

# Creative Accommodations The Art of the ADA

M. Beth Mehaffey, SPHR  
Sr. Vice President of Human Resources  
Baptist Health Systems, Inc.  
Jacksonville, Florida

Heather A. Owen  
Constangy, Brooks & Smith, LLP  
Jacksonville, Florida

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# Learning Objectives

- 1) Gain enhanced understanding of current law and the EEOC's enforcement strategies under the ADA;
- 2) Obtain practical ideas and tools to provide effective accommodations, including leaves of absence.
- 3) Recognize the legal and business costs of flawed or deficient accommodation processes and learn where the most common accommodation breakdowns occur, especially in the health care industry.



# Topics of Discussion

- **Interactive Process**
- **Leave As An Accommodation**
- **Transfer As An Accommodation**
- **Working From Home As An Accommodation**
- **Accommodation vs. Patient Care**

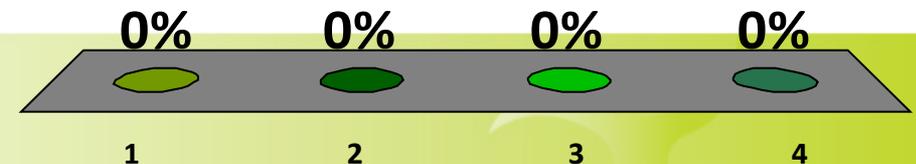


# Interactive Process



An employee provides a doctor's note which states the employee cannot perform the essential functions of his job. The employer:

1. May terminate the employee because he is no longer able to perform his job.
2. May rely solely on the doctor's note for making accommodation decisions.
3. Should meet with the employee and discuss the doctor's note.
4. Answers 1 and 2 are both the best answers.



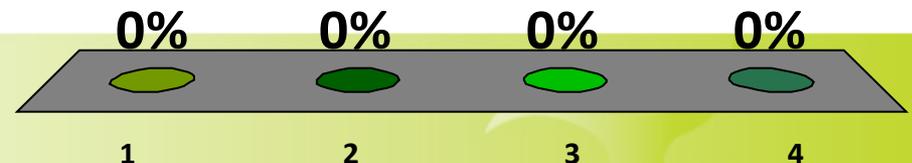
# The Interactive Process

- With the passage of the ADAAA, the focus has shifted from disability to accommodation.
- The EEOC has put renewed and aggressive focus on the interactive process.
- The Courts are also scrutinizing what the employer has done to engage in the interactive process.



# What communications can you have with the employee's doctor?

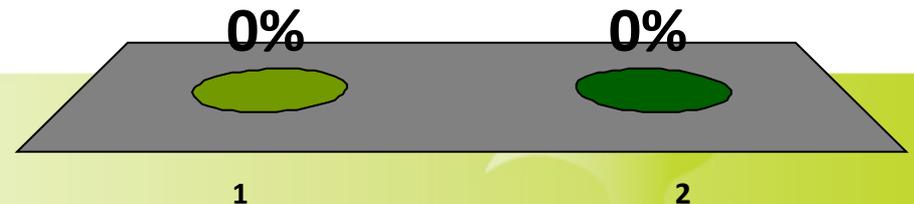
1. Request completion of Fitness for Duty form.
2. Seek clarification and authentication of FFD, but cannot request additional information.
3. Provide information about the employee's performance or behavior beyond the job description.
4. 1 and 3.



A county may refuse to hire a deaf lifeguard because the ability to hear distress calls is an essential function of the job?

1. True

2. False



# Keith v. Oakland Cty (6<sup>th</sup> Cir. 1/10/13)

## Facts:

- Employer initially conducted an individualized inquiry and found him qualified
- But, employer sought opinions of an independent doctor and safety and risk consultants who opined he could not safely perform the job, so offer rescinded.
- Doctor reportedly told the employee's family that he had a family and if someone was hurt, he would be sued.

## Holding:

- Question for jury of whether county acted reasonably in relying on experts.
- “Experts” were not experts on lifeguarding or deafness.
- “Experts” did not include an individualized assessment of applicant's ability.
- Incongruent that county would make it's own individualized assessments, but then defer to experts who had not made individualized assessments
- Employee proffered testimony from experts in lifeguarding and deafness, including evidence that the world record holder who saved the most lives as a lifeguard (900+) was deaf.



