is unwilling to provide counseling on any subject that is in conflict with her religious beliefs. (For example, clients with problems who happen to be in gay or engaging in extra-marital relationships) She requests to be excused from any such counseling assignments. **Put your imagination to work and suggest factors that might weigh in the calculation of hardship in this scenario.**

#7 "Have a Blessed Day"

Situations Where Some Type of Accommodation Has Been Offered

In many situations, your organization's representative will have offered some form of accommodation but not the precise accommodation requested by the complainant. Your task is to document what *was* offered and what was not (and why) inasmuch as what *was* offered might be all that is necessary to meet the duty to accommodate.

In *Anderson v. U.S.F. Logistics(IMC), Inc.* (Seventh Circuit 2001)(274 F.3d 470), Anderson was a follower of the Christian Methodist Episcopal faith who believed that, when signing off on

¹³ See the 8/14/1997 Guidelines on Religious Exercise and Religious Expression in the Federal Workplace which expresses the Federal government's approach to these issues.

¹⁴ A good case to read in order to get your bearings is *Knight v. State of Connecticut Department of Public Health* and *Quental v. State of Connecticut Commission on the Deaf and Hearing Impaired* published together at 275 F.3d 156 (Second Circuit 2001).

written correspondence or greeting employees, it was appropriate to say “Have a Blessed Day.” She did not do so in every instance but did so normally. Two representatives of a key customer of the company complained about her use of the phrase in correspondence to the customer. In response, the company forbade Anderson from using the phrase in written communication with customers and in her voicemail but permitted her to use the phrase with coworkers. It issued a company policy telling employees they should refrain from the use of “additional religious, personal or political statements” in their closing remarks in verbal or written communications with customers or coworkers but permitted Anderson a partial exception to the policy with nonobjecting coworkers. The court held that the company had reasonably accommodated her by offering a limited exception to the new policy. It held further: “A religious practice that does not actually impose religious beliefs upon others can still be restricted if it impairs an employer’s legitimate interests, as long as it is reasonably accommodated.” (477)

In *Wilson v. U.S. West Communications* (Eighth Circuit 1995)(58 F.3d 1337), a Roman Catholic employee insisted upon wearing an anti-abortion button with a graphic photograph of an aborted fetus and an anti-abortion message which offended many coworkers. The company offered three accommodations: (1) she could wear the button only when seated at her cubicle, (2) she could wear the button everywhere at work but after covering it with a cloth or (3) wear the same button but without the graphic picture. She refused and sued. Option (2) was cited by the court as a sufficient accommodation while wearing the button uncovered was viewed as giving Wilson the right to impose her views on her coworkers which the court would not support.

REASONABLE ACCOMMODATION: Disability-Based

Disability-Based Failure to Accommodate: Scope and Limitation

A qualified individual with a disability (applicant or employee) (QID) has a right to receive an accommodation where the limitations that extend from his or her disability are in conflict with one or more job requirements unless certain defenses apply. Damages are in the picture (unless a good faith attempt to accommodate can be demonstrated) and proof of motive is irrelevant.¹⁵

Every successful investigator starts by recognizing the fundamental ambiguity of every key term of Title I of the Americans With Disabilities Act of 1990 (the ADA) and, by inference, the employment provisions of The Rehabilitation Act of 1973. [§501(g)] As a consequence, there has been a mountain of litigation revolving around technical issues the most important of which is the question of whether the plaintiff is truly a QID. In order to investigate disability-based complaints, you must understand the terms related to the concept of a QID as well as the very different (more extensive) scope of the duty to accommodate under the ADA and Rehab Act.

Having said this, I emphasize that there is a world of difference between a legalistic approach to the ADA and a human resource management approach to addressing the needs of employees with physical or mental deficits that are in conflict with the way their job is normally done at a given facility. By this I mean many employers recognize the inherent perils of trying to offer effective “legal” education to various staff who might become involved in responding to a request for help from an employee with some kind of limitation. First, the sheer number of such persons --- from the company physicians to individuals who supervise the complainant --- makes the task daunting. Second, as you will see from the text below, effective education requires close knowledge and savvy judgment about matters that courts continue to struggle with. As a consequence, many organizations have adopted a rather inclusive approach to accommodation and have decided to consider requests for accommodation from persons with an ambiguous level of limitation without worrying initially about whether they have a legal duty or simply a management commitment to accommodate that person. So, if you are investigating a complaint that accommodation was denied, you will need to know how rigorously the organization wants you to investigate whether the ADA applies to the complaint or not. Rigorous investigation into whether someone is likely a QID can be resource intensive.

Moreover, the Federal Government, in accord with the affirmative action provisions in the Rehab Act, has identified itself as a model employer with respect to the purposes of the act. In other words, each agency may well have a different approach to the rigor with which it will want you to establish whether the complainant is a QID.

¹⁵ While I consistently refer to the employer’s obligations under the ADA and Rehab Act, note that labor organizations are covered under the ADA. This can be important when trying to put together an effective accommodation as labor organizations may have rights in the situation but also have an obligation to assist the accommodation process.

