UNDERSTANDING THE AMERICANS WITH DISABILITIES ACT

D.C. BAR ASSOCIATION AUGUST 17, 2017

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I. INTRODUCTION

Next year will mark the tenth anniversary of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), legislation that fundamentally changed the landscape of disability discrimination litigation. In amending the original Americans with Disabilities Act of 1990 ("ADA"), the ADAAA sought to better effectuate Congress's intent to provide broad and comprehensive protection to the millions of American workers who, while otherwise qualified for their jobs, face discrimination as a result of their physical and/or mental disabilities. Since the ADAAA's passage, courts have been more focused on the alleged discrimination at the heart of plaintiffs' claims - questions of accommodation and liability - rather than the threshold question of whether a particular condition satisfies complicated definitions of disability. The ADAAA also broadened the range of protected pregnancy-related disabilities, which in conjunction with the Supreme Court's 2015 decision in *Young v. UPS*, has significantly strengthened protections against pregnancy discrimination. In addition to these developments in statutory law, recent years have also seen the U.S. Equal Employment Opportunity Commission ("EEOC") turn its attention to the intersection of the ADA, the Genetic Information Nondiscrimination Act of 2008 ("GINA"), and employer wellness programs under the Patient Protection and Affordable Care Act ("ACA"), to ensure that in implementing such plans employers do not discriminatorily penalize workers with disabilities. Disability discrimination law has seen further development on the question of the intersection of the ADA and the Family and Medical Leave Act, as well, particularly in evaluating unpaid leave as a reasonable accommodation.

II. AMERICANS WITH DISABILITIES ACT

A. History

As originally enacted in 1990, the ADA was intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Similar to other civil rights statutes that had come before it, such as Title VII of the Civil Rights Act of 1964, the ADA's goal was to protect people with disabilities from discrimination because of their disabilities. The terms of the ADA were modeled after Section 504 of the Rehabilitation Act of 1973, which had long provided broad and inclusive coverage to disabled federal employees and employees of companies receiving federal funds.[1] Among other things, the ADA prohibited employers from discriminating against a "qualified individual with a disability" because of that individual's disability. 42 U.S.C. § 12112(a). It defined "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Despite the legislative history and intent behind the ADA and the guidance provided by years of Rehabilitation Act jurisprudence, federal courts, including the U.S. Supreme Court, engaged in an unexpectedly and (many argued) improperly narrow interpretation of the definition of "disability" under the statute, creating an almost insurmountable standard for employees to

[1] *See* H.R. Rep. No. 101-485, pt. 3, at 27 (1990).

qualify for its coverage. Unlike claims of race, sex, or age discrimination, in which the plaintiff's protected status is accepted without great scrutiny, an employee's ability to prove that he or she had a covered disability under the ADA became the central issue in virtually all disability employment litigation. As a result of increasingly severe definitional restrictions, many people with serious physical or mental limitations – including epilepsy, multiple sclerosis, diabetes, cancer, and schizophrenia – did not qualify for protection under the ADA because courts determined that they were not "disabled."

The Supreme Court's narrowing of the ADA began with a trio of cases known as the "*Sutton* trilogy," which held that mitigating measures used by an employee to treat or correct an impairment should be considered in the determination of whether an individual is disabled under the ADA. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (no disability because corrected vision was 20/20); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999) (no disability because hypertension controlled by medication); *Albertson's v. Kirkingburg*, 527 U.S. 555 (1999) (no disability because of plaintiff's ability to compensate for monocular vision). These holdings came despite the fact that the legislative history made clear that mitigating measures should *not* be taken into account in determining coverage under the ADA; despite the fact that guidance from the EEOC and DOJ stated that mitigating measures should not be considered; and despite the fact that eight federal Courts of Appeal to address the issue before the *Sutton* case all agreed that mitigating measures should not be considered.[2]

Further, the *Sutton* Court also required individuals who alleged a substantial limitation in the major life activity of working to show that their employers viewed them as incapable of performing a "broad range of jobs," and not just the job they had lost or been denied. *See Sutton*, 527 U.S. at 490. In so holding, the Court exported the EEOC's analysis of the major life activity of working in the context of an actual disability (the first prong of the definition of disability) to the context of a perceived disability (the third prong of the definition). *Id.* at 117. In fact, however, the EEOC had outlined two very different analyses for the major life activity of working in the first and third prongs of the definition of disability, and the Court in *Sutton* appeared to conflate the two. This ruling made it almost impossible for plaintiffs to argue successfully that their employers regarded them as substantially limited in the major life activity of working. Not only did plaintiffs have to prove that an employer regarded their impairments as preventing them from working in a particular job for the employer in question, they also had to somehow demonstrate that the employer regarded them as unable to perform in a broad class of jobs for any employer. Not surprisingly, plaintiffs had very little success with these claims after *Sutton*.

The Supreme Court further narrowed the definition of disability in *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), by holding that the term "substantially limited" be applied stringently and that the term "major life activity" be construed as covering only activities that are of "central importance" to people's daily lives. Thus, after *Toyota*, in order to qualify for coverage under the ADA, an individual had to demonstrate an impairment that "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives" – but still be able to perform the essential functions of their job. *Id.* at

[2] *See* S. Rep. No. 101-116 at 121 (1989); *see also Sutton*, 527 U.S. at 496-97 (Stevens, J., dissenting) (listing cases).

185. The Court in *Toyota* went so far as to state that ADA terms "need to be interpreted strictly to create a demanding standard for qualifying as disabled." *Id.* at 197. Such a demanding standard rapidly emerged. Studies conducted after the *Sutton* trilogy and the *Toyota* holding show that plaintiffs lost approximately 97% of ADA claims, usually because that they were unable meet the very restrictive definition of "disability."[3]

Recognizing that judicial interpretation of the ADA had drastically limited the coverage of the statute, lawmakers from both parties, disability rights advocates, and various organizations worked together towards restoring Congress's intent to protect disabled Americans from discrimination in the workplace. This effort culminated with passage of the ADA Amendments Act of 2008, which President George W. Bush signed into law on September 25, 2008. Pub. L. 110-325 (Sept. 25, 2008), *codified at* 42 U.S.C. § 12101 *et seq*. The ADAAA's stated purpose is "to restore the intent and protections of the Americans with Disabilities Act of 1990." *Id*. Congress explained that it had "expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, [but] that expectation has not been fulfilled." *Id.* § 2(a)(3) (codified at 42 U.S.C. § 12101 note). Congress expressly stated that a purpose of the ADAAA was to "reinstat[e] a broad scope of protection to be available under the ADA." *Id.* § 2(b)(1).

The ADAAA retains the ADA's basic definition of a disability as 1) having a physical or mental impairment that substantially limits one or more major life activities; 2) having a record of such an impairment; or 3) being regarded as having such an impairment. 42 U.S.C. § 12102. However, the ADAAA has expanded the non-exhaustive list of "major life activities" to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. *Id.* § 2(a). Whether many of these activities constituted "major life activities" for purposes of the ADA had been hotly contested in prior litigation. The ADAAA also adds a new major life activity category – "major bodily functions" – which includes, but is not limited to: functions of the immune system; cell growth; digestive, bladder and bowel functions; neurological and brain functions; respiratory and circulatory functions; endocrine functions; and reproductive functions. *Id.* § 2(B).

Nullifying *Sutton*, the ADAAA provides that the determination of whether an impairment substantially limits a major life activity is now made *without* regard to mitigating measures (other than ordinary eyeglasses and contact lenses). 42 U.S.C. §§ 12102(4)(E)(i), (ii). Also, in stating that *Toyota*'s standard for "substantially limits" created an "inappropriately high level of limitation necessary to obtain coverage under the ADA," Pub. L. 110-325 § 2(b)(5), the ADAAA directed the EEOC to revise its regulations regarding the definition of "substantially limits" consistent with the amendments. *Id.* § 2(b)(6); 42 U.S.C. § 12102(4)(B). The EEOC did so, effective May 24, 2011. *See* 29 C.F.R. pt. 1630.

[3] *See* Amy L. Allbright, *2006 Employment Decisions Under the ADA Title I – Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (July/August 2007); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100-01 (1999).

The ADAAA also modified the definition of "regarded as" disabled to provide that an individual who is subjected to an action prohibited by the ADA because of an actual or perceived impairment meets the "regarded as" definition of disability. 42 U.S.C. § 12102(3). Therefore, an employee seeking to show that he or she was "regarded as disabled" post-ADAAA must only show evidence of an impairment and that the employer took an adverse action based on the actual or perceived impairment. Importantly, the new standard does not require the plaintiff to show that the actual or perceived impairment substantially limits one or more major life activity.

In sum, Congress's overall intent in amending the ADA was to shift the focus from the definition of disability to the issue of causation – *i.e.*, has an individual proven that an adverse action was taken against him or her because of his or her physical or mental impairment? The ADAAA therefore states that the "primary object of attention in cases under the ADA should be whether entities covered under the ADA have complied with their obligations," and "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Pub. L. 110–325, § 2(b)(5) (codified at 42 U.S.C. § 12101 note). In order to counteract the improperly narrow interpretation of "disability" that had been in place since 1990, Congress was careful to make clear in the ADAAA that "the definition of disability in this Act shall be construed in favor of broad coverage of individuals under this act, to the maximum extent permitted under the terms of this Act." 42 U.S.C. § 12102(4).