# Nelson v. Hitchcock Ind. Sch. (S.D. Tex. 12/21/12)

## **Facts:**

- Teacher's Aide exhausted FMLA for knee surgery and then requested second leave for other knee.
- When advised no more leave available, employee requested to delay surgery and use a walker or pain pills until she was eligible for FMLA again.
- HR recommended leave until dr. note could be obtained, but no action taken and employee allowed to work another week and submit a request for 2 ½ mo. LOA. When no response received, employee proceeded with surgery and was terminated.

## **Holding:**

- SJ denied because school did not engage in “meaningful dialogue.”
- Whether the requested accommodation ultimately posed safety risks to the children was inconsequential because the school bypassed the process for making this determination.
- Lesson: continue and document communications with employees.



# Frisino v. Seattle Sch. Dist.

## Settled for \$750,000 (12/19/12)

### Facts:

- Teacher with sensitivity to multiple toxins
- Sch. Dist. provided HEPA air filter, increased cleaning, moving to a different classroom and hired 3 contractors to remediate the building
- Teacher refused to return to work and was terminated

### Holding:

- App. Ct. overturned SJ on issue of whether accommodations were effective.
- Where no objective standard is available to determine the effectiveness of accommodations, the employer must continue to engage in trial and error accommodations unless it can show undue hardship.

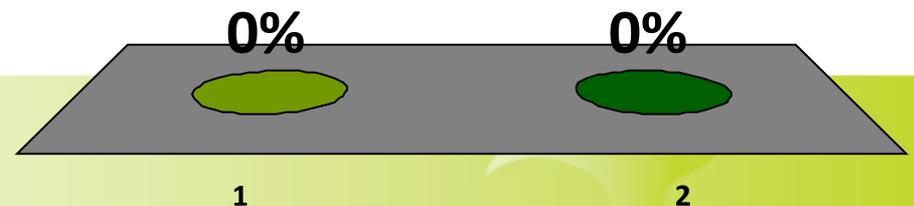
Defense counsel: Problem with case was efficacy was based solely on employee's self report



Employers may require employees to request accommodations using a standard form

1. True

2. False



# Baptist's New Interactive Process

## Background:

- Employee Benefits staff were responsible for administering leaves of absence.
- Lack of communication with managers.
- Processes were fragmented.
- Lack of coordination with workers comp.
- Lack of coordination with request for accommodations.



# Baptist's Process Improvement

## Process

- Commissioned an Operational Performance Improvement Team (OPI) comprised of human resources staff and operational managers.
- Objective was to streamline processes, improve communication and compliance, and coordinate with workers comp.
- In addition we identified a lack of coordination and understanding with requests for non work related accommodations.
- As a result we created the Department of Leave Administration and Occupational Health.



# Leave Administration and Occupational Health

- Responsible for administering:
  - Leaves of Absence including FMLA, Military Leave and Personal Leave requests.
  - Requests for accommodation both work related and non work related.
  - Employee return to work review.
- Department ensures engagement in the interactive process for ADAAA compliance.
- Injury prevention specialist who oversees physical demands for all job.



# Leave Administration and Occupational Health

- Lead by a registered nurse who is a certified case manager and has extensive expertise in workers' comp.
- Improved communication with managers regarding intermittent leave and expectations for time away and return.
- Improved coordination with workers comp.
- Developed an interactive process for requests for accommodation.
- Reviewed physical demands for all jobs.



# Interactive Process

- Requests for accommodation
- RN reviews request and obtains notes from employee's physician.
- RN notifies employee's manager and determines if accommodation can be made in the employee's current position.
- If accommodation cannot be made, RN coordinates "huddle" which includes department/division leadership, employee relations, employee health, recruitment and the employee.



# Interactive Process

- Example:
  - Employee was diagnosed with MS and shows up to work one day in a wheelchair.
  - She was concerned with access in the building, particularly during an emergency, as there were only two elevators and she worked on the 6<sup>th</sup> floor.
  - We engaged in the interactive process and have accommodated her by moving her to the first floor.
  - Coworkers bring the work down to her periodically during the day.
  - There is also better wheelchair access to restrooms on the first floor.



