RECENT DEVELOPMENTS IN EMPLOYMENT LAW
The Americans with Disabilities Act

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2022 Decisions Regarding the ADA (as of 12/12/2022)

- Between January 1, 2022, and December 12, 2022, the Seventh Circuit published seven (7) decisions relating to the ADA in the workplace.
  - Four (4) decisions in 2021; and
  - Thirteen (13) decisions in 2020.
- Six (6) of the decisions addressed summary judgment.
  - All summary judgment decisions were affirmed in favor of the employer.
- One (1) decision addressed a post-verdict motion for judgment as a matter of law and motion for a new trial. Court upheld jury verdict in favor of employee.

2022 Decisions Regarding the ADA (as of 12/12/2022)

- Unlike prior years where most cases involved reasonable accommodation issues, this year there were decisions on a variety of ADA issues – failure to hire, failure to promote, failure to accommodate, termination, hostile work environment, and medical examinations.
- No US Supreme Court cases this year
- No state court opinions this year.

Pontinen v. United States Steel Corporation, 26 F.4th 401 (7th Cir. 2022)

- Decided February 11, 2022. Appeal from the Northern District of Indiana.
- District Court granted summary judgment in favor of Employer. Employee/applicant appealed.
- Seventh Circuit affirmed.
- Issues: Failure to hire and direct threat.

Pontinen v. United States Steel Corporation, 26 F.4th 401 (7th Cir. 2022)

- E suffered 3 or 4 seizures during his lifetime. 3rd seizure happened in June 2014 and was followed 2 months later by a "heat-related illness," but could have also been a seizure.
- Before his 2nd and 3rd seizures, E felt some fuzziness in his left eye. Fuzziness gave him somewhere between 30 seconds and 2 minutes to prepare for the oncoming seizure.
- After the June 2014 seizure, E began seeing a neurologist. Seizure disorder was not well controlled, and neurologist prescribed him medication.
- After the possible seizure in August 2014, neurologist switched medication. By the end of October 2014, neurologist thought the seizure disorder was well controlled and noted that E should not miss his medication.

Pontinen v. United States Steel Corporation, 26 F.4th 401 (7th Cir. 2022)

- E continued to see his neurologist from 2015 to 2017.
- 2016 --E wants to stop taking his medication. Neurologist recommended against it. E continued to ask.
- 2017 --although neurologist recommended against it, started E on a tapering program. E stopped taking medication.
- In May 2017, E applied for a Utility Person position – a safety sensitive and safety critical position.
- E received offer contingent on passing pre-placement FFDE.

Pontinen v. United States Steel Corporation, 26 F.4th 401 (7th Cir. 2022)

- FFDE showed E had history of seizures.
- E reported that he stopped taking medication without neurologist approval.
- Employer requested information from neurologist. Neurologist performed EEG and results were normal.
- Employer reviewed whether E would qualify under DOT regulations, which require an unmedicated driver to be seizure free for 10 years.

Pontinen v. United States Steel Corporation, 26 F.4th 401 (7th Cir. 2022)

- Employer determined E could work, but only with extensive restrictions.
- Employer concluded that restrictions could not be accommodated, and rescinded job offer.
- E sued, alleged Employer discriminated on basis of real or perceived disability.
- Employer argued direct threat.

Pontinen v. United States Steel Corporation, 26 F.4th 401 (7th Cir. 2022)

Employer has the burden to show that qualification standards that "tend to screen out…individual[s] with a disability" escape liability because those qualification standards are necessary to prevent a "direct threat to the health or safety of other individuals in the workplace."

Direct threat "means a significant risk of substantial harm…that cannot be eliminated or reduced by reasonable accommodation."

Pontinen v. United States Steel Corporation, 26 F.4th 401 (7th Cir. 2022)

Direct threat determination is based on an "individualized assessment of the individual's present ability to safely perform the job."

A reasonable medical judgment must inform the individualized assessment. The individualized assessment must consider: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm.

Pontinen v. United States Steel Corporation, 26 F.4th 401 (7th Cir. 2022)

Medical Evidence – Court found that the Employer's decision was based on adequate medical evidence, including, the DOT regulations, the neurologist's records and EEG findings, and the physical examination.

