

Stetson University College of Law
30th Annual National Conference on Law and Higher Education
February 2009

**Issues in Employment of Faculty Members with Mental Disabilities –
Background Materials**

Rachel Levinson Waldman

These materials are intended to provide a foundation for discussion of the accompanying hypothetical case study. They are not comprehensive, but should supply an introduction to the various issues arising from employment of faculty members – or other employees – with disabilities. The materials primarily review the two statutes that govern the rights of employees with mental disabilities and the obligations of employers to accommodate them: the Americans with Disabilities Act (ADA),¹ and the Family Medical Leave Act (FMLA),² which intersects with the ADA to provide time off for employees, including faculty members, with disabilities.³

Americans with Disabilities Act – Statute, Amendments, and Interpretation

Americans with Disabilities Act

The ADA was passed in 1990, and it added disability to the list of characteristics – including race, color, age, national origin, religion, and sex – on the basis of which discrimination is prohibited.⁴ The Act covers both public and private sector employers (“covered entities”) with at least fifteen employees who have worked during at least 20 weeks during the current or previous calendar year.⁵

The statement of findings accompanying the ADA observes that “physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are

¹ 42 U.S.C. §§ 12111-12213.

² 29 U.S.C. §§ 2601-2654. See The Family and Medical Leave Act of 1993 at <http://www.dol.gov/esa/whd/regs/statutes/fmla.htm> for the text of the FMLA (last visited January 26, 2009).

³ A fact sheet on the intersection of the ADA, the FMLA, and Title VII is available at <http://www.eeoc.gov/policy/docs/fmlaada.html>. (Note, however, that some of the guidance may have been superseded by the ADA Amendments Act, described below.)

⁴ For additional information about the ADA, including compliance and enforcement guidance, see www.ada.gov. A list of Frequently Asked Questions about the ADA is available at <http://www.ada.gov/q%26aeng02.htm>, created May 2002, last updated November 14, 2008 (last visited January 29, 2009). The EEOC has additional guidance at <http://www.eeoc.gov/types/ada.html>, last updated December 9, 2008 (last visited January 29, 2009).

⁵ 42 U.S.C. § 12111(5)(A); *see also* 42 U.S.C. § 12202, indicating that states are not immune from suit under the ADA.

regarded as having a disability also have been subjected to discrimination.”⁶ The section adds that “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.”⁷ The purpose of the ADA was therefore, among other things, to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”⁸

The ADA’s basic provision says that “No [employer] shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁹ Much of the core of the statute is devoted to defining the terms in, and providing a gloss on, that provision. A “qualified individual” is defined as a person who, “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”¹⁰ Discrimination against a “qualified individual” includes “adversely affect[ing] the opportunities or status of such applicant or employee because of the disability of” that person.¹¹

A “disability” is “a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”¹² A “mental impairment” – our focus for this outline – includes “any mental or psychological disorder,” including “organic brain syndrome, emotional or mental illness, and specific learning disabilities.”¹³ “Major life activities” include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading,

⁶ 42 U.S.C. § 12101(a)(1).

⁷ 42 U.S.C. § 12101(a)(8).

⁸ 42 U.S.C. § 12101(b)(1)-(2).

⁹ 42 U.S.C. § 12112(a).

¹⁰ 42 U.S.C. § 12111(8).

¹¹ 42 U.S.C. § 12112(b)(1).

¹² 42 U.S.C. § 12102(A)-(C). The regulations interpreting the ADA provide that a person is “substantially limit[ed]” within the definition of “disability” if the person is “unable to perform a major life activity that the average person in the general population can perform” or is “significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.” 29 C.F.R. § 1630.2(j)(1)(i)-(ii). In addition, in determining whether a person is “substantially limited in a major life activity” the factors to be considered include the “nature and severity of the impairment; the “duration or expected duration of the impairment”; and the “permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” 29 C.F.R. § 1630.2(j)(2)(i)-(iii). The “inability to perform a single, particular job” does not rise to the level of a “substantial limitation in the major life activity of working.” 29 C.F.R. § 1630.2(j)(3)(i). (Note, however, that pursuant to the ADAAA, described below, the EEOC has been directed to promulgate additional regulations on this subject.)

