Manuella Reed suffers from bipolar disorder. Upon reporting to work on light duty following a workers compensation leave, Ms. Reed met with a human resource representative and her supervisor behind closed doors to discuss her work restrictions. Ms. Reed was not interested in reviewing her work restrictions as required by company policy. Instead, she was rather insistent on discussing changing her work schedule. Ms. Reed was told they were not there to talk about her schedule. She “lost it,” and went into a “blind rage” that included shouting “fuck you” at the human resource representative. Ms. Reed was terminated following this incident for workplace misconduct. She then sued under the Americans with Disabilities Act. Although Ms. Reed admitted that her conduct was inappropriate, she claimed that the termination for her misconduct was discriminatory because her misconduct was allegedly caused by a disability.

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* This article was originally prepared for publication in the December 2000 issue of *For the Defense*, a monthly magazine published by the Defense Research Institute.

** The authors wish to thank Peter Bennett for his advice in preparing this article. Mr. Bennett and Mr. Finberg defended Lepage Bakeries in the Reed case highlighted herein.
This case, *Reed v. Lepage Bakeries, Inc.*, 102 F.Supp.2d 33 (D.Me. 2000), presents in a nutshell the dilemma presented to many companies who employ persons with disabilities. The disability may cause the employee to engage in misconduct, ranging from violence to unprofessional conduct to absenteeism, which normally would be cause for discipline, often including termination, were that misconduct engaged in by a person without a disability. The disabled employee, however, will often argue that because the misconduct was caused by the disability, adverse employment action taken because of the misconduct actually constitutes action taken against the employee “because of” the employee’s disability, thereby constituting a violation of the Americans with Disabilities Act. This article will explore what the decisions from various federal trial and appellate courts throughout the United States have to say about this issue, including whether an employer must tolerate misconduct caused by a disability.

**USE OF ILLEGAL DRUGS AND ALCOHOLIC BEVERAGES**

Alcoholics and drug users often engage in misconduct which is causally related to their conditions. The issue of taking adverse employment action against such an individual because of the conduct has been frequently litigated. The ADA directly addresses this issue, stating that an employer may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such an entity holds other employees, *even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.*
42 U.S.C. §12114(c)(4) (emphasis added). Thus, the ADA directly provides an employer with the right to take adverse employment action against an employee who uses illegal drugs or is an alcoholic for misconduct, for which it would take adverse action against an employee who is not an illegal drug user or alcoholic, even if the misconduct is directly caused by the employee’s disability.

**ALCOHOLISM**

Alcoholism is generally regarded as a disability under the ADA. *Williams v. Widnall*, 79 F.3d 1003, 1007 (10th Cir. 1996); *Evans v. Federal Express Corp.*, 133 F.3d 137, 139 (1st Cir. 1998). Thus, an employee who is an alcoholic will very likely be a qualified individual with a disability, and therefore entitled to the protections of the ADA. As indicated above, however, the employee’s disabled status will not protect her from the consequences of misconduct caused by the alcoholism.

There are several categories of misconduct that are implicated in cases relating to employees who are alcoholics. The first of these is misconduct that makes the employee not qualified to perform the job. For example, in *Brookins v. Indianapolis Power & Light Co.*, 90 F.Supp.2d 993 (S.D.Ind. 2000), the plaintiff suffered from alcoholism, anxiety, and depression. He had repeated difficulties meeting the attendance requirements of his job, specifically because of his alcoholism. Moreover, he failed to call in to advise the employer that he would not be at work. The court found that because of the employee’s absenteeism he was not a “qualified individual with a disability.” 90 F.Supp.2d at 1001. See also, *Leary v. Dalton*, 58 F.3d 748 (1st Cir. 1995) (under the Rehabilitation Act, civilian naval employee who had excessive unauthorized absences because he was in jail following his arrest for driving while intoxicated was not a qualified individual with a disability); *Peyton v. Otis Elevator Co.*, 72 F.Supp.2d 915,
919 (N.D.Ill. 1999) (discharge for employee’s absenteeism did not violate ADA as long as the reason for termination was conduct that any person would have been disciplined for).