Let's first get a look at where the key sources of ambiguity arise and then we will turn to how we investigate to make judgments about these key terms.

To be "qualified", a person must possess whatever the formal qualifications for a job are (specific education, experience, proven ability of some sort) and be able to perform all the essential functions of the position he/she has or seeks. To be an "individual with a disability", a person must presently have a substantial impairment to one or more major life activities, a history of same or be regarded as having same.¹⁶ The terms "essential function," "substantial" and "major" are not defined by the ADA or the Rehab Act and are the key sources of difficulty.

First, it is not the name of the applicant's or employee's medical impairment that brings them into the coverage of the act. In order to determine whether a person presently has a substantial impairment, we look to the limitations extending from the condition a person has rather than the condition itself. For example, in a group of ten persons with Parkinsonism, only those whose limitations are substantial are disabled under the act. Second, it is now clear that, for the degree of limitation to be substantial, the medical condition must be either permanent or indefinite in duration. ("indefinite" = "more than six months in expected or actual duration") Thus, disabling conditions that are clearly defined and temporary in nature are not considered substantially limiting impairments though they may be substantially limiting while present. [Think of a person who breaks his or her leg skiing. Unless complications intervene to drag out the period of impairment, the period of "disability" caused by the broken leg is not covered by the act.]¹⁷

The ADA Amendments Act of 2008 (effective 1/1/2009)

Key Changes to the ADA

- (1) The definition of a disability should be construed in favor of broad coverage;
- (2) The term "substantially limits" should be interpreted consistently with the findings and purposes of the 2008 act --- "[I]t is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an

¹⁶ Situations where the complainant claims a history of having had an earlier substantially limiting medical condition pose two kinds of problem. First, it can be difficult to document a diagnosis that occurred many years ago or to document the severity of the condition using old medical records. Second, there is an unavoidable lapse of logic here. For the earlier medical condition to be considered substantially limiting, it would have had to have been permanent or, at least, indefinite in duration. Yet, by definition, it is no longer presently substantially limiting. So, it was definite in duration (i.e., had a beginning and an end). Presumably, since the consequences of the earlier disability still affect the individual in the present, the prior condition is, in that sense, still legitimately categorized as "indefinite" in duration.

¹⁷ Normally, a person requests accommodation because of a present, substantially limiting impairment but the person alternatively may need help because of the consequences of an earlier, substantially limiting condition which does not now substantially limit him. (An example would be a person who earlier had leukemia which is in remission but who needs to avoid certain fumes lest they compromise his immune system.) Such a request is covered by the act.

individual's impairment is a disability under the ADA should not demand extensive analysis....”

- (3) “An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”
- (4) The effects of mitigating measures --- including medication, prosthetics and similar medical devices, assistive technology, auxiliary aids or services and learned behavioral or adaptive neurological modifications --- should not be part of an assessment of the degree of limitation (except with respect to ordinary eyeglasses or contact lenses).
- (5) A person can qualify for coverage (as a person regarded as having a disability) where the person alleges an employment opportunity was lost “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” (referred to as the “pure bias” scenario by some commentators)
- (6) A transitory impairment (defined as an impairment with an actual or expected duration of six months or less) is not a covered impairment.
- (7) Any visual acuity standard based on a person's “uncorrected vision” violates the ADA unless the standard is shown by the user to be “job-related for the position in question and consistent with business necessity.”
- (8) The ADA does not provide a cause of action for persons who do not have a disability and who wish to allege loss of an employment opportunity for that reason.
- (9) No covered entity need provide a reasonable accommodation to a person who is regarded as having a disability. Individuals who either have a substantially limiting impairment or a record of having had same are eligible for reasonable accommodation.
- (10) EEOC will update its ADA regulations to incorporate these changes.

At first glance, these amendments might seem to have made the word “substantial” easier to apply to the facts of the situation. Broad coverage is the goal of the Act and extensive analysis of whether a limitation is substantial is frowned upon. Nevertheless, for those employers who approach human resource development from the perspective of hewing to the legal requirements of the law and no more, the practical effect of the amendments might be that they make even more extensive attempts to determine the degree of limitation so as to create a firm defense where access to accommodation is denied. In sum, you will still need to determine from the organization how extensively it wants to gather information about the complainant's degree of limitation.

Remember as well that an employer can end up doing two separate analyses of the limitations that extend from the complainant's medical condition(s) --- one for the purpose of determining jurisdiction (where extensive analysis is now frowned upon) and the other for the purpose of individualizing the accommodation process in the name of making it more effective (where detailed and extensive analysis would be routine).

