REALTIME FILE

JAN‑Monthly Webcast Series‑ADA Update

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>> Hello everyone. And welcome to the Job Accommodation Network's monthly webcast series. Today's webcast is our annual ADA Update, and we're going to focus on the ADA and what's currently going on in the courts and what things 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, we have to go over a few of our housekeeping items. If any of you experience technical difficulties during the webcast, please give us a call at 800-526-7234. Hit button five when the automated system picks up. Or for TTY call 877-781-9403.

Second, toward 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 e‑mail account, which is question@askJAN.org, or you can use our question and answer pod located at the bottom of your screen. To use that pod, you're just going to type in your question and submit it to the question queue. We do have a lot of information to cover today, so if we don't get to the questions during the webcast, we will send answers out later. On the bottom of your screen, you'll notice a file share pod. That's where you'll find them. And finally, I want to remind you at the end of the webcast an evaluation form will automatically pop up on your screen in another window. We appreciate and use your feedback, so please stay logged onto fill out that evaluation form.

Now let me briefly introduce our featured speaker. A lot of you probably already know Jeanne. She's done our ADA update webcast many times for us. But for any of you who haven't joined us before, Jeanne Goldberg is a Senior Attorney Advisor in the Office of Legal Counsel in the EEOC headquarters located in Washington, D.C. She advises the Commission on the interpretation and application of the statutes it enforces, including the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964. Today of course Jeanne is going to be sharing some information on the ADA and some recent developments in court cases. Jeanne, thanks for being here today and I'll turn the program over to you.

>> JEANNE GOLDBERG: Thanks so much, Linda. Good afternoon everyone. As Linda said, we're going to look at some of the new court cases that have come down in the past year, particularly ones that seem to address issues that Linda and Beth at JAN often get questions about and that we at EEOC often get questions about from employers and employees. So, some of these may be reminders to you about particular ADA principles and illustrations of how they apply, and some good reminders about pitfalls and best practices for employers as well.

For those of you who are with federal government agencies, of course the ADA principles about non‑discrimination and accommodation that we'll be discussing apply equally to federal government employers under Section 501 of the Rehabilitation Act. So, all of this material applies equally to government and private sector employers.

With that, we'll start on slide three. The EEOC v. Kaiser Aluminum Washington case that was settled last October. It reminds an employer not to rescind an offer based on a medical condition, if in fact the individual is qualified and does not pose a threat to health and safety.

Of course, we know that during a post offer medical exam, an employer is entitled to find out all kinds of medical information, and it may or may not be job related. It may be the result of a disability‑related inquiry on a questionnaire that is administered by a physician or a nurse. It may be the result of a medical exam. Or obtaining fitness information through the employee or directly from their treating physician.

In this case, an aluminum manufacturing company did decide to rescind the job offer they’d made to this production worker, because of the information they received during the post‑offer medical exam, during the exam, which they conducted while using an outside medical provider -- a vendor who conducted these post-offer exams for them.

During the exam, it was learned that the worker had ten years earlier broken his left heel and had been off of work for a year. And he said in the post-offer exam he had no current problems related to the injury. But the medical provider who was doing the exam recommended that the job offer be revoked because when the [exam] provider obtained the individual's medical records from their [the employee’s] provider, they saw that initially back at the time of the injury it had been designated as a permanent injury.

So even though the individual explained that he no longer had any limitations that would affect his ability to do the job as a result of his broken heel, and had continued to work in jobs of this sort in the interim, based on the fact of this prior injury, the medical provider recommended rescinding the job offer.

We'll go onto slide four. When the applicant learned that the job offer was being rescinded, he contacted the employer and explained, as I said, describing jobs he’d held since the injury, and explaining that he could perform all the physical duties of the position. And the employer told him we just go automatically on the medical provider's recommendation. We don't ever override the medical evaluator's position.

This was a violation of the ADA according to the EEOC because the individual was qualified for the job and did not pose a direct threat to safety.

You may be thinking wait, is a broken heel from 10 years ago a disability? Remember that if somebody is not requesting accommodation, they say I can do the job, I have no restrictions that need to be accommodated, and you discriminate against them -- rescind a job offer, or don't make a job offer initially because of a prior impairment or a current impairment, either way -- they can bring an ADA claim, arguing that they're covered under that “regarded as” prong of the definition of disability. Remember that under the ADA Amendments Act, an employer regards someone as an individual with a disability if you take an adverse action against them, adverse employment action -- like deciding not to offer them a job, rescinding a job offer, firing them, not promoting them -- you take one of those adverse employment actions because of an impairment that is not both minor and transitory. So, unless it’s both minor and transitory, if you act on a medical condition adversely to the employee, such as here rescinding a job offer, you have “regarded” them as an individual with a disability. They are covered under that definition of a disability, they get in the front door of the ADA, they can challenge that action – here, the rescission of the job offer. This case was settled for a substantial amount of money and an opportunity for the individual to be reconsidered … for consideration, subject to an exam, that he was in fact qualified. And there would also be training for HR and for the medical and nurse

contractors that the company used for these post-offer exams.

