Dealing with faculty who have mental or physical disabilities is a challenge facing many college administrators. Although physical or mental disorders can occur at any age, the fact that college faculty as a population are aging suggests that colleges will face an increasing number of requests for accommodation by faculty. Such requests pose a number of challenges for college administrators and faculty leaders, many of which may have legal ramifications. How should a request for an accommodation be evaluated? Should a faculty member be granted a reduced teaching load, a preferred teaching schedule, dispensation from certain otherwise required activities such as attending department meetings, advising students, or attending commencement?

And what if an untenured faculty member, limited to a certain number of years of probationary status, requests one or more additional years of probation as an accommodation for a physical or mental disorder, or asks to be excused from teaching altogether for one or more years? What are the implications of an institution’s decision

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1 This article was written with the assistance of Emily Smith, an associate at Edwards Angell Palmer & Dodge.
to deny such a request? And will a positive response “open the floodgates” to other requests that the college will then have to grant?

This paper addresses a variety of challenges faced by academic administrators when confronted by a faculty member who claims that a disability makes him or her unable to perform some of the functions required for his or her position. It reviews the requirements of federal disability discrimination laws, discusses the concept of “essential functions” and their significance in dealing with disability claims, and reviews the courts’ tendency to defer to academic judgments by college faculty and administrators. The paper then discusses court opinions related to faculty with physical and mental disorders, and concludes with a series of recommendations for dealing with faculty with disabilities.

What the Disability Discrimination Laws Require

Discrimination on the basis of disability is prohibited by two federal laws and by the laws of every state in the U.S. All colleges and universities are subject to the federal Americans With Disabilities Act (ADA); virtually every college and university is also subject to the Rehabilitation Act as a condition of receiving federal funding. And while state laws prohibiting disability discrimination vary from federal law and from each other in certain ways, state courts generally have followed the jurisprudence established by federal courts, particularly since the passage of the Americans With Disabilities Act in 1990.

For a variety of reasons, most plaintiffs have brought lawsuits under the ADA rather than the Rehabilitation Act.\(^2\) The ADA provides that an employer with fifteen or

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\(^2\) Remedies available under the ADA include punitive damages, which are not available under Section 504. In addition, at least one court has ruled that a plaintiff must prove intentional discrimination in order to
more employees may not make employment decisions (including hiring, promotion, dismissal, assignments, or other terms and conditions of employment) on the basis of an individual’s disability. “Disability” is defined as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.³

Once the individual establishes that his or her impairment meets the definition of “disability,” the ADA imposes several additional requirements. The individual must demonstrate that he or she is “qualified,” and that a “reasonable accommodation” exists that will enable the individual to perform the requirements of the job.

The law defines a “qualified” individual as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”⁴ The law does not define “reasonable accommodation,” but provides a number of examples, such as making facilities accessible to employees, job restructuring, allowing the employee to work a part-time or modified schedule, reassignment to a vacant position, or providing assistive devices.⁵ But if the accommodation poses an “undue hardship” to the employer, defined as “an action requiring significant difficulty or expense,”⁶ the employer need not provide it.

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³ 42 U.S.C. §12102(2).
⁴ 42 U.S.C. §12111(8).
⁵ 42 U.S.C. §12111(9).
⁶ 42 U.S.C. §12111(10).

receive compensatory damages under Section 504 (Tanberg v. Weld County Sheriff, 787 F. Supp. 970 (D. Colo. 1992)). Some plaintiffs bring lawsuits under both laws.
Employees tend to allege either that they were excluded or removed from a job because of disability discrimination, or that the employer refused to accommodate their disability. In either type of claim, the employee must first prove that he or she can meet the definition of “disability,” which the courts are interpreting very narrowly. For example, the U.S. Supreme Court, in a trio of cases decided in 1999, ruled that if the effects of a disorder are mitigated by medication or in some other way, the individual cannot meet the definition of “disability” and therefore is not protected by the ADA. The ADA requires that individuals alleging discrimination under the ADA first file a complaint with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discrimination. The EEOC may investigate, attempt to conciliate, or rule on the claim. If the EEOC has not resolved the charge within 180 days of filing, the employee may request a “right to sue” letter and file a claim in federal court. Remedies for victorious plaintiffs include compensatory and punitive damages, equitable remedies such as reinstatement, back pay, etc., and injunctions. Prevailing plaintiffs may also be awarded attorney fees by the court. If the employer prevails, it is quite unusual for the court to order the plaintiff to pay the employer’s attorney fees.

Cases brought under Section 504 generally follow the pattern of ADA lawsuits, except that there is no requirement that the individual first file a claim with the EEOC.

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8 Section 504 provides that individuals alleging discrimination by an educational institution may file a complaint with the Office of Civil Rights, U.S. Department of Education. Although the statute does not specifically grant the right to sue in federal court, courts have interpreted the law to provide a private right of action that does not require the individual to first file with the Office of Civil Rights. See, for example, Tanberg v. Weld County Sheriff, 787 F. Supp. 970 (D. Colo. 1992).
The regulations interpreting Section 504 have been amended to mirror those for the ADA.

As a result of the Supreme Court’s ruling in the Sutton trilogy and a subsequent ruling in the Toyota case, plaintiffs have had difficulty convincing federal courts that they meet the definition of “disability.” Even those employees who meet the ADA’s definition of “disability” may then have difficulty demonstrating that they are “qualified” if they cannot perform the essential functions of their position even if accommodations are provided. While employers should not simply assume that an individual with an impairment cannot meet this definition in deciding whether to provide an accommodation, these cases demonstrate the importance of appropriate medical documentation of the impairment and a close analysis of whether the individual can still perform the essential functions of the position, even if accommodated. For these reasons, a clear explication of the essential functions of an employee’s position is critical. This is particularly important when dealing with faculty with disabilities.

**Essential Functions of a Faculty Member**

The ADA does not require the college to reduce, eliminate, or modify “essential functions” of a job in order to accommodate a faculty member with a disability. The college must, however, be able to explain what the essential functions of a faculty member are in order for a court to ascertain whether a faculty member with a disability is “qualified” and thus protected by the ADA. For that reason, it is important for a college

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9 *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (plaintiff could not meet the definition of “disability” because her impairment did not substantially limit her ability to carry on daily activities outside of work).