Supposing we have a QID, the next step calls for the QID to put his or her employer on notice that there is a need for an accommodation.¹⁸ At this point, if the employer ignores or effectively

¹⁸ There are at least four scenarios where the employer must consider accommodation absent a request from the

ignores the request, it has violated the act. The employer has a responsibility to meet or communicate with the person and begin a dialogue designed to explore the possibility of an accommodation. On the other hand, the employer (as appropriate to the situation) has a right to gather reasonable information about the person making the request. Reasonable information is defined as job-related information needed to determine whether the person is an individual with a disability. Information is job-related if it goes to establishing whether the person has or had a disability and what limitations the person may experience as a consequence of the disability which may conflict with the requirements of the job as it is normally done. When seeking such information, the employer's representative(s) will normally speak with the person and may (where needed) lawfully require the person to be examined or lawfully require the person's caregiver to provide such information. (provided the examination or requested information is job-related) By this process, the decision maker may conclude that a person is not disabled (as that term is used in the act) and deny the request. As in all the scenarios I present here, the person may disagree with his/her employer's decision and contest the decision via a complaint.

Next, we note that, even where the requester is a QID, the request for accommodation may not in fact be grounded in the person's disability and, if that is the case, not covered by the act. Therefore, the employer may examine the person's request and conclude that, while the person is a QID, the requested accommodation is a matter of personal preference rather than a need driven by the person's disability-based limitations. For example, a QID might request the creation of a "handicapped" parking space near the door of the building where he works or a reserved space for him near the door. If the QID is mobility-impaired the request is grounded in his disability-based limitations. If the QID merely seeks to park closer to the door for reasons that cannot be tied to his disability, his request amounts to a personal preference and can lawfully be denied.

After exploring the person's limitations and the behavioral demands of the job (i.e., the physical and emotional abilities required to carry out the essential functions of a job), the employer then is able to isolate the areas where there is friction between what the person can do and what the job demands. It may conclude that there are no areas of friction and, thus, that there is no need for an accommodation.

applicant or employee. First, where the employer's representative believes that placing or continuing the person in a particular job would create a **direct threat** to the person's safety and/or that of others, the employer must consider (without a request from the person) the extent to which the threat can be reduced to an acceptable level by reasonable accommodation as part of its threat assessment. Secondly, where any **qualification an employer uses to reject a person** for a particular job causes the person's rejection because of his/her known disability, then the employer must be able to show that the qualification is job related and consistent with business necessity and (again without a request from the person) must consider whether a reasonable accommodation exists which would enable the person to meet the qualification. (§103a of the ADA) Thirdly, **the request for accommodation can come from** a representative of the individual with a disability (such as a family member or health professional). Finally, **where the person's specific disability** (e.g., mild retardation) acts by its nature to prevent the person from being able to articulate his/her needs under the act, the employer is expected to explore reasonable accommodation (without a request) where its representative observes performance difficulties that might be linked to the person's disability. The employer should proceed cautiously in such an instance, however, in order to avoid the appearance of paternalism. That is, where it is reasonable to expect the person to be able to articulate his/her need for an accommodation, the employer should wait for a request rather than "pressure" the person to discuss an accommodation.

Assuming there are areas of friction, the employer's burden is to seek out information about assistive devices, workplace modifications, scheduling changes and the like in order to arrive at an accommodation. Generally, the employer is required to offer an accommodation that creates an equally effective opportunity for the person to attain or retain his/her particular job. For example, an accommodation that would not allow the person to meet the employer's quantitative or qualitative performance expectations is not an effective accommodation. The "higher" the employer's performance expectations the more carefully it must craft its accommodation in order to provide an effective accommodation. Just as in a religious accommodation setting, where there would exist two or more effective accommodations, the employer is free to offer the accommodation it prefers rather than agree to the person's preference (assuming there is any conflict in this respect).¹⁹

If, based upon the information it gathers as part of the accommodation process, the employer concludes that no effective accommodation is feasible, none need be offered. If it concludes that there are effective accommodations, it next calculates the cost and difficulty of these accommodations. Where the employer correctly concludes that it would be **significantly** expensive or **significantly** difficult to provide an effective accommodation (i.e., that every effective accommodation would impose an undue hardship on the organization), it is not required to provide any accommodation. If challenged, the employer must prove significant difficulty or expense to an agency like the EEOC or to a court. There are a number of factors entering into any "expense" defense. The overall economic resources of the employer will either raise or lower the significant cost threshold. There is no generally agreed upon method of measuring an employer's economic resources. As to governmental agencies, some courts have considered the size of the agency's budget. Secondly, the cost of an accommodation might be lowered by taking advantage of the Department of Defense CAP program. A given accommodation (such as strobing fire alarms) might benefit more than one employee (the EEOC will divide the cost by the expected number of beneficiaries over some reasonable time). And so on. In fact, it is lawful for the employer (assuming the cost of an accommodation has been accurately calculated and assuming the cost is "significant" in light of its economic resources), to approach the person and give him/her the opportunity to defray enough of the cost of accommodation to bring the cost down to a feasible level.

For these reasons, any defense based on cost will frequently be unsuccessful. That is, the resources of the employer matched against the costs of accommodation make the costs less than significant.