# Interactive Process

- Example:
  - Employee reacted to oven cleaner mixed with another chemical. Employee was treated and returned to work.
  - Several years later, another incident occurred when he walked into a freezer that had been converted to dry storage. He reacted to a “musty odor.”
  - Diagnosed with Reactive Airway Syndrome in which he could not be exposed to any chemicals.
  - Employee was transferred to several positions but continued to have health issues.
  - Employee was placed on leave of absence (FMLA).
  - After FMLA expired, employee released to return to work but we could not accommodate due to restrictions (no exposure to chemicals).
  - **Engaged in the interactive process including asking the employee if he had any suggestions as to how we could accommodate his restrictions.**
  - The employee did not have any suggestions and so he was given 30 days to find another position, and when that failed, he was terminated.



# Summary of Lessons Learned

- Must coordinate leave and oversight of activities impacted by FMLA/ADA/WC, preferably within 1 department
- Oversight and administration of FMLA must be beyond entry level employees
- Process serves to educate and involve discussion with management
- Process creates environment for interactive process to take place.
- Ask employees for their suggestions as to accommodations



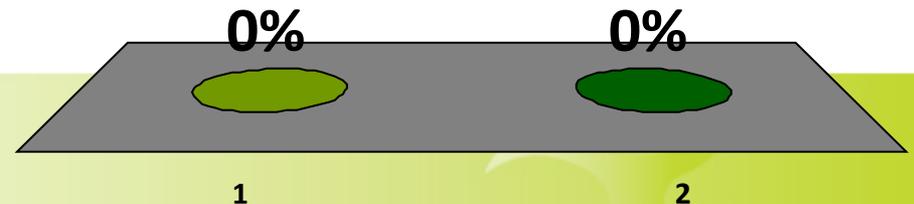
# Leave As An Accommodation



Once an employee exhausts FMLA leave, the employee's position is no longer protected during continued leave.

1. True

2. False



# Lessons learned from UPS, Sears and Interstate Distributor, Co.

- Do not have a blanket policy denying leave once FMLA is exhausted.
- Do not have a “no light duty” policy, or a policy requiring employees to be released to “full duty” before being allowed to return to work.
- Make sure whoever is handling FMLA and WC for your company is knowledgeable of the ADA’s accommodation requirements.
  - Interstate Distributor used a third party vendor to handle WC. WC “full duty release” or “permanent impairments” were not being evaluated in terms of accommodations under the ADA.
- If you ask your supervisors to determine whether they can accommodate restrictions, make sure they have the tools to evaluate and properly (legally) answer this question.



# Prock v. Tamura Corp (Cal Ct. App. 1/25/13)

## **Facts:**

- Doctor prescribes LOA 8/20 – 9/22 for anxiety condition
- 9/22 employee said could not return yet and seeing doctor
- Employee called and advised doctor extended LOA to 10/31
- Co. told employee they could not continue to hold his position until then and terminated.

## **Holding-Reversal** of Summary Judgment for Employer:

- Employee who requests LOA for treatment is still qualified so long as the worker will be able to perform job at the end of leave.
- Real problem: Employer did not engage in interactive process to determine likely period necessary for the leave.
- That the employee did not volunteer any assurances that he would return to work or leave was not indefinite did not relieve employer of obligation to engage in further discussions or accommodations.



# Compare:

## Lawler v. Montblanc (9<sup>th</sup> Cir. 1/11/13)

### Facts:

- Store Manager requested 4 months of leave Sept. – Jan.

### Holding:

- Unreasonable accommodation request:
- 1/3 of Store's annual sales were made during holidays
- Store needed a store manager – so employee was unqualified for the job
- Note: Store did not just say no – went further and asked doctor if any accommodations could be made that would allow her to perform job. Doctor said she needed leave and did not change his recommendation.
- Employee also requested reduced schedule which was also deemed unreasonable because she could not show that it would allow her to perform her essential functions.



# Maharaj v. Cal. Bank (11/15/12)

## Facts:

- CSR with multiple ailments and LOA's
- Feb. 4 FMLA exhausted and bank told employee it was going to begin the process of filling position.
- Job posted Feb. 25, offered Mar. 10, and employee began working April 5. Training would take until April 20
- Employee was released to RTW on April 1.

## Holding:

- Issue for jury whether business necessity justified filling position and denying accommodation.
- Took 3 weeks to post position, 2 weeks to fill it, employee could not start immediately and required training.
- Co-worker resigned around same time and her position was not replaced.



# Baptist: Leave as an Accommodation

- All requests for leave of absence are administered through new department.
- RN reviews all medical certifications.
- If necessary, will obtain permission from employee to speak to physician or discuss with the medical director of employee health if work related.
- RN notifies manager of approval and duration of leave.
- If intermittent, RN will review the expectation for time away, and the expectations/need for accommodation for the time at work.