B. Recent Developments in Application of the ADAAA

After the ADAAA's enactment, courts ruling on pre-amendment cases recognized that the new provisions would have dramatically changed their analysis had the statute been retroactive. *See., e.g.*, *Casseus v. Verizon N.Y., Inc.*, 722 F. Supp. 2d 326 (E.D.N.Y. 2010) (applying the unamended ADA to hold that episodic condition did not constitute disability, but noting that same condition would be considered a disability under the ADAAA). Now that the ADAAA has been in effect for nearly ten years, there is a substantial body of law recognizing a broad variety of impairments as protected disabilities, or at least concluding that these impairments present a factual question regarding disability. This section will detail some recent developments relating to the scope of what constitutes a disability under the ADAAA.

In the recent years, several circuits have tackled the question of how far the ADAAA has extended the definition of disability. While the scope is still largely undefined, courts are slowly illuminating the boundaries of the new, broader definition. In *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222 (5th Cir. 2015), Nicole Burton worked as a temporary employee for staffing agencies Manpower of Texas, L.P. and Transpersonnel, Inc. (collectively, "Manpower"), in a position at Freescale Semiconductor, Inc. In 2011, Burton inhaled chemical fumes while on the job, and experienced heart palpitations and chest pain a month later. After visiting the emergency room for these symptoms, Burton notified both Freescale and Manpower that she believed the fumes had caused her health condition. Two weeks later, Freescale notified Burton that she was terminated, effective once the Company had found and trained her replacement. Manpower recommended against Burton's termination, stating that Freescale's documentation was paltry, but Freescale persisted. The Fifth Circuit concluded that Burton established that she was "regarded as" disabled by Freescale, and thus qualified for ADA coverage, based on the broadened standard under the ADAAA. The ADAAA overruled prior authority requiring an employee to show that

the employer regarded her as being substantially limited in a major life activity. Under the amended provisions, Burton needed to demonstrate only that the Company perceived her as having an impairment. The Court thus found that Burton's supervisor was aware of her medical treatment, she had reported her job-related injury to personnel, and that her supervisors had exchanged emails discussing how to handle her health-related absences, all of which established that Freescale regard Burton as disabled.

The Fifth Circuit again commented on the definition of disability, in *Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586 (5th Cir. 2016). Michael Cannon, a mechanical engineer with twenty years of experience, applied for a job as a field engineer with Jacobs Field Services ("JFS"), a construction company. As part of the application process, Cannon underwent a pre-employment physical exam, during which he disclosed to the doctor that he had undergone surgery to repair a torn rotator cuff the previous year. The doctor cleared Cannon for the position, provided that JFS offered him the following accommodations: no driving company vehicles; no lifting, pushing, or pulling more than 10 pounds; and no working with his hands above shoulder level. After receiving the doctor's form, JFS determined that Cannon was physically incapable of performing the job. Rather than agreeing to the proposed accommodations, JFS informed Cannon that he would not be able to meet his required job duties and rescinded his job offer. The Fifth Circuit held that while Cannon's impairment may not have been a disability under the original ADA, Cannon's injury undoubtedly qualified under the more relaxed standard of the ADAAA. The Court also held that, whether Cannon's impairment qualified as a disability, JFS clearly rescinded his offer on the belief that his injury resulted in a substantial impairment.

The expanded definition of disability has not entirely eliminated conflict over the threshold question of whether an employee is covered by the statute, and a number of cases illustrate that hurdles for plaintiffs remain even under the ADAAA's wider scope. In *Fischer v. Minneapolis Pub. Sch.*, 792 F.3d 985, 986 (8th Cir. 2015), Minneapolis Public Schools ("MPS") refused to reinstate Danny Fischer as a janitor engineer after he failed a strength test. Fischer had been laid off for fiscal reasons, with eligibility for later reinstatement. The following year, Fischer was notified that he was eligible for a vacant janitor engineer position at the school, conditioned on completing a strength test created by Cost Reduction Technology ("CRT"). Fischer completed the test, which yielded a medium strength score, less than 4 points shy of the required score. Fischer was told by several MPS employees that he failed the test because of his low back strength score, which indicated he was more likely to be injured on the job. MPS denied Fischer reinstatement and denied his request to retake the test. On appeal, Fischer argued that, while he is not actually disabled, MPS perceived him as disabled because it believed he could not perform his janitor engineer duties due to his back. In support of his argument, Fischer relied on statements by MPS employees that he was not recalled because of his back, that he was "incapable of pulling, carrying, pushing, or lifting a heavy load," and that his employment "created a substantial risk of injury in the workplace."

The Eighth Circuit held that, even in the light most favorable to Fischer, these statements did not establish that MPS regard Fischer as having a physical or mental impairment. Rather, they indicated that MPS believed Fischer did not have the requisite strength level necessary for the janitor engineer position, based on the CRT test. MPS had not suggested that it viewed back strength as a disability, but rather a requirement for performing the physical labor of the position.

Accordingly, the Court held that the broadened definition of disability under the ADAAA did not support an inference that Fischer's incapacity to meet the CRT test minimum was equivalent to a belief that he suffered a physical impairment. Fischer therefore had failed to establish a case of disability discrimination.

The Eighth Circuit again limited the definition of disability under the ADAAA in another ruling last year, holding that obesity is not a disability if not caused by an underlying physical disorder or condition or it affects a major body system. In *Morriss v. BNSF Railway Company*, 817 F.3d 1104 (8th Cir. 2016), the employee, Melvin Morriss, weighed 285 pounds and had a body mass index (BMI) of 40.9, above his employer's qualification standards that an employee will not have a BMI higher than 40. Morriss alleged that BNSF discriminated against him by revoking his employment due to his obesity, which he alleged was an independent disability. The Court was unpersuaded by the employee's argument, joining other courts in declining to "extend ADA protection to all 'abnormal' (whatever that term may mean) physical characteristics." *Id.* at 1109 (citing *EEOC v. Watkins Motor Lines, Inc.,* 463 F.3d 436, 443 (6th Cir. 2006)); *see also Valtierra v. Medtronic Inc.*, 232 F. Supp. 3d 1104, 1112 (D. Ariz. 2017) (holding that "for obesity, even morbid obesity, to be considered a physical impairment, it must result from an underlying physiological disorder or condition"). The Court cited two other circuits in support of its conclusion that abnormal weight or obesity does not qualify as a disability; however, both cases pre-date the 2008 amendments to the ADA. *Id.* at 1109 (discussing *EEOC v. Watkins Motor Lines, Inc.,* 463 F.3d 436 (6th Cir. 2006), and *Francis v. City of Meriden,* 129 F.3d 281, 286 (2d Cir. 1997)). In fact, even prior to the enactment of the ADAAA, some courts did find that obesity without a physiological basis is a disability. *See Cook v. State of Rhode Island, Dept. of Mental Health, Retardation, and Hospitals,* 10 F.3d 17 (1st Cir. 1993); *E.E.O.C. v. Res. for Human Dev., Inc.*, 827 F. Supp. 2d 688, 693 (E.D. La. 2011).

Most recently, the Third Circuit issued a surprising, albeit non-binding, ruling that cancer is not a *per se* disability under the ADAAA, demonstrating the continuing relevance of the major life activity limitation requirement. In *Alston v. Park Pleasant, Inc.*, 679 F. App'x 169 (3d Cir. 2017), the plaintiff's cancer diagnosis was not contested. The court nevertheless declined to automatically recognize her illness as a disability under the ADAAA, noting that the statute still requires a "individualized assessment" of whether a condition does in fact impose limitations. *Id.* at 172 (citing 29 C.F.R. § 1630.2(j)(1)(iv)). Finding that the plaintiff failed to produce any evidence of such limitations, the court granted her employer's motion for summary judgment. *See also McMullin v. Evangelical Servs. for Aging*, No. CV 16-6660, 2017 WL 3279011, at *5 (E.D. Pa. Aug. 2, 2017) (ruling that plaintiff's serious heart condition was not a qualifying disability under the ADAAA because he provided no evidence that it limited life activities). While the ADAAA undoubtedly broadened the scope of ADA protections, it is clear that courts take seriously all three parts of the current definition for a disability - a physical or mental impairment that substantially limits a major life activity – and will dismiss claims where plaintiffs fall short on any one of them.[4] *See, e.g.*, *Karatzas v. Herricks Union Free Sch. Dist.*, No. 15-CV-2888, 2017 WL

[4] Certain conditions such as diabetes come close to categorical recognition as qualifying disabilities, in large part due to the ADAAA's provision that mitigating measures are *not* relevant to the analysis. *See, e.g.*, *Hensel v. City of Utica*, No. 615CV0374, 2017 WL 2589355, at *3-4 (N.D.N.Y. June 14, 2017).

3084409, at *9-14 (E.D.N.Y. July 18, 2017) (analyzing all three factors to determine whether plaintiff's epilepsy qualified as a disability).

