Emerging Trends in Disability Law

PART I. INTRODUCTION

PART II. STATUTORY/REGULATORY CONTEXT

PART III. CASE LAW DEVELOPMENTS
Part I: Goals of Presentation

1. Alert you to key case law developments.
2. Give an HR practitioner’s perspective on these developments and suggest best practices.
3. You’ll forget me... but you’ll still have the slides.

Part I: My HR Priorities

1. Do the right thing.
2. Comply with the law.
3. Accomplish my firm’s mission.
4. Don’t get sued in the first place.
5. If sued, win on MSJ.

Part I: California-Centric Presentation

FEHA is generally more protective of employees than the ADA (e.g., “limits” a major life activity under FEHA, not “substantially” limits as under the ADA).

Why then do we care about the ADA?
Part I: California-Centric Presentation

- Whenever the ADA’s disability definition is more protective, FEHA incorporates the ADA’s definition into FEHA. 2 C.C.R. § 11065(d)(8).

- More ADA cases than FEHA cases – more likely to find your fact scenario discussed in an ADA case.

Part I: California-Centric Presentation

- California courts will look to federal ADA cases.

“Because the ADA and FEHA share the goal of eliminating discrimination, we often look to federal case authority to guide the construction and application of FEHA…”


Part I: The HR Perspective

The Human Side of Disability Law

1. Often an area of frustration for employer and employee – be sensitive to everyone.
2. Assumptions and prejudices run rampant – ground yourself in the facts.
3. Don’t jump to conclusions – slow down the pace.
4. Consider what the record will look like.
Part I: Disability Law Analytical Process

- Definition of Disability
- Qualified
- Interactive Process
- Reasonable Accommodation
- Misconduct
- Medical Exams/Inquiries (What can you get/when can you get it?)
- Maintaining Medical Info (How do you store the info you have?)

PART II.

STATUTORY/REGULATORY CONTEXT

Part II: Brief History of Disability Law

1990 Americans with Disabilities Act ("ADA")
2000 AB 2222 Expands FEHA
2008 Genetic Information Nondiscrimination Act ("GINA")
2008 ADA Amendments Act ("ADAAA")
2011 EEOC’s Regulations on ADAAA
2012 Updated FEHA Regulations
Part II: EEOC Enforcement Guidance

What is EEOC Enforcement Guidance?

http://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm

“EEOC Enforcement Guidance is ‘very persuasive authority’ in questions of statutory interpretation of the ADA.” Kroll v. White Lake Ambulance Auth., 691 F.3d 809, 815 (6th Cir.2012); Wills v. Superior Court, 195 Cal.App.4th 143, 165 (2011) (noting that “California courts ‘look to EEOC interpretations of the ADA when called upon to interpret comparable provisions of the FEHA’”).

Part II: EEOC Enforcement Guidance

New Guidance Issued July 14, 2014

Enforcement Guidance: Pregnancy Discrimination and Related Issues

http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

“Changes to the definition of the term “disability” resulting from the enactment of the ADA Amendments Act of 2008 make it much easier for individuals with pregnancy-related impairments to demonstrate that they have disabilities and are thus entitled to the ADA’s protection.”

“An impairment does not have to prevent, or severely or significantly restrict, performance of a major life activity to be considered substantially limiting, and impairments of short duration that are sufficiently limiting can be disabilities.”

See Answer to Question 18 of Questions and Answers about the EEOC’s Enforcement Guidance on Pregnancy Discrimination and Related Issues (italics added).

http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm
Part II: EEOC Enforcement Guidance

Examples of Pregnancy-Related Impairments

- Pelvic inflammation, which may substantially limit the ability to walk;
- Pregnancy-related carpal tunnel syndrome affecting the ability to lift or perform manual tasks;
- Disorders of the uterus or cervix that may necessitate certain physical restrictions to enable a full-term pregnancy;
- Pregnancy-related sciatica limiting musculoskeletal functions;
- Gestational diabetes limiting endocrine function; and
- Preeclampsia, which causes high blood pressure, affecting cardiovascular and circulatory functions.


Part II: EEOC Enforcement Guidance

EEOC Suggested Best Practice:

“State explicitly in any written reasonable accommodation policy that reasonable accommodations may be widely available to individuals with temporary impairments, including impairments relating to pregnancy.”

See Best Practice of the Enforcement Guidance.

Part II: EEOC Enforcement Guidance

Does the EEOC Pregnancy Discrimination Guidance change the law in California?
Part II: EEOC Enforcement Guidance

Not Really.

California (FEHA) already has the Pregnancy Disability Leave Law. Gov. Code § 12945.

Part II: EEOC Enforcement Guidance

Why even mention the EEOC’s Pregnancy Discrimination Guidance in this presentation?

- Example of the EEOC embracing “temporary” conditions as protected disabilities.
- Example of the ADA’s Post-ADAAA movement towards FEHA (we’ll discuss in Part III).

PART III.
CASE LAW DEVELOPMENTS
Part III: Case Law Developments

- Definition of Disability
- Qualified
- Interactive Process
- Reasonable Accommodation
- Misconduct
- Medical Exams/Inquiries
- Maintaining Medical Info

Part III: Case Law Developments

DEFINITION OF DISABILITY

Part III: Definition of Disability

Quick Review: Disability Definitions

**ADA:** A physical or mental impairment that substantially limits a major life activity.

**FEHA:** A mental or physical condition that limits a major life activity.
Part III: Definition of Disability

Application of the ADAAA’s Expanded Definition of Disability

Gogos v. AMS Mechanical Systems Inc.
737 F.3d 1170
(7th Cir.2013)

Part III: Definition of Disability

Gogos v. AMS Mech. Sys. – Facts

- Gogos was a pipe welder with high blood pressure. He took medication for this condition.
- In late 2012, his BP spiked and he experienced intermittent vision loss (up to a few minutes at a time).
- In January 2013, Gogos noticed his eye was red and sought permission to leave work for immediate medical attention.