¹³ 29 C.F.R. § 1630.2(h)(2).

concentrating, thinking, communicating, and working,” as well as the “operation of a major bodily function.”¹⁴ And finally, an employee is “regarded as having” a disability under the terms of the ADA if he or she has been discriminated against “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”¹⁵

Because the definition of “qualified individual” contemplates that an employee might need a “reasonable accommodation,” the ADA also provides guidance on what constitutes a reasonable accommodation and when one is required. The statute defines “reasonable accommodation” as including “job restructuring, part-time or modified work schedules, reassignment to a vacant position . . . and other similar accommodations for individuals with disabilities.”¹⁶ As the EEOC has noted, “The decision as to the appropriate accommodation must be based on the particular facts of each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that of effectiveness, i.e., whether the accommodation will provide an opportunity for a person with a disability to achieve the same level of performance and to enjoy benefits equal to those of an average, similarly situated person without a disability.”¹⁷

However, “[a]n employer is only required to accommodate a ‘known’ disability of a qualified applicant or employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently will be able to suggest an appropriate accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of a job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one except where an individual’s known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer. If a person with a disability requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one.”¹⁸

In addition, an employer is not obligated to provide a particular accommodation if it would impose an “undue hardship” hardship on the employer, and the employer need not employ the individual at all if he or she poses, or would pose, a “direct threat” to other employees.¹⁹ An “undue hardship” is “an action requiring significant difficulty or expense, when considered in light of” certain factors.²⁰ A direct threat is “a significant

¹⁴ 42 U.S.C. § 12102(2)(A)-(B).

¹⁵ 42 U.S.C. § 12102(3)(A). That provision does not apply, however, to “impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.” 42 U.S.C. § 12102(3)(B).

¹⁶ 42 U.S.C. § 12111(9)(A)-(B).

¹⁷ Americans with Disabilities Act – Questions and Answers, <http://www.ada.gov/q%26aeng02.htm> (last visited January 26, 2009).

¹⁸ *Id.*

¹⁹ The ADA notes that “qualification standards” for a job “may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.” 42 U.S.C. § 12113(b).

²⁰ 42 U.S.C. § 12111(10)(A). “In determining whether an accommodation would impose an undue hardship on [an employer], factors to be considered include (i) the nature and cost of the accommodation

risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”²¹ The “direct threat” determination must arise from “an individualized assessment of the individual’s present ability to safely perform the essential functions of the job”; that assessment must “be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”²² The factors to be considered in determining whether an employee would pose a direct threat include the “duration of the risk,” the “nature and severity of the potential harm,” the “likelihood that the potential harm will occur,” and the “imminence of the potential harm.”²³ Courts are very reluctant to find that an employee poses a direct threat under the ADA; as the EEOC has cautioned, “With respect to the employment of individuals with psychiatric disabilities, the employer must identify the specific behavior that would pose a direct threat. An individual does not pose a ‘direct threat’ simply by virtue of having a history of psychiatric disability or being treated for a psychiatric disability.”²⁴

ADA Amendments Act (ADAAA)

In response to a series of Supreme Court cases narrowing the definitions of various terms,²⁵ Congress called on the disability and business community to help it strengthen the disability protections provided by the Act. In June 2008, the U.S. House of Representatives passed the ADA Amendments Act of 2008 (ADAAA) 402-17, and in September, the Senate passed the bill unanimously; the ADAAA took effect on January 1, 2009.²⁶ As Representatives Hoyer and Sensenbrenner said in their statement announcing the passage of the bill, “With the passage of the ADA Amendments Act (ADAAA) today, we ensure that the ADA’s promise for people with disabilities will be finally fulfilled. Our expectation is that this law will afford people with disabilities the

needed under this Act; (ii) the overall financial resources . . . ; the number of persons employed . . . ; the effect on expenses and resources, or the impact otherwise of such accommodation . . . ; (iii) the overall financial resources of the [employer]; the overall size of the business of [an employer] with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the [employer], including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered [employer].” 42 U.S.C. § 12111(10)(B)(i)-(iv). See also 29 C.F.R. § 1630.2(p)(2)(v) (adding as a factor “the impact on the ability of other employees to perform their duties”).

²¹ 42 U.S.C. § 12111(3).

²² 29 C.F.R. § 1630.2(r).

²³ 29 C.F.R. § 1630.2(r)(1)-(4).

²⁴ EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice No. 915.002, March 25, 1997, <http://www.eeoc.gov/policy/docs/psych.html> (“Direct Threat” section) (last visited January 28, 2009).