# Leave as an Accommodation

Example:

- EVS employee who was pregnant and was having difficulty with nausea and vomiting.
- Physician note indicated she could not be exposed to bleach or bleach products.
- We accommodated the request by transferring her to an area where there would not be exposure to bleach.
- Received a second request for accommodation indicating employee could not be exposed to bleach, chemicals or any odors.
- Could not accommodate so employee applied for FMLA.
- Leave granted until after baby born.



# Leave As An Accommodation

Example:

- EVS employee suffers WC injury and cannot lift, push, pull more than 5lbs with non-dominant hand.
- Cannot provide light duty b/c no computer or other skills and could not communicate well.
- Placed on FMLA leave until leave exhausted.
- At time FMLA exhausted, she had not reached MMI and was still being evaluated.
- Continued her non-FMLA leave for 3 additional months.
- Terminated at end of 3 month extension because no expectation of return in foreseeable future.



# Leave As An Accommodation

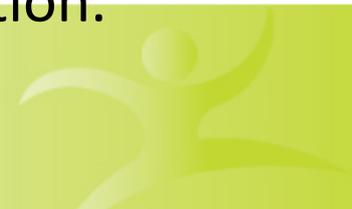
## Example:

- 6 month employee newly diagnosed with MS requested leave and then a temporarily reduced schedule.
- Accommodated for 4 months because expectation was that she would stabilize and be able to increase hours, but hours never increased.
- Employee went into hospital and told supervisor she did not know if she would be able to return to work.
- Since leave was now indefinite, employee was terminated.
- All positive efforts and accommodations already provided, and statement of indefinite leave were all disregarded by EEOC because of 1 factor: employee was terminated while in the hospital.



# Lessons Learned About Leave As An Accommodation

- If you cannot continue leave beyond FMLA entitlement, be able to articulate undue hardship.
- If the business needs require you to replace the employee, be sure the replacement will be in place well before the employee said he or she could return. You can post and actively seek new hires and stop the process if the employee returns.
- If the employee's job can be filled by a temporary employee, the accommodation of additional leave should be strongly considered.
- Consider timing and circumstances of termination.

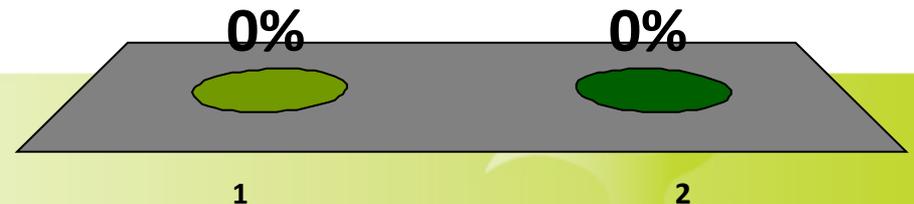


# Transfer As An Accommodation



If an employee cannot perform the essential functions of her own job, but requests a transfer to a position for which she only meets the minimum qualifications, the employer:

1. Must allow the employee to compete for the open position, but the employer may still select the best candidate for the position because the ADA is not a mandatory preference act.
2. Must transfer the employee to the vacant position unless doing so would be an undue hardship.



# EEOC v. Humiston-Keeling (7<sup>th</sup> Cir. 2000)

## Holding:

- An employer does not have to transfer a disabled employee to a vacant position if there is a better applicant provided it is the employer's honest practice to hire the best applicant for the particular job in question.



# U.S. Airways v. Barnette (S. Ct. 2002)

## Holding:

- An accommodation that violates a rule that others must obey does not, in and of itself result in the accommodation being unreasonable
- Employer has the opportunity to demonstrate transfer is unreasonable or an undue hardship
- Permanent reassignment to a vacant position which violated a seniority rule is "ordinarily" sufficient to show that an accommodation is not reasonable, but an employee may present evidence of special circumstances that makes exception to the seniority rule reasonable under particular facts. Specifically, if the employee could show that the employer varied from the seniority system fairly frequently, then it would no longer be unreasonable to vary from the system to provide an accommodation.

Isn't this analogous to an employer's uniformly applied posting and transfer policies under which an employer hires the most qualified candidate.