Pontinen v. United States Steel Corporation, 26 F.4th 401 (7th Cir. 2022)

***Individualized Assessment*—**Court found the assessment was individualized.

- Focused on the fact the medical restrictions placed on E were based primarily on the fact E suffered from uncontrolled seizures, which was supported by E's own statements, his neurologist's records, and the physical examination.
- Also noted it was undisputed when E has seizures, he tends to lose consciousness. Medical restrictions were based on information pertinent to E's personal experience with his seizure disorder and that is sufficiently individual.
- Undisputed evidence shows disorder was uncontrolled at the time he applied for the position because he stopped taking his medication against medical advice.

Pontinen v. United States Steel Corporation, 26 F.4th 401 (7th Cir. 2022)

***Direct Threat*—**Employer has to show that the evidence on the question of direct threat is so one-sided no reasonably jury could find for Employee.

Duration of the Risk: Court found the duration of the risk is indefinite because neurologist warned E that going off his medication would put him at an elevated risk of having a seizure, yet E insisted on discontinuing the medication.

Nature and Severity of Potential Harm: Court found that the nature and severity of the risk weigh in favor of a direct threat finding. E's seizures cause him to lose consciousness and E's "warning signal" before 2 of his 3 or 4 seizures is not guaranteed. If E had another seizure, no guarantee that he would have a warning signal or have long enough to get to safety.

Pontinen v. United States Steel Corporation, 26 F.4th 401 (7th Cir. 2022)

Direct Threat:

Likelihood that Harm Will Occur: Court found that harm is likely to occur given E's uncontrolled medical condition.

Imminence of Harm: Court agreed that E's seizures are fairly rare. However, just before E started controlling his seizures, he had 2 seizures within a few months. Stopping medication also puts him at a higher risk of having another seizure. Court found this factor weighed in favor of Employer, but not has heavily as the others.

Weighing the Factors: Court determined that the factors weigh in favor of a finding that there is a direct threat.

See v. Illinois Gaming Board, et. al., 29 F.4th 363 (7th Cir. 2022).

- Decided March 21, 2022. Appeal from the Central District of Illinois.
- District Court granted summary judgment in favor of Employer. Employee appealed.
- Seventh Circuit affirmed.
- Issues: medical examination without job-related justification.

See v. Illinois Gaming Board, et. al., 29 F.4th 363 (7th Cir. 2022)

- E is a law-enforcement officer who began to exhibit signs of paranoia.
- Complained his supervisor was spreading malicious rumors about him to try to intimidate him. E said that his wife was afraid someone would harm him.
- When odd behavior continued, management became concerned about E's mental stability and placed him on administrative leave pending a fitness-for-duty examination. A few weeks later, E passed the exam and returned to work.
- E sued, claiming Employer discriminated against him by requiring him to undergo a medical examination without job-related justification.

See v. Illinois Gaming Board, et. al., 29 F.4th 363 (7th Cir. 2022)

- ADA prohibits employers from making certain medical inquiries or requiring medical examinations unless they are justified by business necessity.
- Seventh Circuit has repeatedly held the ADA permits fitness-for-duty examinations when public-safety employees are involved.
- Undisputed evidence showed Employer reasonably believed there was a possibility E was suffering from paranoia. E had nothing to refute this evidence.
- Given E's position, Employer's requirement he pass a fitness-for-duty examination before returning to work was job related and consistent with business necessity as required by the ADA.

EEOC v. Wal-Mart Stores, Inc., 38 F.4th 651 (7th Cir. 2022)

- Decided June 30, 2022. Appeal from the Western District of Wisconsin.
- District Court denied Employer's motion for judgment as a matter of law and motion for new trial. Employer appealed.
- Seventh Circuit affirmed.
- Issues: reasonable accommodation, termination.