²⁵ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding that if a mitigating measure sufficiently ameliorates the “substantially limiting” effects of an impairment on a major life activity, the person is no longer categorized as “disabled”), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (holding, as described by the ADAAA, that “the terms ‘substantially’ and ‘major’ in the definition of disability under the ADA ‘need to be interpreted strictly to create a demanding standard for qualifying as disabled,’ and that to be substantially limited in performing a major life activity under the ADA ‘an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives’”).

²⁶ 110 P.L. 325. The final bill was the Senate version, which the House adopted.

freedom to participate in our community, free from discrimination and its segregating effects, that we sought to achieve with the original ADA.”²⁷

The ADAAA makes several important changes to the ADA. According to the EEOC’s description:²⁸

The Act retains the ADA’s basic definition of “disability” as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways. Most significantly, the Act:

- directs EEOC to revise that portion of its regulations defining the term “substantially limits”;
- expands the definition of “major life activities” by including two non-exhaustive lists:
 - the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
 - the second list includes major bodily functions (e.g., “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”);
- states that mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a disability;
- clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- provides that an individual subjected to an action prohibited by the ADA (e.g., failure to hire) because of an actual or perceived impairment will meet the “regarded as” definition of disability, unless the impairment is transitory and minor;
- provides that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation; and
- emphasizes that the definition of “disability” should be interpreted broadly.²⁹

²⁷ Statement of Representatives Hoyer and Sensenbrenner, September 17, 2008 (available at <http://www.bazelon.org/newsroom/2008/9-18-08ADAA.htm>; click on statement in “More Information” sidebox (last visited January 24, 2009).)

²⁸ See Notice Concerning the Americans with Disabilities Act (ADA) Amendments of 2008, last modified October 6, 2008, http://www.eeoc.gov/ada/amendments_notice.html (last visited January 26, 2009).

²⁹ Specifically, the ADAAA says that “[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”

ADA Enforcement

With respect to enforcement of the ADA, the Department of Justice's Guide to Disability Laws notes that complaints against private employers must be filed with the U.S. Equal Employment Opportunity Commission (EEOC) within 180 days of the date on which an employer discriminates on the basis of disability, or within 300 days if the complaint is filed with a governmental fair employment practice agency. Employees can sue in federal court only after the EEOC issues a "right-to-sue" letter. Complaints against public-sector employers may be filed with the Department of Justice within 180 days of the date on which the employer discriminates on the basis of disability; unlike in the private sector, however, employees can also go straight to federal court without filing a complaint with the Department of Justice or any other agency.³⁰

EEOC Guidance on the ADA and Psychiatric Disabilities

In 1997, the EEOC released enforcement guidance on the application of the ADA to persons with psychiatric disabilities.³¹ The EEOC observes that even though covered mental impairments include major depression, bipolar disorder, anxiety disorders, schizophrenia, and personality disorders, an impairment is not a disability unless it "substantially limits" one or more major life activities.³² In addition, the EEOC cautions that "traits or behaviors are not, in themselves, mental impairments. [For instance,] traits like irritability, chronic lateness, and poor judgment are not, in themselves, mental impairments, although they may be linked to mental impairments."³³ Although some of this guidance may be revisited in light of the ADAAA, it helps illuminate the EEOC's approach to accommodations for mental disabilities, and is well worth reviewing.

Family Medical Leave Act

The Family Medical Leave Act (FMLA), which also affects the rights of employees with disabilities and the obligations of employers with respect to those employees, applies to employers with 50 or more employees; employees who have worked at least 1,250 hours in the previous twelve months are eligible for its protections. Under the FMLA, an employee can take up to 12 workweeks of leave during any 12-month period for reasons including "a serious health condition that makes the employee unable to perform the functions of the [employee's] position."³⁴ A "serious health

110 P.L. 325, Sec. 4(a) (2008). The statute also notes that ADA inquiries should focus on employers' compliance obligations rather than on the contours of an employee's asserted disability.

³⁰ See <http://www.ada.gov/cguide.htm#anchor62335> (last visited January 25, 2009).

³¹ See <http://www.eeoc.gov/policy/docs/psych.html> (last visited January 27, 2009). A sidebar notice says that the EEOC will be evaluating its guidance in light of the ADAAA.

³² *Id.* The EEOC added that "some unfriendliness" would not suffice to "substantially limit" a person's ability to interact with others, but that relations "characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary" would constitute a "substantial limitation" (as long as those difficulties are long-term or potentially long-term).

