

ROUGH EDITED COPY

**JAN
MONTHLY WEBCAST SERIES - ADA UPDATE
JULY 9, 2019
1:45 P.M. ET**

**CAPTIONING PROVIDED BY:
ALTERNATIVE COMMUNICATION SERVICES, LLC
www.CaptionFamily.com**

This is being provided in a rough-draft format. Communication Access Realtime Translation (CART) is provided in order to facilitate communication accessibility and may not be a totally verbatim record of the proceedings.

>> LINDA BATISTE: Hello everyone and welcome to the Job Accommodation Network's Monthly Webcast Series. Today's webcast is our annual ADA update and we'll focus on the ADA and what's currently going on in the courts, and what employers should be doing to comply. Our featured speaker is Jeanne Goldberg from the Equal Employment Opportunity Commission. Before we turn it over to Jeanne, I have just a few housekeeping items to go over. First, if any of you experience technical difficulties during the webcast, please call us at 800-526-7234 for voice and hit button 5, or for TTY call 877-781-9403. Second, towards the end of the presentation, time allowing, we'll have a question and answer period, but you can send in your questions at any time during the webcast to our email account at question@askJAN.org or use the question and answer pod located at the bottom of your screen. To use the pod, just type in your question and then submit to the question queue. We do have a lot of information to cover today, so if we don't get to your questions during the webcast we will send the answers out to you later on. On the bottom of your screen you'll notice the FileShare pod. If you have difficulty viewing the slides or just want to download them, you can find them there and finally I want to remind you that at the end of the webcast an evaluation form will automatically pop up in your screen in another window. We really appreciate your feedback so stay on to fill out that form. Please now let me introduce the featured speaker. A lot of you probably know her, but for those who don't, Jeanne Goldberg is a Senior Attorney Advisor at the EEOC headquarters in Washington D.C., and advises the Commission on the interpretation and application of the statutes it enforces, including the Americans With Disabilities Act, the Genetic Information

Nondiscrimination Act, and Title VII of the Civil Rights Act of 1964. Today she will be sharing some of the latest developments in the ADA cases. So Jeanne, thanks for being here today, and I'll turn the program over to you.

>> JEANNE GOLDBERG: Thanks so much Linda and good afternoon everyone. I thought I would start with what's new at the EEOC, starting with our leadership. You may have read that in January, due to the expiration of Commissioner Feldblum's tenure, we were down to two Commissioners on our five-seat bipartisan Commission. Although the day-to-day work did proceed, it meant we no longer had a voting quorum for policy matters and such. Our new Chair, Janet Dhillon, was finally confirmed by the Senate and sworn in on May 15th, so our quorum has been restored. Chair Dhillon joins Commissioner Charlotte Burrows and Commissioner Victoria Lipnic. Commissioner Lipnic served at the President's designation as the Acting Chair for the past two years. Chair Dhillon has extensive experience, having practiced law in the private sector for over 25 years, as Executive Vice President, general counsel, and corporate secretary of Burlington Stores, also as Vice President, general counsel, and corporate secretary of JC Penney Company, and as senior VP, general counsel and Chief Compliance Officer of US Airways Group, and also practiced law of the firm of Skadden, Arps for 13 years. Also, just last week, the President re-nominated Commissioner Burrows for another term, and Keith Sonderling from the Department of Labor's Wage and Hour Division for one of the remaining Commission vacancies, so they will now go through the Senate confirmation process.

So turning now to another quick status update, the next slide: rescission of incentives provision of the ADA and GINA rules on employer wellness programs. If you're formulating workplace wellness programs that include disability related inquiries, medical exams, or requests for genetic information (such as family medical history), you'll recall that EEOC issued regulations in 2016 addressing the question of what level of financial incentives can be offered for employees and their spouses to provide current or past health status information as part of an employee wellness program without violating the ADA or GINA (the Genetic Information Nondiscrimination Act). You may recall AARP challenged EEOC's regulations, arguing in part that EEOC was allowing employers to offer incentive levels that were too high and would effectively render employee participation involuntary because employees would not financially be able to choose not to enroll in the program given the level of incentives they were being offered by the employer – financial incentives.

The court agreed with AARP and vacated the incentive sections of the new wellness regulations effective January 1st, 2019. To comply with the court's order, EEOC rescinded those sections in late December of 2018. It is important to note that the non-incentives portions of the new wellness regulations do remain in effect.

So if we turn to the next slide, we have some examples of those remaining guideposts if you do oversee a workplace wellness program that involves disability-

related inquiries, medical exams or requests for genetic information. The program has to be reasonably designed to promote health or prevent disease. The employer can't be asking an employee to fill out a health risk assessment, for example, and not providing any information or anything else in exchange. There has to be something that's going to happen based on the provision of the information that's designed to promote health and prevent disease. The health information collected is subject to confidentiality provisions. The employer must provide an ADA notice about how the information collected is going to be used and protected from disclosure, and we have a model available on our website. And the participation by employees has to be voluntary. That principle is still enshrined under the ADA. Even though we don't have specific incentive levels to guide employers about what incentives might be so great that it renders participation involuntary, it's still the case that you have to make sure participation is, in fact, voluntary. You can't require people to participate. You can't coerce participation or take an adverse action against an employee for not participating in the wellness program. And that would include of course retaliating against someone or harassing them or terminating them for not participating.