A similar case, EEOC v. Amsted Rail Company, involved an employer who in the post-offer medical exam for these applicants, post-offer pre-employment, was doing an exam that would test to see whether one had carpal tunnel syndrome or a propensity to develop carpal tunnel syndrome. It was a nerve conduction test. And then they rescinded the job offer to those applicants who had carpal tunnel currently, or a propensity to develop it, since they were hired to do a physical job that involved repetitive manual tasks. And an employer obviously cannot make an employment decision based on a fear or concern that in the future an individual might develop a condition, or cannot make an employment decision based on a current medical condition just the same, if the individual is in fact qualified to do the job, can do the job, and does not pose a direct threat to safety. So, this is really a very similar case to the Kaiser Aluminum case, where the employer is regarding these offerees as individuals with a disability. And rescinding the job offer is the adverse employment action based on their impairment. It doesn’t have to be a substantially limiting impairment for that “regarded as” coverage. And because the individuals were qualified to do the job, and did not pose a direct threat to health or safety of themselves or others, the employer -- EEOC alleged -- violated the ADA.

Both of these cases illustrate a type of fact pattern that EEOC often tried to challenge prior to the ADA Amendments Act, but with less success, because remember the old definition of “regarded as” required that the employer think of the individual as substantially limited in performing a major life activity. Now that the “regarded as” prong of the definition of disability has been revised under the ADA Amendments Act to only require that an employer take an adverse employment action because of an impairment that is not minor and transitory, there are many more opportunities for successful challenges to situations such as these, where an employer takes an action to rescind a job offer or fire somebody because of a medical condition that does not actually affect the individual’s present ability to perform the job. So, this may be a common practice that is more frequently going to be reached under the ADA and subject to challenge. So, these two cases are good ones to consider.

Turning to slide five, the EEOC v. American Airlines case, is one that we settled this year involving what we call “100% healed” rules – [where an employer policy is] that if they have been out on medical leave for work, they cannot return until they don’t have any medical restrictions, whether or not the individual is requesting accommodations. Employers sometimes apply these rules to require that someone be restriction-free before they will be permitted to return from a medical leave that they have been on, and EEOC in the American Airlines case challenged just such a policy. The airline would not allow people to return if they needed a reasonable accommodation, and instead would terminate them. And this ended up applying to people with a wide variety of impairments, who ended up having to be terminated because they weren't allowed to return from leave either to their original job, with or without accommodation, or to another job to which they could be reassigned if they weren't qualified for their prior job. And it included -- the application of this policy was applied to individuals with all kinds of conditions. As I said, various impairments including lupus, cancer, stroke, knee and back injuries. So, this type of policy again is something that EEOC frequently challenges if we do see that an employer was applying this. It's a clear violation of the ADA since an employer is always, always allowed to insist that somebody be qualified in order to remain in the job, but not that they be “100% healed” with no restrictions or no impairments. So that's a critical distinction to keep in mind.

You're allowed as the employer to insist somebody be qualified, and you don't have to keep them in a position that they're not qualified for, but that is different from restrictions. The question is, with an accommodation that does not pose undue hardship, you could perform the essential functions of the job. And many of these individuals didn't need accommodation at all. They also, though, were barred by this 100% healed policy from returning to work.

Turning to slide six briefly, you'll see that because this policy was applied across the board, there were actually 1500 identified employees who were potentially barred from -- under the policy from returning to work. Pursuant to the consent decree, a settlement administrator was put in place to evaluate, as to each individual, whether they were improperly excluded. There would be an individualized assessment for each person about whether they were qualified to return to work, whether they could perform the essential functions of their own job, or if not, a vacant job to which they could be reassigned.

So, on the back end here, in the relief that is ordered in this case, you see the very individualized assessment that the employer should have done to begin with, with respect to each employee presenting themselves with or without restrictions, but ready to return from a medical leave.

Turning to slide 7, this is a case, Lewis v. Union City, that illustrates just because an employer has a requirement, even though it might apply it to all the individuals holding that position, that doesn't necessarily mean that that is an essential function of the job, where we have a dispute between the employer and the employee about whether the employee as an accommodation can be excused from performing a particular task. If it is a main duty -- an essential function of the job, the employer does not have to eliminate it as an accommodation. We have to know whether it is when we have such a fact pattern.

Here in Lewis, the plaintiff was a police officer. The police department changed their policy to require that in addition to being trained and using tasers and pepper spray the police detectives would as part of that training be subject to a five‑second shock using the device as part of their training so they would know how it feels to be tased. And this particular officer had had a small heart attack about 15 months earlier, and her doctor requested that she be excused from receiving the shock of the taser or the pepper spray, and she was ultimately fired when she wouldn't go through that part of the training, of receiving the shock or exposure to the pepper spray herself.

And the court in reviewing her challenge to her termination under the ADA ruled that this was a claim that should go to the jury. On whether or not this was an essential function of the job, the employer could not get summary judgment. They said in particular that Taser International, which develops and sells the taser and trains people in using the taser, does not require its employees as part of its own training course to receive a shock in order to become certified. That was very important evidence among other things for the court in deciding that even though they would give special weight to the employer's judgment about what constitutes an essential function -- and that's true in any case that that's a factor, and the court said special additional weight here accorded to the employer because it's a police department -- but still, that's not necessarily conclusive. And this was a case where those facts would have to be sorted out by a jury. So, don't always go just on whether or not this is a written requirement that an employer has adopted. If you have one of these situations, you want to figure out from other evidence, independent evidence, whether it is an essential function of the job within the legal meaning of that term. And here you can see based on these facts why that was disputed.