³³ *Id.*

³⁴ 29 U.S.C. § 2612(a)(1)(D).

condition” is defined as “an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider.”³⁵ The FMLA does not limit or supersede either the ADA or other federal or state statutes that prohibit discrimination on the basis of disability or provide employee leave.³⁶ Pursuant to amendments passed in July 2008,³⁷ an employee may also take leave for a serious health condition “intermittently or on a reduced leave schedule when medically necessary.”³⁸

When an employee must take leave for a planned medical treatment, the Act obligates employees to “make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee” and to “provide the employer with not less than 30 days’ notice,” if possible, of the intention to take leave.³⁹

While the employee is on leave, the employer can require the employee to report periodically “on the status and intention of the employee to return to work.”⁴⁰ And when the employee is planning to return to work, the employer is permitted to request “certification from the [employee’s] health care provider . . . that the employee is able to resume work,” as long as that policy is uniformly applied.⁴¹

State statutes

In addition, some states have passed statutes prohibiting discrimination on the basis of disability and providing leave for employees who need it for medical reasons or family care. For instance, New Jersey has passed its own Law Against Discrimination and a Family Leave Act; while the Law Against Discrimination is quite broad, the Family Leave Act – unlike the FMLA – does not grant employees leave time for treatment for their own disabilities.⁴²

Washington State has a “Law Against Discrimination,” which, among other things, makes it an “unfair practice” for any employer “to refuse to hire any person

³⁵ 29 C.F.R. § 825.113(a). See §§ 825.114 and 825.115 for the definitions of “inpatient care” and “continuing treatment.”

³⁶ 29 U.S.C. § 2651(a) (“Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.”); 29 U.S.C. § 2651(b) (“Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.”).

³⁷ For information about the amendments, including revised FMLA forms, go to the Department of Labor’s website at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.

³⁸ 29 U.S.C. § 2612(b)(1).

³⁹ 29 U.S.C. § 2612(e)(2)(A)-(B).

⁴⁰ 29 U.S.C. § 2614(a)(5).

⁴¹ 29 U.S.C. § 2614(a)(4). This provision is not intended, however, to supersede “a valid State or local law or a collective bargaining agreement that governs the return to work” of employees. *Id.*

⁴² See the Division of Civil Rights of the State of New Jersey’s Office of the Attorney General, at <http://www.nj.gov/lps/dcr/law.html> (last visited January 24, 2009).

because of . . . the presence of any sensory, mental, or physical disability . . . unless based upon a bona fide occupational qualification.”⁴³ The statute adds the caveat that “the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved.”⁴⁴ The state’s Family Leave Act tracks the FMLA, providing that “an employee is entitled to a total of twelve workweeks of leave during any twelve-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of the employee.”⁴⁵

Michigan’s “Persons with Disabilities Civil Rights Act” states that “the opportunity to obtain employment . . . without discrimination because of disability is guaranteed by this act and is a civil right. . . . [A] person shall accommodate a person with a disability for purposes of employment . . . unless the person demonstrates that the accommodation would impose an undue hardship.”⁴⁶ The Michigan statute also specifies a number of prohibited activities with respect to employment of a person with a disability.⁴⁷ In addition, Michigan has a specific statute relating to disability discrimination by an educational institution. While the section appears to be targeted primarily at students, it also generally prohibits educational institutions from “discriminat[ing] in any manner in the full utilization of or benefit from the institution, or the services provided and rendered by the institution to an individual because of a disability that is unrelated to the individual’s ability to utilize and benefit from the institution or its services, or because of the use by an individual of adaptive devices or aids.”⁴⁸ Michigan does not, however, have a separate statute covering general family or employee leave (except in the military and re-employment contexts).

Some Thoughts for Deans & Administrators⁴⁹

⁴³ Rev. Code Wash. § 49.60.180(1).

⁴⁴ *Id.*

⁴⁵ Rev. Code Wash. § 49.78.220(1)(d). The statute also makes clear that the time allowed under this state FMLA must run concurrently with leave allowed under the federal FMLA; i.e., employees are not allowed 24 total weeks of leave. Rev. Code Wash. § 49.78.390.

⁴⁶ Mich. Stat. Ann. § 37.1102(1)-(2).

⁴⁷ Mich. Stat. Ann. § 37.1202(1)(a)-(g). Specifically, the statute provides that “except as otherwise required by federal law, an employer shall not, on the basis of “a disability or genetic information that is unrelated to the individual’s ability to perform the duties of a particular job or position,” “fail or refuse to hire, recruit, or promote an individual,” “discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment,” or “limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee.” An employer also must not “fail or refuse to hire, recruit, or promote an individual,” or “discharge or take other discriminatory action against an individual,” because of “physical or mental examinations that are not directly related to the requirements of the specific job.” Finally, employers may not “fail or refuse to hire, recruit, or promote an individual,” or “discharge or take other discriminatory action against an individual,” if “adaptive devices or aids may be utilized thereby enabling that individual to perform the specific requirements of the job.”