Part III: Definition of Disability

Gogos v. AMS Mech. Sys. – Facts (continued)

- Gogos saw foreman as he was leaving and said he was going to the hospital because “my health is not very good lately.”
- Foreman immediately fired him.
Part III: Definition of Disability

**Gogos v. AMS Mech. Sys.**

Practice Pointer: Don’t do that!

Slow down the pace

Consult counsel before taking adverse action against an employee because of a disability.

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Gogos sued, and the district court dismissed his action. It held that his medical conditions were “transitory” and “suspect” and did not qualify as disabilities.

On appeal, the Seventh Circuit applied the ADAAA and held that Gogos was disabled.

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The Seventh Circuit noted that:

“Under the 2008 amendments, a person with an impairment that substantially limits a major life activity, or a record of one, is disabled, even if the impairment is ‘transitory and minor’ (defined as lasting six months or less).”

*Gogos, 737 F.3d 1170, 1172*
Part III: Definition of Disability

2014 Fourth Circuit ADAAA Authority

“[N]othing about the ADAAA or its regulations suggests a distinction between impairments caused by temporary injuries and impairments caused by permanent conditions. Because Summers alleges a severe injury that prevented him from walking for at least seven months, he has stated a claim that this impairment ‘substantially limited’ his ability to walk.”

Summers v. Altarum Institute, Corp., 740 F.3d 325, 333 n.4 (4th Cir.2014) (holding that a temporary leg injury sustained from a fall is a disability).

Part III: Definition of Disability

What about California law? Is a temporary condition a disability under FEHA?

Yes.


Part III: Definition of Disability

Take away from Gogos, Summers and the EEOC’s Pregnancy Discrimination Guidance

Beware the danger of discounting temporary conditions.

FEHA imports the ADA definition.

Part III: Definition of Disability

Another ADAAA case examining whether an employee is disabled:

**Weaving v. City of Hillsboro**

2014 WL 3973411
(9th Cir. Aug. 15, 2014)

*Weaving* addresses whether an employee’s ADHD limited his ability to “work” and to “interact with others” (major life activities) under the ADAAA.

Part III: Definition of Disability

*Weaving v. City of Hillsboro – Facts*

- Weaving was diagnosed with ADHD as a child. He took medication until he was 12, then stopped because he seemed to outgrow it.
- Weaving became a police officer and worked for one agency for approx. 10 years, passing all psych tests to become a police officer there.
- His reviews frequently noted interpersonal problems – he was intimidating and had an overly aggressive style.
Part III: Definition of Disability

Weaving v. City of Hillsboro – Facts (continued)

● He worked at City of Hillsboro PD for 3 years (2006 to 2009), again passing all psych tests. Was promoted to sergeant in 2007. His supervisor reported that his style inspired fear in fellow officers and he was perceived as arrogant.

● Weaving issued a several page disciplinary letter to a subordinate who filed a grievance over the discipline. Weaving was placed on admin leave pending investigation of the grievance.

● While on leave, Weaving sought treatment from a clinical psychologist who diagnosed him as having ADHD and prescribed a low dose of medication.

● In the investigation, the department concluded that Weaving had “created and fostered a hostile work environment for his subordinates and peers; in particular, he has been described in terms such as tyrannical, unapproachable, noncommunicative, belittling, demeaning, threatening, intimidating, arrogant and vindictive.”

● He was sent to a fitness-for-duty evaluation, which he passed despite his ADHD diagnosis.

● The City then terminated Weaving based on his interpersonal problems and their effect on the department.

Weaving’s Claim: His ADHD was a disability and he was unlawfully terminated because of his disability.

Jury Verdict: Jury trial in favor of Weaving, finding that he was disabled and that he was discharged because of his ADHD – total award in excess of $600,000.
Part III: Definition of Disability

*Weaving v. City of Hillsboro – Majority Opinion*

**Issue:** Did Weaving’s ADHD substantially limit his ability to work or to interact with others?

**Holding:** No. Weaving’s ADHD did not substantially limit his ability to work or to interact with others within the meaning of the ADA.

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**Major Life Activity – Working**

- The ADA specifically lists “working” as a major life activity. The employee must show that he is substantially limited in a type of work – not just his particular job.
- Weaving must show that he is limited as compared to most people in the general population.
- The Court noted that Weaving was a technically competent police officer and was selected for high level assignments.

**Result:** Weaving was not substantially limited in his ability to work.

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**Major Life Activity – Interacting with Others**

- Court cites prior case law finding that employees were substantially limited in “interacting with others” when they had panic attacks that caused them to stay at home for 20 hours a day or were otherwise essentially housebound.
- Court notes record showed that Weaving had “little, if any, difficulty comporting himself appropriately with his supervisors.”

**Result:** Weaving was not substantially limited in his ability to interact with others.
Part III: Definition of Disability

*Weaving v. City of Hillsboro – Majority Opinion*

“One who is able to communicate with others, though his communications may at times be offensive, ‘inappropriate, ineffective, or unsuccessful, is not substantially limited in his ability to interact with others within the meaning of the ADA.’ [Citation.] To hold otherwise would be to expose to potential ADA liability employers who take adverse employment actions against ill-tempered employees who create a hostile workplace environment for their colleagues.”


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Part III: Definition of Disability

*Weaving v. City of Hillsboro – The Dissent*

“Now on appeal, the majority decides that it knows better. It reweighs the evidence on a cold record and issues its own diagnosis: Weaving isn’t disabled, he’s just a jerk. Therefore the City was free to fire him. In the course of doing so, the majority usurps the jury’s role and cuts our controlling precedent [citation].”