10 *Cleveland v. Prairie State College*, 208 F. Supp. 2d 967, 977 (D. Ill. 2002).
or university to specify the essential functions of a faculty member, preferably in some official policy document, such as a faculty handbook, an individual employment contract, or a collective bargaining agreement. This is critical, because if a faculty member states that he or she cannot perform part of his or her job (such as teaching or attending committee meetings), a court could reasonably conclude that the individual was not “qualified” and thus not entitled to an accommodation that would exempt the individual from performing that part of the job.11

A list of essential functions should be prepared before it is necessary to refer to it when a faculty member discloses a disability and requests an accommodation. In Kingsbury v. Brown University,12 a trial court was very critical of the university for the manner in which it developed a list of essential functions when a professor asked to return from medical leave after brain surgery. The faculty member’s colleagues apparently did not wish him to return, and collaborated in developing a list of “essential functions” that the court believed were not applied uniformly to other faculty. When the university then refused to renew the faculty member’s contract, he claimed that the list of essential functions had been manipulated to allow departmental colleagues to create a set of functions that applied only to him. The court rejected the university’s motion for summary judgment, in part because of its concern that the list of essential functions was not objective and had been manipulated.

Cataloging the essential functions of a faculty member’s job is not an easy task, particularly at institutions where faculty members not only teach but serve on committees, advise students, conduct research, write grant proposals, mentor graduate

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11 See, for example, Piziali v. Grand View College, 2000 U.S. App. LEXIS 1823 (8th Cir. 2000).
students, perform service to their institution, community, state, nation, and discipline, and consult. Academic administrators need to determine what is expected of faculty (particularly full-time tenure-track faculty). Must all faculty teach, and is there a standard teaching load? (This is an important question, because if there is no standard teaching load, would a request for a lighter teaching load be a “reasonable accommodation”?). Must all faculty conduct research? Are all faculty expected to advise students, mentor graduate students, or engage in committee work? Would a faculty member’s inability to perform service mean that he or she is not “qualified” under the ADA’s definition? Must all faculty be able to interact in a professional manner with peers, students, administrators, and the general public? This latter job requirement may be particularly important if a faculty member discloses a stress-related disorder and claims an inability to work with particular individuals or to interact with a particular supervisor. In nonacademic settings, getting along with one’s supervisor has been ruled an essential function of virtually every job.13

In determining the list of essential functions, academic administrators should consider what the impact of a faculty member’s inability to teach, conduct research, or perform service would have on the department or program. Would additional part-time faculty have to be hired, or would the institution “close ranks” and ask other faculty to cover that individual’s teaching responsibilities? Would a long-term absence from teaching make it difficult for advanced undergraduates or graduate students to complete their degrees or significant projects? Would important administrative responsibilities be neglected, or would faculty colleagues need to pick up those responsibilities as well?

How do the college’s short- and long-term disability policies operate in a situation where a faculty member can do some, but not all of his or her job?

Administrators may wish to consult the AAUP Statement on Professional Ethics\textsuperscript{14} for assistance in developing a list of essential functions, particularly with respect to the type of behavior expected of a faculty member. The Statement notes that faculty “devote their energies to developing and improving their scholarly competence. They accept the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. They practice intellectual honesty.” Furthermore, with respect to students, the Statement says: “Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors. . . . They respect the confidential nature of the relationship between professor and student.” And with respect to interactions with their colleagues, the Statement says: “Professors do not discriminate against or harass colleagues. . . . In the exchange of criticism and ideas professors show due respect for the opinions of others. . . . Professors accept their share of faculty responsibilities for the governance of their institution.” The Statement has been found to be an appropriate standard of professional conduct by federal courts when faculty challenge discipline or dismissal for actions that colleges have argued violated the Statement.\textsuperscript{15}

Administrators may resist preparing a list of “essential functions” out of a concern that the college may want to accommodate a particularly valuable faculty member under one set of circumstances, but not accommodate a less-valued faculty member if a similar situation arises. Courts have been sympathetic to employers on this issue, and have

\textsuperscript{14} http://www(aaup.org/AAUP/pubsres/policydocs/statemonprofessionalethics.htm

\textsuperscript{15} See, for example, Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984).
allowed them to provide accommodations for some employees beyond those legally required without then subjecting the employer to the requirement that it provide similar accommodations to others, particularly if they do not meet the “qualified” requirement.16

Establishing a clear set of “essential functions” for the college’s faculty members should 1) notify the faculty what they are expected to do; 2) provide a guideline for academic administrators who are asked to provide “reasonable accommodations” for faculty members who cannot perform certain parts of their jobs; and 3) justify a college’s refusal to accommodate a faculty member who cannot perform one or more of the “essential functions” of his or her position if the college determines that it is in the college’s interest to do so.

Judicial Deference to Academic Judgments

Any analysis of the obligation of reasonable accommodation for faculty must recognize the special status that educational institutions occupy in our legal system. Institutions of Higher Education are a major industry in the United States and in many respects they resemble other large corporations in the for-profit world. Many have highly compensated chief executive officers.17 They often vie for the same talent and go to great lengths to recruit and retain “superstars”.18 They are often the subject of intense media

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16 See, for example, Vande Zande v. State of Wisconsin Dept. of Administration, 44 F.3d 538, 545 (7th Cir. 1995)(if an employer “bends over backwards to accommodate a disabled worker—goes further than the law requires—. . . it must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation.”)

17 See Paul Fain & Audrey Williams June, The Million Dollar President, Soon to Be Commonplace?, CHRON. OF HIGHER EDUC., Nov. 24, 2006 (reporting on survey indicating 112 presidents of public and private college and university systems had compensation packages of a minimum of $500,000).

scrutiny and evaluation.\textsuperscript{19} Finally, they are subject to an increasing array of government regulation.\textsuperscript{20}

One the other hand, educational institutions have traditionally enjoyed an unparalleled place in the legal system, deemed by the courts to be in some respects immunized from the same level of scrutiny that other organizations are subjected to. This special status is based upon the courts’ recognition of the importance of academic freedom to our core national beliefs. “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” In \textit{Keyishian v. Board of Regents},\textsuperscript{21} the Supreme Court held the New York state loyalty oath required of teachers in the public university system was unconstitutionally vague.