# Huber v. Walmart (8<sup>th</sup> Cir. 2007)

## Holding:

- The ADA is not an affirmative action statute and an employer is not required to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of hiring the most qualified candidate.
- Relied on 7<sup>th</sup> Circuit Humiston-Keeling case
- The U.S. Supreme Court initially granted certiorari in this case to resolve the split in opinions on this issue, but it was later dismissed because the parties settled the case,



# EEOC v. United Airlines (7<sup>th</sup> Cir. 9/7/12)

## Facts:

- Policy: Employee's who could not perform their own job, would get preferential treatment for vacant positions including automatic interview, and selection over equally qualified candidates.
- EEOC argued that was insufficient and ADA mandated transfer of minimally qualified employees to vacant positions.

## Holding:

- Specifically overruled it's holding in Humiston-Keeling saying it was at odds with Barnette
- Step 1: Court must first determine if transfer is normally reasonable and would be in most cases.
- Step 2: Are there fact-specific considerations particular to the employer's employment system that would create an undue hardship and make the accommodation unreasonable.
- The application of a disability-neutral posting and most qualified-candidate selection process was not enough in this case to demonstrate *per se* undue hardship.



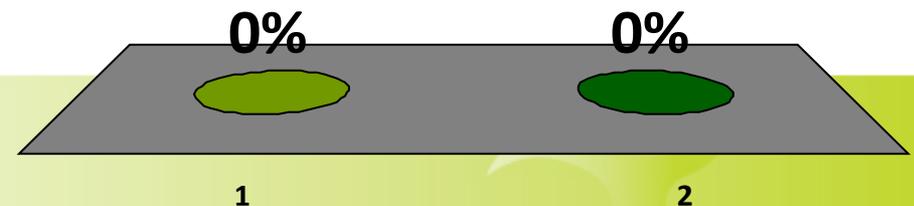
# Lessons Learned from U.S. Airlines

- Review job descriptions and consider whether minimum job requirements are really adequate for the applicants you want for the position.
- Train management to consider transfers as an accommodation
- Unanswered question: Does an employer have to consider transfer if the employee does not request a transfer?



You have accommodated an employee by allowing him to work in a light duty position for 6 months. The employee's doctor submits a note stating that the employee's disability is permanent and the employee requests a permanent transfer to the light duty position. Do you have to grant the request?

1. No, you do not have to create a light duty position.
2. Yes, you have already effectively created the light duty position.



# Wardia v. Justice (6<sup>th</sup> Cir. 1/3/13)

## Facts:

- Juvenile Detention worker with neck injury who could not perform physical restraints.
- Two accommodations requested: 1) have co-workers perform rare restraints; or 2) permanent reassignment to light duty position in “control room.”

## Holding:

- Do not have to shift essential function to other employees, even if “rare.” Must look at seriousness of failing to perform low-probability job function.
- Previously being allowed to work in the control room for one year did not make permanent reassignment a reasonable accommodation
- Control room was used on a rotating basis to accommodate temporary disabilities and the need for workers to have a break from the juvenile population.
- Holding otherwise would deter employers from providing light duty to employees with temporary needs.



# Baptist: Transfer as an Accommodation

- Engage in the interactive process with the employee, the employee's doctor, and appropriate others.
- Review request for accommodation with employee's manager.
- If manager cannot accommodate restrictions in current position due to undue hardship (which we document) we will engage in a "huddle."



# Transfer as an Accommodation

Example:

- RN with asthma that had a reaction to chemical used when EVS was stripping floors on her unit.
- Accommodated her by not having the cleaning occur during her shift.
- Employee walked through another unit that had been recently cleaned and had a reaction.
- We could not guarantee this would not occur again.
- Transferred employee to bed placement coordinator in which she works nights in a confined area.



# Transfer as an Accommodation

Example:

- Pediatric RN had back surgery and had restrictions which prevented her from lifting or restraining children.
- We could not accommodate this in the pediatric emergency department so we assisted her in obtaining a transfer to Utilization Management.



# Transfer as an Accommodation

Example:

- Associate Care Provider (ACP) requested temporary accommodations due to back issues resulting in lifting restrictions.
- Allowed employee to work as a monitor tech. Restrictions became permanent and allowed employee to transfer to monitor tech position.