With regards to the causation standard under the ADAAA, in *Gentry v. E. W. Partners Club Management Company, Inc.*, 816 F.3d 228 (4th Cir. 2016), the Fourth Circuit recently joined the Sixth and Seventh Circuits to hold that the statute requires a plaintiff to show that discrimination was the but-for cause of the adverse employment action, rather than making the less onerous "motivating factor" showing applicable to Title VII discrimination claims. The Fourth Circuit reasoned that Congress indicated its intent to establish the motivating factor standard for Title VII through express amendment of the statute; its failure to make equivalent amendments to the ADAAA, ADEA, and other statutes therefore indicated its intention to retain the pre-existing but-for standard for these discrimination provisions. *Id.* at 233-34; *see also Serwatka v. Rockwell Automation, Inc.,* 591 F.3d 957 (7th Cir. 2010); *Lewis v. Humboldt Acquisition Corp.,* 681 F.3d 312 (6th Cir. 2012) (en banc); *Moore v. Verizon Wireless, LLC*, No. 5:14-CV-02230-SGC, 2017 WL 1196959 (N.D. Ala. Mar. 31, 2017) (ruling that the but-for standard is appropriate for ADA claims, following persuasive authority outside the jurisdiction). Congressional action to amend the Title VII discrimination standard was driven in part by the recognition that a significant number of plaintiffs who face adverse actions will not, for various reasons, meet the but-for standard although they have in fact suffered because of their membership in a protected class. *Gentry* and its ilk could portend the development of ADA doctrine that will mirror that of Title VII in coming years, with a Supreme Court determination that ultimately prompts a revision of the statute. In the meantime, plaintiffs in jurisdictions with a but-for standard for their ADAAA claims face substantially higher burdens than their counterparts elsewhere.

A recent decision from the Fifth Circuit, *Taylor v. City of Shreveport*, 798 F.3d 276, 288 (5th Cir. 2015), also limited the reach of the ADA in a more general sense, for an entire class of claims from public employees. In *Taylor*, a group of police officers raised various statutory and constitutional challenges to a new sick-leave policy that required the officers to remain at home while on leave and submit to visits from City officials seeking information about their health status. The officers argued, *inter alia*, that the policy violated Title II of the ADA, which prohibits disability discrimination by state and local governments in the provision of their public services. The Fifth Circuit, joining the majority of federal circuits, held that Title II does not provide a cause of action for employment discrimination by a public employer. However, the court went on to reverse dismissal of the officers' claims under Section 504 of the Rehabilitation Act, which forbids disability discrimination by any entity receiving federal funds, as to certain aspects of the sick-leave policy.

III. INTERSECTION WITH ADA: PREGNANCY ACCOMMODATIONS & DISCRIMINATION

A. History

Among the most disputed "temporary impairments" potentially relevant to the ADA are those associated with pregnancy. Congress first explicitly addressed pregnancy discrimination in the workplace with the Pregnancy Discrimination Act ("PDA"), enacted in 1978 as an amendment to Title VII. Under the PDA, employers have no obligation to affirmatively provide

accommodations to women as a result of their pregnancy, but they are prohibited from discriminating against pregnant women by denying accommodations available to other employees who are similarly situated in their ability to work. *See Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008). Courts and legal scholars alike have struggled for decades to conceptualize how pregnancy relates to disability, resulting in a complex and sometimes counterintuitive interplay between the PDA and ADA.

Although pregnancy itself is not a disability under the ADA, there are several temporary impairments that frequently accompany pregnancy, which can substantially limit many major life activities and thus come within the provisions of the statute. These may include extreme morning sickness, severe back pain, gestational diabetes, conditions requiring bed rest, unusually limited mobility, and other conditions. The ADA regulations make a distinction between a healthy pregnancy and pregnancy-related complications that may qualify as an impairment:

> Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition.

29 C.F.R. Pt. 1630, App. § 1630.2(h). A pregnant employee may thus be affirmatively entitled to a reasonable accommodation under the ADA for limitations resulting from pregnancy-related conditions that constitute a disability or for limitations resulting from the interaction of the pregnancy with an underlying impairment. *See* 29 C.F.R. § 1630.2(o).

Prior to the ADAAA, courts were reluctant to conclude that a woman experiencing pregnancy related complications was disabled absent unusual circumstances, owing in large part to the temporary nature of pregnancy. *See, e.g.*, *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011) (decided under pre-Amendments Act law, stating that because pregnancy is of limited duration, a plaintiff claiming disability because of pregnancy faces a "tough hurdle," and holding that the plaintiff's pregnancy and associated lifting restrictions did not render her disabled). While the Amendments Act did not expand the ADA to include pregnancy expressly, Congress's directive that courts construe disability in favor of broad coverage opened the door for broader coverage of protection for pregnancy related complications. Since the passage of the Amendments Act, courts have now begun to hold that women who have well-pleaded substantially limiting conditions associated with pregnancy have or may have disabilities under the ADA as amended. *See Heatherly v. Portillo's Hot Dogs, Inc.*, 958 F. Supp. 2d 913, 921 (N.D. Ill. 2012) (finding that plaintiff presented sufficient evidence to create triable issue of fact as to whether her high risk pregnancy rendered her disabled where plaintiff was placed on light duty restrictions due to her pregnancy that restricted her ability to work and lift); *Nayak v. St. Vincent Hosp. & Health Care Ctr., Inc.*, No 1:12-cv-0817, 2013 WL 121838, *2-3 (S.D. Ind. Jan 9, 2013) (dismissing in part employer's motion to dismiss where plaintiff had severe pregnancy complications that lasted for eight months, two months beyond her pregnancy); *Price v. UTi, U.S., Inc.*, No. 4:11-CV-1428, 2013 WL 798014 (E.D. Mo. Mar. 5, 2013) (denying summary judgment for defendant where defendant was alleged to have failed to accommodate complications arising out of plaintiff's pregnancy, as "there is evidence that plaintiff suffered multiple physiological disorders and conditions that affected her reproductive system").

Although courts are more frequently finding that complications related to high risk pregnancies qualify as a disability under the ADAAA, pleading these complications with some specificity and explaining how they substantially limit activities remains important. *See Turner v. Eastconn Regional Educ. Service Center,* No. 3:12—CV—00788, 2013 WL 6230092, at *7 (D. Conn. Dec. 2, 2013) (finding that plaintiff's doctors note prohibiting her from restraining aggressive students due to her pregnancy was insufficient to establish that plaintiff was suffering from any unusual complications in her pregnancy that limited a major life activity); *Wonasue v. Univ. of Md. Alumni Assn.*, --- F. Supp. 2d ---, Case No. PWG—11-3657, 2013 WL 6158375, at *7-8 (D. Md. Nov. 22, 2013) (finding that plaintiff who experienced severe morning sickness resulting in excessive vomiting, hyperemesis, and hospitalization, but which only resulted in one day of required bed rest, failed to establish that her pregnancy-related complications substantially limited a major life activity); *Sam-Sekur v. Whitmore Group, Ltd.*, No. 11-cv-4938, 2012 WL 2244325, at *7-8 (E.D.N.Y. June 15, 2012) (finding that plaintiff's allegations that she experienced "pregnancy and post pregnancy illness" including a breast cancer scare, appendectomy, and IUD infection, were insufficient to state a claim under ADAAA based on pregnancy or pregnancy-related illness because plaintiff failed to explain how illnesses were linked to her pregnancy and the duration of those illnesses).

The Supreme Court recently provided much needed clarity on the issue of comparable accommodation for pregnant workers in *Young v. United Parcel Services, Inc.*, 135 S. Ct. 1338 (2015). In *Young*, a part-time driver for UPS had a physician-imposed lifting restriction during her pregnancy. Due to this restriction, the plaintiff requested an accommodation of "light duty" that was available to non-pregnant employees who had been injured at work. UPS refused the request on the grounds that the driver was not eligible for such temporary reassignment, having suffered no workplace injury, and she lost her job as a result. The plaintiff argued that UPS's refusal to accommodate her represented a violation of the PDA because it denied her an accommodation available to non-pregnant drivers who were "similar in their inability to work" – including drivers whose licenses had been temporarily restricted, or were entitled to accommodation under the ADA – by offering them temporary light-duty assignments. UPS countered that the other accommodated employees were not comparable to the pregnant driver, and the PDA did not require an employer to extend its policies to pregnant workers otherwise ineligible for reassignment.

The Supreme Court struck a middle ground between the parties' positions, holding that a pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework. This allows a plaintiff to make out a *prima facie* case by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work." The Supreme Court remanded the case for further factual development about whether the employer had engaged in disparate treatment against the plaintiff as compared to non-pregnant employees.

The Court noted that a pregnant woman can avoid summary judgment and reach a jury "by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong

to justify the burden," such that the employer's explanation gives rise to an inference of intentional discrimination. *Id.* The Court also gave an example of one way that an employee can demonstrate whether a significant burden exists, namely "by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers." *Id.* The Court observed that in Young's case, the evidence suggested that she could show that UPS accommodates most nonpregnant employees with lifting restrictions, but does not accommodate pregnant employees with the same limitations. *Id.* at 1354-55. The Court vacated and remanded to the Fourth Circuit for an analysis consistent with the framework the majority set forth. *Id.* at 1355-56.

