

Defending the Disability Case – Strategies and Tactics

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Minnesota Cases

Manni v. Duluth Clinic, Ltd., 2017 WL 5077568 (Minn. Ct. App. Nov. 6, 2017)

- **Posture:** Relator Dorothy Manni argues that a looming potential dress code constituted a good reason to quit caused by her employer and challenges the unemployment-law judge's determination that she was ineligible for unemployment benefits. We affirm.
- **Facts:** Manni started working for respondent Duluth Clinic, Ltd. in 2014. The clinic had a business-casual dress code, and she often wore a business jacket. Manni transferred to a new clinic location, and a potential dress code consisting of mandatory polo shirts was part of ongoing negotiations between management and the union at such location. Manni first learned about the potential dress code at a November staff meeting, where she informed management that she did not like to wear polo shirts. She thought they were “tacky” and unprofessional. A couple of hours after the meeting, she informed a manager that she was uncomfortable wearing polo shirts and would not stay with the company if it became a requirement. The company did not accommodate her, so she quit and sued to seek unemployment benefits.
- **Plaintiff's Arguments:**
 - a. Manni argues that she had a medical condition preventing her from complying with the potential dress code and that her managers should have taken the initiative to find out if any possible accommodations were necessary. While Manni does not explicitly equate her argument to possible Americans with Disabilities Act (ADA) or Minnesota Human Rights Act (MHRA) failure-to-accommodate violations, this court has discretion to review any matter in the interest of justice.
- **Ruling:**
 - a. Manni is unable to establish an ADA or MHRA failure-to-accommodate violation. Importantly, the record is not sufficiently developed to determine if Manni is a qualified individual with a disability. The only known information of her medical condition is the letter from her doctor, dated after she quit, which states, “Due to complications with her medical condition, [Manni] is unable to adhere to the dress code of [Duluth Clinic].” This does not explain what the condition is or any effects it has on major life activities.

More fundamentally, Manni did not satisfy her initial burden of putting the employer on notice of a need to accommodate, which is central to a viable ADA or MHRA claim. Manni never requested an accommodation. This is supported by the record. Additionally, there is no evidence that Duluth Clinic knew or should have known that Manni had a disability, and the medical letter from her doctor was dated after she quit. Because of these shortcomings, *an alleged failure to accommodate does not rise to an ADA or MHRA violation and cannot serve as a good reason to quit caused by the employer.*

- **Posture:** Plaintiff James R. Wells (“Wells”) brings three claims against Defendant BNSF Railway Company (“BNSF”): (1) disability discrimination in violation of the Americans with Disabilities Act (“ADA”), (2) improper use of medical examination results in violation of the ADA, and (3) disability discrimination in violation of the Minnesota Human Rights Act (“MHRA”). BNSF moves to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that the Second Amended Complaint contains insufficient facts to show that Wells is “disabled” under either the ADA or MHRA. For that reason, ***BNSF contends that Wells fails to state any claims to relief*** and the Court should dismiss all three claims. For the reasons set forth below, the ***Court grants the motion.***

- **Facts:** In February of 2008, Wells applied to and received a conditional offer of employment from BNSF in Minnesota as a track laborer. BNSF conditioned the offer on Wells' successful completion of a medical evaluation. Wells passed the evaluation per a third-party testing contractor, despite multiple past neck surgeries. The BNSF Medical Department received the results of the examination and concluded that Wells was “not medically qualified for [the] safety sensitive Track Laborer position due to significant risk of aggravation or recurrence of a neck/cervical spine condition following 2–level spinal fusion.” BNSF withdrew its employment offer, did not try to eliminate the "significant risk" and did not determine whether Wells could work as a track laborer if given accommodations. Wells concludes that BNSF mistakenly regarded him as disabled such that he was “substantially limited [in] the major life activity of working.” Wells sued asserting claims under the ADA and MHRA.

- **Plaintiff's Arguments:**
 - a. BNSF violated 42 U.S.C. § 12112(a) by failing to hire Wells based on a perceived disability.
 - b. BNSF violated 42 U.S.C. § 12112(d)(3)(C) by improperly using the results of a medical examination to discriminate against Wells based on a perceived disability.
 - c. BNSF violated Minn. Stat. § 363A.08, subd. 2 by discriminating against Wells with respect to hiring based on a perceived disability.

- **Ruling:**
 - a. ...if Wells applied to a broad class of jobs, BNSF's failure to offer one of those jobs could potentially signal a belief that Wells is unable to work in a broad class of jobs. Because Wells offers no factual details, there is no basis from which the Court can plausibly infer that BNSF's failure to offer Wells another job revealed a belief that Wells was “unable to work in a broad class of jobs.”
 - b. ...an employer violates § 12112(d)(3)(C) if the employer uses the results of a post-offer medical examination to discriminate against an individual in violation of § 12112(a). . . the Court dismisses Wells' claim for a violation of § 12112(a). As a

result, the Court also grants the motion to dismiss Wells' claim for a violation of § 12112(d)(3)(C).