# Transfer as an Accommodation

## Example:

- Night ACP had a hearing impairment which prevented her from hearing a nurse calling for help on the Pediatric Adolescent unit.
- The ACP was sent to our employee health medical director for a fit for duty evaluation.
- Since there was limited staffing on nights on this unit (one ACP and one RN) medical director indicated the ACP was not fit for duty for this position.
- Attempted to engage in the interactive process by finding the employee an ACP position on another unit or a sitter position.
- Employee would not engage but contacted an attorney.



# Temporary Transfer as an Accommodation

Example:

- RN was pregnant with lifting restrictions.
- Temporarily transferred to Lab as a Medical Lab Assistant.
- Her pay was reduced during this time.
- She felt this was a great experience as she better understood lab processes which helped her when she returned to work in her former position as an RN after delivering her baby.



# Lessons Learned Regarding Transfer As an Accommodation

- “Not qualified for own position” is no longer good enough to terminate.
- Assist employees by making sure they know how to identify open positions.
- Still no obligation to create a new position.
- If temporary transfer, make sure it is clear it is temporary. Be ready to answer why it is only temporary.
- Update your job descriptions to make sure these are your minimum qualifications.

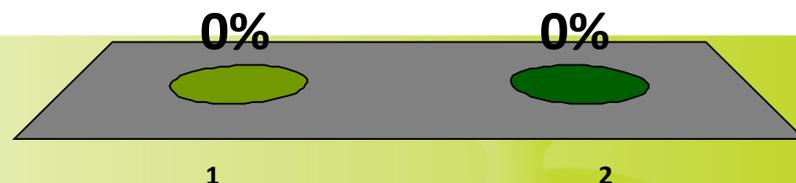


# Telecommuting



Office employee on progressive discipline for performance issues gets a doctor's note which says employee has severe allergies and medication is affecting performance. Employee requests to work from home where he can reduce his allergens and avoid meds. The employer's policy does not permit telecommuting if an employee has had disciplinary action in last 12 months. Can the employer deny the accommodation based on the policy?

1. No, because the employee's disability is causing the performance issues.
2. Yes, because the policy is a legitimate non-discriminatory policy applied equally to disabled and non-disabled employees to ensure employees can work well without direct supervision.



# Goonan v. Fed. Res. Bank of NY (S.D.N.Y 1/7/13)

## Facts:

- Employee trapped in WTC on 9/11 but lived
- New employer moves offices to overlook ground zero
- Employee experiences emotional distress and performance deteriorates as a result
- Employee seeks accommodation of working from home
- Employer policy prohibits telecommuting when employee has poor performance
- Employer denies request because of poor performance and resulting need for supervision

## Holding:

- MTD denied - Failure to accommodate disabilities which lead to poor performance, which performance leads to termination amounts to discharge due to disability.
- Policy which restricts transfers due to performance, but performance is based on disability requiring transfer, adherence to policy may violate ADA



# Bixby v. J.P. Morgan (N.D. Ill. 3/16/12)

## Facts:

- Employee was a supervisor who requested to work from home
- Employer refused stating that supervising employees in person was an essential function of the job.

## Holding:

- SJ denied b/c other managers had been permitted to telecommute.
- Employer also should have involved a medical provider in the accommodation discussion.



# Core v. Champaign Cnty (10/17/12)

## •Facts:

- Employee with sensitivity to particular perfume requested fragrance free workplace or to work from home

## •Holding:

- Essential function of job to be in office because need to conduct on-site inspections of child care facilities, and meet with public.
- Nothing in the ADA suggests that nondisabled individuals are expected to give up or substantially alter their lifestyles to accommodate co-worker with disability.



# Accommodation vs. Patient Care



# Wells v. Cincinnati Children's Hospital S.D. Ohio (Feb. 15, 2012)

## Facts:

- Nurse with gastrointestinal disorder advised supervisor she was prescribed morphine.
- Subsequently nurse had documenting errors, appeared confused on several occasions, pulled morphine from PYXIS for patient without prescription, reported blacking out.
- Nurse claimed additional medication caused confusion.
- FFD ordered; drug testing ordered.



# Wells v. Cincinnati Children's Hospital

## S.D. Ohio (Feb. 15, 2012)

### Facts Cont. . .

- First opinion through EAP – (Dr. M) should not be allowed to work in clinical setting due to persistent use of opiates. “She poses a critical risk to her patients in light of problems . . . Her prognosis is guarded due to her minimalization, denial, and out-and-out dishonesty.”
- Hospital entered into a return-to-work contract: complete treatment program, follow recommendations and submit to random drug testing for 2 years following return.
- Referred to Treating Psych – (Dr. B) “nothing in her current behavior or affect that precluded her from performing her job.” Recommendation of drug screens for 3 months and counseling.
- EAP – recommended 6 annual random tests for 2 years and close monitoring by supervisors.
- Hospital refused to return her to Pediatric Critical Airway Unit citing danger to patient care; assigned to home health care unit and ultimately placed in Bone Marrow Transplant unit.