B. Post-*Young* Developments in the Law

The *Young* case was not a complete victory either for employers or pregnant employees in terms of construing the PDA. For pregnant employees and their advocates, it appears that the ADAAA will serve as a more a promising shield against discrimination going forward. As Justice Kennedy noted in his dissent in *Young*, the ADAAA "expand[ed] protections for employees with temporary disabilities," which would include pregnancy- and childbirth-related medical conditions and restrictions.[5] 135 S. Ct. at 1367. While the PDA still plays an important role in establishing equality between pregnant and non-pregnant workers, the ADAAA's focus on improving the *quality* of legal protections may ultimately deliver more meaningful benefits. The EEOC implicitly acknowledged the import of the ADAAA for pregnant employees when it issued an updated Enforcement Guidance on pregnancy discrimination just months following the decision in *Young*.[6]

The Enforcement Guidance explicitly address the application of the ADA as amended to pregnancy-related conditions, stating that, "[a]lthough pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended."[7] The Enforcement Guidance explains that an impairment's cause and its temporary nature do not affect its status under the ADA as amended. The Enforcement Guidance then lists several examples of pregnancy-related impairments that could result in limitations that give rise to a right to reasonable accommodation under the ADA as amended, including: a diagnosis of cervical insufficiency requiring bed rest; pregnancy-related anemia (affecting normal cell growth); pregnancy-related sciatica (affecting musculoskeletal function); pregnancy-related carpal tunnel syndrome (affecting neurological function); gestational diabetes (affecting endocrine function); nausea that can cause severe dehydration (affecting digestive or genitourinary function); abnormal heart rhythms that may require treatment (affecting cardiovascular function); swelling, especially in the legs, due to limited circulation (affecting circulatory function); and depression (affecting

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[5] Because the ADAAA was enacted after the events that gave rise to the case, the Court did not address this issue directly.

[6] EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#II.

[7] *Id.*

brain function). This list illustrates the EEOC's broad interpretation of "disability" under the ADA as amended, and signals that an increasing number of workers with pregnancy-related conditions can assert a right to reasonable accommodations. While the EEOC regulations continue to state that pregnancy is "not the result of a physiological disorder" and is therefore not an impairment in and of itself, the agency also explicitly maintains that "a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition."[8]

The EEOC Guidance cites several district court cases in which the courts took an approach consistent with the EEOC's in addressing ADA claims based on pregnancy-related conditions. In these cases, plaintiffs successfully argued that conditions arising from or related to their pregnancies brought them within the recently expanded definition of disability, illustrating the important impact of the ADAAA on protecting these employees. *See Heatherly v. Portillo's Hot Dogs, Inc*., 2013 WL 3790909, at *6 (N.D. Ill. July 19, 2013) (concluding that there was a triable issue on the question of whether the plaintiff had a disability within the meaning of the amended ADA, where her doctor characterized the pregnancy as 'high risk' and recommended that the plaintiff limit her work hours and not lift heavy objects, even though the doctor did not identify a specific impairment); *McKellips v. Franciscan Health Sys.,* 2013 WL 1991103, at *4 (W.D. Wash. May 13, 2013) (plaintiff's allegations that she suffered severe pelvic inflammation and immobilizing pain that necessitated workplace adjustments to reduce walking and early pregnancy-related medical leave were sufficient to allow her to amend her complaint to include an ADA claim); *Nayak v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 2013 WL 121838, at *3 (S.D. Ind. Jan. 9, 2013) (denying defendant's motion to dismiss plaintiff's ADA claim based on symphysis pubis dysfunction causing post-partum complications and requiring physical therapy); *Mayorga v. Alorica, Inc.*, 2012 WL 3043021, at *6 (S.D. Fla. July 25, 2012) (denying defendant's motion to dismiss where plaintiff claimed impairments related to her pregnancy included premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, and extreme headaches).

The newly expanded ADAAA may also indirectly provide pregnant women with expanded protections under the PDA itself. As discussed above, the PDA requires that women affected by pregnancy, childbirth, or related medical conditions be treated the same as those who are similarly situated. The ADAAA's expansion of the definition of disability does not change the underlying analysis for PDA doctrine, but can in theory expand the comparator groups against whom women may be judged. Whereas previously, a woman who needed light duty because of a lifting restriction might only be able to point to workers injured on the job as comparators, employers covered by the ADAAA may now be compelled to give light duty to any employees who suffer back problems not related to a work injury. Consequently, even if a pregnant woman's lifting restrictions were not considered a "disability," she might now be able to point to a "similarly situated" employee who was given light duty as an accommodation. The Enforcement Guidance references this theory in a footnote, but does not take a position on its validity.[9]

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[8] 76 Fed. Reg. 16978, 917007 (Mar. 25, 2011) (explaining 29 C.F.R § 1630.2(h)).

[9] ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES, *supra* n. 6, at fn. 106 ("Courts have disagreed as to how disparate impact is established in the context of light duty

It is unclear whether this argument will be successful, as courts may decide that non-pregnant employees protected by the ADA are not an appropriate comparator group. The Seventh Circuit did precisely this in *Serednyj v. Beverly Healthcare*, 656 F.3d 540 (7th Cir. 2011). In that case, a nursing home activity director became pregnant. She had previously suffered a miscarriage and was experiencing complications from her pregnancy. Her doctor advised her to refrain from lifting heavy objects. Though she was still able to perform the essential functions of her job, her employer refused to accommodate her, stating that it had a policy of granting light duty only to those employees who suffered work related injuries or whose non-work related injuries were accommodated under the ADA. Because Ms. Serednyj was not injured on the job, and her pregnancy-related complications were not considered disabilities under the ADA, the Seventh Circuit determined that she was not similarly situated with those other individuals and not entitled to light duty. If this analysis holds sway in other districts, it is possible that the expansion of the ADA will not provide a broader comparison group. Indeed, it could even make matters worse. As the ADA covers more employees, the pool of *non*-ADA eligible co-workers will proportionately shrink, leaving pregnant women with a smaller pool of employees to draw comparisons from.

In the two years that have followed *Young*, a number of cases have been decided that demonstrate how highly fact-specific pregnancy discrimination claims remain under both the PDA and ADA as amended. In *Legg v. Ulster County*, 820 F.3d 67 (2d Cir. 2016), the Second Circuit carefully considered the facts surrounding the refusal of accommodation to a pregnant employee in a PDA case much like *Young* itself. The plaintiff was a corrections officer who requested light duty during her pregnancy after her doctor recommended that she refrain from direct interaction with inmates at the facility where she worked. Light duty was available to other employees who had been injured on the job, and the plaintiff's supervisor rejected her request because she did not come within this category. The court noted that under *Young*, the crucial factual question for a PDA claim is whether a facially neutral limitation on accommodations -- in this case, as in *Young*, for workers who suffered workplace injuries -- had a significantly burdensome effect on pregnant employees, such that a factfinder could draw an inference of intentional discrimination. *Id*. at 77-78. Noting that the employer gave shifting justifications for its denial of the light duty accommodation (including cost and safety of the pregnant employee and her unborn child), and that the trial court made no determination as to whether the policy denied a benefit to many (or all) pregnant employees that many (or all) non-pregnant employees enjoyed, the court reversed the grant of judgment as a matter of law and remanded.

Bray v. Town of Wake Forest, 2015 WL 1534515 (E.D.N.C. Apr. 6, 2015), also involved a light duty policy that applied only to employees who had been injured on the job. The plaintiff was serving as a police officer when she became pregnant and was directed by her doctor to avoid running, jumping, engaging in altercations, and lifting heavy objects. Her request for a light duty assignment was denied on the grounds that she was ineligible as a pregnant but uninjured employee. On the employer's motion to dismiss, the trial court found that the plaintiff had met her *prima facie* burden for a PDA claim under *Young*, in part by offering evidence showing that the accommodation was not, in fact, limited to employees with workplace injuries.

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policies. . . The EEOC agrees . . . that the appropriate comparison is between pregnant women and all others similar in their ability or inability to work.").

Recent ADA cases involving accommodations for pregnant employees indicate that expansion of the definition of disability can provide some additional protection to these workers, but does not in any way suspend the application of well-established doctrines. *See Love v. First Transit, Inc.*, No. 16-CV-2208, 2017 WL 1022191, at *5 (N.D. Ill. Mar. 16, 2017) (noting that the ADAAA had "only a modest impact when applied to pregnancy-related conditions."). In *Lang v. Wal-Mart Stores East, L.P.,* 2016 U.S. App. LEXIS 3909 (1st Cir. Mar. 2, 2016), for example, the First Circuit held that the employer had no obligation under the ADA to accommodate a pregnant employee with a lifting restriction where lifting was an essential function of her position. The plaintiff, Nicole Lang, worked for Wal-Mart as an unloader of merchandise from tractor trailers. According to the job description, one of an unloader's essential functions is being able to move, lift, carry and place merchandise and supplies weighing up to 60 pounds without assistance. Although unloaders occasionally use forklifts and other power equipment, about 70 percent of the tractor trailers require some degree of manual labor to unload them. About two months after Lang began working as an unloader, she learned she was pregnant. Lang's doctor told her not to lift anything over 25 pounds. Lang told her manager about her pregnancy and her lifting restriction, but did not ask for any accommodation. Instead, she kept performing her regular unloader duties, but sometimes had to ask other unloaders to help her. After Lang pulled a muscle lifting a heavy box and took a day off to recuperate, Lang's husband asked Wal-Mart's HR manager if Lang could be reassigned to a less demanding job or if she could unload trailers with a forklift. The HR manager refused, saying if Wal-Mart had to accommodate Lang, the company would need to accommodate everyone. Subsequently, Lang formally asked Wal-Mart for an accommodation and listed her pregnancy as her "condition or impairment." The medical questionnaire completed by Lang's doctor and returned to Wal-Mart said she could not lift more than 20 pounds and asked Wal-Mart as an accommodation to assign her to trailers that did not need to be unloaded by hand or to give her a job that did not require lifting over 20 pounds. Wal-Mart refused Lang's formal request on the basis that her pregnancy was temporary, and therefore, she was not eligible for an accommodation.