EEOC v. Wal-Mart Stores, Inc., 38 F.4th 651 (7th Cir. 2022)

- E was a cart attendant for Employer from 1998 to 2015.
- Employer described the essential functions of a cart attendant in its job description, which included, maintaining availability of and organizing carts/flatbeds, assisting customers, loading merchandise into vehicles, and properly and safely using cart retrieval equipment.
- In performing his role, E was assisted by a full-time job coach paid for by Medicaid.
- E is deaf, legally blind, and experiences anxiety. E communicates via sign language, gestures and facial expressions.
- During his 16 years with Employer, E had 3 job coaches.

EEOC v. Wal-Mart Stores, Inc., 38 F.4th 651 (7th Cir. 2022)

- 2015 -- E's store got a new manager.
- Around June 2015, manager decided to observe E at work.
- Manager told E's job coach and foster mom he was concerned job coach was doing 90-95% of E's job.
- Manager suspended E and told E's foster mom, who sometimes substituted for the job coach, to complete paperwork as if E were a newly hired cart attendant, including having a physician complete an Accommodation Medical Questionnaire.
- March 2016 -- Employer sent E a letter asking to continue in the interactive process. Employer had not allowed E to return to work.
- By that time, E filed an EEOC Charge. EEOC sued Employer, alleging that Employer violated the ADA by refusing to allow E to continue to use a job coach and ending his employment.

EEOC v. Wal-Mart Stores, Inc., 38 F.4th 651 (7th Cir. 2022)

- Case went to trial.
- District court adopted Employer's proposed jury instruction regarding the cart attendant's essential job duties and whether E performed those duties.
- Jury returned a verdict in favor of E and awarded $200,000 in comps and $5,000,000 in punitives. District court reduced the punitives to $100,000 to satisfy the damages cap.
- Employer filed a renewed motion for judgment as a matter of law and moved for a new trial. District court denied both motions.

EEOC v. Wal-Mart Stores, Inc., 38 F.4th 651 (7th Cir. 2022)

- Employer claimed E could not perform certain essential job functions. Employer was asking Court to reweigh evidence rather than accept the evidence presented at trial and evaluated by a jury.

- Employer proposed the jury instruction that the district court adopted and read to the jury. Jury was instructed to decide the essential functions of the cart attendant and whether E was capable of doing those essential functions.

- Court concluded that there was sufficient evidence for the jury to conclude (1) E was able to perform the essential functions of retrieving traditional carts; (2) retrieving motorized carts was not an essential function of the position; and (3) E was able to perform the essential customer service functions of the job.

EEOC v. Wal-Mart Stores, Inc., 38 F.4th 651 (7th Cir. 2022)

- Employer also asked Court to create a per se rule that as a matter of law permanent full-time job coaches are never reasonable accommodations.
- Court noted it has only deemed an accommodation per se unreasonable when the accommodation itself creates an inability to do the job's essential tasks.
- In this case, the accommodation of a job coach did not render E unable to perform the essential job duties.
- Employer also argued E was not entitled to punitive damages because the underlying theory of discrimination was novel or otherwise poorly recognized. EEOC's theory that Employer violated the ADA by not permitting E to use a job coach as a reasonable accommodation not novel. Employer on notice that the jury could find a full-time job coach to be a reasonable accommodation.

Parker v. Brooks Life Science, Inc., 39 F.4th 931 (7th Cir. 2022)

- Decided July 14, 2022. Appeal from the Southern District of Indiana.
- District Court granted Employer's motion for summary judgment. Employee appealed.
- Seventh Circuit affirmed.
- Issues: Retaliation.

Parker v. Brooks Life Science, Inc., 39 F.4th 931 (7th Cir. 2022)

- E suffers from multiple sclerosis and sciatica.
- In January 2017, Employer hired E for a part-time receptionist position.
- E's disabilities did not interfere with her ability to perform the essential functions of her role, which included letting people into the building, greeting visitors, scheduling conference rooms and ordering supplies. E worked from 8 am to 1 pm and then another part-time receptionist who is also disabled worked the afternoon shift.
- March 2018 –new supervisor who, starting in May 2018, repeatedly coached E regarding her failure to follow the PTO policy (request prior approval for planned time off).