- c. There is one difference between the MHRA and ADA definition of disability. “The MHRA ‘materially limits’ standard is less stringent than the [ADA] ‘substantially limits’ standard.” Despite this difference, courts “analyze cases under the ADA and MHRA with the same standard.” Because analysis of the ADA claim applies equally to the MHRA claim, the Court likewise finds that the Second Amended Complaint contains insufficient facts to show that BNSF regarded Wells as “disabled” under Minn. Stat. § 363A.03, subd. 12. By extension, Wells has failed to state a claim to relief and the Court grants the motion to dismiss this claim.

Dalton v. NPC Int’l, Inc., 2018 WL 1401809 (D. Minn. Mar. 20, 2018)

- **Posture:** Plaintiff suffers from cerebral palsy; attempted to enter a Pizza Hut in Fergus Falls, MN. Plaintiff encountered multiple barriers to entry, and now seeks an injunction and attorney's fees under 42 USC §12188(a)(1).
- **Facts:** Plaintiff uses a wheelchair and a van with a wheelchair lift. He alleges that the Pizza Hut restaurant in Fergus Falls has failed to remove architectural barriers in violation of the Americans with Disabilities Act (“ADA”). In his original Complaint, he alleged that he was prevented from eating at the Pizza Hut in June 2017 because the reserved disabled parking spaces “lacked adjacent access aisles that extended the full length of the parking spaces.” After the owner of the Pizza Hut, Defendant NPC International, Inc., fixed the parking spaces and filed a motion to dismiss, Dalton filed an Amended Complaint adding several more alleged architectural barriers, none of which he personally encountered. In addition to the original access-aisles claim Dalton now alleges that the Pizza Hut has two public entrances, one of which is not on an accessible path and is not an accessible means of egress; that there is no signage to identify an accessible entrance/exit; and that the service counter is too tall. Dalton alleges that he was deterred from visiting the Pizza Hut as a result of these alleged architectural barriers.
- **Plaintiff's Arguments:**
 - a. NPC alleges that it has remedied the parking lot, signage, and service-counter violations that Dalton asserts in the Amended Complaint. . . voluntary cessation does not always moot a claim, and NPC “carries a ‘heavy burden’ of demonstrating not only that it has voluntarily ceased the offending conduct but also that it is ‘absolutely clear’ the offending conduct ‘could not reasonably be expected to recur.’”

Dalton does not argue that NPC’s remediation efforts are somehow temporary. *He contends instead, for example, that because he has not independently verified the slope of the new parking spaces, NPC has not met its “heavy burden.”*

- **Ruling:**
 - a. Dalton has known about the new parking spaces since late September 2017. In the intervening six months, he could have measured the slope of the spaces and evaluated NPC’s other remedial measures, but he chose not to do so. His *failure to inspect*

NPS's remediation efforts does not establish that NPC has somehow failed to meet its burden here. Dalton's claims relating to three barriers are moot.

Disability Support All. v. Heartwood Enterprises, LLC, 885 F.3d 543 (8th Cir. Mar. 22, 2018)

- **Posture:** Advocacy organization and disabled individual filed state court action against office building owner alleging public accommodation violations of Title III of Americans with Disabilities Act (ADA) and Minnesota Human Rights Act (MHRA). After removal, the United States District Court for the District of Minnesota entered summary judgment in owner's favor, and plaintiffs appealed.
- **Facts:** Heartwood is the owner and landlord of Heartwood Offices, a former residence converted to a small office building located at 889 Grand Avenue in St. Paul, Minnesota. Its business tenants are visited by appointment only. On December 3, 2014, Wong was driven to Heartwood Offices, without an appointment, intending to see Dr. Jeffrey Raich, a mental health professional leasing an office on the first floor. From the car, Wong could see that the building has a seven-inch step between its path and the sidewalk and four more steps from the private path to the front door. Concluding he would be unable to traverse these steps in his wheelchair, Wong left and commenced this lawsuit, alleging that exterior barriers at Heartwood Offices violate the ADA and MHRA and constitute a bias offense under Minnesota Statutes § 611A.79.
- **Plaintiff's Arguments:**
 - a. On appeal, Wong first argues the district court improperly placed on him the burden of production to show that modifications to Heartwood Offices would be readily achievable.
 - b. Wong next argues there are genuine issues of material fact whether external ramp installation would be readily achievable—whether Heartwood could obtain departures from exterior accessible route requirements and tax benefits to defray the cost of ramp installation, and whether Heartwood's financial position would make the \$11,987 cost of ramp installation readily achievable.
- **Ruling:**
 - a. Heartwood more than satisfied any applicable burden of production when it submitted with its motion for summary judgment detailed evidence showing that removal of its access barriers was not readily achievable, evidence Wong completely failed to refute. Thus, the district court committed no plain procedural error.
 - b. Heartwood submitted substantial, unrefuted evidence that removal of the barriers in question would not be “easily accomplishable and able to be carried out without much difficulty or expense.” 42 U.S.C. § 12181(9). On this record, the district court did not err in granting Heartwood summary judgment dismissing Wong's Title III claim on the merits.