There is no statutory definition of significant difficulty but the law references the "nature" of the

¹⁹ The situation is somewhat different in an application setting. Where an applicant would need an accommodation to gain access to an employer's facility or to be interviewed or to take an employer's entrance examinations (including a physical agility test) or to demonstrate certain job-related abilities, the applicant is expected to give the potential employer notice of the need for accommodation. The employer is not expected to provide an immediate accommodation (unless this is feasible) but rather is given a reasonable amount of time to arrange for the accommodation.

accommodation, the number of persons employed at the facility where the accommodation is being considered, the impact of the accommodation on the operation of the facility, the potential for accommodation at other facilities of the employer, the composition, structure and functions of the workforce at the facility, and the geographic separateness of the facility. To build on this, consider that the employer does not have to alter its quantitative or qualitative performance standards in order to accommodate the person. Thus, it appears that an accommodation which would negatively impact upon the ability of one or more coworkers to accomplish the employer's performance standards might well constitute significant disruption to the employer's operation. Put differently, an employer might successfully argue that the only effective accommodation which would enable the person to hold the job would also diminish the ability of coworkers to perform their jobs at the expected level of performance. Other successful defenses might center around the fluid nature of the jobsite (e.g., a movie set or a construction site) or the effect of a given accommodation on the systems used by the employer to track production, distribute equipment or carry out its operations in the most efficient manner.

In other words, accommodations that demand wide scope or systemic alteration to an employer's way of doing business might be more successfully defended as too "difficult."

With respect to employees (and not applicants), there is an additional consideration. Even where the employer correctly concludes that (1) every effective accommodation would impose an undue hardship, *or* (2) there is no feasible, effective accommodation that would enable a QID who is already employed to retain his/her particular job, *or* (3) no accommodation will reduce the level of threat to an acceptable level *or* (4) that no accommodation will enable the employee to meet the job qualification used to reject the person's candidacy --- then, as a final step in the accommodation process, the employer must consider reassignment of the employee to a position that is vacant or about to become vacant, provided the QID is otherwise qualified to perform the essential functions of the vacant job(s) with or without a reasonable accommodation.²⁰ The EEOC believes the employer has the obligation to search its database to uncover such expected or actual vacancies and it is not appropriate to require the person to find a vacancy for him or herself. Finally, the EEOC believes the person should be placed into the vacancy without regard to other "rules" that may govern the filling of vacancies. That is, in its opinion the vacancy disappears as a "vacancy" once reassignment is in the picture. In other words, where a person might ordinarily apply for a vacancy or be ordinarily required to wait until an examination is

²⁰ The act distinguishes between functions of a job that are essential to the job and those that are marginal to the job. The same function can be marginal in one context and essential in another, depending on the availability of coworkers to take over the marginal function or the other resources of the facility doing the accommodating. If the areas of friction between what the job requires and what the person is able to do center on functions that are marginal to the job, reasonable accommodation might well include transfer of these marginal functions to other workers and the allocation of other functions to the person which the person is able to do. This is called job restructuring. Finally, even with regard to an essential function, the EEOC distinguishes between the object of the function and the manner and timing with which the object is attained. Frequently, the objective of the function is essential but the way the objective is accomplished can be accommodated. Reasonable accommodation never requires transfer of an essential function but it can involve alteration of the way the function is accomplished.

offered in order to be considered for a vacancy, in a reassignment setting the only obstacles to reassignment would be those needed to determine whether the person is otherwise qualified for a position (such as passing a test of some sort). It would be appropriate to give the required examination immediately.²¹

Reassignment may bring the employer into conflict with its collective bargaining agreement (CBA) because the person being reassigned does not have enough seniority to compete successfully for the position that is "vacant." In such a situation, the employer and union frequently work out an understanding that avoids a direct conflict and facilitates accommodation. If no joint understanding is agreed to (presumably because either party concludes accurately that every effective understanding would impose an undue hardship on it), a Federal court would probably have to decide in the particular case which rights were paramount, those created by the act or those created by the CBA. The Supreme Court has held that, in the normal run of cases (those cases where employees of a given company have a reasonable expectation that seniority will govern the allocation of certain job vacancies), the employer and/or labor organization are not required by the act to violate relevant seniority provisions in order to reassign an employee who needs reassignment because of disability.

There are many other aspects to the reasonable accommodation process that are too numerous to treat here.²²

A Note on the Direct Threat Defense

The person who decided not to accommodate the complainant might tell you during your investigation that keeping the complainant in the job (s)he occupied or putting him or her in the job (s)he sought would be dangerous. To evaluate this perception you need to understand a few things about the concept of direct threat. First, it is asserted as an affirmative defense which means the employer bears the burden of pleading and proving the defense. Second, it is defined in the ADA as "significant risk to the health or safety of others that cannot be eliminated by

²¹ There is a wealth of information about ADA/Rehab issues in the policy guidance issued by the EEOC. These can be found at www.eeoc.gov.

²² For example, the cost of accommodation cannot be gauged by reference to the wage or salary of the person being accommodated.