Next slide: if you want to read more updates, news, and information from EEOC, more about cases filed and settled under all of the statutes enforced, or other developments, there are a couple of links that may be of interest. First, to the EEOC press releases, and we update those daily or weekly so you can follow news developments, including what cases are filed and settled.

You can also see from the second link on this slide the EEOC Fiscal Year 2018 Performance and Accountability Report, if you want to hear about the nitty-gritty of what the Commission was carrying out over the past year and under the statutes we enforce.

And now turning to the next slide, we'll get on to our ADA case update and look at what lessons can be learned from this past year's new crop of cases.

The first slide: Is your online application process accessible? The EEOC v. Blue Cross/Blue Shield of Texas case we settled in March involves, based on a resume an applicant invited -- was invited to complete an online assessment that included an audio portion. However, they were unable to complete the online assessment because there were no captions, and no other visible accommodations for applicants with hearing impairments. This applicant contacted the company to request accommodation to complete the online assessment, but the company simply ghosted him notwithstanding repeated attempts to follow up with Human Resources staff. EEOC resolved that case: \$75,000 settlement, ADA training, important changes to the employer's policy for communicating with applicants who are deaf or hard of hearing to ensure that they can apply for open positions without any barriers.

So accessible is -- accessibility is critical when you have these online application portals. Accessibility -- I should mention before we go on -- is also important to consider for your orientation or onboarding process. In a settlement that we just

announced yesterday, so it was too late for me to include in the PowerPoint, in a case against Kroger supermarket, we resolved the matter that involved somebody who was newly hired as a courtesy clerk at the Kroger supermarket. They requested accommodations due to a visual impairment for completing the computer-based portion of the company's orientation session. So they are hired, they are there, they are going through orientation. and there's a computer-based segment about company rules and regulations. They asked for accommodation. The management says no. And while the employee is still sitting there trying to muddle through the computer assessment without accommodation, he's summoned into the store manager's office and fired on the spot.

So ideally your online application process and your orientation materials are accessible to begin with. But it's just as important to make sure that frontline hiring staff and management are aware that ADA accommodation applies to the application process and training, and that they have to know what to do when they receive an accommodation request from someone who has encountered a barrier using your technology. And know how to figure out a practical work-around.

Turning to the next slide. Our next issue is are you ADA compliant when you're assessing medical information that you obtain in a post-offer or fitness for duty exam? And this comes up with some frequency, and the key guideposts are really to first be aware of making assumptions about impairments. You want to do an individualized assessment instead based on the actual limitations, the work history, and the current ability of this applicant or employee to perform the essential functions -- and that could be with accommodation, if accommodation is needed and does not pose an undue hardship. And finally, make sure not to rescind a job offer or exclude someone from a position based on their impairment if the individual is qualified and doesn't pose a direct threat to safety. So that's the standard that you need to use once you get this medical information. Do an individualized assessment. Figure out whether they are, in fact, qualified for the job, and don't exclude them unless they are not qualified or they pose a significant risk of substantial harm and can't be accommodated.

Next slide: Are you ADA compliant when assessing medical information? Two recent examples to continue with the point we were just making.

A pre-litigation EEOC settlement in the charge of -- against Cumbres and Toltec Scenic Railroad. This was a case where the employer rescinded an offer to a qualified applicant for a brakeman position because of his disability without doing an individualized assessment to see whether he could perform the job. They learned just about the medical conditions and rescinded the job automatically. The EEOC v. Zachry Industrial case similarly involved a construction worker and -- construction firm that terminated four workers because of an occupational health exam that revealed they had disabilities -- again without doing any kind of individualized assessment, despite the fact they had adequate work performance. And all of the court cases as well as the

EEOC administrative adjudications take into account someone's work performance and recent work history in determining whether they are qualified to do the job and do it safely, so that's an important factor to keep in mind, not simply the medical diagnoses and other medical information you might learn during an exam.

Next slide, do your hiring officials, HR staff, managers and supervisors, know that accommodation may be requested at any time? In the EEOC v. Jones Lang LaSalle Americas case, which we settled last July, the individual had accepted a job offer. And then when she contacted HR to discuss the new position, it was at that time that she disclosed she would need certain accommodations and requested them. And the employer rescinded the job offer, frustrated that -- I think what you often see in these cases is there's some frustration on the part of HR staff or hiring staff that the individual didn't mention this during the hiring process, or there's some misinformation on the part of HR thinking that's required. In fact, accommodation can be requested at any time. It might be raised voluntarily by the applicant during the application process, or as here it might be raised in the post-offer pre-employment period, or it might be raised by an employee once they have begun work. Even if they had the prior need for accommodation, the request needs to be considered at the time that it's raised. There's no requirement under the ADA that accommodation be requested at a particular time. And this is addressed in the EEOC's Enforcement Guidance on Reasonable Accommodation, at question 4, which says that accommodation can be requested at any time during the application process or during the period of employment, and that the ADA does not preclude somebody with a disability from requesting accommodation just because they did not ask for one when they were applying for the job or after receiving the job offer.