The First Circuit held that, even assuming that Lang had an ADA covered disability, lifting up to 60 pounds without assistance was an essential function of Lang's unloader job. The court explained that excusing Lang from the 60-pound lifting component of her job was not required because exempting an employee from an essential function is not an ADA reasonable accommodation. Additionally, the court pointed out that Lang had failed to offer any evidence that there were vacant positions that did not require her to lift up to 60 pounds to which Wal-Mart could have transferred her.

Even with the shift towards broader protections for pregnant workers from Congress, the EEOC, and the Supreme Court, *Lang* and other cases like it demonstrate that there is no carve-out to the essential function defense, regardless of the temporary nature of pregnancy-related disabilities. *See, e.g., Agee v. Mercedes-Benz U.S. Intern., Inc.*, 2016 WL 1248507 (11th Cir. 2016) (affirming summary judgment on the grounds that a flexible work schedule and mandatory overtime were essential functions of the pregnant employee's job in an automobile assembly plant, and therefore the employer was not required to grant an accommodation for a 40-hour work week during pregnancy); *Moore v. CVS Rx Services, Inc.*, 142 F.Supp.3d 321 (M.D. Penn. 2015) (granting summary judgment on the grounds that climbing, lifting, and bending were essential functions for a pregnant warehouse worker). Where an employer is not able to show that certain

activities are essential functions of an employee's position, the ADAAA expanded definition of disability, particularly for temporary conditions, can bring pregnant employees within important anti-discrimination protections. *See, e.g., Varone v. Great Wolf Lodge of the Poconos, LLC*, 2016 WL 1393393 (M.D. Penn. Apr. 8, 2016) (denying the employer's motion to dismiss where the plaintiff alleged that conditions related to pregnancy required an accommodation of ten-minute rest breaks between customer appointments); *Meachem v. Memphis Light, Gas, & Water Div.*, 119 F.Supp.3d 807 (W.D. Tenn. 2015) (denying summary judgment where the employer failed to show that the employee's physical presence was necessary during her pregnancy-related bedrest).

IV. INTERSECTION WITH ADA: WELLNESS PROGRAMS

A. History

Wellness programs are health promotion and disease prevention programs and activities generally offered to employees as part of an employer-sponsored group health plan or separately as a benefit of employment. Many of these programs ask employees to answer questions on a health risk assessment or undergo biometric screenings for risk factors, such as high blood pressure or cholesterol. Other programs provide educational health-related information or resources such as nutrition classes, weight loss and smoking cessation programs, onsite exercise facilities, or coaching to help employees meet health goals. While such programs have been in place, particularly in large companies, for many years, they have proliferated recently, with 49% of small employers and 81% of large employers offering smoking cessation, weight loss, and/or other lifestyle adjustment programs in 2015.[10] Wellness programs have traditionally been promoted as a tool to reduce healthcare costs for employers and employees, and increase productivity and morale.[11]

Employer wellness programs – if designed and implemented properly – can potentially offer employees an avenue for improving and maintaining their health, and lower costs for the employer. While there may be benefits of "participatory" wellness programs that seek to improve employee health across the board, outcomes-based or punitive wellness programs effectively shift costs to employees and have not been scientifically proven to promote improved health. These wellness programs often utilize biometrics that are not always adequate measures of health and enable employers to reduce their health care costs under the guise of wellness promotion by merely shifting those costs to employees that they deem to be most unhealthy. This practice is akin to medical underwriting, the practice of determining an employee's health insurance premium on the basis of certain health information. Punitive wellness programs also implicate employment nondiscrimination statutes if they disproportionately penalize people with disabilities, and other protected classes. Wellness programs that impose punitive measures or that grant so-called

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[10] GARY CLAXTON ET AL., KAISER FAMILY FOUNDATION, EMPLOYER HEALTH BENEFITS: 2015 ANNUAL SURVEY 205 (2015), http://files.kff.org/attachment/report-2015-employer-health-benefits-survey.

[11] *See* Kristin Madison, *Employer Wellness Incentives, the ACA, and the ADA: Reconciling Policy Objectives*, 51 Willamette L. Rev. 407, 411 (2015).

"rewards" in the form of lower insurance premiums to some employees but not to others could run afoul of anti-discrimination laws if they have a disparate impact on members of a protected group.

Although the Patient Protection and Affordable Care Act (ACA) permits employers to implement wellness programs, it also sets important nondiscrimination standards for such programs that are intended to safeguard civil rights. Section 1557 of the ACA prohibits discrimination on the basis of sex, race, color, national origin and disability by health programs receiving federal funds or by any entity established under Title I of the Act. 42 U.S.C. § 18116. This provision incorporates and applies numerous civil rights laws, including Section 504 of the Rehabilitation Act of 1973, to federal health programs and entities. 29 U.S.C. §§ 794 *et seq*. Additional provisions of the ACA require insurance companies to cover all applicants and to offer enrollees the same rates regardless of pre-existing conditions. 42 U.S.C. § 300gg. Allowing employer wellness programs to raise costs for protected groups contravenes the purpose of these provisions, which endeavor to ensure equal and affordable access to everyone, regardless of pre-existing conditions or other status. Similarly, punitive programs that impose fees or withhold financial rewards for failing to meet certain health benchmarks carry the risk of disproportionately impacting groups protected under the ADA.

Wellness programs that involve gathering information about the health of employees, as nearly all do, also intersect with the privacy and non-discrimination principles of the ADA. The ADA prohibits employment discrimination on the basis of disability and limits an employer's ability to make disability-related inquiries and to require medical examinations. 42 U.S.C. §§ 12101 *et seq*. Generally, an examination or inquiry must be made on a post-offer basis for employment and either be "job-related and consistent with business necessity," or a voluntary medical examination, as "part of an employee health program available to employees at that work site." 42 U.S.C. § 12112(d); *see also Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999); *Tice v. Centre Area Transp. Authority*, 247 F.3d 506, 514 n. 7 (3rd Cir. 2001). Wellness plans and health risk assessments may be prohibited under the ADA's "no medical exams or inquiries" provision if they are not voluntary.[12] The level of inducement, or more specifically, the value of the incentive for taking the health risk assessment, may impact whether the medical examination or inquiry is truly voluntary. *Id.* Financial penalties for failure to meet health criteria also can have a disparate impact on individuals with disabilities. For example, wellness programs run afoul of the ADA if they penalize employees who fail to have normal blood glucose or cholesterol levels, who fall within a certain range of weight or blood pressure, or who cannot participate in a walking or other exercise program due to a disability. In short, a wellness program that requires inappropriate disability-related inquiries, offers reduced benefits, or carries financial penalties for individuals with disabilities can subject an employer to liability under the ADA. Title I of the ADA also requires employers to make all wellness programs, even those that do not obtain medical information, available to all employees, to provide reasonable accommodations (adjustments or modifications) to employees with disabilities, and to keep all medical information confidential. *Id.*; 42 U.S.C. §§ 12112(b)(5)(A), (d)(3)(B)(iii); 29 C.F.R. § 1630.9.

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[12] *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ADA ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS, http://www.eeoc.gov/policy/docs/medfin5.pdf.

B. The EEOC's Role and Action in Wellness Programs

As wellness programs increased in popularity and visibility over recent years, the EEOC became more active in monitoring whether they functioned as a subterfuge for unlawful discrimination. The agency filed three lawsuits in 2014 challenging wellness programs under the ADA and the Genetic Information Nondiscrimination Act ("GINA"), but these cases have provided little clarity on the issues. In one case, Wisconsin company Flambeau offered a wellness program that began by offering financial incentives to employees who submitted to a health risks and biometric assessment, but ultimately became a condition for company-subsidized health insurance coverage. *EEOC v. Flambeau, Inc.*, 131 F. Supp. 849, 852 (W.D. Wisc. 2015). The EEOC argued that Flambeau's conditioning of healthcare coverage on mandatory assessments violated the ADA's prohibition against employer-mandated medical examinations, except where such examinations are job-related and constitute a business necessity. *Id.* at 853 (citing 42 U.S.C. § 12112(d)(4)(a)). Flambeau countered that its practice was permissible under the ADA's "safe harbor" provision, which permits employers to determine the "terms" of benefit plans that are based on underwriting, classifying, and administering health risks. *Id.* (citing 42 U.S.C. § 12201(c)(2)). The district court agreed with Flambeau's construction of the ADA, finding that the wellness program was a term of the benefit plan and bona fide attempt to properly manage health risks with regards to its provision of coverage and granting summary judgment. On appeal, the Seventh Circuit upheld the ruling without reaching the merits of the case, finding that the lack of damages rendered the claim moot. *EEOC v. Flambeau, Inc*., 846 F.3d 941 (7th Cir. 2017).