⁴⁸ Mich. Stat. Ann. § 37.1402(a).

⁴⁹ With thanks to Barbara Lee, “Accommodating Faculty with Psychiatric Disorders,” presented at NACUA, June 2007; Laura Rothstein, “Faculty Issues of Mental Health and Mental Illness,” presented at NACUA, June 2007; Susan Wheeler, “One of Our Faculty Members is Acting Crazy,” presented at

An institution will be best positioned to assess the ability of a faculty member (or any other employee) with a mental disability to fulfill the functions of his or her job, with or without a reasonable accommodation, if the institution has described with specificity the essential functions of a faculty member **before** any claim for accommodation is made. Indeed, the ADA states that “consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”⁵⁰ The administration should also ensure that policies and practices are applied to faculty members equally, and that complaints regarding the faculty member are documented and addressed promptly.⁵¹

Job descriptions may vary by institution and by particular faculty position. Nevertheless, functions that a faculty member must fulfill could include:

- Teaching: Must all faculty members teach? If so, is there a particular number of courses that full-time faculty are expected to teach?
- Research: Are all faculty members required to engage in research of some type? What would constitute research – working with graduate students? Maintaining a lab? Publishing? Getting grants?
- Ability to work with colleagues and administrators: Is this a requirement for all faculty members? If so, how will this function be defined so as not to unfairly target a faculty member who might not get along with his or her colleagues but for whom that does not otherwise interfere with his or her job?
- Service obligations: Must all faculty members serve on committees or engage in other types of service obligations? If a faculty member could not do one of these things but remained in his or her position anyway, how would the department or school be affected?

The EEOC has also advised that “[a] job description will be most helpful if it focuses on the results or outcome of a job function, not solely on the way it customarily is performed. A reasonable accommodation may enable a person with a disability to

NACUA, June 2007; Martha Hartle Munsch, “Beautiful Minds: Accommodating Faculty and Other Special Issues Regarding Employees with Psychological Impairments,” presented at NACUA, June 2005, and Charles P. Stevens & Reginald D. Odom, “Taking Control of the FMLA/ADA Runaway Train: Solutions for Advanced FMLA and ADA Problem Situations,” presented at NACUA, June 2004.

⁵⁰ 42 U.S.C. § 12111(8). The regulations interpreting the ADA add that evidence of whether a particular function is essential may include: the employer’s judgment as to which functions are essential; written job descriptions prepared before advertising or interviewing applicants for the job; the amount of time spent on the job performing the function; the consequences of not requiring the employee to perform the particular function; the terms of a collective bargaining agreement; the work experience of past employees in the job; and/or the current work experience of employees in similar jobs. 29 C.F.R. § 1630.2(n)(3)(i)-(vii).

⁵¹ For instance, in *Kingsbury v. Brown University*, 2003 U.S. Dist. LEXIS 25792 (D.R.I. Sept. 30, 2003), the federal district court criticized the university for developing a list of essential functions only after the faculty member requested to return after major surgery, when the list appeared to have been crafted to prevent the faculty member from returning.

accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function.”⁵²

When a faculty member does request a reasonable accommodation, he or she does not need to use “magic words” (i.e., “the ADA” or “reasonable accommodation”), and need not even be the one to request a reasonable accommodation; a family, friend, health professional, or other representative may request a reasonable accommodation on behalf of a person with a disability. In addition, the faculty member does not need to request the accommodation at the outset of the employment relationship; he or she can make the request at any point.

Once a faculty member has requested an accommodation, a representative of the administration should engage him or her in an “informal, interactive process” to ascertain what reasonable accommodation will allow her to satisfy the essential functions of the position without imposing an “undue hardship” on the college or university.⁵³ This interactive process should “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”⁵⁴ This is a highly fact-specific inquiry, and reasonable accommodations could include time off from work, a modified work schedule, changes to workplace policies, or modifications to supervisory methods (assuming that these steps do not impose an undue hardship on the employer).⁵⁵ Even if the university cannot ultimately provide the faculty member with a reasonable accommodation that allows him or her to do the job, an administrator must go through the interactive process to determine whether such an accommodation exists.⁵⁶

One common question is how much information the employer can request from the employee in order to ascertain whether the employee in fact has a disability or to assess the nature of a requested accommodation. The ADA states that an employer “shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, **unless such examination or inquiry is shown to be job-related and consistent with business necessity.**”⁵⁷ According to the EEOC, inquiries that are “disability-related” – and thus must be job-related and consistent with business necessity – include:⁵⁸

⁵² Americans with Disabilities Act – Questions and Answers, May 2002, last updated November 14, 2008, <http://www.ada.gov/q%26aeng02.htm> (last visited January 28, 2009).