Now, the Guidance also says at Question 4, as a practical matter, that it may be in an employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur, since of course we know that an employer is never required to apply accommodation retroactively to excuse poor performance or misconduct that has already occurred.

Next slide: Accommodating people with hearing impairments. Both applicants and employees.

Accommodating people with hearing impairments of course is not one-size-fits-all. And depending on the nature of both the job and the individual, the accommodations may range from none at all to providing a sign language interpreter for meetings, whether it's in-person or through Video Remote Interpreting service, to assistive technology, including use of a simple handheld device that converts speech-to-text for the hearing impaired person to view and vice versa, or the use of written notes for brief, simple or routine communications. Any of these might be accommodations that are appropriate in a given case. And remember, when a disability is obvious or it's shared by the applicant, the -- and the employer has a reason to believe that given what the job

is, the -- that accommodation might be needed, the employer is free to ask in the application process what accommodations might be needed to do the job if the applicant is hired. Yet still we repeatedly see situations where employers violate the ADA by simply cutting off the application process once they realize the applicant has a hearing impairment. And I've got three recent examples here in the next -- in these two slides. I could have included many more, however.

The EEOC v. USA Parking case where an applicant for a valet -- parking valet service position was not hired because of his hearing impairment. The Jacksons Food Stores case which -- where a convenience store manager refused to interview an applicant once the applicant explained he was deaf and needed a sign language interpreter for an interview.

And the next slide, the EEOC v. Capstone Logistics case, where the manager told the deaf applicant for a warehouse position once he realized that a sign language interpreter was needed that they would reschedule the job interview for when an interpreter could be present, but the company never rescheduled. Instead they sent the applicant a text message that said we have determined there's no job we can offer you that would be safe for you.

And there are in fact a lot of stereotypes that enter into the ADA cases involving applicants with hearing impairments, notions that someone could not perform a job safely or that communication would be hindered, instead of realizing that with accommodation there may be many qualified applicants who could perform the job.

And the EEOC, in that EEOC Enforcement Guidance on Reasonable Accommodation that I mentioned a moment ago, gives at Question 13, Example A, a scenario that's exactly like this, where an employer is impressed with an applicant's resume. They contact them to come in for an interview. The applicant, who is deaf, requests a sign language interpreter for the interview, and the employer cancels the interview and refuses to consider the applicant further because they believe if we hire them we'll have to hire a full-time interpreter. And the guidance points out that that violates the ADA. That the employer should have proceeded with the interview using a sign language interpreter if it would not have posed an undue hardship to do so, and then at the interview inquired to what extent the individual would need a sign language interpreter or other accommodations to communicate if hired for the job.

So, you don't want to assume incorrectly that an applicant with a hearing impairment will necessarily cause safety hazards or increased employment costs or have difficulty communicating in a fast-paced environment. Because in reality, with or without accommodations, there will be many individuals with hearing impairments who can effectively and safely perform the job.

The next slide: a number of cases that have come up this year, and I want to give you some examples, where managers simply didn't understand the practical aspect of how to accommodate a current employee with a hearing [or vision] impairment. In the

EEOC v. AT & T Pacific Bell Telephone Co. case, the EEOC alleged that there were numerous requests by an employee for a sign language interpreter but managers violated the ADA by choosing instead to simply stand close to the employee during meetings so he could read their lips, or to jot down notes explaining the meeting after the fact. And this did not allow the employee to participate in the meeting effectively. The next slide, Stokes v. Nielsen, involved an employee at the Department of Homeland Security who had a vision impairment -- not hearing impairment but a vision impairment, but I want you to see the same concept play out. She alleged that the Department failed to provide her with meeting materials, either in large font that she could use at the meeting, or electronically in advance so that she could review them before the meeting using her assistive technology. And the court ruled that her claim could proceed. The Department of Homeland Security argued that it's only required to provide accommodations if they are needed to perform essential functions and the court rejected that argument, recognizing that participating in the meeting fully the way other employees can -- you can comment, you can ask questions -- because they are being given the same information, hearing the same conversation, seeing the same conversation at the same time, same materials, that's a benefit or privilege of employment -- to have the same materials that others could view -- as an accommodation to enjoy the equal benefits or privileges of employment.

So receiving the materials after the meeting was not effective.

The court also said she did not waive her right to an effective accommodation for onsite meetings simply because she went along with or accepted inferior accommodations when there were offsite meetings where advanced materials might not have been feasible. That didn't mean that the employer was off the hook for providing accommodations where possible and advanced materials were specifically what was at issue here.

In the Cadore v. Sikorsky Aircraft Corp. case decided in Connecticut in 2018, it was also held that the employer violated the ADA by delaying the period of time -- it went over a long period of time where it failed to provide an interpreter or use Video Remote interpreter service for employee meetings and training. Again a situation where the employee was able one-on-one to communicate through writing notes or other means but needed an interpreter or interpretative services through Video Remote Interpreting for meetings and trainings. And the period during which the employee was denied that, and the employer used ineffective solutions, was a period in which they violated the ADA. So a number of cases arising involving that.

Would you, Linda, like to comment on the JAN resources that we have on the next slide? I know you often get inquiries for some nitty-gritty advice about this and you're always available for those, and we have three resources of yours on the next slide.