Secondly, while the process of attempting a reasonable accommodation is generally triggered by a request from the applicant or employee, "the employer must notify applicants and employees of its obligation under this legislation to make reasonable accommodations." (Report of the Committee on Education and Labor) Thus, failure to request a reasonable accommodation might not be material in a situation where such notice was not provided.

Another frequent problem can arise with respect to the interplay between "light duty" and accommodation. While both the person and the employer may agree to deal with the need for accommodation through a "light duty" assignment, technically a "light duty" assignment does not constitute an attempt to enable a person to attain or retain a particular job and thus is not an accommodation. It is a way of deferring the accommodation burden for a period of time in an attempt to eliminate the need for accommodation at a later date. Thus, the employer may put an employee in a light duty assignment while the employee engages in a program of therapy to regain the physical ability to return to the job without an accommodation. In such a situation, if the need for therapy would become indefinite in duration and the employer is unwilling to retain the person in a light duty assignment indefinitely, the next step would not properly be termination but a bona fide attempt to accommodate the person.

reasonable accommodation.” [§101(3)] However, you need to know that the U.S. Supreme Court has determined that the employer can consider the health and safety of the applicant/employee as well as “others”. (*Chevron U.S.A. Inc. v. Echazabal*)(536 US 73)(2002) Also, the word “eliminated” is not taken literally as there is often some element of risk in a given job and the point of the direct threat assessment is not to eliminate all risk but assess the additional risk posed by the complainant’s medical limitations. (“Because few, if any, activities in life are risk free, *Arline* and the ADA do not ask whether a risk exists but whether it is significant.” --- *Bragdon v. Abbott*, 524 US 624, 1998)

In *Arline v. School Board of Nassau County Florida* (480 US 273) (1987), the Supreme Court dealt with a teacher with active tuberculosis who was deemed a direct threat to her students by her employer. To assess whether Ms. Arline posed a “significant risk of communicating an infectious disease to others” (287, n16), the Court cited with approval a brief submitted by the American Medical Association. The brief asserted the analysis should be based upon four factors: The nature of the risk, the duration of the risk, the severity of the risk and the probabilities of the risk occurring. As a result of this approach to assessing threat and because the risk had to be significant, it was commonly believed (and EEOC determined) that the probability the risk would occur also had to be significant. Similarly, to deny someone employment, it was believed the harm itself had to be substantial. Again, the terms “significant” and “substantial” are ambiguous and require careful judgment.

However, some lower courts have taken a different approach. In a series of cases involving HIV+ health workers, courts have acknowledged that the risk of the worker transmitting the disease to the patient was quite small. Nevertheless, the harm was so substantial (possible death), the worker was held to be a direct threat. In other cases, the courts focus not on the probability of harm but on the idea that the occurrence of harm is uncertain. The very indefiniteness of when (if ever) harm might occur leads the court to find the threat to be a “significant risk.” These decisions have had the practical effect of turning the apparent *Arline* “significant probability” burden on its head.

In some tension with the relaxation of the standard of evidence needed to establish a direct threat, the Supreme Court considered the question of what kind of evidence should be used when weighing threat. In *Bragdon v. Abbott*, the Court dealt with a dentist who refused to offer treatment to an HIV+ patient in his office but offered to provide dental treatment in a hospital with the patient assuming the additional costs. The Court held the assessment of threat must be based upon medical or other objective evidence. (citing *Arline*) Even though the dentist was a professional, the Court would not defer to his opinion unless he could show it was based upon such evidence. Even the advice of the American Dental Association was not held to be definitive absent a showing that it was based upon objective medical evidence.

Thus, where the employer’s representative made an assessment of danger that was not grounded in objective medical evidence demonstrating the significant nature of the threat posed by the complainant, the employer may well be liable for disability discrimination.

A Note on Major Life Activities

In *Bragdon*, the ability to procreate was held to be a major life activity. (MLA) Plaintiffs have asserted that a number of activities should be considered major life activities. Very few have been denied by the courts and the amendments explicitly broaden the notion to include basic bodily functions. A few that have been accepted are: Caring for oneself, cleansing the blood through liver/kidney functions, breathing, seeing, swallowing, standing, lifting, walking, and performing manual tasks. Driving at night has consistently been held not to be a MLA. Some courts have had difficulty categorizing concentration (an activity often compromised by serious emotional illness) as a MLA. The Supreme Court has addressed the concept twice. In *Bragdon*, it stated that MLA's are not confined to activities "with a public, economic or daily aspect." However, in *Toyota Motor Manufacturing Inc. v. Williams* (534 US 184) (2002), the Court referred to MLA's as "activities that are of central importance to most people's daily lives."

Given the importance of the concept of a MLA to the notion of whether a person is a QID, you will need to ask the complainant which MLA is substantially limited. Different MLA's require different types of evidence to weigh them. Two more complex scenarios arise where the complainant cites to either the aggregate effects of several impairments that are individually not substantially limiting and impact upon more than one MLA or to "working" as the MLA that is substantially impaired. When faced with either scenario, consider downloading and applying the EEOC's guidance on the definition of what constitutes a disability.