Similarly, courts are traditionally reluctant to exercise their judicial authority in ways that would interfere with the pedagogical interests of the university. This issue can arise in the context of academic decisions,\textsuperscript{22} admissions,\textsuperscript{23} student discipline\textsuperscript{24} and dismissal.\textsuperscript{25} Judicial deference to the academy is perhaps most often a factor in cases

\textsuperscript{19} See Fain & June, \textit{The Million Dollar President}, supra note 17.
\textsuperscript{20} See Fain & June, \textit{The Million Dollar President}, supra note 17.
\textsuperscript{21} 385 U.S. 589, 603 (1967) 10 AD cases 1106 (ED. Pa. 2000).
\textsuperscript{22} See \textit{Regents of the Univ. of Mich. v. Ewing}, 474 U.S. 214, 225-26 (1985) (holding judges should not substitute own judgment for faculty’s professional judgment regarding an academic decision unless it is a “substantial departure from accepted academic norms”); \textit{Bd. of Curators, Univ. of Mo. v. Horowitz}, 435 U.S. 78, 92 (1978) (cautioning against judicial intrusion into academic decision-making because “courts are particularly ill-equipped to evaluate academic performance”).
\textsuperscript{23} See \textit{Grutter v. Bollinger}, 539 U.S. 306, 328 (2003) (accordig deference to law school’s admission policy by classifying the admission policy as an academic decision within the expertise of the university).
\textsuperscript{24} See \textit{Schaer v. Brandeis Univ.}, 432 Mass. 474, 482 (2000) (holding colleges have wide discretion in deciding proper disciplinary measures for violations of its policies).
\textsuperscript{25} See \textit{Ewing}, 474 U.S. at 225-26 (1985) (concluding dismissal of student from school program was an academic decision and that judges “asked to review the substance of genuinely academic decisions ...
involving the employment of faculty. Often, these issues arise in the context of the
discipline or discharge of a faculty member.\textsuperscript{26}

Tenured faculty are themselves quite different from other types of employees.
While the procedure for gaining tenure and the specific definition may vary somewhat
from institution to institution, the essential elements remain the same. Tenure is a
contract of employment between the faculty member and the institution that may only be
abrogated under certain limited circumstances and under very specific conditions.
Generally, a revocation of tenure requires a showing of “adequate cause” or in
extraordinary circumstances, financial exigency.\textsuperscript{27} The period prior to an award of tenure
is often compared to a probationary period during which the faculty member
demonstrates his or her ability to meet the expectations of the institution in scholarship,
teaching and service.\textsuperscript{28}

Because the status of tenure is so unusual and so central to the function of the
university in our society, courts have been very reluctant to become enmeshed in an
institution’s decision concerning an award of tenure. Thus in cases where faculty claim
that they were unfairly denied tenure, courts often remind litigants that they do not sit as

\begin{itemize}
  \item See, for example, *Huang v. Coll. of the Holy Cross*, 436 F.Supp. 639, 653 (D. Mass. 1977) (noting reluctance by courts to override faculty appointments and tenure decisions absent discrimination by the university); *Cussler v. Univ. of Md.*, 430 F.Supp. 602, 605-06 (D. Md. 1977) (noting that courts defer to judgment of academic professionals regarding promotion decisions in academia because such decisions involve “matters of professional judgment”).
  \item 1940 Statement of Principles on Academic Freedom and Tenure AAUP Policy Documents and Reports at p. 4 (9th Ed. 2001).
\end{itemize}
“super tenure committees.”

Courts have recognized that to do so would threaten the “diversity of thought, speech, teaching and research both within and among universities upon which free academic life depends.”

Even where a faculty member has succeeded in establishing that the denial of tenure was tainted by impermissible discrimination, courts are reluctant to require a faculty member to be granted tenure. In *Meling v. St. Francis College*, plaintiff obtained a jury verdict on her claim of disability discrimination including reinstatement. She sought reinstatement with tenure on the grounds that had she not been unlawfully terminated by the College, she would have been awarded tenure in due course. During the course of the trial, the trial judge had expressed his opinion that plaintiff had shown herself to be qualified for tenure, and, that if he had the authority to grant it, he would do so. At the post-trial stage the judge, while recognizing that he had the authority to order reinstatement with tenure, declined to do so because he reasoned that the courts are ill-equipped to make those determinations and because a tenure decision affects more than strictly academic concerns. “The essentially permanent employment conferred on a tenured professor produces administrative consequences that can last for several decades. Again, courts are ill-suited to consider the impact of a particular tenure decision on the present and future needs of the professor’s department and the college as a whole.”

While acknowledging the deference given to academic organizations, courts recognize that this special status does not give educational institutions the right to violate

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30 *Vargas-Figueroa v. Saldana*, 826 F.2d 160, 162-3 (1st Cir. 1987).
32 Id at 278.
the statutes that apply to all employers. “At the same time, we recognize that Congress has committed to the federal courts a duty which we may not abdicate: that of eliminating workplace discrimination within educational settings as well as without”.33 These principles of deference to academic decision making and the administrative impact of tenured faculty on the department and the institution as a whole are important points to keep in mind as we look at balancing those principles with the requirements under the ADA and the Rehabilitation Act to accommodate employees with disabilities.

**What are Reasonable Accommodations for Faculty?**

In many respects accommodating faculty will be no different than accommodating other employees. Faculty may request a variety of physical adaptations to the classroom from a higher podium or arranging classes on a different floor to avoid having to navigate crowded stairways during the press of class hours. This is no different from the employee who requests an ergonomic desk or chair or an office closer to the parking lot to limit the walking distance. As the regulations make clear making existing facilities accessible to individuals with disabilities is likely to be a reasonable accommodation in the absence of a showing of undue hardship.34

However, there are some requested accommodations that are so intertwined with the essential functions of a faculty member that they may pose special concerns, at least initially. Thus, a faculty member with a physical disability that limits mobility might request an assistant to help with class demonstrations. Particularly if the institution provides assistants to faculty for other reasons, providing a disabled faculty member with

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34 29 CFR §1630.2(o)(2)
an assistant to help with clerical or administrative tasks will be a reasonable accommodation unless the institution can show that there is some significant reason why the request is inappropriate. Thus, it would be an appropriate accommodation to provide a disabled physical education instructor with an assistant to perform physical demonstrations or to assist students in performing physical demonstrations.  