Similarly, in Little v. Federal Bureau of Investigation, 1 F.3d 255 (4th Cir. 1993), a Rehabilitation Act case, the plaintiff was a special agent with the FBI; he was also an alcoholic. He had been charged with driving while intoxicated, sought help from his supervisors, and got counseling through the FBI’s Employee Assistance Program. Although he completed the counseling, he nonetheless subsequently became intoxicated while on duty. He was discharged for this misconduct. The court found that the discharge was not discriminatory in that Mr. Little was not a qualified individual with a disability. The FBI had standards that required special agents to remain mentally and physically fit for duty at all times. The court reasoned that the FBI could reasonably conclude that being intoxicated while on duty violated this standard, rendering Mr. Little not qualified for the position. 1 F.3d at 259.

A second category of misconduct is those alcoholics who are intoxicated while on the job. The case law is very clear that an adverse employment action (including termination) based on this sort of misconduct is not improperly discriminatory under the ADA. For example, in Flynn v. Raytheon Co., 868 F.Supp. 383 (D.Mass. 1994), the plaintiff was terminated after he arrived at the work site in an intoxicated state. Although he later successfully completed a rehabilitation program, his employer refused to reinstate him. Mr. Flynn, the former employee, brought suit under the ADA, alleging that the failure to reinstate him constituted a failure to reasonably accommodate him. The federal district court disagreed, holding that the employer’s action was justified under the ADA. It noted that the ADA states that an employer may require that employees not be under the influence of alcohol while at work. Thus, despite the fact that
Mr. Flynn’s misconduct may have been caused by his disability, Raytheon’s actions did not violate the ADA.

Similarly, in *Martin v. Barnesville Exempted Village School District Board of Education*, 209 F.3d 931 (6th Cir. 2000), the plaintiff was a school district employee who was rejected in his bid for a position as a school bus driver. The proffered reason for the refusal was that Mr. Martin, a custodian, had been drinking beer while on the job; immediately following that incident, he signed a “last chance agreement” by which he kept his job. When Mr. Martin applied for the bus driver position, he was rejected, the employer citing the earlier beer-drinking incident. He sued under the ADA, contending that he was denied the position because of his alleged record of alcoholism. The court upheld the employer’s decision because the beer-drinking incident constituted a legitimate non-discriminatory reason for the employment action. The court noted, “The ADA does not protect plaintiff from his own bad judgment in drinking on the job. The plaintiff cannot force defendant to hire him as a school bus driver when there is a serious risk that he may again drink on the job, have an accident and kill a group of school children. Any suggestion to the contrary is absurd.” 209 F.3d at 935.

A third category of misconduct related to alcoholism is behavior that occurs when the employee is off duty. The courts have almost universally held that an employee who engages in off-duty misconduct is subject to adverse employment action, even if that off-duty misconduct is related to his alcoholism. A prime example of this is the case of *Maddox v. University of Tennessee*, 62 F.3d 843 (5th Cir. 1996), in which the plaintiff was the football coach at the University of Tennessee. He was arrested for drunk driving, and for that reason was terminated by the University. Mr. Maddox brought suit, alleging that his termination was discriminatory and in violation of the ADA and the Rehabilitation Act. The district court granted the University
summary judgment, and the court of appeals affirmed, noting that there is a distinction between discharging an employee because of misconduct and discharging an employee because of a disability. 62 F.3d at 847. See also, Larson v. Koch Refining Co., 920 F.Supp. 1000, 1004 (D.Minn. 1996) (the employer’s termination of the employee for his arrest on drunk driving charges was proper; “alcoholics are not protected from the consequences of their conduct”).

Illegal Drug Use

An individual who “currently” uses illegal drugs is not considered a “qualified individual with a disability” under the ADA. 42 U.S.C. §12114(a). For purposes of the ADA, the term “illegal use of drugs” includes “the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act,” found at 21 U.S.C. §812. 42 U.S.C. §12111(6)(A). However, if the individual has completed a supervised drug rehabilitation program (or has otherwise been rehabilitated successfully) and is no longer using illegal drugs, or is participating in a supervised rehabilitation program, the person would be considered a “qualified individual with a disability.” 42 U.S.C. §12114(b)(1), (2).

