



Americans with Disabilities Act (ADA)-Title I

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Today's Agenda

- The What – ADA Title I
- The Why – Reasons to Comply
- The Who – Who is Protected?
- The When – When Do Protections Apply?
- Employer Obligations
 - Qualified Individual
 - Essential Functions
 - Reasonable Accommodations
 - Undue Hardship
- Flow Chart for Interactive Process
- Scenarios



"[T]he ADA was designed in part to integrate persons with disabilities into the economic and social mainstream of American life."

PGA Tour Inc. v. Martin, 532 U.S. 661, 675 (2001).

Americans with Disabilities Act Title I

- Prohibits discrimination against people with disabilities in employment
- Amended in 2008 to clarify (restore?) definition of disability (ADAAA)
- Montana Human Rights Act (Title 49)

The Why

- US unemployment rate for disabled hovers around 65%; slightly lower in Montana
- Studies show people with disabilities take less absence days and more likely to stay on the job longer than non-disabled
- Workers with disabilities have significantly higher performance in area of safety
- Increase diversity of workplace and employee morale
- 92% of the American public view companies that hire people with disabilities more favorably than those that do not

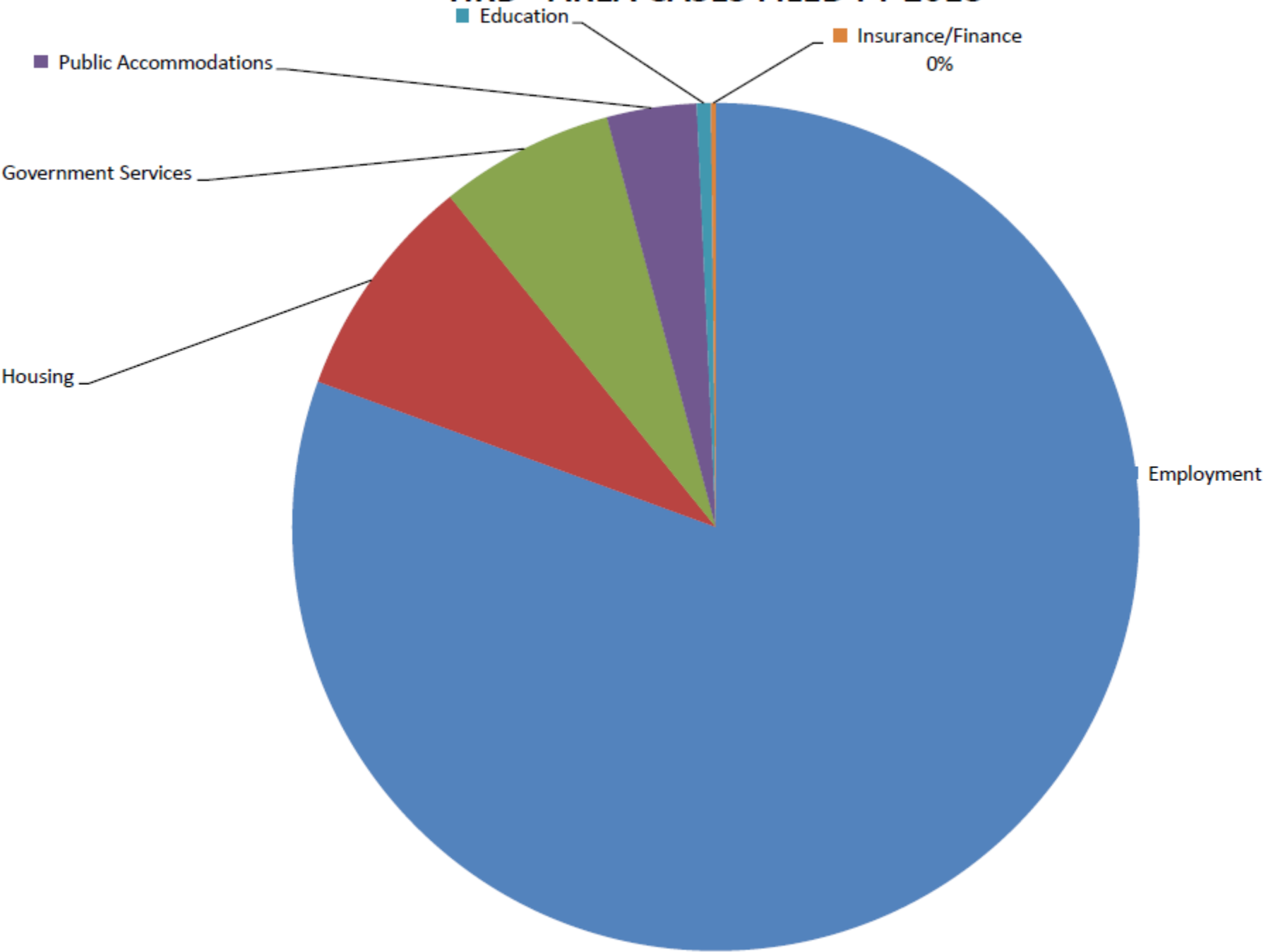
Consequences of Violations

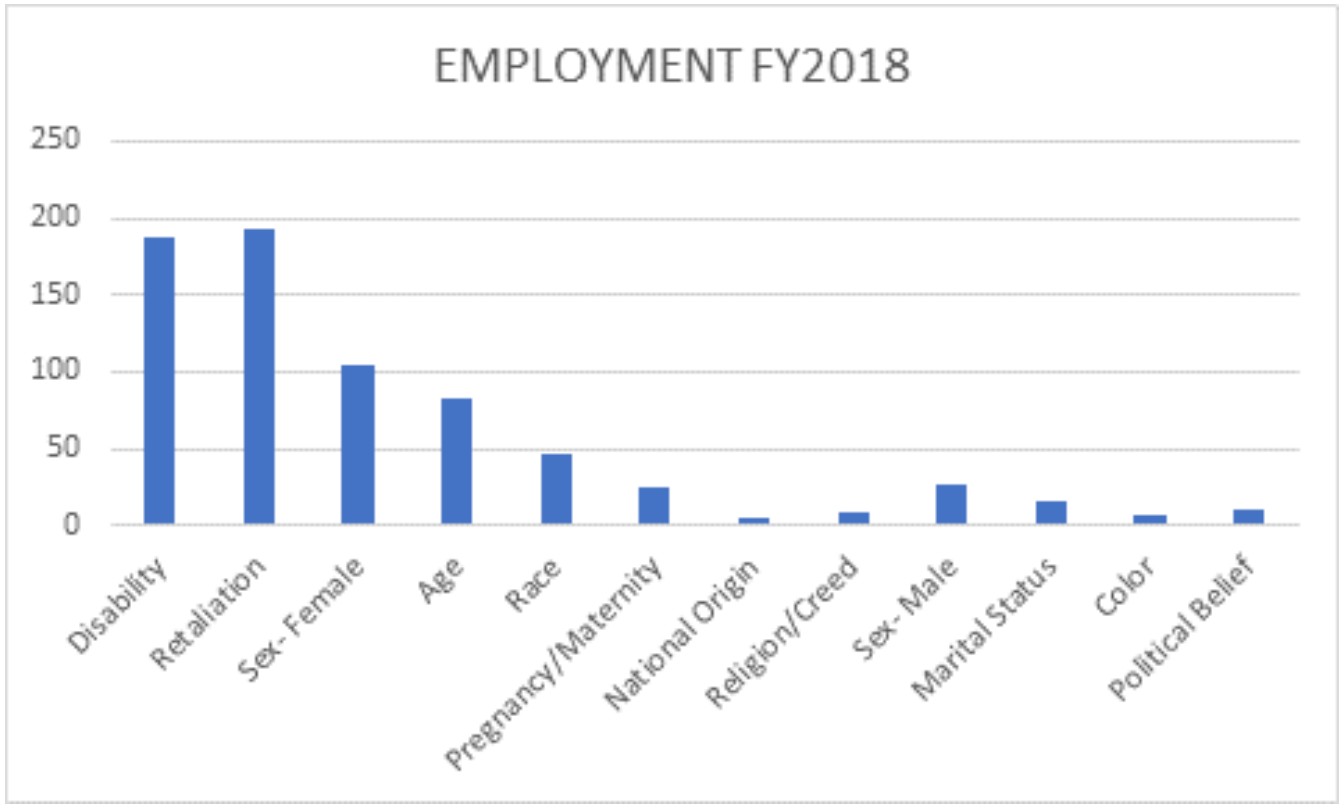
- U.S. Dept. of Labor-Equal Employment Opportunity Commission (EEOC) enforces Title I of ADA
- Montana Dept. of Labor- Human Rights Bureau (MHRB) is the Fair Employment Practice Agency (FEPA) for Montana
- Complaint must be filed with HRB within 180 days of adverse action ("dual" filed)
- If ER has 15+ EE, then the charging party can file claim directly with EEOC within 300 days

Consequences of Violations Continued...