Where the assistance is administrative or clerical, providing an assistant may be reasonable, even where the college believes that the function is central to the professor’s obligation. Even if that were true, that does not end the inquiry, as the institution is required to determine whether its educational interests can be protected while still providing a reasonable accommodation. Thus, in *Cleveland v. Prairie State College* the court found that engaging an assistant in order to transfer grades to a grade book would be a reasonable accommodation despite the college’s policy prohibiting anyone but the professor from transferring and posting grades. While the policy was legitimate and was instituted after a departmental secretary was found to have changed some grades in the course of entering them in the grade book, there was no showing that in this instance the college could not have protected the integrity of the grading process while still accommodating the professor. The court suggested that the college could have engaged an assistant to make the transfer under the supervision of the professor or required the professor to check the grade book after the grades had been entered.

Where an institution has multiple campuses, a transfer to another campus may be appropriate. In such a circumstance it is also crucial to look at the institution's general

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36 208 F. Supp. 2d 967 (N.D. Ill. 2002)
personnel policies to determine whether and under what circumstances, transfers to
different campuses would normally be allowed. *Los Angeles Comm. Coll. Dist.* 37 is an
instructive case on several levels. The faculty member was a tenured faculty member in
the mathematics department who had been at the institution for 23 years. As a result of
an automobile accident, his right heel was crushed and right ankle severely damaged. He
had ongoing and worsening pain. He requested a transfer to a campus closer to his home
on the grounds that he had only limited mobility and the long commute to his current
assignment was debilitating. 38 He supplied documentation from his doctor supporting his
request. The College declined his request, stating:

Reasonable accommodation applies to modifications that
specifically assist an individual in performing the duties of a
particular job. The requirement to provide a reasonable
accommodation applies when an employee arrives at work.
Traveling to and from work is the responsibility of the employee.

Generally, transportation to and from work is the responsibility of the employee.

However, that usually means that the employer is not required to provide the
transportation or to allow an employee to telecommute. 39 However, such transportation
related accommodations such as providing handicapped parking are generally considered
to be the obligation of the employer.

Because the faculty member was subject to a collective bargaining agreement, his

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37 112 LA 733 (1999).
38 Id. At 735. Not surprisingly, faculty are often able to articulate their case in a compelling fashion. In
requesting an accommodation, the faculty member stated: “‘I have only a certain number of steps per day
before the pains and aches set in. By the end of a one-way commute, after one to two and a half times on
the road, I’ve used up my pedestrian mobility for the day.’” Id. Often the disabled faculty are long-term,
valued employees. In this case the faculty member had taught part time previously at the campus he
wished to transfer to and had received the Golden Apple Award twice (for outstanding teaching), the only
two years the award was given.
39 Courts have not been terribly supportive of an employee’s request to telecommunicate as an alternative to
being present at work. *Smith v. Ameritech*, 129 F.3d 857 (6th Cir. 1997). However, as more employers
utilize employees working at remote locations, that may change
disability claims were heard by an arbitrator.⁴⁰ The arbitrator ruled that a transfer in order to shorten the commute would be a reasonable accommodation. The College then argued that there was no full time position “available” at the campus he wished to transfer to. However, there were multiple temporary positions being utilized and full time faculty had the right to “bump” temporary or part-time faculty. The school asserted that this would in effect be creating a new position which was not required by the ADA. Since, however, the collective bargaining agreement itself provided the mechanism for the faculty member to have a full time teaching load, no new job was being created. Finally, the College raised several claims of undue hardship including the fact that allowing the faculty member to cobble together a full time schedule from multiple temporary assignments would impair the college's ability to schedule classes to meet student demands; hourly rate employees would be displaced; and concern that a forced transfer would cause dissension and disruption within the department. The arbitrator found that even if there were evidence to support these asserted undue hardships, which there was not, these claims did not rise to the level of an undue hardship.

As was noted earlier, faculty positions encompass a variety of responsibilities: teaching, research, committee and administrative work. Even within these broad categories, there are many variations. Teaching a large lecture course may for some be a physically demanding assignment; however, there also may be teaching assistants available to help with the grading and workload. Teaching a small seminar may involve fewer students but be of greater academic intensity. While an employer is not required to eliminate essential functions of a position, job modification and restructuring may be

⁴⁰ In the collective bargaining agreement the College agreed to comply with all state and federal non-discrimination laws including specifically the Americans With Disabilities Act.
elements of a reasonable accommodation. Thus, for example, where a teaching position encompasses both in-class lectures and clinical demonstrations, a disabled faculty member who cannot lift heavy equipment may request limited clinical assignments and a heavier concentration of classroom teaching.\[41\] The determination of whether such an assignment would be considered a reasonable accommodation will depend upon whether the institution can show that it would be a disruption of its teaching method. It is not enough for an institution to claim that it requires all teachers to engage in both lectures and clinical work in order to keep up to date. Such an argument would be undercut, for example, by a showing that other non-disabled faculty had purely classroom rather than clinical responsibilities, or that the plaintiff, prior to being disabled, had mainly classroom duties with only occasional clinical responsibilities. Cases such as *Kacher* should not be read to indicate that essential functions may have to be eliminated, only that the institution must be careful that it has treated these functions as essential for other non-disabled faculty.

Where the requested accommodation requires the elimination of clearly essential functions of a position, the accommodation will not be considered reasonable. Thus, in *Hong v. Temple University*,\[42\] a professor of anesthesiology could not perform his duties as an anesthesiologist after undergoing laser eye surgery because of continued severe eye pain. While the faculty member was trying to get relief from his medical issues, he was given less demanding duties and was limited to covering the prep assessment unit and the recovery room budget. He did not administer anesthesia, perform any invasive procedures or perform any on-call duty. At the end of his term, his contract was not

\[42\] 10 AD cases 1106 (E.D. Pa 2000)
renewed. He suggested that he be allowed to remain in the restructured position indefinitely. Since such a restructuring eliminated many of the essential functions of his position, the court held that such an accommodation was not reasonable. Case law makes it clear that the fact that an employer has gone beyond what is required under the ADA, will not obligate the employer to continue to do so. 43

Another accommodation that is often requested is a leave of absence and in the case of a tenure track faculty, a corresponding extension of the tenure track to accommodate lost research time. Leaves of absence are a common accommodation for employees with disabilities. Indeed, the Family and Medical Leave Act guarantees leaves for up to twelve weeks for employees who are unable to work because of their own serious health condition. However, adherence to the requirements of the FMLA or the institution’s own leave of absence policy does not, necessarily fulfill an employer’s obligation of a reasonable accommodation. 44 Depending upon the circumstances additional leaves of absence may be required. The issue often turns on whether continued absence by the faculty member will be disruptive to the operations of the institution. As one court acknowledged, “Obviously, it is extremely difficult—indeed plausibly impossible—to run college classes when instructors are absent.” 45 However, a faculty member who is requesting flexibility in scheduling might have a much stronger argument, since in most cases, there are no set or core hours that a faculty member is