- c. The parties agree that, in determining liability, “[c]laims under the MHRA are analyzed the same as claims under the ADA.” *Somers v. City of Minneapolis*, 245 F.3d 782, 788 (8th Cir. 2001). Thus, the district court properly granted summary judgment dismissing Wong's MHRA claim, even if the MHRA affords a successful plaintiff additional remedies.

Hanson v. N. Pines Mental Health Ctr., Inc., 2018 WL 1440333 (D. Minn. Mar. 22, 2018)

- **Posture:** Former employee brought action alleging that her former employer violated the ADA and MHRA by discriminating against her because it regarded her as disabled. Plaintiff also asserts employer retaliated against her by terminating her employment because she requested accommodations for her disabilities, sought outside assistance from an attorney regarding her claims, and filed a claim against the employer.
- **Facts:** Hanson was a peer counselor at a rehab facility. She was responsible for documenting care with inpatients, which was difficult because she had extreme visual impairment. Her employer provided multiple accommodations to help her see her computer screen adequately, but it was still difficult for Hanson; while providing these accommodations, the employer became concerned that Hanson was still driving her car with such poor vision, particularly because she often transported rehab patients on her own accord.
- **Plaintiff's Arguments:**
 - a. District court erred in not finding that Heartland failed to "reasonably accommodate" Plaintiff's disability. Plaintiff identifies three possible accommodations: (1) a multi-month leave of absence following the expiration of his FMLA leave; (2) reassignment to a vacant job; or (3) a temporary assignment to a light-duty position that did not require heavy lifting.
- **Ruling:**
 - a. A “reasonable accommodation” is one that allows the disabled employee to “perform the essential functions of the employment position.” § 12111(8). ***If the proposed accommodation does not make it possible for the employee to perform his job, then the employee is not a “qualified individual”*** as that term is defined in the ADA. . . Putting these interlocking definitions together, ***a long-term leave of absence cannot be a reasonable accommodation.*** . . . Simply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working.

Davis v. Anthony, Inc., No. 16-4051, 2018 WL 1525827 (8th Cir. Mar. 29, 2018)

- **Posture:** Wheelchair user brought action against restaurant owner, seeking declaratory and injunctive relief based on alleged violations of Americans with Disabilities Act (ADA). The United States District Court for the District of Nebraska granted owner's motion to dismiss for lack of subject matter jurisdiction, on grounds of mootness arising from owner's remediation of alleged access barriers in parking lot. Wheelchair user appealed.

- **Facts:** Davis has cerebral palsy and uses a wheelchair for mobility. She tried to eat at an Omaha steakhouse owned and operated by Anthony. Davis alleges she could not access the steakhouse “due to the physical barriers to access” that fail “to comply with the requirements of the ADA.” (only 4 handicap parking spaces, two of which were not adjacent to the front door). The complaint says Davis needs “an inspection of [the steakhouse] in order to photograph and measure all such barriers to access and violations of the ADA.” Anthony moved to dismiss under Rule 12(b)(1) for lack of subject-matter jurisdiction. It asserted mootness, claiming it remediated the violations. Anthony submitted affidavits, pictures, and invoices. The district court agreed and dismissed the case as moot.
- **Plaintiff’s Arguments:**
 - a. Davis says that the district court prematurely ruled on mootness before allowing discovery about other ADA violations that could be litigated in this case—specifically “what, if any, other barriers affecting her disability existed at [the steakhouse] at the time [she] brought her claim.”
- **Ruling:**
 - a. Davis has standing to sue for the parking-space violations she encountered. Davis did not enter the steakhouse—a “building” under the ADAAG. She encountered only the parking space—which is not within the definition of “building.” *Davis cannot use the violation encountered in the parking space to expand her standing to sue for unencountered violations inside the steakhouse that never injured her.*

Non-Minnesota Cases

Bagwell v. Morgan Cty. Comm'n, 2017 WL 192694 (11th Cir. Jan. 18, 2017).