Exactly what constitutes “current” illegal drug use will generally be determined on a case-by-case basis. For example, in Shafer v. Preston Memorial Hospital Corp., 107 F.3d 274 (4th Cir. 1997), the court held that the employee was a current illegal drug user where she had used drugs during the weeks prior to her discharge, although she did not use drugs on the day she was fired. In Baustian v. Louisiana, 910 F.Supp. 274 (E.D.La. 1996), the court held that seven weeks was not a sufficiently long enough time away from drugs to qualify someone as not a current illegal drug user. In Vedernidov v. West Virginia University, 55 F.Supp.2d 518, 523 (N.D.W.Va. 1999), the court noted that a one-year abstinence will not be considered current use of illegal drugs, but “the use of illegal drugs during weeks and months prior to a discharge is
considered current use.” The touchstone is whether “the drug use was sufficiently recent to justify the employer’s reasonable belief that the drug abuse remained an ongoing problem.” Zenor v. El Paso Healthcare System, Ltd., 176 F.3d 847, 856 (5th Cir. 1999). See also, Collings v. Longview Fibre Co., 63 F.3d 828, 833 (9th Cir. 1995).

Thus, the interpretation of the word “current” is crucial, simply because an employee who is a current illegal drug user is not a “qualified individual with a disability,” and is not entitled to any protection under the ADA. Moreover, misconduct related to drug use will also justify adverse employment action against an employee, and will not run afoul of the ADA.

In Collings v. Longview Fibre Co., supra, the employer discharged five employees who then sued, claiming that the employer terminated them for their drug addiction disability in violation of the ADA. The evidence, however, was that the employees admitted during investigatory interviews that they had violated company rules, during the weeks and months prior to their discharge, by buying, selling, or using marijuana at the workplace, or by returning to work under the influence of marijuana. Thus, notwithstanding their contention that the employees were drug-free at the time of the discharge, because they had not used drugs that day, the employees were properly terminated under the ADA for drug-related misconduct, rather than any drug addiction disability. 63 F.3d at 833.

CRIMINAL CONDUCT

Sometimes an employee’s disability will be causally related to misconduct which is criminal in nature. The courts are virtually unanimous in holding that even when an employee’s misconduct, in the form of criminal conduct, is related to the employee’s disability, adverse employment action based on this misconduct does not violate the ADA.
Often the criminal conduct will be related to alcoholism or drug use. See, e.g., *Larson v. Koch Refining Co.*, supra; *Maddox v. University of Tennessee*, supra. In *Wilber v. Brady*, 708 F.Supp. 837 (D.D.C. 1992), the court held that the discharge of a federal employee did not violate the Rehabilitation Act. He had been driving while intoxicated and became involved in an accident which resulted in the death of a two-year-old; he pled guilty to charges of vehicular homicide and driving under the influence of alcohol. The court held that the employee was terminated for criminal misconduct and not because he allegedly was an alcoholic. In *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995), an alcoholic employee who lost his driver’s license after a fourth conviction for drunk driving was then demoted to a job classification not requiring driving. He unsuccessfully sued his employer under the ADA and the Rehabilitation Act. “The criminal law . . . takes the not irrational position that alcoholics are capable of avoiding driving while drunk.” 63 F.3d at 636. In *Newland v. Dalton*, 81 F.3d 904 (9th Cir. 1996), an alcoholic employee attempted to fire an assault rifle at individuals in a tavern after his employment was terminated. He unsuccessfully sued for disability discrimination under the Rehabilitation Act. “The Rehabilitation Act does not immunize Newland from the consequences of his drunken rampage . . . Attempting to file a weapon at individuals is the kind of egregious and criminal conduct which employees are responsible for regardless of any disability.” 81 F.3d at 906.