- Multiple step appeal process for charging party
- HRB/EEOC may issue Notice of Right to Sue
- EEOC may file lawsuit against employer directly

HRB - AREA CASES FILED FY 2018





Applicable to:

- Hiring process



- Post-offer, pre-employment



- Current employees



Hiring Process

- Must be made accessible and accommodations provided if requested
- No disability inquiry during recruitment, screening, or hiring process
- No medical inquiries or “indirect” questions about disability
- Many disabilities are not “obvious”
- Applicants have legally protected right to not disclose disability during the hiring process

Post-offer, pre-employment



- Some medical inquiry can be made
- Must apply same medical inquiry process to all applicants in a job category (no selective inquiries)
- If inquiry shows that the person has a disability, the job offer can only be withdrawn if:
 - The withdrawal is job-related and consistent with business necessity
 - No reasonable accommodation can be provided

Current Employment

- Must not discriminate based on disability, perceived or actual
- Must provide reasonable accommodations through interactive process
 - Medical information related to the accommodation need can be collected and must be kept confidential
- Must not retaliate against EE for enforcing rights or opposing practices

Disability is Defined Broadly

- Any person who has a physical or mental impairment which substantially limits one or more major life activities
- Includes walking, seeing, hearing, communicating, concentrating, breathing, learning, working, eating, caring for oneself or performing manual tasks
- Has a record of such an impairment or is regarded as having an impairment

ADAAA—Amended ADA

- Section 3(4)(A) of the ADAAA states definition: “shall be construed in favor of broad coverage of individuals under this Act to the maximum extent permitted”
- Safest to assume that a medical condition may be a disability
- Includes many Workplace Injuries that may result in long term restrictions or limitations—different from early return to work

Not Protected:

- Short-term illness
- Environmental, cultural, or economic disadvantages
- Age, pregnancy without work restrictions, or obesity
- Gender identity disorders, sexual behavior disorders, or compulsive gambling disorders
- Disorders resulting from the current use of drugs/alcohol—if in treatment, then addiction is covered

Qualified Individual

- “[T]he individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position ... and, with or without reasonable accommodation, can perform the essential functions of such position.” (29 CFR 1630.2)
- Qualification standards, tests, and other criteria that screen out individuals with a disability is unlawful discrimination, unless it is job-related and consistent with *business necessity*. (42 USCS § 12112(b)(6); *Cripe v City of San Jose* 261 F.3d 877 (9th Cir. 2001))

Essential Functions

“The fundamental job duties of the employment position... [not including] the marginal functions of the position.” (29 CFR 1630.2(n))

- The reason the position exists;
- Limited number of employees among whom the function can be distributed; or
- Highly specialized

Evidence of Essential Functions

- Employer's judgment
- Amount of time spent performing function
- Consequences if function is not performed
- Terms of a CBA
- Work experience of past incumbents in position
- Work experience of incumbents in similar jobs
- Written job descriptions prepared prior to hiring and signed by employee

Tips on Essential Functions

- Essential functions are WHAT is performed; accommodation is HOW it is performed
- Use caution when modifying essential functions
- Know which functions are essential, non essential and/or marginal duties
 - Not essential simply because it is written or you “say so”
- Ensure all positions have a Job Description
- Ensure all Job Descriptions are current

Reasonable Accommodations

- An employer has a duty to provide a reasonable accommodation, absent undue hardship, to a person with a physical or mental disability if, with such accommodation, the person could perform the job's essential functions. (See *McDonald v DEQ*, 2009 MT 209; *Samper v Providence St. Vincent Med. Ctr*, 675 F.3d 1233 (2012))
- Must be EFFECTIVE
- EE is entitled to a reasonable accommodation if it can assist with job duties or alleviate barriers to EE's ability to enjoy equal benefits, privileges, and opportunities of employment

Examples of Accommodations

- Modified policies
- Devices to assist with mobility/lifting
- Computer software for typing, talking
- Sign Language Interpreters
- Physical changes to the work place, furniture, equipment
- Larger pens/scissors for hand mobility
- Screen readers or magnifiers
- Aids: reminders, checklists, picture-based tools
- Written instructions
- Schedule changes, frequency of breaks
- Leave
- Reassignment to vacant position for which they qualify
- Telecommuting

Factors to Consider:

- Purpose and essential functions of the job
- Job-related limitations imposed by disability
- Effectiveness of potential accommodations
- Preference of the employee or applicant
- May have multiple accommodations to meet various/single essential functions
- Nature and cost of the accommodation(s)
- Financial resources of the employer – average cost of an accommodation nationally is \$500 (about half of all accommodations cost nothing)

Undue Hardship

- “Significant difficulty or expense incurred” by ER
- Factors to consider include:
 - Nature and cost of the accommodation
 - Overall financial resources of the facility involved
 - Overall financial resources of ER as a whole;
 - Type of operation or operations of ER
 - Impact on operation of the facility

Obligations of Employer

- Engage in the interactive process in good faith
- “Is there anything I can do to help you do your job?”
- Offer effective and reasonable accommodations
- Continue open dialogue with EE



Yeah, but how?