>> LINDA BATISTE: Absolutely. These are things that could be specifically used for people with hearing impairments, but we do have a wealth of other things on our

website if you haven't visited askJAN.org. The first is the main publication for accommodating people with hearing impairments, and it has all types of different -- it has types of limitations people might experience, types of workplace duties they might need to do, and types of accommodations that might help, so it's a really good starting point for accommodations for people with hearing impairments. The second one is a blog article that one of our consultants did that is specifically focusing on effective workplace accommodations for employees with hearing impairments, and that provides just kind of an overview of how to approach accommodations for people with hearing impairments. And the last thing is not specific to hearing impairments, but it's a lot of different tips for the interviewing process, for providing accommodations, and it does include some examples related to hearing impairments. And then you can always call us for one-on-one consultations any time you get any kind of request for accommodations or you're not sure what to do. And visit our "A to Z" on our askJAN.org website. We now have a new "by accommodation" tab, in case you haven't seen that, that provides information on specific types of accommodations.

Thanks, Jeanne.

>> JEANNE GOLDBERG: Great. The next three slides involve accommodating somebody by making a workplace modification. And the question I have asked here is: are your front-line supervisors aware that workplace modifications may be required as a reasonable accommodation? And when you see how simple the fixes may have been on these next three case examples, then you may agree this is a training issue to help the front-line supervisors know that the ADA is implicated, even with some of these simple requests, if it's a disability-related need.

In the EEOC v. Grand Hyatt New York case, a hotel front desk agent had a back impairment that caused severe pain if he had to do prolonged standing. So, although front desk agents typically stood at the counter at the front desk when serving customers -- folks checking into the hotel, coming by the front desk, he asked if he could sit on a chair or a high stool while working at the front desk.

The hotel actually initially granted the request, but then after two weeks reversed course even though there was no undue hardship, the EEOC alleged, and they simply refused to let him use the chair or come up with another way to accommodate him.

In the next slide, the EEOC v. Merritt Hospitality case, an employee had an asthma -- a respiratory condition. Worked at a hotel conference and catering sales office as the manager. And the respiratory condition was aggravated when they were assigned to a windowless room that had inadequate ventilation and a broken air conditioner. And after the first day in this new office they told the supervisor that the lack of ventilation was making them sick due to this chronic health condition, and the supervisor said, you know, I don't know when if at all the air conditioner is going to be fixed, and questioned why the employee had a problem breathing when nobody else did. And the employee further explained the medical condition, provided a doctor's

note, continued to seek accommodation. But the employer said they couldn't accommodate and simply asked for a resignation letter. You know, again, a really simple, easy accommodation to provide if you had recognized that it's disability-related and therefore you may have to do something as an accommodation that you wouldn't make -- a workplace modification you would not otherwise have to.

And finally, the next slide, the EEOC v. InsideUp case, the EEOC alleged the employer violated the ADA by refusing to accommodate an employee who had -- again a respiratory disorder -- COPD. The employee requested a transfer to a first-floor office because the building did not have an elevator, and due to the respiratory condition he had difficulty climbing stairs, and that was an accommodation -- that transfer to a first-floor location -- that was denied.

So, you can see those examples well illustrate some situations where the accommodation fix might be really simple, but you are, in fact, obligated to do it if it doesn't pose an undue hardship.

Turning to the employer's selection of an accommodation, as we know the employer has discretion to choose if there's more than one effective accommodation available. It's up to the employer to decide. But before you reach that point of choosing among multiple effective alternatives, you may have to consider the specifics of the job task, the physical workplace, and so on. These are fact-specific considerations to determine whether a particular accommodation is among the effective options you have to choose from.

And so if you turn to the next slide, I've posed the question, are you engaging in a fact-specific determination of whether there is a reasonable accommodation available? And I've given you two contrasting examples here.

The Gardea case, Gardea v. JBS, was a case that held that a lift assisting device was not a reasonable accommodation for the employee. He was a maintenance mechanic. He had lifting restrictions due to carpal tunnel syndrome in his right wrist. And it turns out that for the types of machinery that had to be lifted, the lifting devices he sought as an accommodation would have necessitated overhead beams that simply didn't exist in all areas of the plant where he worked, and it would have been impractical to use those in the tight quarters of the plant.

So there was no way he could lift objects such as ladders and machinery. Also he couldn't do that, lift them onto lifting devices. And the court said there wasn't a reasonable accommodation for him. There was no way to get these lifting devices in the plant. They wouldn't work with the workplace. He could not lift objects such as ladders and machinery on to the lifting devices. And the ADA does not require an employer to have others assist with that, since lifting the object in this case, in this job, was part of his essential function. Even if it wasn't, some of the areas of the plant where he would have to have assistance lifting were too small to fit two mechanics in.

And other mechanics wouldn't necessarily have been available, given the way the

work was distributed and done. So, you see how fact-specific that is in terms of what the court considered in concluding the employer was correct, there was no way to accommodate in that job these lifting restrictions.