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Part III: Definition of Disability

*Weaving v. City of Hillsboro*

What result under FEHA?
Part III: Definition of Disability

*Weaving v. City of Hillsboro* – California Analysis


**Working as Major Life Activity Under FEHA**

“Further, under the law of this state, ‘working’ is a major life activity regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.”

Gov. Code. § 12926.1(c).

**Interacting with Others as a Major Life Activity Under FEHA**

Explicitly identified as a major life activity at 2 C.C.R. § 11065(l)(1).
Part III: Definition of Disability

Weaving v. City of Hillsboro – Take Away

1. When defending a case, don’t assume that every condition is a disability.

2. If you believe your employee is not disabled, make sure your own doctor agrees (Weaving passed Hillsboro’s fitness-for-duty exam).

Part III: Definition of Disability

Associational Discrimination Claim

Rope v. Auto-Chlor System of Washington

Holding: Employee stated an associational discrimination claim under FEHA.

Rope v. Auto-Chlor is the only California FEHA case addressing this issue directly.

Part III: Definition of Disability

Rope v. Auto-Chlor – Facts

- In Sept 2010, Scott Rope was hired by Auto-Chlor.
- At that time, he told Auto-Chlor he would need to donate a kidney to his physically disabled sister in February 2011.
- In Nov. 2010, Rope learned about the newly enacted Donation Protection Act (“DPA”), which would guarantee him 30 days of paid leave. The Act went into effect on Jan. 1, 2011.
Part III: Definition of Disability

Rope v. Auto-Chlor – Facts (continued)

● Rope asked Auto-Chlor for 30 days of paid leave. The regional manager said he would look into it.

● Rope informed Auto-Chlor he might need additional leave after the surgery, depending on his doctor’s recommendation.

● On December 30, 2010, Rope was fired.

Part III: Definition of Disability

Rope v. Auto-Chlor – Rope’s Claims

Rope sued on several theories, including:

● Violation of the DPA.

● Associational discrimination in violation of FEHA.

● Violation of FEHA under the perceived/regarded as prong.

Part III: Definition of Disability

Rope v. Auto-Chlor – Court’s Opinion

● Court dismissed the DPA claim because it was not operative on Dec. 30, 2010 and was not retroactive.

● Court upheld Rope’s associational discrimination claim.

● Court dismissed his FEHA perceived/regarded as claim.
Part III: Definition of Disability

Rope v. Auto-Chlor – Associational Discrimination

Rope alleged that he was discriminated against based on his relationship or association with his physically disabled sister.

Federal ADA case law, but not California FEHA law, addressed this type of claim.

NOTE: Example of ADA case law relevant to FEHA.

Part III: Definition of Disability

Rope v. Auto-Chlor – Associational Discrimination

Federal authority recognizes three types of association discrimination:

1. Expense
2. Disability by association
3. Distraction

Larimer v. IBM Corp., 370 F.3d 698 (7th Cir.2004).

Part III: Definition of Disability

Rope v. Auto-Chlor – Associational Discrimination

Here, Court held that Rope had adequately pleaded the expense claim – that Auto-Chlor terminated him “to preemptively avoid an expense stemming from Rope’s association with his disabled sister.”

Part III: Definition of Disability

*Rope v. Auto-Chlor* – No Future Disability Claim

Rope also argued that he was “regarded as” as having either (a) a current disability or (b) a condition that would become a disability.

The Court rejected this.


Part III: Definition of Disability

*Rope v. Auto-Chlor* – Take Away

1. Associational disability claims are rare.

2. An individual planning to have surgery or other medical procedure that is not related to a current condition cannot raise a “regarded as” claim.
Part III: Case Law Developments

QUALIFIED

Part III: Qualified

This analysis arises in two contexts:

1. When evaluating a candidate for the job (job qualification standards).

2. When evaluating a current employee who could previously perform the essential functions of the job, and may no longer be able to because of a new condition or because an existing condition has worsened (i.e., when identifying whether the employee can perform with a reasonable accommodation).

Part III: Qualified

Job Qualification Standards


- Samson had applied to be a Senior Global Vehicle Technician.
- FedEx determined that an essential function of the technician position was the ability to obtain a federal commercial motor carrier license.
- Because of Type-1 diabetes, Samson could not pass the DOT medical examination required for operation of a commercial motor vehicle in interstate commerce.
Part III: Qualified

Samson v. Fed. Ex. Corp. – Facts (continued)

• FedEx therefore withdrew its offer of the position to the employee and in essence, screened out diabetic employees from eligibility for the position.

• Samson sued for disability discrimination and FedEx argued that the Federal Motor Carrier Safety Regulations provided a complete defense. FedEx argued Samson was not “qualified” for the position because his diabetes prevented him from obtaining the required license.

• The district court granted summary judgment for FedEx.

Part III: Qualified

Samson v. Fed. Ex. Corp. – Court’s Opinion

• The Eleventh Circuit reversed the district court and held that test-driving FedEx trucks might not be an essential function.

• Court did not defer to FedEx’s judgment (the license requirement was in the job description).

Part III: Qualified

Samson v. Fed. Ex. Corp. – Court’s Opinion

Court noted the following facts:

1. Nine other licensed truck drivers at the facility where Samson wanted to work.

2. The incumbent technician spent only a “miniscule” amount of time test-driving trucks.

3. FedEx technicians throughout Florida test-drive an average of 3.71 hours per year.
Part III: Qualified

Samson v. Fed. Ex. Corp. – Court’s Opinion

- The Court did not accept FedEx’s argument that the FMCSR were a complete defense.
- It would be a defense only if test driving constituted “transporting property or passengers in interstate commerce.”
  1. The incumbent had never test-driven across state lines.
  2. The incumbent had never test-driven with cargo.