Turning to slide 8, it's often challenging to decide whether something is an essential function because we are so steeped in how that particular task historically has been performed. The Dunlap v. Liberty Natural Products case involves a situation where a shipping clerk presented lifting, pushing, and pulling restrictions from her doctor. And in addition to labeling packages and data entry and so on, one of the main tasks of the job was regularly moving these boxes that weighed up to 55 pounds from one point to another as you were preparing them for shipping.

And she requested accommodation. The employer denied it. Looking at this case, when she brought her ADA challenge, the employer argued that lifting, pushing, and pulling were essential functions of the shipping clerk position. And the court said, however, that it's moving the boxes. That she could be qualified because she could have performed the essential function of moving the boxes from point A to point B. In other words, lifting, pushing, and pulling was how the essential function was performed, but the essential function was moving the boxes from point A to point B. And here, if the employer had allowed her to use rolling cart or other assistive devices, whether they're manual or motorized, as an accommodation, the evidence was that she would have been able to perform that duty of moving the boxes from point A to point B. This was a case where there actually was a jury trial and a verdict in favor of the shipping clerk. And considering this on appeal, the 9th Circuit upheld the jury verdict. And one thing in particular that they noted was the employer in this case was well familiar with these assistive devices that existed in this industry of packing and shipping, and that could have been affordably purchased for the plaintiff. And in fact, interestingly, the plaintiff produced evidence that was entered at the trial that included the catalogs that the employer in fact subscribed to, that displayed these different types of equipment that were available for sale in the industry to assist employees with lifting, pushing, and pulling. But the employer didn't consider using these, even though they regularly got this type of catalog and their own managers testified they were familiar with these things. Now of course if you weren’t familiar, you could research whether there was a way to accommodate somebody in this type of position. But there was, it turns out, one of these mobile scissor lift tables where you could adjust the height of the table, adjustable height that could go up to the right height for this employee to be able to do her tasks of auditing and packing and moving the boxes, and that would hold the requisite weight. So, this is really an interesting case about looking into whether there is an assistive device or another accommodation that would allow the employee to perform this task, and the essential function of accomplishing a particular physical task, just in a different way than it’s usually been done.

Turning to slide 9, there are of course sometimes essential functions that require that you be present in a particular work environment. So, it’s not really possible for the employer to accommodate the employee if the employee is saying create an environment that does not have certain things present. In the Brown v. Milwaukee Board of School Directors case, there was an assistant school principal who had severe arthritis in her knee, it got worse after she was injured when she tried to restrain a student. And she requested to be reassigned to a position where she would not have contact with potentially unruly students. And the court here agreed with the employer that all positions in a school involved exposure, potentially, to a student who might in the same scenario might reoccur where a student was unruly and needed to be subdued. The court said well some job functions can be performed without regard to the work environment. It’s just about looking at that task and whether the employee can do that task.

Other job functions require that an employee be present in the specific work environment. And here all positions involve student contact and there was no way for the employer to ensure that either to provide a position that didn’t involve student contact, or to ensure that the same situation wouldn’t recur. The court agreed that proximity to students can be considered an essential function when you’re looking at something that is environment-specific like this, a job like this of performing tasks in a certain environment. Well then doing it in that environment is part of the essential function. And the fact that this employee was restricted from encountering students because they might become unruly meant that she couldn’t patrol the hallways, meet with students, observe classes, all things that were essential functions of the various jobs she wanted to be reassigned to. So, there was this integral relationship between the essential functions of the job and the environment such that performing the essential functions required her presence in a particular work environment, so she couldn’t be accommodated as she sought to be given a position where she would not be in that type of work environment exposed to students.

Turning to slide 10, you have to be able to perform the essential functions of the job at the time you’re required to do it. The Jordan v. City of Union City case out of Georgia from the 11th Circuit involved a situation with a probationary police officer who had anxiety and panic disorder. He did not have episodes all the time. To the contrary, it was only occasional. But he had to, as a police officer, be able to handle high-stress and emergency situations in a cool, calm, collected manner. The way EEOC looks at these kinds of fact patterns, we consider that as -- an attribute like that, that you need to possess in order to perform the job -- a qualification standard. And then we say is that standard the employer is requiring job related and consistent with business necessity? Here the court looked at it, as they often do, an essential function.

What happened in this case is on a particular occasion, the police officer with a group of other officers was responding to a situation where someone had a gun, who they needed to disarm. And this police officer had an anxiety attack and hid behind a tree. So, you know, he couldn’t react quickly. He couldn’t be calm in this high-stress situation in this particular event. And they ended up removing him. And when he challenged it, the court agreed with the police force that even if he was fully capable of performing the duties of his job much of the time, even an infrequent ability to perform the essential functions of the job is enough to render somebody not qualified in a situation like this.

Now, you know, if he had been an office worker sitting at a desk, reviewing files, or doing all kinds of other jobs, you could imagine where the case would come out differently. But here, for the type of job this was, he had to be able to perform the essential functions at the time required when he needed to respond, with other officers or on his own, to a criminal incident in progress. So, there was -- the court agreed with the employer, that he could be excluded from this position.