Contrast that with the Dunlap v. Liberty Natural Products case, where the Ninth Circuit upheld the verdict in favor of a shipping clerk who was denied accommodation for her lifting, pulling, and pushing restrictions. The court said in Dunlap she was qualified because she could have performed the essential function of moving boxes from Point A to Point B notwithstanding her lifting restrictions if the employer had allowed her to use a rolling cart or some other assistive device, a lifting device -- either a manual or motorized one -- as an accommodation. There were carts already onsite that could have been used. Or the court said there were affordable manual or motorized lifting devices such as a scissor lift table that were advertised in the very catalogs that this employer regularly received, that were used in those type of work environments.

So, I hope the lesson that you take from these two cases, Gardea and Dunlap is you too need to do a very fact-specific determination when you have an accommodation request, considering all of these facts to see if there is a way that you could accommodate the employee without an undue hardship.

The next slide, are you engaging in a meaningful interactive process? And there are two examples I have on this slide and the next from this year where the courts concluded that the employer properly -- the employer properly denied accommodation. There was no violation of the ADA. And the reason was that they went through an entire interactive process and each step, so in fact the result they reached, the conclusion they reached, that no accommodation could be provided, was the correct one, because they had -- they were assured of that because they had gone through each step and done the right fact gathering.

In the Brunckhorst case, there was an accountant who contracted that flesh-eating bacteria you hear about in the news these days. He's left with these long-term injuries. He did FMLA leave, and when that was up, he took unpaid leave as an accommodation under ADA. He asked about reasonable accommodations that might enable a return to work. Sorry; the employer asked about that. So the employer granted the leave and also said, is there a way you could return to work with accommodations? During this period, for unrelated reasons, his job was eliminated, so he was given the choice between a severance package or reassignment to whatever vacancy would be available that he was qualified for, in this case the only one happened to be a lower level position. But the employee refused to return unless he was given his original job and that was something he was not entitled to because his job had been eliminated for unrelated reasons, and the city explained what his options were, to return to the reassignment position or be terminated.

They also, again, asked for a list of any reasonable accommodations he would need

to perform the new job. They extended an offer to meet with staff to discuss it. But the employee -- it was the employee who failed to meet to discuss return to work so the court held he was lawfully terminated. The employer engaged in an interactive process, they made attempts to learn about possible accommodations, to respond with appropriate ones that would enable his return to work with medical restrictions, and did everything they could.

In the Faidley v. United Parcel Service case, next slide, from the Eighth Circuit, the employee Faidley had submitted doctor's letters with work restrictions in two different periods of time, and UPS met with him both times to find appropriate accommodations. After correctly determining there were no accommodations that would permit him to perform the essential functions of the job, they did the right thing by identifying several possible jobs he could perform within his restrictions, and again like the prior case, looking to see if any of those jobs were vacant so they could offer him a reassignment. Turned out those jobs had no full-time vacancies or he didn't have the seniority he needed to bid on them, so instead the company offered him a vacant part-time position for which he was qualified -- so the best available thing that was at his level, or the next closest, that was vacant that he was qualified for -- that's what they offered him, but he declined. So, again the court held the company engaged in good faith in the interactive process with the employee trying to find accommodations.

So, I think these are good illustrations about the fact that where employers go through each step of the process to see if the employee can be accommodated in their current position, and if they cannot be, to do the reassignment search for a vacancy, that step-by-step approach -- it helps to ensure that the employer will reach the correct result if they are ruling out options that the employee would prefer.

Next slide.

Performance issues caused by the unlawful denial of accommodation. We all know the general performance and conduct rule that an employer never has to lower production or performance standards as an accommodation, or excuse violations of uniformly-applied job rules that are consistent with business necessity. The Guzman case from the Seventh Circuit this year on this slide is a good example of that.

The employee had a bunch of tardiness -- tardy episodes. She was going to be terminated for it. Before they could tell her, but after she had committed to tardiness infractions that warrant termination -- before they could inform her she would be terminated -- she submitted a doctor's letter -- submitted a doctor's letter seeking accommodation. And the court said it was too late. She could still be fired because the misconduct that had warranted the termination had already occurred, and reasonable accommodation does not include excusing prior misconduct.

What I want to note today is that a different result from this usual rule obtains where an employer's improper denial of accommodation is what caused the performance or conduct issue.

And so we turn to the next slide. A few examples of this.

The EEOC v. The Cheesecake Factory case involved a restaurant that EEOC alleged fired a newly-hired dishwasher who is deaf for performance issues associated with the failure to provide accessible training. So, he did have the performance issues, but they were tied to, caused by, the employer allegedly improperly denying accommodation for the training period. Had they accommodated him during the training period, so that notwithstanding his hearing impairment, the training would have been accessible to him, the EEOC's contention was he would not have had the performance issues.

So, it's a different result where the unlawful denial of accommodation is what caused the performance issues. There the employer can still be liable for denial of accommodation.

The next slide, EEOC v. Dolgencorp, is another example of this. It's a Sixth Circuit decision. In this case, a cashier who had diabetes was denied her request to keep juice at the cash register, and then she was terminated for violating the pay-first-eat-later policy for employees when she had a hyperglycemic episode, grabbed a juice, and drank it, and then paid. Employees are supposed to, under the anti-grazing policy, pay first and then drink or eat any product that they want to purchase. And the employer argued, well, we don't have to make an exception to the policy that you can't have a drink by the cash register, and she violated this [anti-grazing] conduct rule. But the court agreed instead with EEOC that the -- she could have been accommodated without an undue hardship -- maybe it would have been with a drink at the register, maybe it would have been allowing a different break schedule -- but that it was the unlawful denial of accommodations that resulted in her violation of the conduct rule, so the employer was liable.