A second EEOC case filed in Wisconsin raised very similar issues as *Flambeau*, but resulted in a directly contrasting analysis. In *EEOC v. Orion Energy Systems, Inc*., 208 F. Supp. 3d 989 (E.D. Wis. 2016), the agency alleged that Orion's wellness program violated the ADA when it made 100% of its contribution to health care premiums dependent on employee participation in a health risk questionnaire and imposed financial penalties for smoking and failing to exercise. Like the employer in *Flambeau*, Orion argued that its program came within the ADA's safe harbor provision. Refuting the analysis issued just the year before, the court rejected this argument, deferring to the EEOC's interpretation of the statute and noting that "the wellness program was not used to underwrite, classify, or administer risk" as required to come within the exception. *Id.* at 999. The court then turned to Orion's second argument that its program was not subject to the ADA because it was voluntary. Somewhat surprisingly, it found that Orion's practice of conditioning 100% of its benefits coverage on participation in the wellness program constituted a "strong incentive" for employees, but not compulsion. *Id.* at 1001. The EEOC's final claim for unlawful retaliation survived summary judgment, and the case ultimately settled in April 2017.[13]

The third 2014 EEOC action was against Honeywell International, alleging that its wellness program violated the ADA and GINA. Under Honeywell's provisions, employees and their spouses were screened, on a voluntary basis, for cholesterol, blood pressure, body-mass index, blood-sugar levels, waist circumference, and nicotine. Employees who decided not to undergo testing faced several penalties, including an additional $500 payment for health insurance and a

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[13] *See* EEOC, *Wisconsin Employer Resolves EEOC Case Involving Wellness Program and Retaliation* (Apr. 5, 2017), https://www.eeoc.gov/eeoc/newsroom/release/4-5-17a.cfm.

$1000 surcharge based on the presumption that they use tobacco. Honeywell claimed that its corporate wellness program served dual purposes: to inform employees about their health status in an effort to support their overall wellbeing and to prevent healthy employees from subsidizing healthcare premiums for less healthy employees. The sizable amount of money that Honeywell charged employees for noncompliance, however, caught the attention of federal regulators. The district court denied the EEOC's motion for a preliminary injunction to immediately suspend the program, holding that the plaintiffs faced no future irreparable harms (as they had already submitted to the required procedures) and the merits of the case were not exceptionally strong due to ambiguity in this area of the law. *EEOC v. Honeywell Int'l Inc*., 2014 WL 5795481 (D. Minn. 2014). The case was ultimately voluntarily dismissed.

It is clear from these early results that the interplay between wellness programs, the ADA, and GINA has been underdeveloped in case law and regulatory guidance. On May 16, 2016, the EEOC issued long-awaited clarity as to how Title I of the ADA and Title II of the Genetic Information Nondiscrimination Act apply to wellness programs offered by employers that request health information from employees and their spouses. The rules now provide guidance to employers and employees about how wellness programs must comport with the ADA consistent with the provisions under the ACA.

The final EEOC rule provides that wellness programs that are part of a group health plan and that ask questions about employees' health or include medical examinations may offer incentives of up to 30 percent of the total cost of self-only coverage. 29 C.F.R. § 1630.14(d)(3). No incentives are allowed in exchange for the current or past health status information of employees' children or in exchange for specified genetic information (such as family medical history or the results of genetic tests) of an employee, an employee's spouse, and an employee's children. The final rules, which went into effect in January 2017, apply to all workplace wellness programs, including those in which employees or their family members may participate without also enrolling in a particular health plan. The rule also makes clear that the ADA provides important protections for safeguarding health information. The ADA rule states that information from wellness programs may be disclosed to employers only in aggregate terms. It requires that employers give participating employees a notice that tells them what information will be collected as part of the wellness program, with whom it will be shared and for what purpose, the limits on disclosure and the way information will be kept confidential. It also prohibits employers from requiring employees or their family members to agree to the sale, exchange, transfer, or other disclosure of their health information to participate in a wellness program or to receive an incentive.

The interpretive guidance published along with the final ADA rule identifies some best practices for ensuring confidentiality, such as adopting and communicating clear policies, training employees who handle confidential information, encrypting health information, and providing prompt notification of employees and their family members if breaches occur. 81 Fed. Reg. 31,142 (May 17, 2016). The ADA makes no distinction between wellness programs that are part of, or outside of, a group health plan but, rather, requires all wellness programs that obtain medical information from employees to be voluntary. The final rule, therefore, applies to all wellness programs that include disability-related inquiries and/or medical examinations, while the wellness

program requirements in HIPAA, as amended by the Affordable Care Act, apply only to wellness programs that are part of a group health plan.

The rule also states that the ADA's safe harbor provision allows insurers and plan sponsors (including employers) to use information, including actuarial data, about risks posed by certain health conditions to make decisions about insurability and about the cost of insurance. 29 C.F.R. § 1630.14(d)(6). Such practices have to be consistent with laws governing insurance and cannot be a subterfuge to evade compliance with the ADA. Without the safe harbor, these practices would violate the ADA by treating some individuals with disabilities less favorably than individuals without those disabilities. Many of the insurance practices the safe harbor permitted at the time of the enactment of the ADA, such as denying health coverage for individuals with pre-existing conditions or charging some individuals in group health plans more than others because of their health conditions, are now unlawful under the Affordable Care Act. The EEOC takes the position that the safe harbor provision does not apply to employer wellness programs because employers are not collecting or using information to determine whether employees with certain health conditions are insurable or to set insurance premiums. In fact the final rule adds a new provision explicitly stating that the safe harbor provision does not apply to wellness programs even if they are part of an employer's health plan. *Id.*

While guidance on wellness programs was sorely needed, there has been criticism that the EEOC did not go far enough in protecting employees with its interpretation of the law. In October 2016, AARP filed suit challenging the EEOC's wellness programs rule, arguing that the agency's decision to allow 30% variations in benefit coverage effectively made participation involuntary and thus violated both the ADA and GINA.[14] While AARP's motion for preliminary injunction was not successful, *AARP v. EEOC*, 226 F. Supp. 3d 7 (D.D.C. 2016), the case remains active and could have a significant impact on how wellness programs function going forward.

V. INTERSECTION WITH ADA: FAMILY AND MEDICAL LEAVE ACT

A. History

The basic aim of the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.*, is to keep qualified employees working or able to return to the workplace after a period of medically required leave. Before the passage of the FMLA in 1993, employees facing medical crises often had to choose between their jobs and their families. No leave was guaranteed by law, and, even where employers voluntarily provided leave, there was often a loss of benefits or no guarantee of return to the same or a similar job. Addressing these hardships, the FMLA provides many employees – but far from all – with a period of unpaid, job-guaranteed leave to deal with the unpredictable events that touch everyone.

The FMLA requires employers with 50 or more employees within a 75-mile radius to

[14] AARP, *AARP Challenges New Federal Wellness Rules Allowing Employers to Penalize Employees for Keeping Private Health Information Private* (Oct. 25, 2016), https://press.aarp.org/2016-10-25-AARP-Challenges-New-Federal-Wellness-Rules-Allowing-Employers-to-Penalize-Employees-for-Keeping-Private-Health-Information-Private.

provide a 12-week period of unpaid, job-guaranteed leave to qualifying employees under the following circumstances:

> (1) The birth of a child and to care for the newborn child within twelve months of the birth;
> (2) The placement of a child for adoption or foster care and to care for the adopted or foster child within twelve months of the child entering the employee's home;
> (3) To recover from the employee's own serious health condition that makes the employee unable to perform the functions of his or her job;
> (4) To care for a child, spouse, or parent suffering from a serious health condition;
> (5) A qualified exigency arising out of a spouse, child or parent who is a military member on active duty; and/or
> (6) To care for a spouse, child, parent, or next of kin servicemember with a serious injury or illness.[15]

29 U.S.C. §§ 2612(a)(1)-(3).

While unpaid leave is available to qualified employees under both the FMLA and ADA, the two statutes provide different frameworks for leave, with various benefits and drawbacks. Under the FMLA, a qualified employee is entitled to 12 weeks of leave, regardless of whether her absence will impose a hardship on her employer. The ADA, in contrast, does allow employers to balance their hardship against the employee's need for leave as a reasonable accommodation for disability; there is, however, no statutory limit on the duration of that leave once an employee has established her entitlement to it. 29 C.F.R. § 825.702(b) ("[The] FMLA entitles eligible employees to 12 weeks of leave in any 12-month period, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation."). While the FMLA's categorical grant of leave to qualified employees is, in some respects, easier on employees, there are many individuals whose need for unpaid medical leave is limited to the provisions of the ADA. Such employees include those who:

- Have not yet worked for their employer for at least 12 months;
- Work for an employer with more than 15 employees (the minimum for coverage under the ADA) but less than 50 employees (the minimum for coverage under the FMLA);
- Work for an employer with more than 50 employees, but which has fewer than 50 employees within a 75-mile radius of the plaintiff's work site;
- Work fewer than 1,250 hours per year (which generally will be true of many part-time employees);
- Have already exhausted the 12 weeks of leave for which they are eligible under the FMLA; or
- Have a medical condition that will almost certainly require more leave than the 12 weeks permitted under the FMLA.