The Investigative Sequence

With this overview of the ADA (Rehab Act), we turn to the steps you would take to investigate a complaint of disability-based failure to accommodate.

First, unlike a complaint of race or sex discrimination, it is necessary to determine whether the complainant is a QID. You need to interview the complainant and ask questions which get at the degree of limitation (s)he was experiencing at the time of the alleged failure to accommodate. At the time of the interview, the complainant may no longer be qualified because the limitations extending from his condition have grown so great he is no longer able to work. This is irrelevant to the question of whether accommodation was feasible at the time it was requested.

Remember, even with the amendments, it is still the degree of limitation that makes a person *substantially* limited, not the name of the condition the person has been diagnosed as having. Your questions are designed to get at this aspect of the case. They involve three areas --- the duration of the condition, its severity and its impact on the individual. Duration questions might be answerable through documents from a physician which diagnose the person's condition(s) and forecast its/their likely duration. To be covered the condition must be permanent or indefinite in duration. (Again "indefinite" = expected or actual duration of at least six months) Severity questions go to issues like whether the person experienced pain, saw a physician, underwent surgery or other intervention, took medication, was forced to alter his life activities and so forth. Documents related to this would be prescription records and the like. Impact questions go to what life activities the person can no longer do at all or in the same way as a result of the condition. Some corroboration might be possible from friends or family members. The practical

effect of the amendments is that more sets of limitations will be taken to be “substantial”.

Where the person experienced a period of time when he was substantially limited but is now in remission or otherwise less limited, your task is to determine what limitations continue to affect the person in order to show how they link to the need for accommodation.

Where the person alleges that he was regarded as disabled but is not, your task is to determine on what basis he believes he was so regarded and whether there is any corroboration of same he can offer for the record. Given the amendments, it is now clear that the person who regards the complainant as limited in some way does not have to specifically regard the complainant as substantially limited or limited with respect to a specific MLA. An example might be an employer’s representative who denies an applicant a job in a retail sales setting because of a cosmetic facial blemish. There is now no need to establish that the representative’s “pure bias” relates to his or her notional degree of limitation or to a specific MLA.

It is a matter of judgment as to how substantial the degree of impairment is. Any judgment your organization makes is subject to being second-guessed by an administrative agency or court. One problem plaguing the matter is the centrality of words with little or no meaning but common use. For example, “lifting” is commonly used as a MLA but it is a very vague term to apply to the law. Lifting really measures a degree of physical demand that varies not with the weight of the object being lifted but with factors like whether the object is a liquid or solid, has handles, extends far from the body or is held close to the body, is lifted from knuckle height or from the floor, is moved with a twisting motion from the waist because of the confined physical environment in which the job is performed, is placed in a spot behind a barrier or above the plane of the shoulder and so forth. As an added level of complexity, some courts have accepted a limitation of no more than 25 pounds as a substantial limitation while others have plumped for 15 pounds or even 10 pounds. It remains to be seen how courts will assess future litigation when they balance their prior standards with the spirit of the amendments. Nevertheless, it is your task to obtain the best description you can of the complainant’s limitations at the time of the request for accommodation.

Next, you focus on any indication that the job duties the complainant has difficulty performing (or performing frequently, safely or some other way germane to the case) are essential to the job. This may come out more clearly in connection with the decision maker’s assertions about what the complainant can and cannot do on the job. However, if it is asserted that the complainant is not qualified, you will need to gather evidence as to the nature of the function (essential or marginal) as well as to the ability of some accommodation either to decrease the demands of the job or increase the person’s capacity to the point where he or she is able to perform every essential function at a satisfactory level. Physical observation of a full work cycle is normally required. While making your observations, be mindful of any differences between the formal job description the decision maker may have relied upon and the actual way the job is done by incumbents. For example, except in a setting like a forge, lifting an object over 75 pounds in weight may be listed as a task performed unaided while workers on the floor routinely aid each other when such weights need to be lifted. Testimony from others performing the same job may be needed to document how the job is actually performed at that facility.

As in religious accommodation cases, be alert to accommodations the organization might have offered the complainant in the past as a way to gauge the actual level of hardship asserted by the decision maker who denied the accommodation. Use the observation of the work cycle to see how feasible certain accommodations suggested by the complainant seem to be.

Next, you focus on the **tasks** performed to accomplish the functions that are essential to the job. Essential functions are the **purposes** for which the job exists and they are not required to be accommodated. Nevertheless, the way the function is achieved is subject to accommodation. For example, while incumbents have always used their hands to carry out a given function, you need to gather evidence to determine whether sight or voice or other methods could be used to accomplish the same function. (in other words, walking, standing, using one's hands, speaking, looking at a piece of equipment and so on are tasks --- **what** one does to carry out the function as opposed to **why** one does the task) In cases where a given task is the only way to accomplish a given function, it operates like a function itself and is not subject to accommodation. For example, repairing a large printing press may require rolling and twisting to reach areas of the press. While these are tasks, there is no feasible way to accomplish the repair function except by being able to carry out these tasks so the tasks become essential functions in this job in their own right.