Parker v. Brooks Life Science, Inc., 39 F.4th 931 (7th Cir. 2022)

- October 8, 2018, E told supervisor she had to leave early that day and the following day for medical treatment and the part-time receptionist was covering for her.
- Supervisor asked E to put in PTO for the time. Also noted that she thought E would be short PTO for her October 12 to October 21 vacation.
- October 8, employees reported to supervisor that while supervisor was out of the office the week before, E altered her schedule several times and had other employees covering for her.

Parker v. Brooks Life Science, Inc., 39 F.4th 931 (7th Cir. 2022)

- A couple of days later, E told supervisor the temporary receptionist was going to cover her shift on October 12 and on October 22, the day she was supposed to return from vacation.
- Supervisor told E all time off needed prior approval and she had mentioned this requirement to E before.
- Supervisor told E that she was exceeding her PTO and no additional time would be approved.

Parker v. Brooks Life Science, Inc., 39 F.4th 931 (7th Cir. 2022)

- E and supervisor met. Supervisor told E she violated the PTO policy during the week supervisor was out and reminded E they had discussed the PTO policy before.
- E acknowledged they had discussed the policy and she needed to do a better job complying with the policy moving forward.
- Supervisor took E's statement to be an admission she violated the PTO policy.
- After the meeting, supervisor emailed 2 HR employees and recommended termination. HR agreed with the termination.
- On October 11, 2018, supervisor met with E and terminated her.

Parker v. Brooks Life Science, Inc., 39 F.4th 931 (7th Cir. 2022)

- E sued, claiming termination was retaliatory for requesting to leave early on October 8 and October 9 for medical treatment.
- Only the causation element was disputed.
- E first claimed suspicious timing of the decision to terminate her, which occurred 2 days after her request to leave early on October 8 and October 9 for medical treatment.
- Timing may appear suspicious in a vacuum, but suspicious timing alone rarely establishes causation especially where there is a significant intervening event separating the protected activity and the termination.

Parker v. Brooks Life Science, Inc., 39 F.4th 931 (7th Cir. 2022)

- Here, significant event was the supervisor learning E altered her schedule the week supervisor was out of the office.
- Supervisor learned this information after E requested the schedule accommodation but before supervisor recommended E's termination.
- E also claimed pretext. Relied on 3 emails she interpreted as evidence her supervisor praised her for the very same thing for which she was terminated.
- Court found no reasonable juror could read the emails in the context that E wanted.

Tate v. Dart, et. al.,
51 F.4th 789 (7th Cir. 2022)

- Decided October 25, 2022. Appeal from the Northern District of Illinois.
- District Court granted Employer's motion for summary judgment. Employee appealed.
- Seventh Circuit affirmed.
- Issues: Failure to promote.

Tate v. Dart, et. al.,
51 F.4th 789 (7th Cir. 2022)

- E was a correctional officer.
- 3rd year of employment, E injured his back.
- Returned to work--medical restrictions required him to “avoid situations in which there is a significant chance of violence or conflict.”
- After promotion to sergeant, Employer accommodated by allowing him to work in Classification Unit, where the possibility of violence or physical conflict was relatively remote.

Tate v. Dart, et. al.,
51 F.4th 789 (7th Cir. 2022)

- When E sought a promotion to lieutenant, Employer told E it could not accommodate him in that position because lieutenants had to be "able to manage and defuse regular, violent situations involving inmates."
- Employer determined that E could not perform this essential job function with his medical restrictions, so he remained a sergeant.
- Central issue in this case was whether being able to respond in emergencies to inmate violence is an essential function of the lieutenant position.

Tate v. Dart, et. al.,
51 F.4th 789 (7th Cir. 2022)

Court looked at the 7 categories of evidence set forth in 29 C.F.R. § 1630.2(n)(3):

(1)The employer's judgment as to which functions are essential;
(2)Written job descriptions;
(3)The amount of time spent on the job performing the function;
(4)The consequences of not requiring the incumbent to perform the function;
(5)The terms of a collective bargaining agreement;
(6)The work experience of past incumbents in the job; and/or
(7)The current work experience of incumbents in similar jobs.

Court found that the undisputed facts showed that the ability to respond to violent emergencies is an essential function for lieutenants.

Thank you!

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