# Wells v. Cincinnati Children's Hospital

## Holding:

- No violation of ADA for suspension pending FFD – “beyond any serious argument that a nurse cannot safely treat patients if she is taking medication which causes or may cause her to black out and become disoriented.” SJ granted.
- Refusal to reinstate in Critical Airway Unit – direct evidence of discrimination. Supervisor testified that past errors and risk of reverting to same behaviors is not one she was willing to accept.
- Was affirmative defense of direct threat available
- SJ denied b/c sufficient basis for juror to conclude nurse was qualified to perform her duties in CAU even without accommodation.
  - Stopped problematic medication
  - Placed in other positions with patient safety needs including Bone Marrow Transplant Unit.
  - Physician who cleared her to work evaluated her longer.
- Once cleared, under FMLA could not deny immediate reinstatement even based on RTW agreement – can't waive FMLA rights.



# A.D.P. v. Exxon Mobile (10/26/12)

## Facts:

- NJ state disability law – not the ADA.
- Policy of not terminating employees who voluntarily enter into a rehabilitation program for drug or alcohol use, but must submit to agreement and random drug tests; failure of test = discipline / termination.
- Employee self admitted for alcohol treatment program; signed contract with employer agreeing to random alcohol test for 2 years.
- Passed 9 tests, but failed 10<sup>th</sup> with .047 BAC.
- Terminated.

## Holding:

- App. Ct. overturned trial court - Business necessity defense only applies to disparate impact cases and not disparate treatment.
- No individualized assessment of business necessity or safety issues.
- Employee was a good performer and no evidence of alcohol consumption at work.
- Policy only applied to addicts regardless of their work performance or job duties.
- No policy prohibiting any other employee from consuming alcohol.



# Considerations

- Drug testing employees suspected of diversion
- RTW agreements
  - Difference between alcohol, prescription drugs and illegal drugs?
  - Once an employee is released to RTW w/o restrictions, can employer continue to drug test?
- Conflicting opinions of experts
- Expert opinion at odds with employer's observations
- Policies requiring disclosure of medications



# Grosso v. UPMC (W.D. Pa. 2012)

Perfusionist

Responsibilities:

- Running cardiopulmonary bypass machine
- Maintaining blood pressure, oxygenation, and body temperature
- Monitoring medications given during operation, including anesthetics



# Grosso v. UPMC (W.D. Pa. 2012)

Employee had Type I Diabetes and Hypoglycemic Unawareness Syndrome (“HUS”)

- Could become disoriented and pass out without warning
- Happened about once a month in past eight months



# Grosso v. UPMC (W.D. Pa. 2012)

- Employee terminated for sleeping on the job
- Claims disability discrimination and failure to accommodate under ADA
- Claims additional accommodations should have been provided
  - Make co-workers aware of symptoms
  - Have second perfusionist present in OR



# Grosso v. UPMC (W.D. Pa. 2012)

- Should UPMC Have Assigned a Second Perfusionist as a Reasonable Accommodation?
- Court found that this was unduly burdensome



# Grosso v. UPMC (W.D. Pa. 2012)

Was Employee a Direct Threat to Patients?

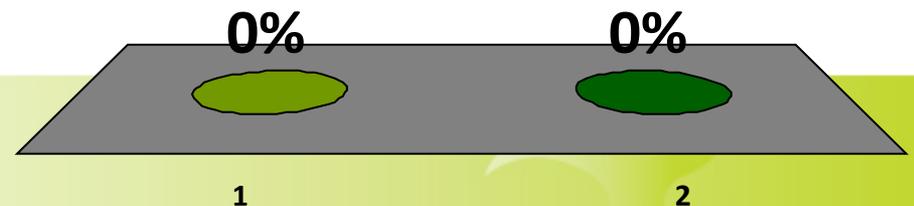
1. Duration of the Risk
2. Nature and Severity of Potential Harm
3. Likelihood of Potential Harm
4. Imminence of Potential Harm