Part III: Qualified

Compare Samson to Javala v. Crete Carrier Corp.

- In Javala, the Eleventh Circuit held that an employee with current diagnosis of alcoholism was not qualified for a position driving commercial trucks.
- DOT regulations prohibit anyone with a “current clinical diagnosis of alcoholism” from driving commercial trucks.
- The Company’s policy prohibited it from employing anyone who had a diagnosis of alcoholism within the past five years.

Javala v. Crete Carrier Corp., 754 F.3d 1283 (11th Cir.2014).

Part III: Qualified

Samson and Javala. – Take Away

1. Your job description is not a get-out-of-jail-free card.

1. Be prepared to defend your job description: engineer it in reverse.
Part III: Case Law Developments

INTERACTIVE PROCESS

Part III: Interactive Process

No California State Court Cases to Discuss.

California law remains split on whether an employee may bring an independent cause of action under FEHA for failure to engage in the interactive process.

Part III: Interactive Process

HR Perspective on the California Law Split:

Always engage!!

Always document!!
Part III: Interactive Process

ADA Interactive Process Cases

Spurling v. C&M Fine Pack, Inc.,
739 F.3d 1055 (7th Cir.2014)

- Employee exhibited a pattern of decreased consciousness and alertness, and received several disciplinary warnings.
- Employee was found asleep in the restroom and was suspended.

Spurling v. C&M Fine Pack – Facts (continued)

- Employee’s doctor completed the company’s ADA paperwork and checked the box marked “yes” asking if the if the patient had a disability under the ADA.
- Doctor wrote that employee exhibited excessive drowsiness that affected her job performance and recommended periods of scheduled rest.
- Doctor also wrote “add’n medical work up in progress.”

Spurling v. C&M Fine Pack – Facts (continued)

- After receiving the doctor’s note, supervisor determined the company had engaged in the interactive process and recommended in an email that the company take an “aggressive approach.”
- The employer then terminated Spurling.
Part III: Interactive Process

Spurling v. C&M Fine Pack – Facts (continued)

Held: Doctor’s note was sufficient to trigger the interactive process.

“Rather than collaborate with Spurling or her doctor to find a reasonable accommodation, C&M chose to turn a blind eye and terminate her. It did not seek further clarification from either Spurling or her doctor and disregarded the medical evaluation altogether. This is hardly engaging with Spurling to determine if a reasonable accommodation could be made.”

Spurling, 739 F.3d 1055 at 1061-62.

Part III: Interactive Process

Another ADA Interactive Process Case

“[A]n employee's accommodation request, even an unreasonable one, typically triggers an employer's duty to engage in an 'interactive process' to arrive at a suitable accommodation collaboratively with the employee.”

Summers v. Altarum Institute, Corp., 740 F.3d 325, 333 n.4 (4th Cir.2014)

Part III: Interactive Process

Central District Court Case
Analyzing FEHA Interactive-Process Claim

Hoskins v. BP Products, 2014 WL 116280 (C.D. Cal. Jan. 9, 2014) (holding that employer was not obligated under FEHA to obtain medical information from its third-party workers compensation insurer as part of the interactive process).
Part III: Case Law Developments

REASONABLE ACCOMMODATION

Part III: Reasonable Accommodation

Work at Home as a Reasonable Accommodation.

_EEOC v. Ford Motor Company_
752 F.3d 634 (6th Cir. 2014)
(April 22, 2014)

As of Aug. 29, 2014 the above case was vacated, pending rehearing en banc.

Part III: Reasonable Accommodation

_EEOC v. Ford Motor Co. – Facts_

- Employee Jane Harris was a resale steel buyer ("RSB") for Ford. She began employment as resale steel buyer in 2003 and held that position until her 2009 termination.

- Harris suffered from irritable bowel syndrome ("IBS"), which causes fecal incontinence, the entire time she worked as RSB. Her symptoms worsened over time. On bad days, Harris would be "unable to even to drive to work or stand up from her desk without soiling herself."

- Court held that her IBS was "indisputably" a disability under the ADA – not at issue in the case.
Part III: Reasonable Accommodation

EEOC v. Ford Motor Co. – Facts (continued)

What is a Resale Steel Buyer (RSB)?

- An RSB responds to emergency supply issues to ensure there is no gap in steel supply to parts manufacturers.
- The position involves “some individual tasks, such as updating spreadsheets and periodic site visits to observe the production process.”
- “Essence of the job was group problem-solving, which required that a buyer be available to interact with members of the resale team, suppliers, and others in the Ford system when problems arose.”

Harris’ Performance:

- In her job, Harris was “consistently competent, though not perfect.” In annual performance reviews between 2004 and 2008, rated as “excellent plus,” which was same rating given to 80% of RSBs. Reviews noted “she worked diligently with ‘minimal supervision’ and possessed strong knowledge of the steel market.” Her supervisors critiqued interpersonal skills, noting that she could be “disruptive and argumentative.”
- Supervisors also rated RSBs on a “contribution assessment” which was not shared with employees. In 2007 and 2008 Harris received the lowest score, placing her in bottom quartile of peer employees. Also received low ranking on job-related skills assessment in 2007 and 2008.