Turning to slide 11, I want to talk about some recent telework cases because often employers are faced with sorting out whether a particular job’s duties can be performed remotely or not. And I think these cases show you how fact specific courts view this analysis to be, how into the factual weeds they are willing to go in sorting this out. And I think that’s a good lesson for all of us in learning how fact-specific we need to be in analyzing whether a specific request for telework would be feasible, and whether or not it would pose an undue hardship.

In the Mosby-Meachem case out of the 6th Circuit, it was held the employer violated the ADA when it denied a pregnant employee’s request to telework for 10 weeks due to medical necessity. She was an in-house corporate attorney. And on her written job description, it did say that trying cases in court and deposing witnesses were functions, duties of her job. But the evidence also was that in eight years of working for this employer she had never actually tried a case in court or deposed a witness. She had never been called onto do so. And her own coworkers, and outside counsel with whom she worked closely, themselves testified that that was the case and that she could perform her essential functions while teleworking for ten weeks. It was all brief writing, motions, you know, writing things that were filed, negotiating things, coordinating with outside counsel. She was not herself, the attorneys in her position were not themselves the ones who appeared in court or took depositions. She had previously teleworked for two weeks when she had an unrelated surgery a year earlier, and for three weeks while they allowed her to telework while her accommodation request was pending, and also the evidence was during that time she had performed all of our duties satisfactorily. This shows you that this kind of real-world evidence of what actually happens in this person’s day-to-day here over an eight-year period is relevant, as well, not just the job description. So, if you are [handling a request for] an employer who receives a request to review and you are not familiar with how the duties of that particular position are actually performed in real life, as opposed to just on the written the job description, you need to find out and talk about these kinds of facts as part of your decision-making process.

Let’s contrast Mosby-Meachum with the Credeur v. Louisiana case on slide 12. This is a case that also involves an attorney, also a litigation attorney, who sought to do full-time telework. She initially requested part-time telework. She was recovering from complications she had from a kidney transplant operation that she had had years earlier. She develops complications, seeks part‑time telework, they grant it, but soon after she says I want to telework full-time. That's what I medically need. And here the employer denied the full-time telework, and the court agreed with the employer that that decision was correct, that it would have posed an undue hardship.

Because here the evidence shows that the attorneys in this office, the state attorney's office, who did litigation could only work from home on rare occasions and temporarily. The job was very interactive and team oriented. There were all kinds of in‑person appearances that had to be made. The employee -- now this is a very important fact, we didn't have this in the other case, but this is very important -- the employee in the Credeur case, because she had been part-time teleworking, the employer had some evidence of how this was going and whether it was an effective accommodation or not. And here, during the part‑time telework they had granted, she was having difficulty keeping up with her work. Some of it had to be assigned to others. The court said that placed a strain on the rest of the office. She failed to complete certain administrative tasks once she was teleworking, such as accounting for her time the way attorneys are required to record their time to the minute. And although she could cite to two coworker attorneys who were allowed to telework, one only did it when they were working above and beyond outside the regular hours of the workday doing extra work, extra hours, and the other was not a litigator, so they were in a different role.

Comparing those two cases, both of which involved attorneys, both of whom the real-life experience perhaps looked a little different than what their job description was on paper -- that the job description on paper didn't tell the whole story. You can see the kinds of facts that might be relevant in evaluating a telework request to decide whether it's feasible or poses an undue hardship. And also how fact-specific you can and should get.

Turning to slide 13, some more telework cases that illustrate this principle. The Everett v. Grady Memorial Hospital case from the 11th Circuit this year involved a woman who worked at a hospital overseeing the car seats program. When they have new parents leaving the hospital with their babies, they had a program, and you know this has become somewhat common, where they're showing the parents how to properly install the car seat for the baby in the cars as they were leaving.

This involved meeting with patients, teaching classes that they had for the parents of newborns, and supervising an employee, because she wasn't the only employee who did this. She was in a supervisory role. And the court agreed with the employer that these essential functions couldn't be performed from home. They accounted for up to a third of her time. And there could be no way as you could imagine that she could supervise another employee in terms of whether they were performing this physical task of teaching the installation of the car seats correctly, each classes to patients at the hospital, meeting with patients, actually showing them how to install the car seat, and doing it with them or for them -- you can imagine how that type of task obviously couldn't be done if she was granted the full-time telework that she sought. Part‑time telework, maybe you would have a different result in this case, if due to her disability she needed part‑time telework. But with these tasks, accounting for up to a third of her time, the full‑time telework was not feasible and would have posed an undue hardship.

Also, if she was seeking part-time telework it's logical to conclude that the court would have considered and the employer could have considered whether all of these tasks were so necessarily interspersed throughout her day that there was no way to do part‑time telework.

I'll also mention for sake of contrast also on slide 13, the EEOC v. Advanced Home Care case, a case we filed this year, that involves an allegation that the ADA was violated when the employer denied telework requests by a patient account representative, someone who due to their respiratory impairment sought to telework to avoid the fragrances, scents, and odors in the workplace – that was going to aggravate the condition. And this person's duties were pure computer, phone‑based tasks, did not require personally interacting with patients. So, the communications that were necessary, the other aspects of the work duties, could all be done remotely in the EEOC's view. So, I think these facts show maybe the other end of the spectrum. Maybe a much easier case. But give you an idea of a contrast with the Everett case.