Court Found Direct Threat to Patients



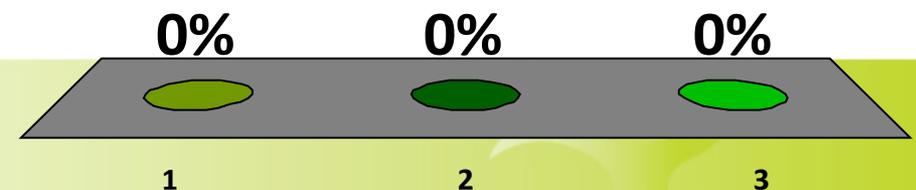
If the employee could tell when episodes were coming on and requested intermittent FMLA leave when she anticipated a hypoglycemic attack, even in the middle of surgery, would this have changed the outcome?

1. Yes, because you have to provide an eligible employee with FMLA leave when they need it, and no more leave than they need.
2. No, because she still cannot perform the essential functions of her job.



In the FMLA hypothetical, could the employer have involuntarily transferred the employee to another position during the period of FMLA leave to protect the patients in surgery?

1. Yes
2. Not without violating the FMLA
3. No, but I would anyway



# Considerations:

- Essential Job Duties are Key
- Having a “back up” employee perform another employee’s essential job functions has often been deemed unreasonable or unduly burdensome



# Baptist: Accommodation vs. Patient Care

## Example:

- Nuclear Med Tech was in a motorcycle accident which left her paralyzed from the waist down.
- She went on FMLA which she exhausted and we extended her leave for another 9 months.
- She began inquiring about returning to her position as a nuclear med tech.
- We did not have an open position at the time and were concerned about her returning to the role due to patient safety. She could not assist patients nor could she perform CPR which is required for the position.



# Accommodation vs. Patient Care

Continued:

- She obtained an attorney and filed an EEOC charge.
- We engaged in the interactive process assisting her in seeking a role that would accommodate her restrictions.
- She obtained a position working per diem in registration.



# Accommodation vs. Patient Care

Continued:

- The EEOC issued a “for cause” determination based on the following:
  - We did not engage in the interactive process until former employee was represented by counsel.
  - There was no “independent” job assessment completed.
  - ER is down the hall so patient safety was not an issue.
  - There are usually two techs working so no one is alone.
  - Patient transportation was not an essential function of the job.



# Accommodation vs. Patient Care

We continued to argue:

- Redundancies in personnel not required under ADA.
- Patients need assistance getting on and off exam tables.
- We did not need an outside expert to evaluate the functions of the job.
- The interactive process was fully satisfied.
- During this entire process there was never an opening for a nuclear med tech.
- Former employee had received short term and long term disability so during this evaluation it was determined she could not do her job.



# Accommodation vs. Patient Care

Continued:

- Former employee was unable to do the job in registration. It was more demanding than she had realized.
- EEOC issued a Right to Sue letter.
- A law suit was never filed.
- Employee was also represented by a personal injury lawyer. She obtained a settlement in which there was a lien due to the provisions on our medical plan.
- We settled by reducing the amount of reimbursement to the plan.



# Baptist Observations

- Consolidating leave administration with workers' comp with injury prevention has been a significant improvement in communication and processes.
- Having a clinical person lead the team resulted in better understanding of medical certifications as well as the need for accommodation.
- Engaging the interactive process, including asking the employee for suggestions on how we can accommodate restrictions has proven to be successful.



# Best Practices

- **Identify internal processes for identifying and evaluating requests for accommodations, and deciding whether or not requested accommodations are “reasonable.”**
- **Have effective communications with treating physicians – tell them what is going so they know when completing a FFD evaluation.**
- **Review internal processes to coordinate FMLA, LOA, WC, Hiring, Benefits and other policies with ADA compliance.**
- **Train managers to recognize requests for accommodations.**
- **Identify who will engage in the interactive process when the need for accommodation is present.**
- **Document the interactive process communications.**
- **Be able to articulate/document why an accommodation is not reasonable or would cause an undue hardship.**
- **Update or prepare job descriptions with true minimum, physical and mental requirements and adhere to them.**
- **Review drug testing and drug reporting policies.**



# Thank You

M. Beth Mehaffey, SPHR  
Sr. Vice President of Human Resources  
Baptist Health Systems, Inc.  
Jacksonville, Florida

Heather A. Owen  
Constangy, Brooks & Smith, LLP  
Jacksonville, Florida





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