While alcohol and drug abuse are common in criminal misconduct cases, criminal misconduct by an employee may also be related to other kinds of disabilities, such as mental illness. The courts are once again virtually unanimous in their treatment of disability claims in these circumstances, holding that the employee may be terminated regardless of any causal connection between the misconduct and disability.
In *Houck v. City of Prairie Village*, 978 F.Supp 1397 (D.Kan. 1997), the plaintiff was a mentally ill police officer who had been discharged for criminal misconduct. Mr. Houck suffered from a litany of mental illnesses: post-traumatic stress syndrome, borderline personality disorder, psychosis from mania, unipolar depression, bipolar depression, clinical depression, chronic depression, and chemical imbalance of the brain. Mr. Houck’s misstep was that he engaged in domestic violence and then a battery against a law enforcement officer who responded to the domestic violence call. Houck sued under the ADA, claiming that his firing, instead of granting him disability leave and making reasonable accommodations to maintain a position for him as a police officer, was discriminatory. He alleged that his firing was discriminatory because his misconduct was caused by his disability. The federal district court in Kansas rejected this claim, stating that “[a] person who commits a criminal act as a result of a disabling condition is not excused from the employment consequences of the criminal act because of the disability.” 978 F.Supp. at 1403.

In *Harris v. Polk County, Iowa*, 103 F.3d 696 (8th Cir. 1996), the plaintiff was a legal stenographer who was fired from her job in the county attorney’s office after she pled guilty to a shoplifting charge. Four years later, she reapplied for her old job, informing the county that the mental health problems which had caused her to shoplift were now resolved. The county refused to consider her application because she had a criminal record, a decision that was based on a policy against employing persons with criminal records. Ms. Harris sued under the ADA, contending the county could not use her criminal record to reject her application because her shoplifting was caused by a mental illness. The court disagreed, stating that “an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees.” 103 F.3d at 697.
An interesting case out of the federal court in Nevada is *Schutts v. Bently Nevada Corp.*, 966 F.Supp. 1549 (D.Nev. 1997). The court awarded attorneys’ fees and sanctions to the defendant employer which prevailed on an ADA claim by a former employee who was discharged for criminal misconduct. Mr. Schutts, in the course of interceding on behalf of a friend in connection with the purchase of an automobile, struck an individual on the side of the head with an automatic pistol, knocking the individual to the ground. While the individual lay on the ground, Schutts pressed the gun barrel against the individual’s temple, stating, “I am going to blow your f---ing brains out if you don’t give me back the car.” 966 F.Supp. at 1553. Mr. Schutts was charged with numerous crimes and ultimately pled guilty to two of them. His employment was then terminated.

Schutts sued under the ADA, claiming his assault was a product of his depression and the termination of his employment was “because of” his disability, and therefore a violation of the ADA. The court granted the employer summary judgment, noting

[i]t is simply not debatable that employers may discharge employees who commit acts of misconduct . . . An employee who commits an act of misconduct may be fired, whether he or she is disabled within the meaning of the ADA, or an astronaut or Olympic athlete. Federal and state statutes which bar discrimination do not insulate disabled employees from discharge for acts for which a non-disabled employee could certainly be fired. Aggravated battery with a deadly weapon constitutes egregious misconduct for which employees are responsible regardless of any alleged disability.
Id. at 1555. In Schutts as in the other decisions described here, the law clearly permits an employer to terminate an employee for criminal misconduct, regardless of whether the misconduct was caused by a disability.

**EGREGIOUS MISCONDUCT IN THE WORKPLACE**

The courts are not unanimous, however, in how employers may respond to other types of employee misconduct caused by a disability. Some courts may require an employer response less severe than discharge for so-called non-egregious employee misconduct caused by a disability. However, there is an overwhelming consensus among courts that an employer need not tolerate *egregious* misconduct in the workplace, regardless of whether the misconduct is triggered by a mental illness or other disability. Importantly, egregious misconduct may go beyond misconduct connected to alcohol, drugs, and illegal conduct as already discussed.

In *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047 (5th Cir 1998), the Fifth Circuit upheld the termination of Hamilton; he was discharged for directing profanity at another employee. The plaintiff allegedly suffered from post-traumatic stress syndrome after rescuing a drowning woman. Shortly after the rescue, Mr. Hamilton acted in an explosive manner in the workplace, by angrily confronting a female manager in front of witnesses. On another occasion, he directed profanity at a female manager, momentarily left the area, and then returned and continued a barrage of profanities toward the woman.