- **Posture:** Former county employee brought action against county, alleging employment discrimination, in violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The United States District Court for the Northern District of Alabama granted summary judgment for county. Employee appealed.
- **Facts:** Plaintiff was terminated from position as a groundskeeper whose essential job functions included tasks necessary to maintain and upkeep city parks, such as traversing uneven and wet surfaces, standing, and walking. Due to stamina and endurance issues caused by a leg injury, she was unable to safely perform these functions consistently, even with the assistance of an accommodation.
- **Plaintiff's Arguments:**
 1. District court erred by finding that the “essential functions” of her groundskeeper job included all of the duties listed on the County’s job description.
 2. Asserts that she could perform the “essential functions” of the groundskeeper position with or without a reasonable accommodation.
- **Ruling:**
 1. Plaintiff's argument merely asserts that the district court inappropriately weighed the legal factors for determining the “essential functions.” . . . there is no dispute that the job *could entail any function needed to maintain the park*, which included, but was *not limited to*, all of the *functions listed in the written job description*.
 2. *Even considering all of the reasonable accommodations suggested* by Bagwell throughout this litigation, *she could not perform the essential functions of the position*. Plaintiff can only tolerate walking and standing for one-third of the day. Plaintiff's argument on what she perceives the job functions to entail (with accommodations) is not probative.

Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, (Feb. 22, 2017)

- **Posture:** Parents sued local and regional school districts and principal, alleging that they violated Title II of Americans with Disabilities Act (ADA) and Rehabilitation Act when they refused to allow child, who had cerebral palsy, to bring service dog to school. The United States District Court for the Eastern District of Michigan, Lawrence P. Zatkoff, J., 2014 WL 106624, granted defendants' motion to dismiss, for failure to exhaust remedies available under the Individuals with Disabilities Education Act (IDEA). Parents appealed. The United States Court of Appeals for the Sixth Circuit, John M. Rogers, Circuit Judge, 788 F.3d 622, affirmed. Certiorari was granted.
- **Facts:** The Individuals with Disabilities Education Act (IDEA) offers federal funds to States in exchange for a commitment to furnish a “free appropriate public education”

(FAPE) to children with certain disabilities, 20 U.S.C. § 1412(a)(1)(A), and establishes formal administrative procedures for resolving disputes between parents and schools concerning the provision of a FAPE. A plaintiff bringing suit under the ADA, the Rehabilitation Act, or similar laws “seeking relief that is also available under [the IDEA]” must first exhaust the IDEA's administrative procedures.

Petitioner E.F. is a child with a severe form of cerebral palsy; a trained service dog named Wonder assists her with various daily life activities. When E.F.'s parents, petitioners Stacy and Brent Fry, sought permission for Wonder to join E.F. in kindergarten, officials at Ezra Eby Elementary School refused. The officials reasoned that the human aide provided as part of E.F.'s individualized education program rendered the dog superfluous. In response, the Frys removed E.F. from Ezra Eby and began homeschooling her.

The Frys then filed this suit in federal court against Ezra Eby's local and regional school districts and principal (collectively, the school districts), alleging that they violated Title II and § 504 and seeking declaratory and monetary relief. The District Court granted the school districts' motion to dismiss the suit, holding that § 1415(1) required the Frys to first exhaust the IDEA's administrative procedures. The Sixth Circuit affirmed, reasoning that § 1415(1) applies whenever a plaintiff's alleged harms are “educational” in nature.

- **Plaintiff's Arguments:**

- a. Primary concern in filing suit was failure to accommodate under the ADA - the action should not be preempted by IDEA requirements, as the Frys are not seeking to challenge school district on failure to provide their child a "free and appropriate public education."

- **Ruling:**

- a. How is a court to tell when a plaintiff “seeks” relief for the denial of a FAPE and when she does not? By looking, they both say, to the “substance” of, rather than the labels used in, the plaintiff's complaint. . .we agree with that view: What matters is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading.

In addressing whether a complaint fits that description, a court should attend to the diverse means and ends of the statutes covering persons with disabilities—the IDEA on the one hand, the ADA and Rehabilitation Act (most notably) on the other. . .IDEA guarantees individually tailored educational services, while Title II and § 504 promise non-discriminatory access to public institutions. . .*The Frys' complaint alleges only disability-based discrimination, without making any reference to the adequacy of the special education* services E.F.'s school provided. The school districts' “refusal to allow Wonder to act as a service dog,” the complaint states, “discriminated against [E.F.] as a person with disabilities ... by denying her equal access” to public facilities.

Accordingly, on remand, the court below should establish whether (or to what extent) the Frys invoked the IDEA's dispute resolution process before bringing this suit. And

if the Frys started down that road, the court should decide whether their actions reveal that the gravamen of their complaint is indeed the denial of a FAPE, thus necessitating further exhaustion.

Whitaker v. Wisconsin Dep't of Health Servs., 2017 WL 745600 (7th Cir. Feb. 27, 2017).