Turning to slide 14. These are a couple of cases from the past year that illustrate the basic principle that as a reasonable accommodation you never have to excuse prior misconduct, even if the disability caused the employee to engage in the misconduct. And by misconduct, what we mean is a violation of a uniformly‑applied conduct rule. In other words, a rule that you hold everybody else to as well, and a rule that is job related. And there's rarely a dispute about that. But there are cases, for example, a classic example in the EEOC guidance of a conduct rule that was not held to be job related for the particular position was a dress code rule that required your shirt to be tucked in and the individual [couldn’t comply] due to their psychiatric disability, who worked in a warehouse, where they weren't interacting with customers, that rule was not job related as applied to them. But if you're talking about theft and violence at the workplace and all those kinds of rules of being on time, not being tardy, those are uniform and usually job related and consistent with business necessity.

Now in the Guzman case, a call center operator had excessive tardiness, warranting termination. She never asked for accommodation or told the employer about why she was tardy. It turned out she had a sleep apnea diagnosis and related symptoms, and she violated their uniformly applied rules on tardiness, and management decided to fire her because she had had enough tardies to warrant termination. After she had all these tardies, as they're meeting with her to terminate her, she presents a letter from her psychiatrist saying that she most probably had sleep apnea, and therefore had a medical condition, potentially a disability that was causing this, so she might need a schedule adjustment or other disability accommodation. The court agreed with the employer that the employer did not violate the ADA by going ahead with the termination anyway, because the misconduct on which they were basing the termination had already occurred. So, the accommodation request was made too late. If she had made the request after the first or second tardy, and let's say under the rule you were terminated once you accrued five tardies, and after the first or second, she got a warning, and at that point she said it's being caused by my sleep apnea. Then the employer would have been able to give her the warning or whatever discipline she had earned under their policy, because they don't have to excuse the consequences -- they don't have to excuse the misconduct, even if it's disability related. They would have given her the warning, but they would have had to look at an interactive process to see if she could be accommodated going forward, whether it involved a schedule change or some other accommodation. But because she waited until after she had already committed all the acts that justified the termination, at that point it was too late for her to request accommodation because the employer never has to excuse prior misconduct. They can impose the consequences of misconduct of this sort even if it was caused by the disability, and any accommodation that the person is entitled to is only prospective. So, she didn't ask soon enough. She had already earned herself a termination by her tardiness. So, the employer was permitted to, as it would in any situation, impose the consequences of the actions, the misconduct that had already occurred. And there was no prospective accommodation to provide, because she had already earned herself a termination.

In the Monroe Case, similarly, also from the 7th Circuit in the past year, an individual with PTSD had engaged in abusive behavior to coworkers. And it had risen to a level where it had warranted discharge. And the court agreed with the employer that it could impose this consequence for that type of misbehavior as it would on any other employee, even though the misbehavior was caused by the disability, because the rule it was imposing was job related and consistent with business necessity and uniformly applied.

Turning to Slide 15, it's important to remember to give employees with disabilities the benefit of the same treatment that others would receive. I suppose one side of this coin is what we just talked about: an employee with a disability would be subject to the same uniformly applied conduct rules as other employees. The flip side on this slide are cases that illustrate that employees with a disability should get the same benefit of feedback that you would give to other employees.

In the Caldwell case, an employer did not interact with the individual with a disability with respect to his alleged performance problem. Didn't provide the counseling that was provided to other employees for the same type of performance issues. And that type of feedback or counseling is what would give an employee an opportunity to improve. And so the court held in this case that the employer may have discriminated against the employee, engaged in disparate treatment based on disability, by withdrawing from communication with the employee and not communicating with him, not giving him the benefit of the same feedback and counseling meetings on performance problems that other employees received the benefit of.

And I think we see this fairly commonly that once a manager or supervisor knows a particular employee has a disability or has requested accommodation that they fear some sort of legal minefield, perhaps, and stop communicating with the employee in the normal manner, whether it be normal social office chitchat, or as in this case about work expectations and giving the normal work feedback. And it's important for supervisors and managers to know that they should treat individuals with disabilities the same as they would other employees in this regard, and it's really to everyone's benefit in fact to do so, in addition to being necessary to avoid the type of legal violation of potential disparate treatment that was found in the Caldwell case.

The Banim case involves a situation where the employee said well I'm being subject to disparate treatment based on my disability because as a condition of my telework, which I've been granted as a reasonable accommodation, the employer is making me fill out daily activity reports, you know, that say this is what I accomplished today, and this is what I still have on my plate. And here the court disagreed with the employee, rejecting this ADA claim, and saying, you know, the employer required this of everybody who teleworked, so there is no disparate treatment based on disability. And in fact, we often recommend this as a useful telework management tool. And I think it's especially helpful where supervisors or managers are concerned that people who are teleworking may not be productive as they would be if they were working in the office. And I think these daily reports can be a useful tool. And here, importantly the court emphasized because the employer was requiring them across the board for everyone who teleworked there was no ADA disparate treatment based on disability.

We at EEOC, in our own telework policy, in fact have a provision for all teleworkers that the day before the telework, the supervisor and the employee are to communicate and agree on what work will be performed on the telework day.

Turning to slide 16, going above and beyond what the law requires. Often, I think employers wonder about this. What if we did something extra. We knew the person didn’t necessarily have a disability within the ADA definition, or we decided to remove an essential function for a period of time as an accommodation, or we did it by mistake -- we know now looking back on it this was a mistake. Legally we did not have to grant this accommodation. Can we dial it back? Can we then rescind the accommodation at some point in the future in that scenario? The Boyle vs. Pell City case from the 11th Circuit dealt with just this situation.