Although the Fifth Circuit concluded that Mr. Hamilton did not suffer from a disability as defined under the ADA, it went on to hold that even if Hamilton was disabled under the ADA’s definitions, “the ADA does not insulate emotional or violent outbursts blamed on an impairment.” 136 F.3d at 1052. Even if the alleged disability caused the emotional and violent outburst, the outburst was nonetheless a violation of company policy and the employer had the
right to discharge Hamilton for “his egregious and violent behavior.” 136 F.3d at 1052. The court further reasoned that the rights provided to employees under the ADA “are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors.” 136 F.3d at 1052.

The rationale adopted by the Fifth Circuit is consistent with decisions issued by several other courts both prior to and subsequent to Hamilton. In Guin v. Wal-Mart Stores, Inc., 1997 Westlaw 391599, 1997 U.S.Dist.LEXIS 22112, 6 AD Cases (BNA) 1584 (N.D.Fla.), a greeter employed by Wal-Mart was discharged after using profanity in front of customers, in violation of the store’s policy. Subsequent to the misconduct, the greeter conceded that his outburst was inappropriate, but also suggested that the outburst may have been caused by medication he was taking for his epilepsy. The district court was unsympathetic and concluded that the “ADA does not shield an employee from the consequences of his or her misconduct.” 1997 WL 391599, at *3.

A majority of circuits have reached similar holdings when addressing egregious misconduct in the workplace. In Bussey v. West, 86 F.3d 1149 (4th Cir. 1996), the Fourth Circuit affirmed the employer’s right to discharge an employee even if the employee’s multiple sclerosis caused the irritability that ultimately contributed to her discharge. Similarly, the Seventh Circuit has ruled that the ADA could not shield a police officer from discharge because of misconduct attributed to a diabetic reaction. The officer had a reaction while on duty and “erratically drove his squad car at a high speed through residential areas some forty miles outside his jurisdiction.” Siefkin v. Village of Arlington Heights, 65 F.3d 664, 665 (7th Cir. 1995). The officer’s diabetic reaction included a loss of memory and the police officer had no memory of the incident. In a strongly worded decision, the Seventh Circuit opined that “[t]he ADA does not, however, erect
an impenetrable barrier around the disabled employee, preventing the employer from taking any employment actions vis-à-vis the employee.” 65 F.3d at 666.

The Sixth Circuit has joined the majority of circuits in affirming an employer’s right to discharge an employee for disability-related egregious misconduct. In Brohm v. JH Properties, Inc., 947 F.Supp 299 (W.D.Ky. 1996), aff’d, 149 F.3d 517 (6th Cir. 1998), the employee, an anesthesiologist, slept during several surgical procedures in which he was administering anesthesia. Doctor Brohm later attributed his behavior to sleep apnea. The Sixth Circuit upheld the lower court’s ruling that the doctor’s sleep apnea, even if a disability under the ADA, does not prevent the hospital from terminating his employment for egregious misconduct.

Numerous decisions with similar holdings on the issue of egregious misconduct can be found in the federal circuit and district courts (many of which are mentioned in this article). Although some of these cases involve alcohol, drugs, or criminal conduct, the rationale used, at least in part in those cases, can be extended to other types of egregious misconduct.

In Martinson v. Kinney Shoe Corp., 104 F.3d 683, 686 (4th Cir. 1997), the Fourth Circuit noted that “misconduct—even misconduct related to a disability—is not itself a disability, and an employer is free to fire an employee on that basis.” Mr. Martinson was the sole employee at a shoe store and was responsible for maintaining security in addition to other responsibilities. He suffered from seizures that rendered him unable to perform his security functions during the actual seizures. The Fourth Circuit upheld the discharge. See also, Tyndall v. National Education Centers, 31 F.3d 209, 214-15 (4th Cir. 1994) (discharge not discriminatory even when discharged because of disability-related absences). The Ninth Circuit has likewise noted that termination based on misconduct, notwithstanding the fact that the misconduct was triggered by a disability, is appropriate. Newland v. Dalton, 81 F.3d 904 (9th Cir. 1996).
In a recent decision, *Spath v. Hayes Wheels International*, 211 F.3d 392 (7th Cir. 2000), the Seventh Circuit rejected an employee’s claim that the employer failed to accommodate his disability. Mr. Spath argued, in part, that his organic brain syndrome, mild mental retardation, and dependent personality disorder caused him to repeatedly deny participating in horseplay at work. He claimed that his disabilities impaired his memory so that he could not always recall what he was doing or what he might have stated previously. The court held that the ADA does not prohibit an employer from terminating an employee for lying even if the lying was somehow connected to his disability. See also, *Jones v. American Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999) (“The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee’s misconduct, even if the misconduct is related to a disability.”).