- In 2005, Harris’ absences began to affect job performance in Ford’s view. Harris’ supervisor allowed her to work on a flex-time telecommuting schedule on a trial basis, but the trial was deemed unsuccessful because Harris was unable to establish regular and consistent work hours.
- Harris worked from home on informal basis, including evenings and weekends, to keep up with her work. But Ford didn’t credit Harris for any time worked during non-core hours and marked her work-at-home days as absences. Ford considered this non-core-hour work as “casual OT” expected of all salaried employees.
Part III: Reasonable Accommodation

_EEOC v. Ford Motor Co. – Facts (continued)_

Ford’s Telecommuting Policy

- Ford authorized employees to work up to four days per week from a telecommuting site. Policy provided that all salaried employees are eligible to apply but stated that such arrangements are not appropriate for “all jobs, employees, work environments, or even managers.”
- Under this policy, several other RSBs telecommuted one day per week.

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Part III: Reasonable Accommodation

_EEOC v. Ford Motor Co. – Facts (Continued)_

Harris’ Accommodation Request

- In Feb 2009, Harris requested permission to telecommute on an as-needed basis as accommodation for her disability.
- In an interactive process meeting between Harris, the supervisor’s supervisor, and HR, Harris took the position that most of her work could be done via computer or telephone.

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Part III: Reasonable Accommodation

_EEOC v. Ford Motor Co. – Facts (continued)_

Ford Rejects Harris’ Work at Home Request:

- Ford determined that RSB position was not suitable for telecommuting. Instead, Ford proposed several alternatives, including that Harris’ cubicle be moved closer to the bathroom or that she seek another job more appropriate to telecommuting.
- “Ford managers made the business judgment that such meetings were most effectively handled face-to-face, and that email or teleconferencing was an insufficient substitute for in-person team problem-solving.”
Part III: Reasonable Accommodation

**EEOC v. Ford Motor Co. – Facts (continued)**

- Harris filed EEOC charge in April 2009.
- Tensions increased between Harris and supervisor’s supervisor.
- At time of July 2009 interim performance review, Harris ranked as “lower achiever.” Harris was put on Performance Enhancement Plan (PEP).
- At end of 30 day review period, Ford determined she hadn’t met any of PEP’s objectives and terminated her.

Part III: Reasonable Accommodation

**EEOC v. Ford Motor Co. – District Court Opinion**

District Court held that Harris was not “qualified” under ADA because of her excessive absenteeism.

It refused based on precedent to “second guess an employer’s business judgment regarding essential function of job” to find that a request to telecommute up to four days per week was a reasonable accommodation for the position.

Part III: Reasonable Accommodation

**EEOC v. Ford Motor Co. – Court’s Analysis**

**Issues:** (1) Is Ford’s physical-presence requirement an essential function? (2) If it’s not an essential function, is telecommuting a reasonable accommodation for an employee who cannot satisfy the physical-presence requirement?

**Holding:** (1) No, the physical-presence requirement is not essential. (2) Yes, telecommuting could be a reasonable accommodation. Reversed and remanded.
Part III: Reasonable Accommodation

_EEOC v. Ford Motor Co._ – Court’s Analysis

Court took no issue with precedent that “for many positions, regular attendance at the work place is undoubtedly essential.”

BUT

Court observed that this precedent is predicated on the assumption that the “workplace is the physical worksite provided by the employer.”

“...but any job also requires the employee to interact directly with people or objects at the worksite.” _EEOC v. Ford_, 753 F.3d at 647.
Part III: Reasonable Accommodation

*EEOC v. Ford Motor Co.* – Court’s Analysis

“We are merely recognizing that, given the state of modern technology, it is no longer the case that jobs suitable for telecommuting are ‘extraordinary’ or ‘unusual’...[C]ommunications technology has advanced to the point that it is no longer an ‘unusual case where an employee can effectively perform all work-related duties from home.’”

*EEOC*, 752 F.3d at 647.

Part III: Reasonable Accommodation

*EEOC v. Ford* – Cited by D.C. Circuit

“Technological advances and the evolving nature of the workplace, moreover, have contributed to the facilitative options available to employers (although their reasonableness in any given case must still be proven).” [Citing *EEOC v. Ford*.] For those reasons, it is rare that any particular type of accommodation will be categorically unreasonable as a matter of law.


Part III: Reasonable Accommodation

*EEOC v. Ford Motor Co.* – Take Away

1. Prior case law that attendance is an essential function is still alive and well.

2. But work-at-home may no longer be extraordinary or unusual accommodation.

3. Employers should distinguish between “attendance” (i.e., work hours) and “physical presence” (i.e., work location).
Part III: Reasonable Accommodation

EEOC v. Ford Motor Co. – HR Best Practices

- Avoid knee jerk reactions that you need “bodies in the chair.”
- Find out if you’ve let others work at home.
- If need for physical presence is real, put it in job description.

Part III: Reasonable Accommodation

What do California Courts applying FEHA say about working at home?

Part III: Reasonable Accommodation

Leave as an ADA Reasonable Accommodation

Hwang v. Kansas State University, 753 F.3d 1159, 1165 (10th Cir.2014) (holding that a leave longer than six months will generally be unreasonable) (”[T]he leave policy here granted all employees a full six months’ sick leave—more than sufficient to comply with the Act in nearly any case....”).
Part III: Case Law Developments

WORKPLACE MISCONDUCT

Part III: Workplace Misconduct

Two Conflicting Approaches in Case Law

1. An employee's disability will not preclude an employer from imposing discipline, up to and including termination, for the employee's violation of a workplace rule, even when there is a connection between the disability and the violation. “A rule’s a rule.”

2. Conduct resulting from a disability is part of the disability, rather than a separate basis for termination. Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1139-40 (9th Cir.2001).

Part III: Workplace Misconduct

The first approach (“a rule's a rule”) is the generally accepted approach under ADA federal case law and the EEOC.

9. If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?

"Yes, if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability."

"Certain conduct standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibitions on violence, threats of violence, stealing, or destruction of property."