One gray area arises from the use of generic job titles by employers. If a large group of warehouse workers are all "associates" and the complainant can perform some work assignments but not others, then all the accommodation the person needs is to be given a set of daily work assignments which he or she can perform and which are sufficiently valuable to the organization rather than the particular assignments within the generic job title (s)he has been assigned in the past. This would not require reassignment because the person's job duties are in fact encompassed within the generic job title. One sees this with correctional officers, nurses and other jobs where people share a common job title but, in fact, perform widely different daily tasks. Yet, curiously, it is my experience that some decision makers get defensive when asked why they didn't simply give the QID a different set of daily assignments. In the face of the complaint, you might be told that, while everyone is classified and paid as a nurse, there are in reality medical-surgical nurses, neonatal nurses, intensive care nurses, utilization review nurses and so forth. In other words, instead of switching the assignments of two workers, the decision maker will try to describe a different set of duties within a common job title as requiring a reassignment to a vacant position and argue that there are no vacancies. Whether this is the way a court would view the situation is an unsettled question. Generic job titles increase employer flexibility by increasing worker interchangeability. They would also seem to open up greater ability to accommodate.

Turning to the notice to the employer, you will have to determine when the organization was made aware of the duty to attempt to accommodate and what it was told about the complainant's needs. This notice should have initiated a process of interaction with the person requesting accommodation. The goal of the process is to make decisions based upon *the individual's* limitations (not the generic kinds of limitations a person with a given condition may experience) matched against the actual (not the assumed) duties of a job. As a consequence, you will try to

determine what each person in the organization who was part of the process did in order to respond to the request. What attempts were made to understand the person's medical condition, to find assistive devices, to explore changes in policy or procedure, to see what other organizations have done to reduce physical demand or increase capacity and so forth? If initial accommodations were put in place but found ineffective, what actions were taken to refine the accommodation attempt or explore other options?

With respect to any determination of cost or difficulty, what steps were taken to determine these factors accurately? Is there any documentary corroboration?

With respect to reassignment, what steps were taken to meet this obligation? Is there any documentary corroboration? [Note that reassignment does not require creation of a new job, promotion, reassignment to a job the person is not otherwise qualified to perform (taking into consideration the usual period of training and familiarization), promotion or grandfathering of the person's wage from his former position.]

“Regarded as disabled” cases rarely involve accommodation issues. If anything, the complainant seeks accommodation and the company decides he or she is not disabled. However, there is an interesting Seventh Circuit decision worth reflecting upon. In *Cigan v. Chippewa Falls School District* (388 F.3d 331, 335)(2004), the court faced the situation where a person asserted that her employer must have regarded her as a person with a disability because it made various attempts to accommodate her. The court did not accept this argument. “Cigan’s line of argument supposes that an employer offers accommodation *only if* it thinks that the employee suffers from a substantial limitation in a major life activity. The ‘only if’ is vital; if employers accommodate for other reasons, then the fact of accommodation does not support an inference that a given employer must have regarded a given employee as disabled.... Decent managers try to help employees cope with declining health without knowing or caring whether they fit the definition in some federal statute. Managers also respond to state laws, local regulations, collective bargaining agreements and other norms that go beyond federal law.... Cigan offers no reason to conclude that the principal at her school knew, supposed or cared anything about the effect of her conditions on ‘major life activities’ when providing breaks, chairs and other assistance to continue teaching.” In other words, your task is to determine as best you can the state of mind of any representative of the employer who provided some help to the complainant. Efforts to help a person are not de facto evidence that the person was regarded as disabled as that term is used in the ADA/Rehab Act.

Key terms used in the act have no exact meaning and take on meaning only as they are applied to the facts of the individual case. Complex judgments need to be made by the company's representatives and by you as you investigate. Imagination is often a key ingredient in any attempt to understand how a job might be accomplished through novel ways of achieving its purposes. The advice in this section has been designed to help you make your way accurately and efficiently. As in every area of EEO law, the results might make the difference between whether a person loses an employment opportunity and is harmed for life or that person receives a second chance and truly equal employment opportunity!

A Note on Attendance-Related Accommodations

Among the many subtleties involved in applying the act to actual cases, employers can be especially perplexed by how to handle requests for accommodation that involve leave of absence, freedom from shift rotation, overtime, special schedules and the like. EEOC offers cogent guidance on these issues as part of its policy guidance on accommodation. Briefly, the controversy is this. Many defendants have argued that maintaining regular and reliable attendance is an essential function of many (if not most) jobs. Where the employee cannot perform this essential function, it seems reasonable to conclude that the employee is not qualified for the job and, therefore, not protected by the ADA. The problem is solved by looking at the wording of the statute. At §101(8), the following appears: “The term ‘qualified individual with a disability’ means an individual with a disability who, ***with or without reasonable accommodation***, can perform the essential functions of the employment position that such individual holds or desires.” (emphasis added)

Thus, the employer, when faced with a request for leave of absence or other attendance-related matter, must still attempt to accommodate the request. Any valid denial will normally be based upon the difficulty or expense of accommodating the person’s absence or inability to work rotating shifts and so forth. A person who is able to meet the employer’s attendance-related needs with accommodation (that is, without imposing a significant cost or level of difficulty) is still considered qualified.