- **Posture:** Former state employee brought action against state department of health services, alleging claim for intentional discrimination based on her disability in violation of Rehabilitation Act [identical "reasonable accommodation" standard to ADA]. The United States District Court for the Eastern District of Wisconsin granted summary judgment in favor of department. Employee appealed.
- **Facts:** Plaintiff worked as a corrections officer for the Wisconsin Department of Health Services, eventually transitioning into other positions due to a back injury; her job role required regular attendance. Over multiple months, Plaintiff exhausted available FMLA leave as well as a 30-day unpaid leave, and was given notice by the Department that if she failed to return to work upon the conclusion of the 30-day leave, the termination process would begin. Plaintiff did not return to work on her expected date, but she *did* submit notes from her doctor requesting additional time off for a medical leave. Because the notes did not contain any information detailing her course of treatment or estimated recovery, the Department notified Plaintiff it was initiating termination proceedings. Plaintiff requested "finite, unpaid leave" as an accommodation, and was denied.
- **Plaintiff's Arguments:**
 1. District court erred in ruling that accommodation of lengthy unpaid leave was not "reasonable" alternative to termination is unfounded.
- **Ruling:**
 1. A request for "*open-ended*" *unpaid leave is an undue burden on employer*, and is not required as an accommodation to termination.

Yates v. Sweet Potato Enterprises, 684 F.Appx 655 (9th Cir. Mar. 22, 2017).

- **Posture:** Plaintiff sued restaurant owners and operators, alleging presence of unlawful architectural barriers in violation of the Americans with Disabilities Act (ADA). The United States District Court for the Northern District of California denied injunctive relief and awarded damages. Cross appeals were taken.
- **Facts:** Plaintiff sued owner of a Popeyes Chicken store alleging presence of unlawful architectural barriers in violation of ADA (no power door). The district court found that installation of a power door was readily achievable, but denied injunctive relief mandating installation of the door on the ground that a sign and employee assistance fixed the problem and mooted the claim. The district court found that Plaintiff was entitled to damages for the ADA violation as incorporated by the California acts, but that California law barred recovery for all but the first visit, and entered judgment in favor of Plaintiff for \$4,000.

- **Plaintiff's Arguments:**

1. Under the ADA, “[d]iscrimination includes ... a failure to remove architectural barriers ... in existing facilities ... where such removal is readily achievable.” 42 U.S.C. § 12182(b)(2)(A)(iv). The ADA defines “readily achievable” as “easily accomplishable and able to be carried out without much difficulty or expense.” Id. § 12181(9). Question as to whether the court record supports a finding that remediation of the barrier was in fact "readily achievable" at Plaintiff's first visit.
2. Failure to find that remediation of the barrier was "readily achievable" resulted in faulty damages and failure to issue an injunction against inadequate remedies.

- **Ruling:**

1. The district court erred in finding that remediation of the barrier was readily achievable during Plaintiff's earlier visits. The "*readily achievable*" analysis is *necessarily time sensitive* because of its consideration of cost and practicality. The district court did not take into account Defendant's financial position, or its intention to remediate.
2. As a result, district court's finding of limited damages and denying an injunction was reversed.

Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017), cert. denied, 2018 WL 489210 (U.S. Apr. 2, 2018).

- **Posture:** Former employee brought action alleging that his former employer violated the ADA by failing to provide him a reasonable accommodation of three-month leave of absence after his FMLA leave expired. The United States District Court for the Eastern District of Wisconsin entered summary judgment in employer's favor. Employee appealed.

- **Facts:** Plaintiff worked in physically-demanding role for fabricator of retail display fixtures. Took 12-week medical leave under FMLA to deal with back pain. On last day of leave, Plaintiff underwent back surgery which required another 2-3 months of time off. Plaintiff requested further time off, was denied and terminated, but employer invited Plaintiff to reapply when cleared to work. 3 months later, after cleared, Plaintiff sued Heartland alleging discrimination by failing to provide a reasonable accommodation.

- **Plaintiff's Arguments:**

1. District court erred in not finding that Heartland failed to "reasonably accommodate" Plaintiff's disability. Plaintiff identifies three possible accommodations: (1) a multi-month leave of absence following the expiration of his FMLA leave; (2) reassignment to a vacant job; or (3) a temporary assignment to a light-duty position that did not require heavy lifting.

- **Ruling:**

1. A “reasonable accommodation” is one that allows the disabled employee to “perform the essential functions of the employment position.” § 12111(8). *If the proposed*

accommodation does not make it possible for the employee to perform his job, then the employee is not a “qualified individual” as that term is defined in the ADA. . . Putting these interlocking definitions together, a long-term leave of absence cannot be a reasonable accommodation. . . Simply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working.