⁵³ 29 C.F.R. § 1630.2(o)(3).

⁵⁴ *Id.*

⁵⁵ <http://www.eeoc.gov/policy/docs/psych.html> at Question 23.

⁵⁶ If an employee rejects a reasonable accommodation that is “necessary to enable the individual to perform the essential functions of the position,” and because of that rejection “cannot . . . perform the essential functions of the position,” the employee “will not be considered a qualified individual with a disability.” 29 C.F.R. § 1630.9(d).

⁵⁷ 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.14(c) (emphasis added).

⁵⁸ EEOC’s Enforcement Guidance on Disability-Related Inquiries and Medical Examinations Under the ADA, July 27, 2000, <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> at Question 1 (last visited January 28, 2009). (As with the EEOC’s other publications, the EEOC will be analyzing the effect of the ADAAA on this guidance, and it may be revised or updated.)

- Do you have a disability? Have you ever had a disability? Do you have any impairments?
- Can you provide medical documentation regarding your disability?
- Do you know if _____ (a co-worker) has a disability?
- Are you currently on any medications?

Questions that are not disability-related, and therefore do not trigger ADA scrutiny, are questions like:

- How are you doing? Are you feeling OK?
- How did you break your leg? (a broken leg is not a disability)
- Can you perform [certain identified] job functions?
- When is your baby due?

With the exception of those examinations and inquiries that are “job-related and consistent with business necessity,” employers are prohibited from conducting a medical examination of an applicant or employee, or inquiring as to whether an applicant or employee is an “individual with a disability” or as to the “nature or severity” of the disability.⁵⁹ To be job-related and consistent with business necessity, an inquiry must be supported by objective evidence based on an assessment of the employee, not based on general assumptions.⁶⁰ That information can be gained from another person, as long as it is reliable and “would give rise to a reasonable belief that the employee’s ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition.”⁶¹

In addition, an employer can request information of an employee requesting a reasonable accommodation when the disability or the need for the accommodation is not known or obvious.⁶² For instance, an employer can ask for documentation that is

⁵⁹ 29 C.F.R. § 1630.13(a), (b); see also 29 C.F.R. § 1630.14(a), (c); 42 U.S.C. § 12112(d). Also see the EEOC’s publication on the ADA and psychiatric disabilities (<http://www.eeoc.gov/policy/docs/psych.html>, referenced above) for additional guidance on the types of inquiries that can be made at each stage of the employment relationship: the application stage, after an offer of employment is made, and during employment. As the EEOC’s publication on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA notes, “Under the ADA, an employer’s ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and employment. At the first stage (**prior to an offer of employment**), the ADA prohibits all disability-related inquiries and medical examinations, *even if* they are related to the job. At the second stage (**after an applicant is given a conditional job offer, but before s/he starts work**), an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category. At the third stage (**after employment begins**), an employer may make disability-related inquiries and require medical examinations *only if* they are job-related and consistent with business necessity.” EEOC Notice No. 915.002, July 27, 2000, <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> (last visited January 28, 2009).

⁶⁰ See <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> at Question 5.

⁶¹ See <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> at Question 5.

⁶² See <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> at Question 7; 29 CFR 1630.9(a) (“It is unlawful for a covered entity not to make reasonable accommodation to the **known** physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can

sufficient to substantiate the existence of a disability and the need for the requested reasonable accommodation; this would not generally include a request for *all* medical records.⁶³ An employer can also ask for a doctor's note or other explanation to justify the use of sick leave, and can ask for periodic updates and an estimated date of return when an employee takes extended leave due to a medical condition, *if* the employee did not specify a length of time for the leave or has requested additional time.⁶⁴ When an employee who has been on leave reports that he or she is ready to return to work, an employer can request additional information if the employer "has a reasonable belief that an employee's **present** ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition Any inquiries or examination, however, must be limited in scope to what is needed to make an assessment of the employee's ability to work. Usually, inquiries or examinations related to the specific medical condition for which the employee took leave will be all that is warranted."⁶⁵