The plaintiff was a heavy equipment operator and he had a back impairment. And the employer for many years – first, for several years, allowed him to perform office work, but he stayed as a heavy equipment operator. That was his job title. He got paid as a heavy equipment operator, but they assigned him to do office work. And then for seven years he performed the foreman duties and the foreman voluntarily agreed to do the heavy tasks and the mechanic duties that were the essential functions of the equipment operator position. So, this goes on, and then this new superintendent comes on the job and decides to put everybody back where they are supposed to be, so to speak, restoring the plaintiff and the foreman to their original duties. The plaintiff challenged this. Of course, for years he's had this arrangement. Why couldn't he continue? He argued this was now his new job. And you could imagine a situation where it certainly would be proof that, you know, something was not an essential function of a job if an employer allowed you not to remain in your position and not do it for many years. But here, the court said going above and beyond what ADA requires does not obligate an employer to continue the arrangement it had made. It's clear here they had done a switch, allowing the employee not to perform the essential or any functions of his existing position, and had somebody else do that job instead. And when they wanted to switch them back, the court said that was permissible. When the employer provided a greater accommodation than what was required under law. The foreman position was never vacant during this point. They said there would be no obligation to promote somebody as an accommodation, and it was a higher-level job. That also made it clear that this was also something that the employer was doing that went above and beyond its ADA obligation, but was not something it therefore had to continue if it chose to the stop the arrangement. Reasonable accommodation, the court said, does not require an employer to force an employee to leave a position or promote an employee to a higher‑level vacancy, even if one exists.

An interesting case there. I think this is a question we get from time to time about whether an employer, when it realizes it has gone above and beyond what ADA requires, is it permitted to go back and in fact this case supports the notion that the employer can.

Okay. Now turning to slide 17 and beyond, we're going to look at a couple of trending issues that I know JAN and EEOC have been getting a number of questions about.

First, animals in the workplace.

Turning to slide 18. This is a situation where if you ask me is allowing an employee to bring a service animal or an emotional support animal into the workplace a reasonable accommodation, I need to back up and first tell you about non‑workplace rules.

The U.S. Department of Justice enforces titles II and III of the ADA. Title II deals with state and local government agencies dealing with members of the public, like people from the public who are going into a state courthouse, or going into a state DMV office, or going into a city office to do business. And Title III deals with businesses and non‑profits that are public accommodations, such as theaters, hotels, restaurants, offices where members of the public come in to do business.

Under those provisions of the ADA -- so these are non‑employment situations, where businesses are interacting with members of the public or customers -- in situations other than employment, the obligation is to admit service animals, if they are trained to perform a task. But the Department of Justice has said that state and local government agencies and public accommodation do not have to admit animals that only provide emotional support and are not trained to perform a service, trained to perform a task.

They have also said that in this context -- which is often a one‑off interaction, right, a one‑time interaction; I'm just going to eat my meal at the restaurant, or I'm going in to shop at this store -- that the government agency or public accommodation cannot require documentation such as proof that the animal has been certified or trained or licensed as a service animal as a condition for entry. They can ask certain questions about that, and we'll give you some resources on that in a moment, and they can exclude where animals are unruly or not controlled. But these are basic rules that the Department of Justice has decided apply in these non‑employment settings under Titles II and Title III of the ADA. So where you're not dealing with an applicant or an employee, instead you're dealing with a member of the public or a customer who is coming into your business, Department of Justice has said you only have to admit service animals who are trained to perform a task. In other words, not an animal that is only an emotional support animal, and is not trained to perform a service. But on the flip side, you can't require documentation in these often one‑time transactions.

Now, how is it different for employment? Turning to slide 19. Under Title I of the ADA, the employment provisions of the ADA, EEOC hasn't addressed whether these kind of provisions apply, the provisions of limiting only to a service animal, not an emotional support animal. So, because they haven't addressed this, there's no existing limitations in the regulations or an appellate decision that says these limitations that DOJ has announced for members of the public and customers coming into your business -- they haven't said that applies in the employment context. As a result, for applicants or employees who request to bring a service animal or an emotional support animal into the workplace as a reasonable accommodation, employers should process the requests the same way they would any other accommodation request.

Note: an animal doesn't have to be certified. I just wanted to mention that. Sometimes we run into this with both sign language interpreters and service animals. People mistakenly think they have to be certified. Somebody might have trained the animal themselves or they might not have a particular certification, but they could still be a trained service animal. And they certainly of course could fall in this category that we don't have any binding authority on about emotional support animals.

So, what does it mean when I say that if someone requests -- an applicant or employee requests -- to bring a service animal or an emotional support animal into the workplace as a reasonable accommodation, that you should handle it the same way you do any other accommodation request. Well it means that you follow that interactive process, right? Well, that permits you to obtain documentation, the same way as you would with any other accommodation if the disability or the need for accommodation is not obvious or already known to you.

Let's take an example. Suppose the disability is blindness and the employee or applicant has a guide dog. Then the fact that the person has a disability and the fact that they need the accommodation are obvious. So, you may not need any documentation. There may be other issues that you need to find out about in terms of if you had a particular workplace where there were reasons why that might be an undue hardship. But you would not need any underlying documentation about whether they have an impairment that substantially limits a major life activity, or whether they medically need the accommodation they've requested. Right? It would be obvious.