Punt v. Kelly Servs., 862 F.3d 1040 (10th Cir. 2017)

- **Posture:** Temporary employee brought action against staffing agency and temporary employer, asserting a failure-to-accommodate claim under the Americans with Disabilities Act (ADA) and genetic information discrimination in violation of the Genetic Information Nondiscrimination Act (GINA). The United States District Court for the District of Colorado, Christine M. Arguello, J., entered summary judgment in favor of staffing agency and temporary employer. Employee appealed.
- **Facts:** Plaintiff Kristin Punt was an at-will employee of Kelly. Kelly assigned Plaintiff to the receptionist position at GE, and she worked there from October 24, 2011, through December 5, 2011. Shortly before she began this assignment, she had had a screening mammogram which showed suspicious microcalcifications in her right breast, and in November, while working at GE, she had a breast biopsy and was informed she had breast cancer. Plaintiff alleges that she told various GE and Kelly employees about her cancer diagnosis and her family history of breast cancer.

In the six weeks that Plaintiff was assigned to work as a receptionist at GE, Plaintiff never worked a full 40-hour work week. She was absent from work on six occasions. On or about December 5, GE’s general manager and HR director contacted Ms. Wilgus to end Plaintiff’s assignment, telling Ms. Wilgus that Plaintiff was not showing up for work and that GE “needed an employee that’s going to be able to show up and fulfill the needs of the position.” Ms. Wilgus then contacted Plaintiff to inform her that her temporary assignment with GE had been terminated. According to Plaintiff, during the course of this conversation, Ms. Wilgus told Plaintiff that GE’s HR director had said she wanted to terminate Plaintiff’s assignment “because [she] would be very unreliable having cancer.”

Plaintiff filed suit in district court. Although Plaintiff characterized her ADA claim as a failure-to-accommodate claim, the court held that this claim must be evaluated as a disparate-treatment claim, subject to *McDonnell Douglas* burden-shifting analysis, because Plaintiff had not presented direct evidence of a discriminatory motivation on the part of Defendants. The court then held that Plaintiff had failed either to establish a prima facie case of disability discrimination or to show that Defendants’ legitimate, nondiscriminatory reason for her termination was pretextual. The court further held that Plaintiff had failed to establish a prima facie case of genetic information discrimination under GINA. The district court thus granted summary judgment in favor of Defendants on both claims for relief.

- **Plaintiff’s Arguments:**
 - a. Plaintiff asserted at trial and maintains on appeal that her complaint pled a failure-to-accommodate claim, while Defendants argue that her complaint should instead be construed to plead a disparate-treatment claim.

Ruling:

- a. The determination of whether a requested accommodation is reasonable “must be made on the facts of each case taking into consideration the particular individual’s disability and employment position.” In this case, Plaintiff did not inform either Kelly or GE of the expected duration of her impairment, and “she was very vague about how much time she ... was going to miss” as well.

Plaintiff has not cited to a single case in which a court found a leave of absence to be a reasonable accommodation for a temporary employee who was assigned to fill a position at a business by a temporary-staffing agency.

Under all of the circumstances of this case, and especially in light of Plaintiff’s position as a temporary employee whose physical presence at the workplace was the most essential function of her job, we are persuaded the accommodation Plaintiff requested from GE was unreasonable as a matter of law.

Painter v. Illinois Dep’t of Transportation, 2017 WL 6032504 (7th Cir. Dec. 6, 2017)

- **Posture:** Employee brought action alleging that her former employer, the Illinois Department of Transportation (IDOT), required her to undergo unnecessary mental-health examinations in violation of the Americans with Disabilities Act. The United States District Court for the Central District of Illinois granted summary judgment in favor of employer. Employee appealed.
- **Facts:** Painter began working as an Office Administrator for the IDOT’s Division of Traffic Safety in September 2010. After many employees complained about her behavior, the IDOT put Painter on paid administrative leave and required that she submit to a fitness-for-duty examination. IDOT’s fitness-for-duty coordinator, retained psychiatrist Dr. Terry Killian to evaluate Painter’s mental health. Dr. Killian met with Painter on December 2 and 16, 2011. He concluded that Painter was psychiatrically fit for duty, but the statements from her coworkers and supervisors caused him to suspect she might suffer from a personality disorder. Even so, Dr. Killian cleared Painter to return to work.

Painter's behavior remained erratic, leading to an arguable death threat against her union representative. Dr. Killian conducted his second examination of Painter on May 8, 2012. This was the fifth medical examination directed by the IDOT: two with Dr. Fletcher, the occupational-medicine specialist; one with Dr. Lee, the psychologist retained by Painter; and two with Dr. Killian, the psychiatrist. This time Dr. Killian declared Painter unfit for duty because of her “paranoid thinking and the highly disruptive behavior which results from her paranoia.” Painter then filed this action claiming that the IDOT had violated the ADA by forcing her to attend unnecessary medical examinations. The ADA prohibits covered employers from requiring their workers to undergo medical exams that are not “shown to be job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A).

- **Plaintiff's Arguments:**

- a. Painter principally argues that a jury could conclude that those examinations were not job-related or consistent with business necessity.