See Q & A No. 9 from EEOC Performance Guidance: ADA Applying Performance and Conduct Standards to Employees with Disabilities.

http://www.eeoc.gov/facts/performance-conduct.html
Part III: Workplace Misconduct

The second approach has been taken by the Ninth Circuit when interpreting the ADA, but has been distinguished by a California court applying FEHA:


Part III: Workplace Misconduct

Recent Northern District Case Following Second Approach

EEOC v. Walgreens Co.
2014 WL 1410311
(N.D. Cal. April 11, 2014)

Part III: Workplace Misconduct

EEOC v. Walgreens – Facts

- Employee worked at Walgreens for 18 years.
- Five years after working for Walgreens, the employee was diagnosed with Type II diabetes.
- Walgreens knew she had diabetes and allowed her to possess candy in case of low blood sugar, to keep insulin in the break room refrigerator, and take additional brakes to test her blood sugar or eat.
- During the 13 years that she worked at Walgreens while a diabetic, she asked to take an additional break only once.
**Part III: Workplace Misconduct**

*EEOC v. Walgreens – Facts (continued)*

- On one occasion, the employee was returning items to the shelves and noticed she was shaking and sweating from low blood sugar.
- She didn’t have any candy with her and took a $1.39 bag of potato chips. She didn’t ask permission to do this.
- When she started feeling better 10 minutes later, she alleged she went to pay for the chips but no one was there.

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**Part III: Workplace Misconduct**

*EEOC v. Walgreens – Facts (continued)*

- Walgreens investigated – during an interview with the Loss Control Supervisor, she wrote “[m]y sugar low, not have time.”
- Walgreens terminated her for stealing.
- She filed an EEOC complaint and the EEOC sued Walgreens.

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**Part III: Workplace Misconduct**

*EEOC v. Walgreens – District Court Opinion*

- District Court held in favor of employee, reasoning that Walgreens had failed to show that the no stealing rule was job-related and consistent with business necessity as applied to the employee.
- Walgreens settled with the EEOC for $180,000 – an expensive bag of chips!

http://www.eeoc.gov/eeoc/newsroom/release/7-2-14b.cfm
Part III: Workplace Misconduct

Compare EEOC v. Walgreens
to

Rossitto v. Safeway, Inc., 2014 WL 1047729, *5 (N.D.Cal. March 17, 2014) (not reported in F.Supp.2d) (agreeing with defendant that “in Wills v. Superior Court [citation], the California Court of Appeal rejected the Ninth Circuit’s view that in all cases ‘conduct resulting from a disability is considered to be part of a disability rather than a separate basis for termination.’”).

Part III: Workplace Misconduct

EEOC v. Walgreens – Take Away

1. The law hasn’t changed on this – you need to be aware of both approaches.

2. Be reasonable.

3. Ask how discipline will look after the fact.

Part III: Case Law Developments

PERMISSIBLE MEDICAL EXAMINATIONS AND INQUIRIES
Part III: Medical Examinations

FMLA/ADA Interaction
Permissible Fitness-for-Duty Evaluations

White v. County of Los Angeles
225 Cal.App.4th 690 (2014)
(April 15, 2014)

Part III: Medical Examinations

White v. County of LA – Hypo Based on Case Facts

- An employee is having performance problems.
- You believe the problems are likely caused by the employee’s disability.
- You believe the employee may not be able to perform the essential functions of the job.
- You are about to send the employee to a fitness-for-duty evaluation when the employee seeks FMLA leave and submits proper FMLA medical certification.

Part III: Medical Examinations

White v. County of LA – Hypo Based on Case Facts

- At the end of the employee’s FMLA leave, the employee presents a return-to-work release from her doctor. The release contains the bare minimum necessary under the the FMLA to be sufficient.
- Based on what happened before the employee went on leave, you still have concerns about the employee’s ability to perform the essential functions of the job. The doctor’s note did not address your concerns.

Question: Do you have to let the employee come back to work?

Question: Can you send the employee for a fitness-for-duty evaluation?
Part III: Medical Examinations

White v. County of LA — Review of Relevant FMLA Rules

- The employee is entitled to be reinstated to her position or an equivalent position upon certification by her health care provider. 29 U.S.C. § 2614(a)(1), (4).

- If the employer has a uniform policy, the employee can be required to provide certification from health care provider stating that employee is able to return to work. 29 USC § 2614(a)(4).

Part III: Medical Examinations

White v. County of LA — Review of Relevant FMLA Rules

- FMLA does not permit the employer to obtain a second opinion prior to reinstating the employee. The implementing regulations specifically state: “[n]o second or third opinions on a fitness-for-duty certification may be required.” 29 C.F.R. § 825.312(b).

- FMLA regulations note that ADA regulations apply and that “[a]fter an employee returns from FMLA leave, the ADA requires that any medical examination at the employer’s expense by the employer’s health care provider be job related and consistent with business necessity.” 29 CFR § 825.312(h).

Part III: Medical Examinations

White v. County of LA — Review of ADA Rule

The ADA fitness-for-duty rule:

An employer “...shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature of severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.”

Part III: Medical Examinations

White v. County of LA

Issue: After an employee has been returned to work as required by the FMLA, is the employer prohibited by the FMLA from requiring a medical reevaluation related to the serious health condition for which the employee was granted leave?

Rephrased: Can an employee avoid an employer’s mandated ADA fitness-for-duty evaluation by going on FMLA leave for the condition which caused the fitness-for-duty evaluation request in the first place?

White v. County of LA - Facts

- White was a Senior District Attorney Investigator with the LA County District Attorney’s Office.
- Essential duties included serving warrants, making arrests, interrogating suspects and booking prisoners.
- This position must have peace officer status under Gov. Code § 1031.