By contrast, if you have a situation where the disability or the need for accommodation are not obvious or already known, again, our general rule, you can request reasonable documentation. So just as with any accommodation request, you would want to know that the employee has an impairment that substantially limits a major life activity and that they need the accommodation they've requested, and you can ask for the employee to provide documentation that demonstrates that to you.

So, turning to slide 20, what if other employees might experience severe allergic reactions or they have phobias related to the presence of a service animal in the workplace. Possible accommodations in this situation where there is a conflict between the needs of a coworker and the needs of the employee who proposes to have the service animal in the workplace -- possible accommodations might include separate paths of travel to minimize the coworker's exposure to the animal; telework or other flexible schedules to minimize the days in which they would physically be present at the same time; alternatives to in‑person communications, such as allowing participation in meetings by phone, even when an employee is in the office. I know of one situation where the individual with the severe dog allergy and the individual who used the service animal took turns as to who would attend the staff meeting in the conference room in person, and who would phone in.

Now there could be situations where, as with any accommodation, allowing the service animal poses an undue hardship. The kinds of facts that might feature here is that the animal is disruptive, poses a direct threat to health, significant risk to health or safety, or is not properly controlled by its handler. And I included a case here, Maubach, from this spring, where the workplace was an enclosed emergency operation center, on slide 21. The individual sought to bring in an emotional support animal, named Mr. B, a dog, to work because of his anxiety. It was excluded by his employer, and it was upheld by the court. In this case, the floor was covered by clumps of fur and dander from the dog and the dog bed that had been left there, and coworkers experienced allergies, even after the dispatcher, who was the employee, had vacuumed. And also, he allowed an inexperienced coworker to cover the emergency operation center -- it was like a 9-1-1 center -- to cover the center when he went to walk the dog. So, obviously neglecting his duties, and that is not a feasible setup.

If we turn to slide 22, you’ll see that the court explained exactly what I have endeavored to do over the past few minutes, that Title I has no specific regulations or guidance related to service animals or emotional support animals. There’s very little case law on it. The question is whether an emotional support animal can qualify as a reasonable accommodation. And the court said here assuming without deciding that whether an emotional support animal can qualify as a reasonable accommodation under Title I, even though it’s not allowed under Titles II and III, it depends on the particular employer and particular employment context.

If you turn to slide 23, you'll see that the court said that if this were under Title II or Title III, not this employment setting, it would be a one‑off transaction, and the allergies would not be sufficient on their own to justify barring the animal, because you're going to be in public spaces for a short period of time. And you don't know which other members of the public are going to be there at a given time. And the court said in public spaces -- in public accommodations, such as restaurants, theaters, hotels, and so on, if allergies were a sufficient justification to bar a service animal to accompanying their owner, because allergies are so common, the individual with a disability who uses a service animal would effectively be barred from using any public accommodation.

Turning to slide 24, the court explains in the employment context we look at the particulars of the workplace. It's an enclosed workplace. It would be prohibitively expensive -- it would be prohibitively expensive to build a whole other emergency operations center. This was the place where this employee worked, and it was enclosed, and he did have coworkers who had allergies, and this dog was triggering the allergies. And as a result, you know, having the dog present in this enclosed work space would pose an undue hardship. That is how the court analyzed one example of how this came up in an employment setting.

If you turn to slide 25, there's some great resources where you can read more about both the employment setting, Service Animals in the Workplace, and then the nonemployment setting -- your obligations to customers or members of the public -- and there for that, I've cited Department of Justice publications since they enforce Titles II and III.

Now in our closing minutes, I want to talk about one final trending issue which we've gotten some questions about which is drug use, addiction, and treatment.

I’m not going to go through each provision. But on slides 27, 28, and 29, you'll see set out with quotations from the ADA the specific provisions that state that somebody does not have a disability if they are currently engaging in the illegal use of drugs. However, a drug taken under the supervision of a licensed healthcare professional or other uses authorized by the Controlled Substances Act would be an exception.

What this means -- and I'm going to ask Beth if you would turn now to slide 30 so we'll have the quotes there on 27, 28, and 29 that you can go back to -- let me tell you what this adds up to. The question is what is the result under the ADA if a state law legalizes either recreational or medical marijuana use. Is that the current illegal use of drugs? After all, it's lawful under state law. So, is the employee who gets caught in a positive drug test due to their medical marijuana use, for example, that is legal under state law, do they have some sort of a claim under the ADA that they cannot be disciplined or terminated for that positive test result because of disability?

And the answer is, based on these excerpts from the ADA, that the ADA expressly excludes people who are engaged in current illegal drugs from the definition of disability, and says employers can act on the basis of test results for illegal use. And this is the key: the ADA defines illegal use by reference to the federal Controlled Substances Act. And marijuana use, even if it's legal under a state law, either for recreational or medical purposes, is considered unlawful under the federal Controlled Substances Act. So, there is no federal ADA protection, courts have said, for employees where the employer acts based on the employee's current marijuana use, even if it's in a state that has legalized marijuana use. So, the employee cannot claim they're an individual with a disability and have been discriminated against under the ADA if employer terminates them because of a positive test result from medical marijuana, and I’ve given you some examples here on slide 30 of courts that have held that.