The court said: "A company may not illegitimately deny an employee a reasonable accommodation to a general policy and use that same policy as a neutral basis for firing him. Imagine a school that lacked an elevator to accommodate a teacher with mobility problems. It could not refuse to assign him to classrooms on the first floor, and then turn around and fire him for being late to class after he took too long to climb the stairs between periods. In the same way, Atkins [the charging party in this case, Dolgencorp] never would have had a reason to buy the store's orange juice during a medical emergency if Dollar General had allowed her to keep her own orange juice at the register or worked with her to find another solution."

So good lesson there.

Next slide, an example involving 100% healed policies. And this is the next couple of slides. These are policies that employers impose that require that someone have no medical restrictions in order to return to work. And they effectively deny accommodation to those individuals who, notwithstanding their disability-related medical restrictions, could return to work either with or without accommodation. And you'll see

settlements here involving this issue. In the Cato Corporation case, the Kessinger Hunter Management case, and the conciliation agreement with Coca-Cola Refreshments and you'll see these especially in the Coca-Cola case very large settlements. They -- I'm sorry; the -- I said the wrong name. The Cato Corporation case, the Wilmington Trust Corp. case, and the Absolut Facilities Management case on the next slide. And so you see these are pretty large settlements, \$3.5 million to Cato employees, \$700,000 in the Wilmington Trust case, and \$465,000 -- and of course policy changes as well as in all of these -- in the Absolut Facilities Management case. Why are these settlements so large? Well these are across-the-board policies that affected many employees, so the settlement was on behalf of a large group. Even if it was just one individual who came to EEOC, we saw that what happened to them was pursuant to a 100% healed policy that the employer was applying across the board. But that actually means that it's easier for an employer to fix before the fact. Because you can easily determine if an across-the-board policy is being applied in this manner to deny employees to return, even if they have disabilities or other impairments if they could return to work nonetheless. So if you have policies relating to clearance to return to work, if you have staff who specifically review those clearances to return to work, if they -- you can easily scrutinize those policies and train that staff to know that they can't impose a policy of insisting that people have no restrictions before they return. That would violate the ADA, and result in settlements of this sort, and these three cases are good examples from the past year.

Turning to the next slide: exceptions to "no-fault" maximum leave policies if the additional leave needed is disability-related and does not pose an undue hardship.

A couple of examples here -- now the Kessinger Hunter Management case and the Coca-Cola Refreshments conciliation agreement. That is where the employer has a set policy that no one for -- for no reason can have a leave for longer than three months or six months whatever the time is. And while they can have a set policy, they might need to make an exception as an accommodation for somebody with a disability if it wouldn't impose an undue hardship. So, you may have somebody who for a disability-related reason may need several more weeks or several more months of unpaid leave to recuperate and be able to return, and the doctor saying they will be able to return but they need this additional leave for disability-related treatment or recuperation. The employer can't deny it automatically under one of these no-fault leave policies. They need to determine whether that accommodation of the extra unpaid leave would pose an undue hardship, given again the facts and the nature of the job, the business, et cetera.

Turning to the next slide: pregnancy related limitations that raise both ADA and Pregnancy Discrimination Act issues. The Hostettler case against College of Wooster this year got a lot of attention. This was someone at the college that had severe postpartum depression and separation anxiety when it was time to return from her

leave, and she sought to return but with a part-time schedule and the employer ultimately denied that. And in the ADA case that she subsequently brought, the Sixth Circuit held that the employer failed to show that a full-time schedule was an essential function of her job, and she might have been qualified under the ADA even if she was restricted to a part-time schedule because she was doing her full-time workload while working a part-time schedule when that had initially been allowed. The court also said that a jury might be able to find the motivation for terminating her was pregnancy discrimination in violation of the Pregnancy Discrimination Act, because the evidence showed that the employer had allowed longer periods of medical leave for two employees who had other kinds of conditions, not pregnancy-related conditions, other kinds of medical conditions.

So be aware of this kind of fact pattern where both PDA and ADA might apply.

Turning to the next slide, just there's a quick recap there for you of the rules relating to ADA and PDA as they potentially apply to pregnant employees. The ADA of course makes clear that pregnancy itself is not an impairment but pregnancy-related medical conditions could be impairments, and then you look at whether it's substantially limiting in a major life activity, and if it's not an undue hardship to accommodate. Under the PDA, you look at whether the individual is being discriminated against based on pregnancy, and that second part of the PDA that requires that pregnant employees be treated in the same manner as others who are similar in their ability or inability to work.

So that's set out there as a recap, and we'll give you some resources at the end if you want to read more about these pregnancy-related accommodation issues.

I want to turn to the slide on association with an individual with a disability.