43 Id. at 112 (“In any event, the mere fact that an employer has exceeded its statutory obligations for a limited period of time, does not create an obligation for it to continue to exceed those obligations indefinitely. To hold otherwise would undermine the goals of the ADA; employers would be reluctant to attempt extraordinary accommodations of disabled individuals, even for a limited period of time, for fear of being locked in to those extraordinary measures indefinitely.”)
44 See, e.g., Garcia-Ayala v. Lederle Parentals, Inc., 212 F.3d 638, 649 (1st Cir. 2000) (Leave beyond employer’s one year job reservation policy could be reasonable accommodation required by ADA.)
required to be present in his office.46

Any discussion of the reasonableness of a leave of absence and a corresponding extension of the tenure track must start from an understanding of the circumstances under which the institution gives leave and extends tenure in non-disability cases. Most institutions have maternity leave policies recognizing that female faculty are making their way through the tenure process at just the time that they are most likely to be having their children. The AAUP recommends that a faculty member (male or female) who is a primary or co-equal caregiver of children be allowed to stop the tenure clock for up to one year for each child but for no more than a total of two years.47 Thus, at a minimum, tenure track extensions to make up for lost productivity and teaching time as a result of a disability should be no less than would be given for time lost under the applicable parental leave policy. Additionally, it appears that some institutions are looking at whether a six-year tenure clock is realistic given the number of demands that are placed upon junior faculty.48 To the extent that the tenure clock is extended for other reasons, it would make it more difficult for a college to assert that extending the tenure clock is either an undue hardship or an unwarranted burden on the academic standards of the institution.

The difficulty comes when a faculty member asks for more than the time lost as a result of the disability. Suppose, for example, that a faculty member is given a year’s

46 See, e.g. Ward v. Massachusetts Health Research Institute, Inc., 209 F.3d 29 (1st Cir. 2000) (open-ended flexible schedule no unreasonable in the absence of a showing by the employer that a regular and predictable schedule is an essential function of the job.)
leave of absence to undergo treatment for cancer and a corresponding additional year on
the tenure clock. The faculty member now asserts that the course of treatment has left
him without his pre-disability energy and stamina and therefore he will not be able to
produce scholarship at the same pace that he would have done before his illness. Assume
that his doctor will supply a medical recommendation concerning the effects of post
cancer treatment fatigue. Is a further extension of the tenure clock required or even a wise
thing to do? Not surprisingly there is no hard and fast answer to this, but an institution
must proceed cautiously.

One important questions is whether the proposed accommodation would allow the
faculty member to meet the requirements of the position. There must be some showing
that the accommodation will allow the faculty member to return to teaching, research and
service at his or her institution. An accommodation that is not likely to lead to a
resumption of all essential duties and responsibilities is not likely to be required. Thus,
there must be some showing that a reasonable further extension of the tenure clock will
allow the faculty member to produce scholarly work at the level required and to teach and
perform other responsibilities.49

**Accommodating Faculty with Physical Disabilities**

Reading the case law on disability discrimination, especially those cases
involving institutions of higher learning, suggests three lessons. The first is the
importance of the interactive process, in which the employer and the disabled employee
confer on potential accommodations and their probability of success. The second point is

to avoid making statements or creating records that will come back and undermine the institution if efforts to accommodate the employee go awry. Finally, it must be recognized that undue hardship is difficult to establish. Each of these will be discussed briefly.

At the time that the ADA was being considered the Senate and House Committees recognized that this law would only be effective if employers and employees worked cooperatively on a case by case basis to find a way to accommodate the employee.

The Committee believes that the reasonable accommodation requirement is best understood as a process in which barriers to a particular individual’s equal employment opportunity are removed. The accommodation process focuses on the needs of a particular individual in relation to problems in performance of a particular job because of a physical or mental impairment. A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations that will result in a meaningful equal opportunity for the individual with a disability.50 (Emphasis added)

Congress’ intent that employer and employee should take a problem solving approach is reflected in the EEOC’s Regulations to implement the Equal Opportunity Provisions of the Americans With Disabilities Act,51 in which the EEOC states: “To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”

51 29 C.F.R. §1630.2(o)(3)
Courts have focused on this language of the requirement of the interactive process. Employers ignore this requirement at their peril. In Cleveland v. Prairie State College, the Court denied the college’s motion for summary judgment because the College had denied the requested accommodation (an assistant to help with transferring grades to a grade book) without ever sitting down and talking with the faculty member about whether there was some way that the faculty member’s needs and the college’s needs could both be met. “The court finds that there is a genuine issue of fact as to whether this lack of communication is sufficient to meet the requisite ‘ongoing dialogue’ that should occur between an employer and a qualified individual” under the ADA. In Meling v. St. Francis College, the court upheld the jury’s award of punitive damages in part based upon the college’s failure to engage in any interactive process with the plaintiff as a means of determining a reasonable accommodation.

As a practical matter, engaging in the interactive process can also narrow the issues in dispute, should the matter come to litigation at a later point. In Kacher v. Houston Community College System, at the point of summary judgment, there was a dispute about the nature of the accommodation that the plaintiff was actually seeking, with the College asserting that she was asking to be relieved of all clinical duties, and the plaintiff contending that she was willing to do the clinical instruction so long as she could be relieved from the obligation of heavy lifting. That dispute was deemed to be a material issue which precluded the grant of summary judgment. As the EEOC makes clear in its interpretive guidance to the regulations, the steps of the interactive process includes

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52 208 F. Supp. 2d 967 (N.D. Ill. 2002)
53 Id. at 979.
54 974 F. Supp. 615 (S.D. Tex. 1997)
identifying potential accommodations and further, in conjunction with the individual determining the efficacy of each proposed accommodation.

The second lesson is that the individuals who are making the accommodation decisions should be cautioned about how they characterize these issues. Even where there is a legitimate reason for the action taken, an insensitive comment about an employee’s condition or abilities can undermine what might otherwise be a strong case for the institution. Thus, in *Kingsbury v. Brown University*,\(^5^5\) in discussing possible accommodations for an ongoing but improving neurological condition as a result of the removal of a brain tumor, a colleague, reviewing the proposed accommodation wrote:

> Have we not done enough for Henry? When will it end, this generosity to a hostile, irrational, and damaged colleague at the expense of the rest of us. Enough!