demonstrate that the accommodation would impose an undue hardship on the operation of its business." (emphasis added)). Some employers may be concerned that such inquiries will expose them to liability under the "regarded as" prong of the anti-discrimination provisions of the ADA. Several courts have, however, rejected the notion that asking an employee who has demonstrated significant "unusual behavior" to undergo a psychological examination to demonstrate fitness for employment exposes the employer to liability for "regarding" the employee as disabled under the ADA. As the U.S. Court of Appeals for the Sixth Circuit reasoned, "A request that an employee obtain a medical exam may signal that an employee's job performance is suffering, but that cannot itself prove perception of a disability because it does not prove that the employer perceives the employee to have an impairment that substantially limits one or more of the employee's major life activities. Deteriorating performance may be linked to motivation or other reasons unrelated to disability, and even poor performance may not constitute a disability under the ADA. . . . Just as requesting a mental evaluation does not indicate that an employer regards an employee as disabled, so too expressing concern over an employee's job performance does not show that an employer regards an employee as having a disability that substantially limits a major life activity." *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999) (citations omitted) (adding that "[t]here is no good reason to confine an employer's ability to determine the fitness of employees only to instances where they pose a direct threat," *id.* at 812). *Accord Cody v. CIGNA Healthcare*, 139 F.3d 595, 599 (8th Cir. 1998) ("An employer's request for a mental evaluation is not inappropriate if it is not obvious that an employee suffers from a disability. . . . Employers need to be able to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims" (citations omitted)). In both cases, the employer had objective evidence to support a concern about job behavior, and did not rely upon speculation or conclusory assumptions. *See also Fritsch v. City of Chula Vista*, 2000 U.S. Dist. LEXIS 14820 at *16 (S.D. Cal. Feb. 17, 2000) (noting approvingly that supervisor consulted with doctor, who recommended that employee be required to undergo a psychological exam). *See, however, Jackson v. Lake County*, 2003 U.S. Dist. LEXIS 16244 at *48 (N.D. Ill. Sept. 15, 2003), in which the district court held that where an employer suspended an employee after he requested to consult with an attorney before undergoing a blanket psychological exam and then failed to complete the examination, "a reasonable jury could find that the mental evaluations [the employer] required of [the employee] were not consistent with business necessity."

⁶³ See <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> at Question 10. The guidance adds: "Documentation is sufficient if it: (1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed."

⁶⁴ See <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> at Questions 15-16.

⁶⁵ See <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> at Question 17.

With respect to discipline, an employer can discipline an employee for violating a standard governing appropriate conduct in the workplace, even if the employee's misconduct resulted from a disability, as long as the workplace conduct standard is "job-related for the position in question and is consistent with business necessity."⁶⁶ If an employee is engaging in misconduct because he or she is not taking prescribed medication, the employer "should focus on the employee's conduct and explain to the employee the consequences of continued misconduct in terms of uniform disciplinary procedures. It is the employee's responsibility to decide about medication and to consider the consequences of not taking medication."⁶⁷

In addition, as suggested by the sections above, the FMLA also provides certain protections – though in some circumstances only one statute and not the other may apply, while in other circumstances both may apply.⁶⁸ For instance, a faculty member could be protected by the ADA but not be entitled to FMLA leave, if he or she has not worked for the college or the university for the requisite amount of time. On the other hand, the faculty member could have a "serious health condition" under the FMLA that does not rise to the level of a "disability" under the ADA (for instance, pregnancy⁶⁹).

When a faculty member requests time off for a reason that is related or might be related to a disability, an employer will be safest assuming that this is a request for both an ADA reasonable accommodation **and** for FMLA leave.⁷⁰ The employer may then request FMLA certification and make additional inquiries, as permitted by the ADA, to assess whether the employee is entitled to a reasonable accommodation. As the EEOC notes, however, "if the employee states that [he or she] only wants to invoke rights under the FMLA, the employer should not make additional inquiries related to ADA coverage."⁷¹ If an employee is in fact covered under both the ADA and the FMLA, then the employer must provide the greater amount of leave.

The FMLA permits employers to request certification that an employee has a serious health condition,⁷² and the EEOC has promulgated guidance suggesting that such

⁶⁶ <http://www.eeoc.gov/policy/docs/psych.html> at Question 30.

⁶⁷ <http://www.eeoc.gov/policy/docs/psych.html> at Question 32.