Ruling:

- a. Preventing employees from endangering their coworkers is a business necessity: “a safe workplace is a paradigmatic necessity of operating a business.” EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1283 (7th Cir. 1995). Employers need not retain workers who, because of a disability, might harm someone; such a rule would force an employer to risk a negligence suit to avoid violating the ADA. Timmons v. Gen. Motors Corp., 469 F.3d 1122, 1129 (7th Cir. 2006); Palmer v. Circuit Court of Cook Cty., 117 F.3d 351, 352 (7th Cir. 1997).

The undisputed evidence compels a finding that Dr. Killian’s initial exam of Painter was job related and consistent with business necessity.

Arndt v. Ford Motor Co., 2017 WL 6375584 (6th Cir. Dec. 13, 2017)

- **Posture:** Former employee brought action against his former employer, alleging that employer violated Americans with Disabilities Act (ADA) and Michigan Persons with Disabilities Civil Rights Act (PWDCRA) by failing to engage in good faith in interactive process regarding his request to have his service dog accompany him to work as an accommodation for his post-traumatic stress disorder (PTSD), and by failing and refusing to accommodate his PTSD, resulting in his constructive discharge. The United States District Court for the Eastern District of Michigan entered summary judgment in favor of employer. Employee appealed.
- **Facts:** Bradley Arndt, a 24-year veteran of the United States Army, was diagnosed with service related Post Traumatic Stress Disorder (PTSD) and mild traumatic brain injury (mTBI). Ford hired Arndt in August 2012 as a Process Coach supervising hourly employees at its Van Dyke Transmission Plant. Arndt supervised workers in the “clean room” where controls were assembled by employees who wear lab coats and protective eyewear. In February 2013, symptoms of Arndt’s PTSD caused him to miss a day of work and prompted him to inquire about bringing his service dog “Cadence” to work with him. A long period of granting Arndt permission for this accommodation, then retraction of such permission, followed. A workgroup was put together to decide whether service dogs could be in a clean room, and an HR rep was included to determine the tasks Arndt needed accommodation for. At a meeting with the HR official, Arndt became distraught, pulled out his employee badge and resigned. He followed up with a handwritten note, stating that his resignation was of his “own accord and not influenced by anyone either from Ford Motor Company or the Van Dyke Transmission Plant.” Nonetheless, Arndt contends that he was constructively discharged by Ford’s failure to accommodate him or engage in the interactive process in good faith.

- **Plaintiff's Arguments:**

- a. Arndt terminated the interactive process by resigning his position, but he contends that he did so only because Ford failed to engage in the interactive process in good faith. He argues that a jury could find undue delay, inadequate interactive process, and redundant requests for information.

Ruling:

- a. Arndt argues that Ford failed to comply with the timeline in its own ADA policy, but the very timeline he relies on stated that it is a guideline and that the turn-around time can vary depending on the circumstances. The novelty of Arndt's request made it reasonable for his process to take longer than average.

Despite Arndt's distress about being repeatedly asked which job functions he had difficulty performing, the ADA's guidelines advise the employer to "[c]onsult with the individual with a disability to ascertain the precise job-related limitations imposed by [his] disability." It may be that a different HR person could have framed the question better or broken it into more specific questions that might have drawn out the information Ford needed. But, however abrupt or condescending HR may have been, asking him this question even multiple times does not support a finding that Ford failed to participate in the process in good faith.

Finally, the claim that Ford was at fault for the breakdown because it did not propose an alternative accommodation is without merit. First, Ford had not reached any conclusion about the accommodation that Arndt had specifically requested at the time Arndt resigned. Second, Ford was aware that Arndt had objected to the idea that a transfer to Dearborn might be a possible alternative accommodation the previous year. Moreover, an employer is not required to counter with an alternative accommodation in order to have participated in the interactive process in good faith.

Rodrigo v. Carle Found. Hosp., 879 F.3d 236 (7th Cir., Jan. 2, 2018)

- **Posture:** Medical resident brought action under the Americans with Disabilities Act (ADA) against hospital, alleging disability discrimination, retaliation, and failure to accommodate disability, stemming from his termination for failing, for a third time, to pass exam that was necessary to obtain a license to practice medicine and also was requirement for a third year in hospital's residency program. The United States District Court for the Central District of Illinois entered summary judgment in favor of hospital. Resident appealed.
- **Facts:** Rodrigo was a resident in Carle's Family Medicine Residency Program ("Program") beginning in July 2010. Residents are required to pass a "Step 3 test" before advancing to the third year of the Program. Carle adopted a policy in July 2012 that "[m]ore than two failures of USMLE Step 3 ... will result in termination from the program." Passing the Step 3 exam is a prerequisite for obtaining a license to practice medicine in the United States, and a license, in turn, is necessary to be eligible to take the Family Medicine board exam.

Carle did not graduate residents from its Program unless they completed licensing requirements and were eligible to take the board exam.