Notably, while some courts concede that the obligation to provide a reasonable accommodation may technically apply to disabled employees who commit egregious misconduct, these courts also conclude that as a matter of law there is no accommodation that is reasonable under such circumstances. No employer should have to work under the stress and uncertainty of whether an accommodation will be sufficient to prevent the disabled employee from having a subsequent potentially violent outburst without notice. *Palmer v. Circuit Court of Cook County*, 905 F.Supp. 499, 508, 509 (N.D.Ill. 1995), aff’d, 117 F.3d 351 (7th Cir. 1997).

**LESS EGREGIOUS MISCONDUCT**

Some courts have suggested that less serious misconduct may require an employer to provide an employee with reasonable accommodations and additional opportunities to improve certain unacceptable conduct in the workplace. In *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1086 (10th Cir. 1997), the court held that “[a]s a general rule, an employer may not hold a
disabled employee to precisely the same standards of conduct as a non-disabled employee unless such standards are job-related and consistent with business necessity.” The court justified its ruling by reasoning that the ADA generally requires an employer to provide a reasonable accommodation to permit an employee to perform the essential functions of a job. The only exception to this obligation under the ADA is with regard to employees who are illegal drug users and alcoholics. 42 U.S.C. §12114(c)(4). According to the Tenth Circuit, “the disability v. disability-caused conduct dichotomy seems to be unique to alcoholism and drugs.” 129 F.3d at 1086.

The Den Hartog court also reviewed the affirmative defenses that enable employers to avoid providing reasonable accommodations in certain situations. These affirmative defenses include undue hardship and the direct threat or safety defense. 42 U.S.C. §§12112(b)(5)(A), 12113(b). Given the availability of the affirmative defenses, the court concluded that there must be “certain levels of disability-caused misconduct that have to be tolerated or accommodated.” 129 F.3d at 1087.

The Den Hartog court then ruled that an employer should provide a reasonable accommodation to an employee to address that employee’s disability-caused misconduct if a reasonable accommodation exists. Even if a reasonable accommodation does not exist, the court went so far as to suggest that there may still be occasions in which the employer may still only discipline the employee for the disability-caused misconduct if one of the affirmative defenses (undue hardship or direct threat) applies. This requirement presents obvious challenges to employers. Cries of favoritism from employees who must follow the employer’s code of conduct to the letter could create morale problems in the workplace and create workplace tension
that employers would obviously prefer to avoid. Tolerating certain levels of misbehavior may also negatively impact productivity, thereby adding a concrete financial cost to the problem.

Following the reasoning articulated by the Tenth Circuit in *Den Hartog*, an employer may need to extend to an employee who has committed less serious misconduct in the workplace the ADA’s general requirement that an employer “make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee,” unless the employer can “demonstrate that the accommodation would impose an undue hardship on the operation of the business.” 42 U.S.C. §12112(b)(5)(A). An employee is only “otherwise qualified” to perform the job if he or she has the requisite background, experience, skills, and licenses to perform the essential functions in question. 42 U.S.C. §12111(8). Additionally, the employee must be able to perform these essential functions with or without a reasonable accommodation. If no reasonable accommodation exists that would enable the employee or applicant to perform the essential functions of the job, then the applicant or employee is not otherwise qualified and cannot maintain an action under the ADA. “Technical skills and experience are not the only essential requirements of a job.” *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 674 (1st Cir. 1995). The ability to get along with supervisors and co-workers and the ability to follow the orders of superiors is an essential function of any position. 70 F.3d at 674-675.