White v. County of LA – Facts (continued)

- White’s supervisor relocated her office because the supervisor believed White was a distraction to co-workers.
- During the execution of a search warrant, White made a poor tactical decision which jeopardized her safety as she placed herself in a position of potential cross fire.
- During a tactical training, employee did not perform well and was continuously pointing her fake weapon at other team members.
Part III: Medical Examinations

White v. County of LA – Facts (continued)

- During execution of another search warrant, White was supposed to wait in her location while officers tried a low key contact. Instead, White sped down the street in her car with its siren on and parked in the middle of the street.
- While testifying at trial, she lost her composure and potentially gave untruthful testimony.

White v. County of LA – White’s Leave Request

- White requested a month off. She told her supervisor that she would be in the hospital for two weeks, then have two weeks of outpatient treatment.
- Her doctor completed the certification form and stated:
  - White is “severely depressed despite medications”
  - “very high functioning baseline, excellent prognosis after treatment”
  - duration of condition is 6 months but can work prior
  - is unable to perform job functions only while undergoing treatment
  - unknown if there would be flare ups
  - White should “potentially” not be at work during flare ups.

White v. County of LA – Facts (continued)

- Prior to end of FMLA leave, her doctor requested she have several additional weeks past her FMLA leave. She was placed on unpaid admin leave.
- The day before she was to return, the County placed her on paid admin leave and reassigned her to her home. This reassignment was because she was subject to an investigation.
- While White was still on paid admin leave, she was ordered to undergo a fitness-for-duty exam.
White v. County of LA – Facts (continued)

- White refused to attend the fitness for duty exam and sought an injunction, claiming the exam interfered with her FMLA rights.
- The Court granted the injunction.

White v. County of LA – Majority Holding

The Court held LA did not violate the FMLA because did put White back to work immediately (she was on paid admin leave).

The Court then held that “[o]nce an employee has been returned to work, ‘the FMLA’s fitness-for-duty regulation no longer applies.’”

White v. County of LA – Majority Holding

If the employer is not satisfied with the employee’s health-care provider’s FMLA return-to-work certification, the employer may restore the employee to work, but then seek its own evaluation of the employee’s fitness-for-duty at its own expense.

Part III: Medical Examinations

White v. County of LA – Take Away

If an employee seeks to return from FMLA leave and you still have concerns despite the employee's doctor's release, first return the EE to work, second place the employee immediately on paid leave (thereby satisfying FMLA) and third order an ADA fitness-for-duty exam by company paid doctor.

Part III: Medical Examinations

White v. County of LA – What it Doesn't Stand for

Caution: Just because an employee takes FMLA leave, doesn't mean there's sufficient basis for an ADA fitness-for-duty exam:

"The mere fact that an employee went on FMLA leave, or had a medical condition justifying FMLA leave, would not normally create a business necessity without evidence that the condition impacted, or posed a risk to, the employee's work. In the instant case, we are concerned with the unique situation of a peace officer who carried a weapon; in such a situation, the employee's depression alone is sufficient to justify an examination. This, however, will not necessarily be the case with all other employees taking FMLA leave."

White, 225 Cal.App.4 at 707 n19.

Part III: Medical Exams and Inquiries

Permissible Fitness-for-Duty Exams

Kroll v. White Lake Ambulance Authority
(Kroll II)
2014 WL 4067748
(6th Cir. Aug. 19, 2014)
Part III: Medical Examinations

Kroll II - Facts

- Kroll, an EMT, had an affair with a coworker. Prior to the affair, her performance was good.
- The affair was rocky, and she was seen crying on several occasions by coworkers.
- Her former lover claimed that Kroll frequently sent him text messages and screamed at him over the phone while he was working.
- Other coworkers said they’d seen Kroll arguing with her former lover on the phone or texting while driving an ambulance.

Kroll’s supervisors decided that Kroll should seek counseling. They did not consult a psychologist or other mental-health professional before deciding to require Kroll to seek counseling.

- Kroll’s supervisor approached her and expressed the employer’s desire that she seek mental-health counseling. The employer wouldn’t pay for the counseling but wanted Kroll to sign a release permitting it to monitor whether she was attending.
- After Kroll had an altercation with a fellow EMT and allegedly failed to help her administer oxygen to a patient, a different supervisor told Kroll that she could continue her employment only if she agreed to undergo counseling. She refused counseling and stopped receiving shift assignments.

Kroll sued under the ADA, contending that the requirement she submit to the psychological counseling violated the ADA. She argued that counseling was a medical exam that was not job-related and consistent with business necessity.
Part III: Medical Examinations

Kroll II – Prior 6th Circuit Opinion (Kroll I)

The District Court held that the counseling was not a medical exam and granted summary judgment but....

...in Kroll I (a 2012 decision), the Sixth Circuit held there was sufficient evidence such that a jury might find the psychological counseling she was ordered to attend was a medical exam under ADA.

Part III: Medical Examinations

Kroll II – Underlying District Court Opinion

On remand, the employer argued that, even if it was a medical exam, the counseling order was permissible because it was job-related and consistent with business necessity. The District Court agreed and granted summary judgment.

District court had two reasons: (1) enough evidence that her emotional issues were compromising her ability to perform her job duties in a competent and safe manner; and (2) evidence of a direct threat because of her unsafe driving.

Part III: Medical Examinations

Kroll II – Majority Opinion

Issue: Was the required psychological counseling job-related and consistent with business necessity?