There were also earlier emails in the record from this same faculty member, critical of the disabled faculty member’s physical impairments and concluding that he must be replaced “next year”. These emails were used to undermine the University’s claim that the plaintiff would not be able to show that he could perform the essential functions of the job with or without a reasonable accommodation because the statement of essential functions, created in response to a demand letter requesting reasonable accommodations was tainted by the involvement of the individual who wrote the emails and who could be found, perhaps, to harbor a discriminatory animus. The court went on to find material disputes of fact concerning the legitimate non-discriminatory reasons asserted by the University. At the end of the decision, the Court acknowledged the substantial case law requiring special care in tenure cases, not to sit as a “super-tenure

committee”. Where, as here, there was evidence of discriminatory animus, the court opined that it was appropriate to deny summary judgment.

The third and final lesson is that undue hardship is a difficult threshold to cross. The regulations state that undue hardship means significant difficulty or expense, and the factors to be considered include the nature and net cost, the financial resources for both the accommodating facility and the overall covered entity, the type of operation and the impact of the accommodation on the operation of the facility, including the impact on other employees' ability to do their job and on the facility’s ability to conduct business.56

Simply because an accommodation is inconvenient for the employer does not amount to a showing of undue hardship; rather, an employer must prove that such accommodations pose a significant burden. Thus, for example, in Smith v. Henderson,57 the court rejected the employer’s argument that permitting a supervisor who suffered from rheumatoid arthritis to delegate accounting duties constituted an undue hardship. Although the court acknowledged that the supervisor’s delegation of her accounting duties decreased productivity and raised costs, the court stated that “it is not clear that the lower production and increased costs amounted to significant difficulty or expense.” The court did not elaborate on what is meant by "significant."

Many accommodations may be inconvenient for the faculty member's peers or for the institution generally. They will also likely have some impact on other employees, who may have to pick up the slack for a colleague who is absent. Thus, as noted earlier, courts have ruled that diminished flexibility in scheduling, and dissension within the

56 29 C.F.C. § 1630.2(p).
57 376 F.3d 529 (6th Cir. 2004).
department do not rise to the level of undue hardship.\textsuperscript{58} In \textit{Los Angeles Community College District},\textsuperscript{59} the defendant, a community college system, argued that it would suffer a number of undue hardships if it were required to transfer the plaintiff from one college within the system to another, including reduced flexibility to schedule classes and dissension within the department. Despite the defendant’s asserted hardships, the arbitrator still expressed doubt as to whether the defendant’s proffered hardships would amount to undue hardship.\textsuperscript{60} This case underscores the heavy burden that employers face when asserting the undue hardship defense.

If a university can establish departmental dysfunction resulting from a proposed accommodation rather than mere dissension among the faculty, the university may prevail in establishing undue hardship. In \textit{Schall v. Wichita State University},\textsuperscript{61} the plaintiff was a clinical supervisor who worked as a part of a team. An essential element of the plaintiff’s job required the plaintiff to visit students at various locations throughout the state. Following surgery for cervical disc disease, the plaintiff was unable to fulfill the travel requirements of his position. The other faculty members objected to his returning part-time without reassuming his travel responsibilities because such a revised schedule created a “dysfunctional” department. In particular, the faculty were unable to complete their own work because they had to assume some of the plaintiff’s job duties and believed that they would have to continue filling in for the plaintiff if he returned to

\textsuperscript{58} \textit{Los Angeles Comm. Coll. Dist.}, 112 LA 733 (BNA) (1999) (expressing doubt as to whether a university system’s asserted hardships, including reduced flexibility to schedule classes and dissension within the department, would amount to a finding of undue hardship).

\textsuperscript{59} 112 L.A. 733 (BNA) (1999).

\textsuperscript{60} The arbitrator rejected the defendant’s “undue hardship” defense because the defendant failed to present any evidence in support of the defense. Thus, the arbitrator did not make a final conclusion as to whether the defendant satisfied its burden of establishing undue hardship but expressed doubt as to whether its claims were persuasive.

\textsuperscript{61} 7 P.3d 1144 (Kan. 2000)
work on a part-time basis. Furthermore, the faculty could not travel and meet with students off campus in his stead; consequently, the faculty asserted that the students were not being properly trained. The court agreed with the university’s position that requiring other faculty members to perform the plaintiff’s traveling duties was not a reasonable accommodation because the faculty’s own job performance suffered and the students were not being adequately trained. In this case, the university succeeded with its undue hardship defense because it demonstrated an actual negative impact on its faculty and programs as a result of the proposed accommodation rather than simply arguing a theoretical consequence to an accommodation.

**Accommodating Faculty with Psychiatric Disabilities**

The National Institutes of Mental Health has estimated that one out of five Americans has a diagnosed or diagnosable mental disorder. In addition, psychiatric disorders comprise four of the top ten conditions that result in work disability in the U.S. and developed countries: major depression, bipolar disorder, schizophrenia, and obsessive-compulsive disorder. Given these statistics, it is likely that administrators will encounter faculty with psychiatric disabilities that may affect their work performance or their behavior at work.

Not surprisingly, individuals filing employment discrimination claims with the Equal Employment Opportunity Commission (EEOC) are more likely to identify a

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psychiatric disorder than any other type of disability. In FY 2005, the latest year for which data are available, 19 percent of the disability discrimination claims received by the EEOC cited a psychiatric disorder as the claimant’s type of disability.64 This figure mirrors the prevalence of individuals with psychiatric disorders in the U.S. population.