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[15] Where the leave is to care for a spouse, parent, child, or next of kin servicemember with a serious injury or illness, qualified employees may take up to 26 weeks of leave.

As explained in the FMLA federal regulations, the FMLA and ADA apply distinct concepts of "disability" and "serious health condition," which require independent analysis. 29 C.F.R. § 825.702. The regulations explicitly state that "an employer must . . . provide leave under whichever statutory provision provides greater rights to employees." *Id.* The regulations also note various distinctions between the requirements of both statutes regarding reassignment (the FMLA permits an employer to temporarily reassign an employee to an alternative position, while the ADA permits reassignment to an equivalent position only when the employee cannot perform the essential functions of her original job and accommodation is impossible or creates undue hardship); reinstatement (the ADA requires reinstatement to the same job upon return, while the FMLA permits reinstatement to an equivalent position); and provision of health insurance during leave (the FMLA requires the maintenance of coverage, while the ADA only do so if other employees receive this benefit under the same circumstances). *Id.* Under the regulations, FMLA leave may serve as a reasonable accommodation under the ADA, but an employee may not refuse otherwise applicable FMLA leave by offering a job with reasonable accommodation instead. Moreover, an employer may not change the essential functions of a position in order to deny FMLA leave that is otherwise available. *Id.*

Court decisions regarding how much leave (or additional leave, beyond the FMLA's limit) is reasonable as an accommodation under the ADA underscore that this analysis is a very fact-specific inquiry, with the case law varying greatly. While many courts have approved unpaid leave of a year or longer, other courts have disproved leave as short as a few months. *Compare Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 649-50 (1st Cir. 2000) (twenty months); *Ralph v. Lucent Techns., Inc.*, 135 F.3d 166, 171-72 (1st Cir. 1998) (thirteen months). *See also Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 185-86, nn.5, 6 (2d Cir. 2006) (several weeks); *Dark v. Curry County*, 451 F.3d 1078, 1090 (9th Cir. 2006) (three months); *Kitchen v. Summers Continuous Care Ctr., LLC*, 552 F. Supp. 2d 589, 595 (S.D.W. Va. 2008) (three months); *Cleveland v. Federal Express Corp.*, 2003 WL 22905314, at *4 (6th Cir. Nov. 28, 2003) ("unpaid leave of an indefinite duration (or a very lengthy period, such as one year)" may qualify as a reasonable accommodation under the ADA, depending on the circumstances); *Powers v. Polygram Holding*, 40 F. Supp. 2d 195, 200 (S.D.N.Y. 1999) (noting that cases in which courts have concluded that the length of requested medical leave is an unreasonable accommodation as a matter of law usually involved requests for close to a year or more), *with Dudley v. Cal. Dept. of Trans.*, 213 F.3d 641, 641 (9th Cir. 2000) (six months of leave unreasonable); *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1048 (8th Cir. 1999) (more than one week deemed unreasonable).

B. Recent Developments in the Law

A number of recent cases illustrate how the related, but not always overlapping, protections of the FMLA and ADA play out. In *Scruggs v. Pulaski County*, 817 F.3d 1087 (8th Cir. 2016), the employee, Scruggs, used her full 12 weeks of FMLA leave to manage health conditions that also prompted her doctor to impose a lifting restriction on her work activities. Scruggs requested an additional week of leave to confer with a second doctor who she asserted would clear her to work without the lifting restriction. Her employer refused to grant the extended leave and terminated her employment on the grounds that the lifting restriction in place prevented Scruggs from performing an essential job function. Scruggs asserted claims under the FMLA and ADA,

arguing that she was entitled to a reasonable accommodation for her disability in the form of extended unpaid FMLA leave that would have allowed her to secure clearance for the lifting requirement of her position. The Court rejected this position, holding that because the FMLA entitles an employee to only twelve weeks of leave per year, an extension is not a reasonable accommodation under the ADA. *Id.* at 1093. Finding that Scruggs was unable to carry out the essential function of lifting, per the restrictions of her prior doctor, the ADA did not prohibit her termination. Somewhat curiously, the Court did not discuss whether further unpaid leave more generally, outside of the provisions of the FMLA, would have been a reasonable accommodation. *Id.* at 1094. *Scruggs* illustrates that while the purposes of these statutes can often coincide, reasonable accommodation under the ADA does not require employers to go beyond the statutory leave limits of the FMLA.

Scruggs also demonstrates how the FMLA's provision of leave can intersect with the ADA's essential function test in complex ways. While FMLA leave carves out time away from the workplace for qualified employees and requires an employer to keep their position available on return without any regard to the burden imposed, the ADA reasonable accommodation requirement does allow employers to take the impact of employee absence into account. Courts have recognized that attendance is typically a necessary element of jobs. *See, e.g., Spangler v. Fed. Home Loan Bank of Des Moines,* 278 F.3d 847, 850 (8th Cir. 2002). In recent cases involving the ADA and FMLA, employees' claims of disability discrimination have failed where courts find that absences constitute a legitimate, non-retaliatory reason for termination. *See Hill v. City of Phoenix*, No. CV-13-02315-PHX-DGC, 2016 WL 469613, at *4 (D. Ariz. Feb. 8, 2016); *Wheeler v. Jackson Nat'l Life Ins. Co*., No. 3:14-CV-0913, 2016 WL 427796, at *13 (M.D. Tenn. Jan. 4, 2016) ("[E]xcessive absenteeism can render an individual unqualified under the ADA as a matter of law . . ."); *see also Echevarria v. AstraZeneca, LP*, 133 F. Supp. 3d 372 (D.P.R. 2015) (holding that employee's failure to report to work after exhausting leave of absence constituted a legitimate reason for termination). An employee who is unable to qualify for FMLA leave for medical or tenure reasons can face a significant obstacle in overcoming the attendance-as-essential-function standard under the ADA. *See, e.g., Williams v. AT&T Mobility Services, LLC*, 2016 WL 3172917 (W.D. Tenn. June 6, 2016) (granting summary judgment where employer was able to show that punctuality and attendance were essential functions for call service center employee who did not qualify for FMLA coverage for numerous absences, and had requested a flexible schedule going forward).

Medical conditions that establish eligibility for FMLA leave can also, in some cases, render an employee unqualified for ADA protections. In *Wheatley v. Factory Card and Party Outlet*, 826 F.3d 412 (7th Cir. 2016), for example, the plaintiff had exhausted FMLA leave after suffering an injury to her foot. The injury required the use of an immobilizing boot, which limited her ability to walk and climb stairs. Upon her return to the workplace, the employee requested an accommodation to limit these activities. The Seventh Circuit held that the employee was not entitled to an accommodation, as both activities were essential job functions. *See also, Frazier v. Southwire Company, LLC*, 2016 WL 2869792 (W.D. Ken. May 16, 2016) (granting summary judgment on an ADA claim under the essential function test where the employee had exhausted FMLA leave and requested accommodations related to his injury on his return). In other circumstances, FMLA leave can bolster an employee's claim. Some courts have permitted plaintiffs to make out a *prima facie* regarded-as-disabled ADA claim by showing close temporal

proximity between a request or use of FMLA leave and an employer's adverse action. *See, e.g.*, *Sine v. Rockhill Mennonite Home*, No. CV 17-0043, 2017 WL 3172721 (E.D. Pa. July 26, 2017); *but see Litzinger v. Allegheny Lutheran Soc. Ministries*, No. 3:15-CV-306, 2017 WL 3089022, at *7 (W.D. Pa. July 20, 2017) (ruling that plaintiff's use of FMLA leave did not alone support the inference that her employer perceived her as disabled).

As noted above, the federal regulations state that FMLA leave can serve as a reasonable accommodation under the ADA. It is not clear, however, whether an employee who requests FMLA leave has also requested an accommodation for disability, for the purposes of a *prima facie* claim under the ADA. The Third Circuit has held that such a request may satisfy an employee's duty under the ADA, but there remains some debate over the application of such a rule. *See Lambert v. Xpress Global Systems, Inc.*, 2016 WL 1639668 (W.D. Penn. Apr. 26, 2016) (noting inconsistent application of the holding in *McCall v. City of Philadelphia*, 629 Fed. Appx. 419, 422 (3d Cir. 2015)).