The Camber Corporation case was one we settled last summer that involved an employee who alleged that their employer terminated them immediately upon finding out that the employee was asking to transfer to a different location to be closer to his disabled son, and also to take leave to participate in the son's care. And the employee alleged this was denied and he was terminated on pretextual grounds, that he was being discriminated against because the employer learned about this association with a child with a disability and did not want to continue to employ him even though he wanted to work but from a different location. And, of course, even though we know that employees are not entitled to ADA accommodation based on the needs of a child or a parent with a disability, they are protected from disparate treatment. And what the EEOC alleged here was that the employer, either based on stereotypes about the amount of time somebody might take away from -- seek to take away from the office based on their association with the person with a disability or based on outright animus, sought to terminate the employee on pretextual grounds. So it was straight disparate treatment case -- disparate treatment for association with a person with a disability. He wouldn't be entitled to transfer as a leave for the accommodation for his child having a disability -- he didn't have a disability -- so, accommodation could not come into play.

But the allegation was that other employees might be able to voluntarily transfer to other facilities or locations, and other employees might be allowed to take voluntary leave, unpaid leave, for whatever reason. But he was denied these because of the reason that he sought it, which was his association with the child with a disability. So, it was a disparate treatment claim. And there's a Q&A I have linked here for you on this slide about this Association Provision of the ADA that walks you through it.

The next slide: when is a fitness for duty exam allowed? There's an interesting case EEOC v. McLeod Health from the Fourth Circuit from this year, involving a company newsletter editor who was ordered to undergo a functional capacity exam because she fell several times in the workplace. The exam -- actually because she did have a neurological impairment -- the exam resulted in some recommended restrictions for her not traveling more than 10 miles from the main office, using a motorized scooter, and being provided accessible parking. And the company said in response that these restrictions would prevent her from doing her job as a company newsletter editor because they wanted her to physically visit each location in order to report on it. They never considered it might be done through other methods of remotely gathering information, and doing travel using a motorized scooter and so on.

So she was told she could apply for other positions in the company, and put on involuntary medical leave and eventually terminated. And EEOC took up her case, and the Fourth Circuit held that a jury could find that the employer lacked the required basis for even sending her to the exam to begin with. You have to have a reasonable belief based on objective evidence that the employee's medical condition may render her unable to perform an essential function or pose a direct threat of safety to herself or others. And here a reasonable jury could conclude she still could perform her job, whether or not she was traveling to the different company locations. Even if that was an essential function to -- that she might still be able to get the information in a different way and perform her essential functions of being a newsletter editor. You couldn't conclude she posed a direct threat to safety or might, simply because she had fallen multiple times in an office job and that her manager thought she looked groggy and out of breath. Those were the other grounds cited for sending her to a fitness for duty exam. So I think an important reminder there if you are dealing with fitness for duty exams on an decision to send an employee, it's important to note what the job is, not merely that the employee is experiencing a medical condition, but what the connection is to the job in terms of deciding whether you do have a reasonable basis for thinking they might not be qualified to perform the essential functions or might pose a direct threat to safety.

Next slide.

A word about opioids and drugs to treat opioid addiction or other legal use under Federal law. You will all remember that ADA does not protect marijuana use even where it's legal under state law, but ADA does protect disability-related use of drugs if

it's legal under Federal law, and like any other medication, that might include legally prescribed opioids, or opioid addiction drugs such as suboxone. And like any other medication, you can't exclude somebody from a job or rescind a job offer unless with the medication they are not qualified or they pose a direct threat to safety due to the side effects of the medication. And you'll see the Voss decision, where the employer did not violate the ADA where it placed an employee on paid suspension following a positive drug test for opiates in order to obtain a letter from the treating physician to determine whether or not he was a direct threat to safety due to prescribed medication. Turned out he did not, so they brought him back. And the Eighth Circuit said in the Voss case you did the right thing, employer, you're allowed to get that information after the positive drug test to sort out if the person can do the job safely. Having found out from the treating physician they can do the job safely even while taking this medication, you brought them back to work. In the Breaux case, the employer may have violated ADA by terminating the employer who was a welder due to his suboxone prescription because the -- because they terminated the employee without getting that information first about whether he could safely perform the job even though he was taking the opioid painkillers. So what you want to do is get that underlying information.

Next slide, a final note, is obesity a disability, and if so, how can it be accommodated? In the Richardson v. Chicago Transit Authority case from last month, the court held extreme obesity can only be considered a physical impairment under the ADA if it's the result of a separate underlying physiological condition. This is different than the position that EEOC has historically taken over the years that morbid obesity -- which is a medical diagnosis of being a certain number of times over the normal BMI for your height -- that morbid obesity, the diagnosis of morbid obesity, itself is an impairment under the ADA, even if there is not a separate underlying physiological condition. I've given you a link to a case where EEOC argued that -- there have been quite a few. This is an issue that's percolating in the case law, unresolved. And JAN has a good publication on different ideas for accommodating employees with obesity if you do have that issue arise, and I have included it here on this slide.