The ADA protects an individual with “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”65 Examples of mental illnesses potentially covered by the ADA include bipolar disorder, major depression, anxiety disorders, obsessive compulsive disorder, post-traumatic stress disorder, schizophrenia, and personality disorders.66 The ADA specifically excludes a variety of disorders, some of which are mental disorders.67

Faculty whose psychiatric disorder is controlled with medication may have difficulty demonstrating that they are “disabled” under the ADA’s definition if the medication mitigates the effects of the disorder.68 And if the faculty member cannot demonstrate that the disorder “substantially limits” that individual in one or more “major life activities” (such as sleeping or caring for oneself), the faculty member will not be able to establish that he or she meets the law’s definition of disability. For example, in Lee v. Arizona Board of Regents,69 the plaintiff, a professor at Northern Arizona University, claimed that the university had discriminated against her on the basis of

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64 www.eeoc.gov/stats/ada-receipts.html.
65 29 C.F.R. §1630.2(h)(2).
67 Excluded from coverage are transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance abuse disorders resulting from current use of illegal drugs. 42 U.S.C. §12211.
68 See discussion accompanying note 7.
69 25 Fed. Appx. 530 (9th Cir. 2001)(unpublished). The plaintiff brought claims under both the ADA and Section 504 of the Rehabilitation Act. The court dismissed her ADA claims in light of the Supreme Court’s ruling in Board of Trustees v. Garrett, 531 U.S. 346 (ruling that individuals cannot subject states to lawsuits in federal court under the ADA), but considered her claims under Section 504.
disability (among other bases) when it assigned her to teach introductory courses, denied her part-time teaching, removed her from teaching, denied her institutional research funds, and failed to accommodate her depression. The court ruled that Lee was not disabled under Section 504’s definition because she did not demonstrate that her depression restricted her sleep or that “her interactions with others were characterized by ‘consistently high levels of hostility, social withdrawal, or failure to communicate’.”70 Nor had she established that her depression impaired her intellectual functioning. The court affirmed the portion of the lower court’s summary judgment award that applied to Lee’s disability discrimination claims. However, the court did rule that reassignment to a different teaching schedule could be a form of retaliation for Lee’s filing of an earlier EEOC complaint, and that this issue must be tried.

If the faculty member’s disorder is deemed to meet the ADA or Section 504 definition, the next step that the faculty member must take is to demonstrate that he or she is “qualified”—that he or she can perform the essential functions of the job with or without reasonable accommodation. This requirement means that the faculty member must identify one or more reasonable accommodations that would enable him or her to perform all of the essential functions of the job—which is why it is so important to articulate these essential functions before it is necessary to make an evaluation when a faculty member discloses a disability.

An illustrative case is Motzkin v. Trustees of Boston University.71 Motzkin, an untenured professor of philosophy, was terminated after being found guilty by a faculty committee of sexually harassing several students and harassing and sexually assaulting a

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70 25 Fed. Appx. at 534, quoting McAlindin v. San Diego, 192 F.3d 1226, 1235 (9th Cir. 1999).
faculty colleague. Until the university began termination proceedings against him, administrators were unaware that Motzkin apparently suffered from a psychiatric condition that caused “disinhibition,” making it difficult for him to control his behavior. Motzkin challenged the termination, stating that his disability had caused the misconduct, and suggested that a “reasonable accommodation” would be an assignment in which he had no contact with students. The court reviewed Motzkin’s contract with the university, which required him to teach three courses per semester. The court ruled that, because teaching and interactions with students and faculty colleagues were essential functions of Motzkin’s job as a professor, he was not qualified, and thus was not protected by the ADA. The court also noted that the university was not aware of Motzkin’s disorder when it terminated him, and granted the university’s motion for summary judgment.

The essential functions of a college professor were also an issue in *Horton v. Board of Trustees of Community College District No. 508.* In this case, a faculty member had been granted a leave of absence because of a “nervous disorder” that his doctor said was caused by “stress from teaching.” Horton’s leave was extended twice when his physician said that he was unable to return to work because his condition had not improved. Horton was on leave for five years, and requested a fourth leave, saying that he was unable to return to work. The college asked Horton to formally apply for another leave, and to provide updated documentation from his physician. Horton did not provide the requested documentation. When the college dismissed him for failure to return to work and refusal to provide the requested documentation, Horton sued for disability discrimination under the ADA.

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The court ruled that Horton was not a qualified individual with a disability because he could not teach, an essential function of his position. Although Horton argued that he could perform non-classroom related functions, the court rejected that argument, noting that, as a full-time assistant professor, Horton was required to teach 12-13 contact hours per semester (as provided for in the collective bargaining agreement between the faculty union and the college). With respect to Horton’s request for an additional leave, the court found that the college made “more than a reasonable accommodation” for Horton’s disability. The court granted the college’s motion for summary judgment.

Although psychiatric disabilities do not necessarily manifest themselves in inappropriate behavior, on occasion a faculty member with a psychiatric disorder engages in behavior that cannot be accommodated. Courts have generally ruled that it is not reasonable to expect an employer to tolerate unprofessional or inappropriate behavior as an accommodation. *Newberry v. East Texas State University*73 provides a good example of the consequences of not dealing promptly with a faculty member with performance problems. Newberry, a tenured professor of photography, came to campus two days per week, worked afternoons only, refused to hold office hours, and engaged in numerous disputes with the department chair and other colleagues. His colleagues had recommended against tenure, but the college decided to grant him tenure. After thirteen years of fractious relationships with his colleagues, and the resignation of at least one department chair after his dealings with Newberry, several of Newberry’s colleagues asked the dean to intervene. The dean met with Newberry on several occasions to discuss Newberry’s behavior, and warned him that he would be dismissed if his behavior did not improve. Although Newberry requested a leave of absence, he was terminated instead.

73161 F.3d 276 (5th Cir. 1998).
Newberry sued under both the ADA and Section 504, alleging disability discrimination in his termination, and also alleging that college officials had “regarded him” as disabled—also illegal under the ADA. Newberry’s physicians testified that he had obsessive compulsive personality disorder. Newberry testified that his disorder caused “excessive perfectionism, rigidly ethical behavior, and an insistence on addressing all details of his interpersonal relationships.”

A jury rejected Newberry’s ADA claim, ruling that he was not a qualified individual with a disability. The appellate court concurred, determining that the college had dismissed Newberry based upon his work performance and lack of collegiality. Despite the fact that there was testimony that Newberry’s departmental colleagues had described him as "paranoid," "nuts," "crazy," and "having mental difficulties,” the court ruled that his dismissal was based on his behavior, not on his disability or a perception that he was disabled.