VI. INTERSECTIONS WITH ADA: GENETIC INFORMATION NONDISCRIMINATION ACT

A. History

With the rise of access to genetic information for medical assessment and treatment in recent decades has also come the concern about discrimination against individuals whose genes indicate a history or increased risk of disease. In the late 1990's and early 2000's, a number of protections were put in place to address the potential for genetic information discrimination in a number of contexts, including the prohibition on genetic information discrimination for health care coverage under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and President Clinton's executive order in 2000 prohibiting the use of genetic information for federal employment decisions. Exec. Order No. 13,145, (Feb. 8, 2000). Congress addressed the issue more broadly with the Genetic Information Nondiscrimination Act of 2008 (GINA), Pub. L. No. 110-233, 122 Stat. 881 *et seq.* (2008), which went into effect on November 21, 2009. Title I of GINA, which addresses the use of genetic information in health insurance, is administered by the Department of Labor, Health and Human Services and the Treasury. The EEOC enforces Title II of the Act, which bars the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II from requesting, requiring or purchasing genetic information, and limits the disclosure of genetic information. 42 U.S.C. § 2000ff *et seq*.

GINA forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. This prohibition is based on the principle that genetic information is not relevant to an individual's current ability to work. Genetic information includes information about tests carried out on an individual and his or her family members, as well as information about diseases or disorders that occur in an individual's family, and information related to an employee's fetus or embryos. Family medical history is included in the definition of genetic information to prevent employers from using such information to attempt to predict the likelihood of disease for an individual employee.

In addition to barring discrimination, GINA also prohibits harassment because of genetic information. Consistent with the standard for race, gender, and other harassment under Title VII, harassment under GINA is actionable when it rises to a level that is severe and pervasive, and the law extends to harassment by a direct supervisor, a supervisor in another area of the workplace, a co-worker, or third-parties, such as clients or customers. GINA also includes a retaliation provision that protects employees who have filed a charge of discrimination, participated in a discrimination proceeding, or otherwise opposed discrimination.

B. Recent Developments in the Law

Recent activity in GINA law has largely centered around the law's application to wellness programs offered by employers. As discussed in detail in Section III, *supra*, wellness programs incentivize employees to improve their health and reduce health care costs, and often require employees to provide personal medical information. In May 2016, the EEOC issued a Final Rule amending the regulations that implement Title II of GINA, to clarify how employers can comply with the law when administering such programs. Genetic Information Nondiscrimination Act, 81 Fed. Reg. 31143 (May 17, 2016). The Final Rule reiterated the EEOC's commitment to enforcing the strict prohibitions on use of genetic information by employers. The agency did, however, clarify that employers are permitted to offer "limited inducements" to an employee's spouse in exchange for information regarding a disease or disorder as part of a health risk assessment or wellness program. *Id.* at 31,144. This Rule does not disturb GINA's prohibition on group health plans requiring or requesting that an individual or family member undergo a genetic test, or requesting, requiring or purchasing genetic information for underwriting purposes. By defining "genetic information" to include not only genetic test results but also family history of a disease or disorder, GINA affects any health risk assessment or other wellness program feature that asks for such information -- or even might be expected to elicit it.

Case law related to GINA is far less abundant than that of other nondiscrimination statutes, such as the ADA or Title VII. In the recent years, a number of federal courts have addressed the application of GINA, most finding no genetic discrimination, but claims remain somewhat rare and only four circuit courts have issued decisions under the law. In one of the few appellate decisions under GINA in recent years, the Fifth Circuit held that an employer did not violate GINA by requiring the employee to participate in its mandatory wellness program, absent evidence that the employer requested, required, or purchased the employee's genetic information, or discriminated against him on the basis of his genetic information. *Ortiz v. City of San Antonio Fire Dep't*, 806 F.3d 822 (5th Cir. 2015). The Court's holding rested on the distinction between "medical information" and "genetic information." The GINA statute itself states that an employer does not violate GINA through "the use, acquisition, or disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition of an employee or member, including a manifested disease, disorder, or pathological condition that has or may have a genetic basis." 42 U.S.C. § 2000ff–9; *see also Lewis v. Gov't of the D.C.*, No. CV 15-521, 2015 WL 8082293, at *11 (D.D.C. Dec. 7, 2015) (holding that a drug testing policy did not request *genetic* information as defined by statute); *Duignan v. City of Chicago*, No. 16 C 9688, 2017 WL 1283629 (N.D. Ill. Apr. 6, 2017) (employer's knowledge of plaintiff's medical conditions did not, alone, support inference that it had knowledge of genetic information); *Fuentes v. City of San Antonio Fire Dep't*, --- F.3d ---, No. 15-CV-1010, 2017 WL 916423 (W.D. Tex.

Mar. 6, 2017) (GINA provisions did not apply where employer's medical exam lacked genetic tests).

Because GINA adopted Title VII's remedy framework and has analogous statutory language, courts have used Title VII case law as precedent in GINA cases, thus extending protections under these well-developed doctrines. For instance, a Minnesota district court recently held that, like Title VII, GINA does not shield an employer form liability where a third-party engaged in the discriminatory practices that form the basis for the employee's suit against the employer. *See Equal Employment Opportunity Comm'n v. Cummins Power Generation Inc*., 313 F.R.D. 93, 100 (D. Minn. 2015). Another federal district court held that Title VII's standard regarding post-verdict injunctive relief applies to GINA claims, as well. *Lowe v. Atlas Logistics Grp. Retail Servs. (Atlanta), LLC*, No. 1:13-CV-2425-AT, 2015 WL 10891935, at *1 (N.D. Ga. Sept. 28, 2015).

As previously stated, however, the scope of GINA is still unsettled – for instance, very little case law has determined whether a plaintiff can sustain a GINA claim at summary judgment by proffering evidence to show that the employer took an adverse action because of the employee's qualifying genetic information, or whether such a showing also triggers a burden-shifting scheme akin to the *McDonnell-Douglas* framework. *Compare, e.g., Leone v. N. Jersey Orthopaedic Specialists, P.A*., No. CIV.A. 11-3957 ES, 2012 WL 1535198, at *5 (D.N.J. Apr. 27, 2012) (required showing is "(1) that [the plaintiff] was an employee; (2) who was discharged or deprived of employment opportunities; (3) because of information from [her] genetic tests"), *and Allen v. Verizon Wireless*, No. 3:12-CV-482 JCH, 2013 WL 2467923, at *23 (D. Conn. June 6, 2013) (same; "the issue is whether Allen alleges that Verizon considered her genetic information in deciding to deny her request for [short-term disability]"), *with* Ortiz, 2015 WL 7423019, at *4 (affirming district court's "borrowing" of the *McDonnell Douglas* burden shifting framework in GINA case, "which the parties appear to agree was appropriate"); *Conner-Goodgame v. Wells Fargo Bank*, N.A., No. 2:12-CV-03426-IPJ, 2013 WL 5428448, at *10 (N.D. Ala. Sept. 26, 2013) (analyzing a plaintiff's GINA claim under Title VII's anti-retaliation framework); *Garnett-Bishop v. New York Cmty. Bancorp, Inc.*, 49 F. Supp. 3d 321, 327-28 (E.D.N.Y. 2014) (in case with consolidated discrimination claims of multiple employees, including some with GINA claims, noting that "the familiar burden shifting framework...will still apply"). While courts will continue to slowly build doctrines under GINA, they remain in general agreement that GINA "plainly tracks the language and remedies of Title VII's anti-discrimination provisions." *See e.g., Punt v. Kelly Servs*., No. 14-CV-02560-CMA-MJW, 2016 WL 67654, at *14 (D. Colo. Jan. 6, 2016) (citing several district court cases affirming this assertion).

VII. CONCLUSION

While the ADAAA has dramatically changed the analysis of the term "disability" and eased the burden for plaintiffs seeking to bring cases for disparate treatment and failure to accommodate, it has not changed judicial analysis with respect to many other issues that arise in disability cases. Until recently, comparatively few cases discussed the fact-dependent questions of who is a qualified individual, what is an essential function of the job, what is a reasonable accommodation (and what is undue hardship), or more nuanced questions about the employee's specific responsibilities in providing medical information to the employer and the precise requirements of

the interactive process used to determine what reasonable accommodations were unavailable. These determinations are now a more substantial part of ADA law, and will continue to be so.

Looking more broadly, the EEOC has taken a strong stance on the role of the ADAAA for both the Pregnancy Discrimination Act and employer wellness programs under the ACA. Although there is no clear obligation under the ADAAA or PDA to provide accommodations for pregnant employees, in light of recent developments, employers are at risk if they fail to provide such accommodations. The EEOC has made clear in its regulations that far more pregnancy-related disabilities now fall under the ADA, and *Young v. UPS* broadened the comparators requirement under the law. The EEOC has also now issued its Final Rule on employers' compliance with the ADA and GINA in establishing voluntary wellness programs. While the ACA promotes wellness programs, demanding information about or penalizing employees' disabilities runs afoul of the ADA and potentially GINA, especially when employers are using employees' confidential health information to raise their health care costs. Finally, with regards to unpaid leave, the FMLA and the ADA continue to provide crucial protections that allow disabled employees to remain employed and productive at work, despite temporary impairments. While the two statutes together expand the group of employees eligible for a period of unpaid leave, courts remain occupied with the task of determining how the laws interact, particularly with regard to qualifying medical conditions and the request for accommodation. In all, the recent developments indicate a strong commitment on the part of the EEOC to advocate for the discrimination and privacy protections for millions of employees, and the profound significance of the ADAAA in bringing these protections to a wider, more diverse population.