Interactive Process

"The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees. The shared goal is to identify an accommodation that allows the employee to perform the job effectively. Both sides must communicate directly, exchange essential information, and neither side can delay or obstruct the process."

*(Barnett v U.S. Air, Inc., 228 F.3d 1105, 1114-1115
(9th Cir. 2000))*

Aware of possible need

- EE asks/tells
- Manager suspects or observes
- “Is there anything I can do to help you do your job?”
- Repeat as necessary

Identify Limitations

- Medical Inquiry Form-ADA doesn't require this
- Repeat as necessary

Research

- Medical Provider
- JAN
- EE ideas
- ER ideas
- Repeat as necessary



Meet with EE
(interactive
process)

- Both share ideas and ask clarifying questions
- Must be effective
- No decisions are made at this stage
- Repeat as necessary



Analyze
Reasonableness

- Involve City Attorney
- Undue hardship?
- Repeat as necessary

DOCUMENT EVERYTHING!



Make Offer/Denial

- With City/Town Attorney assistance
 - In writing, make offer of accommodation(s) you are able to make
 - Have EE sign accepting these
- OR
- In writing, deny accommodations due to being unable to find an effective and reasonable accommodation
 - What is the next step?
 - Hold to performance standards
 - Revisit potential accommodations
 - Discipline if necessary
 - Terminate employment

Burden of Proof

- No direct evidence of discriminatory intent: *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973) (black activist EE RIF'd)
 - EE shows *prima facie* case
 - Disabled, Qualified Individual and suffered Adverse Action
 - ER must rebut presumption of unlawful discrimination by producing legitimate, nondiscriminatory reason for the action
 - EE must show legitimate reasons is pretext

Burden of Proof

- Direct evidence of discriminatory intent, parties agree it was the reason for action taken: *Reeves v Dairy Queen*, 1998 MT 13. (EE fired for high blood pressure in fast food restaurant “for her own health”)
- Focus is on whether the employee is “otherwise qualified” with or without accommodation

Burden of Proof

- Direct evidence of discriminatory intent, parties disagree on reason for action (“Mixed motive analysis”): *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989). (female EE denied partnership and told to act more feminine)
 - EE shows discrimination was motivating factor
 - ER must rebut that it would have made the same decision “but for” the unlawful discriminating factor

Scenario # 1

- ER required 24 hours of orientation and pre-employment training over 6 days as part of its application process
- Applicant, who was deaf, invited to attend the orientation and training; requested ASL interpreter for training
- ER cited policy of providing applicant \$200 to pay for interpreter, told applicant she would have to arrange and pay for interpreter and suggested she have a friend or family member attend with her
- Applicant doesn't appear for training, ER puts application in inactive file

EEOC v Creative Networks (912 F.Supp.2d 828 (DC Ariz 2012))

- Applicant disabled and qualified for position
- ER failed to engage in good faith interactive process, and unlawfully refused to accommodate applicant
- Adverse action does not need to be explicit failure to hire: "A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection."

Scenario #2

- Applicant received job offer contingent on post-offer medical review
- Medical review disclosed prior back injury; his physician, chiropractor, and reviewing examiner all determined no limitations
- ER demanded applicant obtain MRI at his own cost; applicant refused and ER revoked job offer

EEOC v BNSF Ry Co, 2018 U.S. App LEXIS 25852 (9th Cir. 2018)

- District Court finds BNSF regarded applicant as having a disability:
 - Does not require "substantially limit major life activity" as in other prongs
 - Must not be transitory or minor
- Medical exams at post-offer, pre-employment stage can only be given if "all entering employees are subjected to such an examination regardless of disability."
- ADA prohibits passing cost of medical exam to applicant unless all applicants required to obtain additional testing at own cost

Scenario #3

- EE regularly receives good performance reviews, promotions, and awards
- After 8 years on the job, EE diagnosed with ASD and extreme sensitivity to fragrances
- EE informs supervisor and ER responded that it wished to engage in a dialogue about potential accommodations, including exploring possibility of implementing a "fragrance free" policy
- EE's physician provides written documentation that FF policy would be important for EE