Holding: A reasonable jury could find that the supervisor who made the decision to order counseling did not have a reasonable basis for his decision.
Part III: Medical Examinations

*Kroll II – ADA Fitness-for-Duty Rule (per the Court)*

Under ADA, show that an exam is job-related and consistent with business necessity by showing 1 of 3 things:

1. The employee requested an accommodation;
2. The employee’s ability to perform the essential functions of the job is impaired; or
3. The employee poses a direct threat to himself or others

As to the above (numbers 2 and 3), the decision maker must have a reasonable belief based on objective evidence that the employee’s behavior threatens vital function of the business.

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Part III: Medical Examinations

*Kroll II – Majority Opinion*

- Court notes there’s no question Kroll began displaying “aberrant emotional behavior.”

- “However, Kroll’s behavior is relevant to the assessment of whether she was capable of performing her job only to the extent that it interfered with her ability to administer basic medical care and safely transport patients to the hospital.”

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Part III: Medical Examinations

*Kroll II – Majority Opinion*

- Court noted the decision maker had only two data points:
  - He knew of an allegation that Kroll had on one occasion used a cell phone while driving.
  - At one point she had refused to help a fellow EMT administer oxygen to a patient (the court calls this “suboptimal care”).

- The Court said these “isolated moments of unprofessional conduct might reasonable have prompted [the supervisor] to begin internal disciplinary procedures or to provide Kroll with additional training, but they could not support the conclusion that Kroll was experiencing an emotion or psychology problem that interfered with her ability to perform her job functions.”
Part III: Medical Examinations

*Kroll II – Majority Opinion*

- An employee creates a direct threat when she creates a “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 USC § 12111(3).

- To make this determination, you must conduct an individualized assessment based on the employee’s abilities and job functions and “based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.” 29 C.F.R. § 1630.2(r).

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Part III: Medical Examinations

*Kroll II – Majority Opinion*

- Court noted that the supervisor did not consult any medical professional.

- As a result, the employer could not claim the exam was a business necessity to confirm the presence of a “direct threat.”

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Part III: Medical Examinations

*Kroll II – Take Away*

If you believe an employee might be a direct threat, make sure you have a medical basis for ordering a fitness-for-duty examination.

As an example, see *Owusu-Ansah v. Coca-cola Co.*, 715 F.3d 1306 (11th Cir.2013).
Part III: Case Law Developments

MAINTAINING CONFIDENTIAL MEDICAL INFORMATION

Part III: Maintaining Confidential Info

Liability for Disclosure of Confidential Medical Information

_Shoun v. Best Formed Plastics, Inc._,
2014 WL 2815483
(N.D. Ind. June 23, 2014)

Part III: Maintaining Confidential Info

_Shoun v. Best Formed Plastics_ – Facts

- Shoun injured his left shoulder while on the job and was on leave for several months. Jane Stewart processed WC claims for the employer, including Shoun’s claim.
- Stewart posted the following on Facebook:
  “Isn’t [it] amazing how Jimmy experienced a 5 way heart bypass just one month ago and is back to work, especially when you consider George Shoun’s shoulder injury kept him away from work for 11 months and now he is trying to sue us.”
Part III: Maintaining Confidential Info

She did what?

Practice Pointer: Don’t do that!!

Don’t post medical information on Facebook.

If you remember any slide from today, it should be this slide!

Shoun v. Best Formed Plastics – Facts (continued)

- Shoun alleged that Stewart’s Facebook page is linked to her business email address and available to the business communities in northeastern Indiana and southern Michigan. The quoted statement remained on Stewart’s Facebook page for 76 days.
- Five days before Stewart posted on Facebook, Shoun publically disclosed his medical condition in a complaint he filed in superior court.

Part III: Maintaining Confidential Info


- Information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—
  (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
  (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.

Part III: Maintaining Confidential Info

Shoun v. Best Formed Plastics – Standard for Suing

“To state a claim for violation of the ADA’s confidentiality provisions, a plaintiff must allege that his employer obtained his medical information through employment-related inquiries, the information obtained through such means was disclosed by the employer rather than treated as confidential ... and he suffered a tangible injury as a result of the disclosure.”

Shoun, 2014 WL 2815483 at *2.

Part III: Maintaining Confidential Info

Shoun v. Best Formed Plastics – Employer’s Argument

Shoun “voluntarily publicized his medical condition outside the context of an authorized employer-related medical examination or inquiry prior to Ms. Stewart’s Facebook comment, so Ms. Stewart’s alleged disclosure was nothing more than a mere recitation of facts previously disclosed to the public by Mr. Shoun.”

Part III: Maintaining Confidential Info

Shoun v. Best Formed Plastics – Majority Opinion

- In the cases cited by the employer, the employee had volunteered medical information to the employer or to an employee.
- For example, in EEOC v. Thrivent, an employee who didn’t show up to work responded to an email asking where he is with an email discussing his migraines. The employer later disclosed the migraines to prospective employers. The appellate court held that because the employer had no preexisting knowledge that the employee was ill or physically incapable, the employer’s “where are you” email did not constitute an inquiry under the ADA. E.E.O.C v. Thrivent Financial for Lutherans, 700 F.3d 1044 (2012)
Part III: Maintaining Confidential Info

_Shoun v. Best Formed Plastics – Majority Opinion_

Court distinguished employer’s cases. In this case, “neither side alleged that Mr. Shoun voluntarily disclosed his medical information to Ms. Stewart or anyone else at Best Formed Plastics; instead, Mr. Shoun alleges that Ms. Stewart acquired information about his medical condition through an employment-related medical inquiry by the company and then wrongfully disclosed that information.”

_Shoun at *3._

Part III: Maintaining Confidential Info

_Shoun v. Best Formed Plastics – Take Away_

1. Always teach your supervisors to treat medical information as confidential regardless of source.

2. One-Way-Street Rule: Emphasize that it’s not safe to share medical information simply because the employee has shared information with others.

THANK YOU!

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