Nor does a college need to reassign a faculty member to another department in order to accommodate a psychiatric disability if the faculty member’s background and training are not an appropriate fit for the desired department. In *Wynne v. Loyola University of Chicago*, a tenured professor of special education was unhappy that the university had decided to reorganize the School of Education into new departments. Wynne had been a professor at the university for fifteen years when the reorganization occurred. According to the court, Wynne “intensely disliked” the faculty members in the new department to which she was assigned. Although Wynne asked the dean to assign

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74 Id. at 278.
75 Dkt. #97 c 6417 (N.D. Ill., October 10, 2000)(unpublished and unavailable in LEXIS). Copy of opinion on file with authors.
her to a different department, he refused. Wynne then began seeing a psychiatrist for major depression, panic disorder, anxiety attacks, and sleep disorder.

Six months after the reorganization took place, Wynne requested a medical leave, which was granted. The leave lasted for four years. While Wynne was on leave, she advised students, conducted research, and served on dissertation committees, but attended no departmental or School meetings and did not teach.

Wynne stated in writing that she could return to work if she did not have to interact with the colleagues in her department, because they had “caused” her major depression, and that interaction with them made her physically ill. She repeated her request to be reassigned to a different department. The university responded by offering to exempt Wynne from attending general School faculty meetings, from committee assignments with members of her current department, and from attending commencement (all of which were required tasks for other faculty members). It also offered to relocate Wynne’s office away from a faculty member whom Wynne claimed made her “nauseous” to look at. Wynne finally returned to teaching four years after the commencement of her leave. When a position in the department to which Wynne wished to transfer became vacant and she was not given that position, she sued the university under the ADA for failure to accommodate her depression disorder by transferring her to the other department.

The court made short work of Wynne’s claim. It stated that Wynne was not disabled because the only time her depression was aggravated was when she had to work with individuals she disliked. The ADA requires that an individual be unable to perform
a wide range of jobs in order to meet the definition of disability. With respect to Wynne’s claim that the university should have accommodated her through the requested transfer, the court ruled that the university’s insistence that Wynne perform the essential functions of her position was reasonable, and that Wynne was not qualified to be a member of the department to which she had sought a transfer. The court granted the university’s motion for summary judgment.

Overall, the most frequent type of accommodation requested by employees with psychiatric disabilities is time off from work, either for periods of in-patient care, or for psychotherapy, and the cases discussed above demonstrate that such medical leaves are routinely requested by faculty with psychiatric disorders. The dual protections of the ADA and the Family and Medical Leave Act require employers to provide these leaves to qualified workers, although courts will not require employers to provide open-ended, indefinite leaves, or protracted periods of leave on a sporadic basis. But courts are less likely to require other accommodations frequently requested by employees with psychiatric disorders, such as the transfer to a different supervisor (or in a higher education context, the transfer of a faculty member to a different department), a “stress-free” work environment, or working at home (unless, of course, faculty members routinely are permitted to work at home in lieu of being in their offices). Depending on the individual’s job responsibilities, it may not be possible to provide a “reasonable accommodation” that enables the individual to perform all of the essential functions of

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76 See, for example, Toyota Motor Manufacturing Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).
78 29 U.S.C. §§2601 et seq.
79 See, for example, Tyndall v. National Education Centers, Inc. of California, 31 F.3d 209 (4th Cir. 1994).
his or her job, but the employer must go through the interactive process of attempting to identify an accommodation that is appropriate.

Although the statute provides that an employer need not accommodate an employee who is a “direct threat” to him- or herself or others, this defense is rarely used in litigation involving workers with psychiatric disorders. Nevertheless, if a faculty member is behaving in ways that appears to threaten that individual, coworkers, students, or others, the “direct threat” defense may be used to justify a refusal to retain the employee.

In summary, the courts have been very deferential to colleges when addressing claims by faculty that the college did not accommodate their psychiatric disorders. This result is similar to results overall for plaintiffs with psychiatric disorders who bring claims under the ADA. Nevertheless, administrators need to consider faculty requests for accommodation, follow the interactive process discussed above, and ensure that faculty with disabilities are treated fairly and consistently with respect to work assignments and performance expectations.

**Suggestions for Dealing with Faculty with Disabilities**

Faculty members, their disabilities, and the impact of their disorders, are not alike. Faculty members with disabilities may be able to function without any accommodation, may need accommodation, or may not be able to perform their jobs even with

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80 29 C.F.R. §1630.3(r)
accommodation. Every situation is somewhat different, but administrators who are prepared to deal with these often difficult situations should be able to minimize conflict and to prevent the situation from escalating into litigation. Below are a series of suggestions for dealing with issues that may arise when a faculty member becomes disabled.82

1. Review your institution’s policy for dealing with disabled faculty (and/or staff). If there is no such policy, ask the provost or university counsel for assistance.

2. Ensure that faculty workload policies are clear and consistently followed. Document any deviations (such as sabbaticals, course releases funded by grants, etc.).

3. Develop a school-wide or departmental policy on how tardiness or absence from class will be handled. Specify the consequences for repeated tardiness or absence from class.

4. Respond immediately to all student complaints about faculty behavior, including tardiness, cancelled or missed classes, unprofessional behavior, etc. Document all complaints and the response to the complaints.

5. Consider adopting, in whole or in part, the AAUP Policy on Professional Ethics.

6. If a faculty member’s behavior is problematic for one or more colleagues, confront that faculty member and insist that the individual behave in a

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82 This section is adapted from Barbara A. Lee and Peter H. Ruger, Accommodating Faculty and Staff with Psychiatric Disabilities. National Association of College and University Attorneys, 2003.
professional manner. Provide copies of institutional policies and state your expectations for professional behavior clearly. Document the meeting.

7. Develop a list of essential functions for faculty members in the department, school, etc.

8. If a faculty member requests an accommodation, consider it carefully rather than dismissing it out of hand (or granting it without analysis). Consider job restructuring or reassignment, as long as the essential functions are still required of the faculty member.

9. If a faculty member’s behavior poses a danger to him- or herself or to others, obtain competent medical or psychiatric advice before making an employment decision. Document the relationship between the behavior and the essential functions of the job, as well as the needs of the department, school, etc.

10. Clarify that the alleged misconduct is not covered by academic freedom, such as criticism of the administration or of departmental colleagues. On the other hand, scientific misconduct, inappropriate behavior in the classroom or at meetings, or violating rules or policies are not protected by academic freedom.

11. Make sure that colleagues do not harass the faculty member with the disability or make inappropriate comments about his or her mental or physical state.

12. Obtain advice from the university attorney about the possibility of discussing disability leave or retirement with the disabled faculty member.
Following these guidelines will not insure against problems (or lawsuits), but at the very least will give the college a strong defense against a claim of disability discrimination.