Scenario #3

- ER adopts policy banning perfumes and colognes and encouraged EE to excuse himself when encountering offensive smells
- ER documented responses to each incident reported and actions taken
- ER did not complete EE's performance evaluation during this period
- EE continues to encounter disabling fragrances in workplace and worn by non-coworkers (public, clients)
- EE resigns

Borges v Missoula County Sheriff's Office, 2018 MT 14

- MSC upholds dismissal of claims against County
- EE fails to show how different policy would have enabled him to perform his job
- County could not have enforced policy against all clients and public without significant difficulty
- EE made no other accommodations request that was refused
- Delay of performance evaluation not a "significant adverse act" constituting retaliation

Scenario #4

- EE informed new ER that she was disabled and used service dog for physical support when walking and notice and emotional support during dissociative episodes
- Service dog had difficulty maintaining traction on tile floors and began to fall; EE requested ER provide nonskid floor coverings in workplace. Never provided.
- 1.5 years later, service dog could no longer perform trained services, had to be retired, and EE left ER

McDonald v DEQ, 2009 MT 209

- HRB hearings examiner and HRC found for EE, rejected DEQ argument that accommodation was for service dog and not EE
- Cost was relatively minimal; “stereotypical institutional inertia” was violation of law
- Awarded EE \$30K for emotional distress and cost of replacement animal
- District Court overturned; accommodation for service animal not required
- EE appealed, MSC overturns

McDonald v DEQ, 2009 MT 209

- Accommodation not required only if indispensable; if job-related, and assists the EE, then reasonable
- ER not relieved of duty to accommodate when EE already able to perform essential functions of the job (*Buckingham v US*, 998 F.2d 735 (9th Cir. 1993) – must make modifications or adjustments that enable EE to enjoy “equal benefits, privileges, and opportunities of employment”
- Congress intended “the broadest feasible access” be provided to service animals and their users.”

Scenario #5

- EE, who has fibromyalgia, is part-time NICU nurse at major hospital for 11 years
- EE consistently violates ER policy allowing up to 5 unplanned absences in rolling 12-month period for full-time employees
- ER placed EE on work plans, then moved shifts to other days in the week, then provided non-consecutive shift days, then intermittent medical leaves, then month-long leaves of absence
- After numerous accommodations and write-ups, EE missed meeting with ER to discuss attendance issues and ER fired her for excessive absences and attendance problems

Samper v Providence St. Vincent Med Ctr, 675 F.3d 1233 (2012)

- EE is qualified individual if “with or without reasonable accommodation, EE can perform the essential functions of the ... position.”
- “The court first examines whether the individual satisfies the requisite skill, experience, education and other job-related requirements of the position. The court then considers whether the individual can perform the essential functions . . . with or without a reasonable accommodation.”

Samper, cont.

- ER has the burden in establishing whether compliance with attendance policy is an essential function of the job
- In jobs where performance requires attendance at the job, irregular attendance compromises essential job functions:
 - Team position
 - Face-to-face interaction required (teacher, customer service)
 - Work with equipment on site (dockworker, mechanic, mail handler)

Samper, cont.

- ER's evidence in support of attendance as essential function:
 - Written job description requiring strict adherence to attendance policy (EEOC policy)
 - Difficult to find replacements for highly specialized NICU nurses (EEOC policy – work experience of incumbents in similar jobs)
 - Understaffing compromises patient care (EEOC policy – consequence of function not being performed)
- Analysis of reasonableness is “fact-specific” and “individualized” based on individual's circumstances (*Wong v. UC Regents*, 192 F.3d 807 (9th Cir. 1999))
- Reasonable accommodations cannot exempt employee from performing an essential function

Resources

- Job Accommodation Network (JAN) <https://askjan.org/>
- ADA National Network <https://adata.org>
- EEOC Enforcement Guidance for Reasonable Accommodation/Undue Hardship under ADA
<https://www.eeoc.gov/policy/docs/accommodation.html>
- *Employer's Practical Guide to Reasonable Accommodation under the ADA*
<https://askjan.org/publications/employers/employers-guide.cfm>
- Rocky Mountain ADA Center www.rockymountainada.org
- Employee--Ask them questions, learn
- Employee's Medical Provider--Via the ADA Accommodation Form



October is National Disability Employment Awareness Month

- Review policies
- Apply for no cost Employment Practices Coverage via MMIA
- Provide training and education
- Incorporate disability inclusion into your onboarding process