⁶⁸ For guidance on the intersection of the two statutes, see EEOC Guidance on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964, last modified July 6, 2000, <http://www.eeoc.gov/policy/docs/fmlaada.html> (last visited January 27, 2009), as well as the FMLA regulations at 29 C.F.R. § 825.702 ("Interaction with Federal and State anti-discrimination laws").

⁶⁹ Pregnancy is also covered by the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act. See <http://www.eeoc.gov/facts/fs-preg.html> for additional information on prohibitions against discrimination on the basis of pregnancy.

⁷⁰ <http://www.eeoc.gov/policy/docs/fmlaada.html> at Question 16. See also 29 C.F.R. § 825.301(b) ("An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements . . .").

⁷¹ *Id.*

⁷² 29 U.S.C. § 2613. Certification is sufficient in this context if it indicates "the date on which the serious health condition commenced," "the probable duration of the condition," "the appropriate medical facts within the knowledge of the health care provider regarding the condition," and "a statement that the employee is unable to perform the functions of the position of the employee." 29 U.S.C. § 2613(b)(1)-(4)(B). In the case of a request for intermittent leave or a reduced leave schedule because of a serious

a request would not necessarily violate the ADA's prohibitions on making disability-related inquiries of employees. As the EEOC explains, "[t]he FMLA form only requests information relating to the particular serious health condition, as defined in the FMLA, for which the employee is seeking leave. An employer is entitled to know why an employee, who otherwise should be at work, is requesting time off under the FMLA. If the inquiries are strictly limited in this fashion, they would be 'job-related and consistent with business necessity' under the ADA."⁷³

The FMLA's provisions covering an employee's return to work mirror those of the ADA. As the regulations state: "As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work."⁷⁴ An employer can even request that an employee visit a health-care provider of the employer's choice if the employee has provided insufficient information to substantiate a claim of a disability and a request for a reasonable accommodation, as long as the employer pays and the examination is job-related and consistent with business necessity.⁷⁵

health condition that renders the employee unable to perform the functions of his or her job (as opposed to leave for a planned medical treatment), the certification must also include "a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule." 29 U.S.C. § 2613(b)(6). As for the timing of FMLA-required certification, "In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences." 29 C.F.R. § 825.305(b).⁷³ <http://www.eeoc.gov/policy/docs/fmlaada.html>. The current version of the FMLA certification form, under the FMLA regulations that went into effect on January 16, 2009, is available at <http://www.dol.gov/esa/whd/forms/WH-380-E.pdf>.

⁷⁴ 29 C.F.R. § 825.312(a). The regulations also take note of other statutes or policies that might apply. The regulations state, for instance, that "[i]f State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied," and that "[r]equirements under the Americans with Disabilities Act (ADA), as amended, apply." 29 C.F.R. § 825.312(g), (h). The new regulations add that "If an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA." 29 C.F.R. § 825.312(h). See also generally 29 C.F.R. §§ 825.700-825.702 (Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights under FMLA).

⁷⁵ In the EEOC's guidance on the ADA and psychiatric disabilities, the EEOC posits the following example: "An employee with depression seeks to return to work after a leave of absence during which she was hospitalized and her medication was adjusted. Her employer may request a fitness-for-duty examination because it has a reasonable belief, based on the employee's hospitalization and medication adjustment, that her ability to perform essential job functions may continue to be impaired by a medical condition. This examination, however, must be limited to the effect of her depression on her ability, with or without reasonable accommodation, to perform essential job functions. Inquiries about her entire psychiatric history or about the details of her therapy sessions would, for example, exceed this limited scope." <http://www.eeoc.gov/policy/docs/psych.html>.

Finally, the institution's own policies may supply further protection or guidance. Those policies might address issues including: how much time are faculty members permitted to take under those policies? Is the tenure clock stopped when a faculty member takes permitted leave? And how much total time can a faculty member take under various accommodation and leave policies – is it undefined, or is it, for instance, a year plus a potential additional year?

This is a complex and highly fact-specific area of law, and we have yet to see how the new ADA amendments and the new FMLA regulations will be interpreted by courts. The resources and ideas shared above are not a substitute for a careful assessment of the facts of a particular situation, guided by legal counsel. However, I hope they provide a useful overview of some issues of which you will want to be aware when working with a faculty member or other employee with a mental disability.

The views expressed herein are those of the author only. The information contained in these materials is intended as an informational reference; it is not intended to provide a complete analysis or discussion of each subject covered. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of applicable law than can be provided in this format. For guidance in a particular case, please consult your institution's attorney.