A Note on Confidentiality

The ADA contains the following obligation: “[I]nformation obtained regarding the medical condition or history of the applicant is [to be] collected and maintained on separate forms and in separate medical files and is [to be] 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;
- (ii) first-aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- (iii) government officials investigating compliance with this chapter shall be provided relevant information on request.... [§102(d)(3)(B)]”

From the legislative history of the ADA, we know that the obligation extends to the medical information collected from employees as well.

With respect to the accommodation process, this obligation requires persons who are part of the process of attempting accommodation to reveal medical information about the applicant or employee only as needed to further the process. If, during your investigation, for example, you discover that a supervisor who was responsible for exploring job restructuring or some other approach to accommodation told employees he was eliciting information from about the medical condition of the person requesting accommodation, you should contact legal counsel to explore whether this possible breach of the required confidentiality might have exposed the agency to some level of liability.

In the same way, an employer representative can expose the company to liability if he or she explains the accommodation that is being provided to an employee to other workers and reveals medical information about the employee.

The Scenarios

With this detailed background, we turn to the disability accommodation scenarios.

#1 Establishing Whether Someone is a QID

Robin Williams has filed a complaint that she was denied a reasonable accommodation because of her disability. She mentions in her complaint that she has arthritis and some degenerative neuropathy that limits her ability to lift and operate power tools (e.g., a buffer) above the plane of her shoulder and to perform the circular wiping motions sometimes required in her job (quality control inspector). You are about to interview her to determine the degree of limitation she experiences and to gather information as to whether she is likely an individual with a disability. **Give examples of questions you would ask to enable the organization to assess whether it has an obligation under the act in this matter.**

#2 Gathering Medical Documentation

Using the same scenario, discuss the process you would use to gather information to corroborate her medical condition and its limitations. List some of the documents you might seek. What if the organization's representatives who denied Robin an accommodation did not secure some or all of these documents? What if the agency demanded Robin pay for the additional medical examination it required of her? Who pays for copies of these records if the complainant's caregiver demands payment?

#3 Assessing Essential Functions

Using the same scenario, discuss how you would go about determining the functions (and tasks) of the QCI job. Give examples of the kind of questions you might end up asking and from whom you would seek information.

#4 Psychiatric Disorders and Calculation of Threat

Jack Nicholson informs the agency that he has been diagnosed with bipolar affective disorder. He requested transfer to a job with no stress as a form of accommodation but was denied. Among other things, Nicholson, a repair technician at a nuclear processing plant, responds to radiation emergencies. The supervisor who recommended against any accommodation is on record as viewing people with psychiatric issues as unstable and unsuited for many jobs. **Discuss the difficulty of finding a job with no stress. Explain how you will investigate the implied threat assessment embodied in the supervisor's opinions? What is the practical**

effect of Nicholson requesting a transfer? Is this the only avenue the company was obliged to pursue? Are a transfer and a reassignment to a vacant position the same thing?

#5 The Heavy Smoker with Emphysema

Dolly Martin, who works in the office area of a Naval shipyard, has developed early stage emphysema (she is a heavy smoker). She requests an accommodation for her increasing breathing difficulties when she has to walk out into the facility to deliver and pick up shipping/receiving material and perform other duties. The H/R manager met with her and asked her what she sought to resolve the problem. She explained that attaching filtering devices to the repair and other equipment as well air-conditioning the buildings (the office area was already air-conditioned) would take care of her difficulties as best she could tell. The agency investigated these proposed solutions and found them too costly and, ultimately, ineffective. In addition, the H/R manager told Dolly he expected her to stop smoking before she came to the agency for any help with her breathing difficulties. In the event she did that for six months, he offered to provide her with a portable ventilator she could wear whenever she went out into the facility. Dolly declined the offer and the complaint ensued. **Describe your reaction to the interactive process as conducted by the company. Doesn't Dolly have a responsibility to mitigate her limitations as part of meeting the company halfway? Was it sufficient for the company to take Dolly's suggested solutions and explore them or does the company have an obligation to consider other solutions?**

#6 Assessing Significant Difficulty

Smedley Knievel suffered a serious brain injury as a result of a snowboarding accident. He has returned to work at a remote location of the agency which has multiple locations but he is unable to travel for long periods. While he has a sedentary job, he and other staff members are required to journey to the agency's regional headquarters to receive periodic training as part of a continual recertification process designed to keep their skills up-to-date. He requested the opportunity to take the training by computer or by any means which would enable him to avoid the trip to the regional headquarters (three hours away from his office and/or home). **Using your imagination, tell us about factors that might impact upon the difficulty of accommodating Smedley. What are some of the factors that might make accommodation less difficult?**

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