Our final three slides are resources. We encourage you to look at these, use them. They are not copyrighted; reproduction is encouraged, so slice and dice them as they are helpful to you for training internally, newsletters, or anything else. We have the Enforcement Guidance on Reasonable Accommodation and Undue Hardship, Employer-Provided Leave under the ADA, publications on Telework, and on Performance and Conduct Standards. And on the next slide a number of publications addressing pregnancy under the EEOC laws. Some of these are -- one is the longer Enforcement Guidance. Others are shorter, user-friendly publications, technical assistance publications, that may be of use. And the final resource slide is on service animals and the ADA, and I've linked you here to the JAN publication on service animals in the workplace, and then separately to [U.S. Department of Justice]

publications on non-employment situations. If you're dealing with customers or members of the public who are entering your business, there are different rules regarding service animals, so we have given you those resources here as well. We often get asked questions about the difference between the two. Linda?

>> LINDA BATISTE: Thank you, Jeanne. We really appreciate a great presentation. Since we got started a few minutes late, I'm going to take a couple of minutes to ask you a couple of the questions we got. And if you're still willing, we'll send you the rest to answer later. Here is one we get a lot, so I'll throw this at you. This person said we get many requests for sit-stand desks and employees go to the local chiropractor for documentation. They will sign off the employee has lower back pain or shoulder pain and the sit-stand desk or workstation is needed to alleviate that pain. He or she said we have over 40 of these now. It's hard to believe that all of these people have to have sit-stand desks. Do we just have to go along? I'm not a doctor so I don't know if it's ADA-protected, and if they complete documentation to say it is, what can we do about this? Any thoughts on that?

>> JEANNE GOLDBERG: Well, obviously someone has to meet the definition of disability in order to be eligible for an accommodation under the ADA, in terms of the employer being required to provide it. They have to have an impairment that substantially limits a major life activity. If it's not known to you or obvious, the employer could put each employee through the process of requesting that they provide medical documentation about the impairment and the need for the accommodation, for the employer to satisfy itself that it is a disability under prong 1 or 2 of the ADA's disability definition, and that the individual needs the accommodation, medically, that is being requested. If the documentation is unclear or doesn't answer all of your relevant questions, the employer can obviously discuss it with the treating physician and go through the whole interactive process. On the other hand, as a practical matter, with accommodations that some employers see many people are requesting -- this used to come up with ergonomic keyboards before they became more standard -- some employers choose to take that as useful information that it may be cheaper for them to -- and easier for them -- to simply acquire a certain number of these in bulk and make them available to any employee with or without a disability. I know a number of workplaces have done that with sit-to-stand desks as well. Whether you're doing it because of potential health benefits -- workplace benefits to all employees, or whether you're doing it to potentially be more efficient and save money with respect to a commonly requested accommodation, acquiring such items in bulk and making them available to any employee who might request them is something that some employers have done where they have seen a commonly requested item that may be less expensive than the typical accommodation.

>> LINDA BATISTE: Great do you mind one more question?

>> JEANNE GOLDBERG: Sure.

>> LINDA BATISTE: This is a combination of several questions we got related to leave as an accommodation. People are asking what are you advising employers about how much leave is responsible in light of some of the court rulings that said long-term leave isn't required in some of the -- specifically mentioned out of the Seventh Circuit. What is the EEOC's position on providing leave in light of these court cases that are kind of limiting leave?

>> JEANNE GOLDBERG: That Seventh Circuit case is called Severson, for those who weren't familiar with it, and it held that ADA is not for long-term leave. EEOC has continued to bring denial of leave cases in the Seventh Circuit as appropriate and cases in the other circuits, consistent with our position that the standard is whether the leave requested would pose an undue hardship given the length (or unpredictability of the leave if it's intermittent), the nature of the job, and the impact on business operations. So for EEOC's position, I currently still direct you to the publication on the second to last slide, "Employer-Provided Leave and the ADA," that sets out the EEOC's position with a lot of helpful examples. And for the person who asked specifically about the Seventh Circuit, I would be happy to send you examples of some of the cases, links to some of the cases, EEOC has continued to handle even after the Severson decision in that jurisdiction. It's important to note that if an employer simply dismisses a leave request out of hand where it's disability related, for all they know it might have been several more days or a few more weeks, which even under Severson would be permitted. So you don't know until you engage in that interactive process. In any event, it would be good to do that. But I would be happy to share the cases for anyone who asked the question who would like more detail about the post-Severson litigation including in the Seventh Circuit.

>> LINDA BATISTE: Maybe we can post those with the answers to the questions so everybody can take a look at those. I think that's a really important topic.

>> JEANNE GOLDBERG: Right. At the present time, I think we have the technical assistance publication on Leave-Provided Leave the ADA, and we'll also include some of those more recent cases that have come down in the Seventh Circuit or that EEOC has filed.

>> LINDA BATISTE: Great. Really appreciate you doing that, Jeanne. Unfortunately, that's all of the time we have. But I want to thank you again for a great presentation and thank you to everybody that attended today. We also want to thank Alternative Communication Services for providing the net captioning, and if you need additional information about anything we talked about, Jeanne has provided her contact information on the last slide here. And also feel free to contact us at JAN any time. As mentioned earlier an evaluation form will automatically pop up on your screen in another window as soon as we're finished we appreciate your feedback, so we hope you'll take a minute to complete the form. Again, thanks for attending.

This is being provided in a rough-draft format. Communication Access Realtime Translation (CART) is provided in order to facilitate communication accessibility and may not be a totally verbatim record of the proceedings.

* * *