Now turning to slide 31, some important caveats. The employer has to actually be acting on the basis of illegal drug use, not citing that as a pretext for a disability discrimination. And EEOC v. Pines of Clarkston was a situation where EEOC challenged someone's situation who was terminated -- someone who claimed that the real reason was not her medical marijuana use, but her underlying epilepsy – that the employer sought to terminate her because of her epilepsy, and that was the true reason she was fired. And you see the citation [to the decision] agreeing with the EEOC that that kind of claim could be made out.

And, also an important rule to be made aware of on slide 31: past drug addiction could be a record of a substantially limiting impairment. So, people with a past drug addiction could be covered under the ADA under that “record of” prong, and they can't be discriminated against. And they may in fact also seek accommodation that they could be entitled to, relating to current treatment needs related to their past impairment. Such as time off to attend AA meetings.

Now a couple other wrinkles in our final slides. On slide 32, you'll see that we've had several states where -- in these states where they have legalized medical marijuana to one degree or another, the state courts have been confronted with whether the state law protects those employees against discrimination. And I've got four examples for you here. From Rhode Island, Connecticut, and Massachusetts -- those are the three I'm aware of -- where courts have ruled that under the state law, the employer might have an obligation not to discriminate in employment against somebody who is using medical marijuana lawfully under state law. So, the individual would not have an ADA claim, but might have a state law claim. And, there is a new Vermont law that has itself, the legislation, explicitly states this, that someone is protected against disability discrimination based on current medical marijuana use as long as, however, they are not under the influence at work or unable to perform their essential functions, or they pose a direct threat. So, all these, in these four states -- Vermont, Massachusetts, Connecticut, and Rhode Island -- they would still allow the employer to exclude people who are under the influence at work, or otherwise can't perform their duties or pose a direct threat. But they don't allow -- under the state law -- discrimination just based on the positive test result for the medical marijuana. So, this is an interesting development and it's percolating. And a lot of employers are certainly used to the result under the ADA where there is no coverage -- disability coverage -- for current illegal use of drugs, including marijuana. But this is a situation where -- it may or may not be a trend -- but where several states are allowing state law discrimination claims to be brought, so a different result under the federal and state law.

And finally, I need to talk on slides 33 and 34, we'll start on 33, about a very different rule that would apply under the ADA for opioids or opioid treatment drugs like Methadone or Saboxone.

As I said in the beginning, the ADA says that illegal use of drugs under the Controlled Substances Act is excluded from coverage under the ADA, except use of a drug taken under supervision by a licensed healthcare professional or other uses authorized under the Controlled Substances Act. So, opioids might be lawfully prescribed, and opioid treatment drugs may be lawfully prescribed. So, with respect to opioids, the analysis would be different than with respect to marijuana. Because these would not automatically exclude somebody from coverage -- from disability coverage under the ADA.

You would be applying the usual, general rule, based on an individualized assessment, to determine if qualified, even with accommodation. There is an example here, the Happy Jack's Casino Case, involving an employer who sought to exclude everybody who was taking particular prescription or non-prescription medications. You can't do that across the board. It would violate the ADA to do that without making that individualized assessment about whether people are qualified or not.

Similarly, turning to slide 34, the Foothills case and Steel Painters involve similar allegations. In Foothills, EEOC alleged that the employer violated the ADA by simply excluding the person for the presence of this medication in their system without doing an individualized assessment of whether the person could safely perform the essential functions of the job. And the Steel Painters case, which is pending, is a similar issue, and involves somebody who had been previously dependent on opioids and was taking a prescribed dose of Methadone as a treatment.

So if you have a situation where someone tests positive for opioids or opioid treatments, in for example a post‑offer medical exam, where you are finding out what medications somebody is on, then you would need to do that individualized assessment as you would with any type of medication before excluding somebody. Because if they're qualified and don't pose a direct threat to safety, and there is no federal regulation, for example, that mandatorily applies to that position to exclude people taking a particular medication, it would violate the ADA to exclude the person for taking the Saboxone or whatever medication it happened to be in that case.

So, a really different result under the ADA when you're talking about medical marijuana versus opioids and opioid treatment drugs. Although, obviously, in all cases, there is no situation where the employer would be required to keep somebody in a position where they either were not qualified or pose a direct threat to safety. And, of course, you can always follow mandatory federal regulations that require people not be taking certain medications for certain types of positions.

So, with that, on slide 35, we have a whole bunch of disability publications from EEOC you can turn to for further information. And on slide 36, I've got my contact information if someone wants to be in touch with questions after the webcast. I can't bind the Commission as to any particular case, but we're always more than happy to try to answer your questions about what the law provides or direct you to the relevant resources and information.

Linda?

>> LINDA CARTER BATISTE: Thanks, Jeanne. Thanks for the extra information and spending extra time with us today. We appreciate everybody who hung around for this extremely useful and timely information. Jeanne has volunteered to answer your questions via e‑mail. She'll send them to us and we'll post them for you later on after the webcast in a few days.

I want to thank everybody for attending. We hope this was useful. As mentioned earlier, you'll get an evaluation form after we're through here. Please fill it out. Appreciate your input. Again, thanks for attending.

(Ended at 3:15 p.m. ET)