Rodrigo failed the Step 3 test three times, despite receiving an extension from Carle. Carle did not provide Rodrigo an additional opportunity to test; at this point, Rodrigo made novel claims of sleep apnea and restless leg syndrome as issues that caused his prior failures on the Step 3 exams, and asked for a medical accommodation. He was refused by Carle, and dismissed from the residency. Rodrigo sued for violation of ADA.

- **Plaintiff's Arguments:**

- a. Plaintiff asserts that he presented evidence showing that he requested the accommodations of reinstatement to the Program, and the chance to take the Step 3 test a fourth time in California, among other things. He argues that Carle failed to respond to these requests with an interactive process to determine an appropriate accommodation for him as a "qualified individual" under the ADA, due to his disabilities.
- b. Plaintiff asserts that he presented evidence of protected activities including his request for a fourth attempt at the Step 3 test and his request for reinstatement. He claims that his termination and the refusal to reinstate him were in retaliation for engaging in these protected activities.

- **Ruling:**

- a. The consequence to Carle of the resident not passing is that the resident may not be eligible for licensing without significant remediation and will continue to practice on the licenses of supervising physicians, an obvious risk for the hospital. No matter how the requirement of passing Step 3 is framed, whether as a core qualification or as an essential function, the evidence supports only one conclusion: a resident who cannot pass the test in the requisite time frame is not a "qualified individual" for the third Program year.
- b. In asserting that Carle retaliated by refusing to waive its Step 3 passage requirement, Rodrigo is really alleging a discrimination or accommodation claim rather than a true retaliation claim. In other words, Carle's alleged "retaliation" was simply an enforcement of its Step 3 policy, and the retaliation claim is thus a collateral attack on the legitimacy of that requirement. Rodrigo may not make an end-run around the "qualified individual" requirement by simply reframing a discrimination or accommodation claim as one for retaliation. Because he is not a qualified individual for the purposes of his discrimination and accommodation claims, he is not a qualified individual for his mislabeled retaliation claim.

Caporicci v. Chipotle Mexican Grill, Inc., 2018 WL 1638838 (11th Cir. Apr. 5, 2018)

- **Posture:** Lisa Caporicci appeals the district court's grant of summary judgment in favor of her former employer, Chipotle Mexican Grill, Inc. She sued Chipotle, making claims that it discriminated against her based on her disability in violation of the Americans with

Disabilities Act (“ADA”), 42 U.S.C. § 12112(a), and the Florida Civil Rights Act (“FCRA”), Fla. Stat. § 760.10(1)(a).

- **Facts:** Caporicci was diagnosed with bipolar disorder when she was eighteen years old. When not on medication to treat the disorder, she suffers from “[m]ania and depression.” In July 2012, Caporicci began working for Chipotle as a crew member at Chipotle’s South Tampa location. Caporicci began taking a new medication (Saphris) for her bipolar disorder, which her manager was aware of and gave her time off for to adjust to the new medication. She came back to work without incident, though noted the medication made her feel “tired, slow and groggy.” On June 7, 2013 Caporicci came to work and was unable to perform to her manager's expectations. He sent her home “to rest” and called her later to let her know she was fired for violating Chipotle's employee handbook policy regarding inebriation. Caporicci pushed back, arguing the inebriation was caused by her new medication.

In August 2014, Caporicci filed this suit against Chipotle. She alleged that Chipotle discriminated against her “because of her disability,” in violation of the ADA and the FCRA. After discovery was complete, Chipotle moved for summary judgment. The district court found that “[w]hile Plaintiff may well have been fired because of conduct related to medication side effects, that fact is not sufficient to demonstrate disparate treatment based on Plaintiff’s disability.” The court therefore granted summary judgment in favor of Chipotle on Caporicci’s claims under the ADA and FCRA. Caporicci appealed.

- **Plaintiff’s Arguments:**
 - a. Plaintiff and Defendant both admit that (1) Plaintiff is disabled, and (2) she was otherwise qualified to perform the job. Plaintiff argues that she was *discriminated based on her disability* in that her firing was proximately caused by the medications she takes for bipolar disorder.
- **Ruling:**
 - a. Caporicci’s claim fails because she cannot show she was terminated because of her disability and—even if she could—she cannot demonstrate that Chipotle’s nondiscriminatory explanation is pretext.

Whether a firing based on disability-related intoxication constitutes disability-based discrimination under the ADA is an open question in this circuit and one on which other circuits are split. However, Caporicci did not raise this issue in her brief. Therefore that issue is considered abandoned on appeal.

The manager told Caporicci that she was fired for “being intoxicated” at work. The manager did not say anything to her about violating the notification provision. . . . Caporicci violated the policy’s prohibition on workplace intoxication, and this violation was Chipotle’s stated reason for firing her. “A plaintiff is not allowed to recast an employer’s proffered nondiscriminatory reasons.”. . . Caporicci failed to do so.