While an employee or applicant need not specifically use the words “I need an accommodation,” “the employer must know of both the disability and the employee’s desire for accommodations for that disability.” *Taylor v. Phoenixville School District*, 184 F.3d 296, 313 (3d Cir. 1999). Some courts hold that both parties then have an obligation to assist in the identification of reasonable accommodations and engage in a good faith interactive process with
one another. *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996). See also, *Criado v. IBM Corp.*, 145 F.3d 437, 444 (1st Cir. 1998). However, some courts have held that “where a plaintiff cannot demonstrate ‘reasonable accommodation,’ the employer’s lack of investigation into reasonable accommodation is unimportant.” *Willis v. Conopco, Inc.* 108 F.3d 282, 285. See also, *Soto-Ocosin v. Federal Express Corp.*, 150 F.3d 14 (1st Cir. 1998).

Reasonable accommodation can include “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.” 42 U.S.C. §12111(9)(B). Most circuits hold that the plaintiff bears the burden of proof in establishing the existence of a reasonable accommodation that would permit the plaintiff to perform the essential functions of the job. *Reed v. Lepage Bakeries, Inc.*, 102 F.Supp.2d 33, 37 (D.Me. 2000).

Where the ADA claim is based on an employer’s alleged refusal to make a reasonable accommodation, the plaintiff bears the burden of producing evidence that “a specific, reasonable accommodation was available to the defendant at the time plaintiff’s limitations became known.” *Willis v. Pacific Maritime Association*, 162 F.3d 561, 565 (9th Cir. 1998); see also, *Barnett v. US Air*, 228 F.3d 1105, 1113 n.4 (9th Cir. 2000); *McPhaul v. Board of Commissioners of Madison County*, 226 F.3d 558 (7th Cir. 2000); *Hoskins v. Oakland Sheriff’s Department*, 227 F.3d 719 (6th Cir. 2000); *Fjellestad v. Pizza Hut*, 188 F.3d 944 (8th Cir. 1999).

does the Act require ‘the perfect elimination of all disadvantages that may flow from the disability; it does not require a lowering of standards, nor that the employer make fundamental or substantial modifications in order to eliminate the disadvantages flowing from the disability.’” Husowitz, supra, at 835, quoting Fink v. New York City Department of Personnel, 53 F.3d 565, 567 (2d Cir. 1995).

In Reed v. Lepage Bakeries, supra, the federal district court in Maine dismissed Reed’s ADA claim. She claimed that she was entitled to an accommodation that permitted her to walk away from supervisors and disregard their work directives whenever the supervisors upset her. She asserted that such an accommodation would assist her in dealing with her explosive behavior in the workplace that was allegedly caused by her bipolar disorder. The Maine court found that Reed had failed “to put forward evidence demonstrating that it is reasonable or plausible to permit her to walk away from her supervisors.” Reed, 102 F.Supp.2d at 38. (The Reed case is on appeal in the First Circuit).

As noted earlier in this paper, several courts have held that a failure to follow the orders of a supervisor constitutes a failure to perform the essential functions of a job.

A number of courts have reached similar holdings. See Gaul v. Lucent Technologies, Inc., 134 F.3d 576 (3d Cir. 1998) (allowing a transfer whenever an employee decided he was stressed was unreasonable as a matter of law); Mazzarella v. United States Postal Service, 849 F.Supp. 89, 95 (D.Mass. 1994) (it was not reasonable for employer to juggle personnel to entirely remove the possibility that a supervisor might offend a particular employee); Mancini v. General Electric Co., 820 F.Supp. 141, 148 (D.Vt. 1993) (granting summary judgment against an employee who claimed he was entitled to a transfer because his current supervisor was the alleged source of the emotional problem which led
to employee’s misconduct). “Employers are entitled to assign personnel as their needs dictate and are not required to make transfers in order to avoid further insubordination problems on the part of the employees.” Lewis v. Zilog, Inc., 908 F.Supp. 931, 948 (N.D.Ga. 1995).

UNDUE HARDSHIP

Even if an employee has a disability as defined by the ADA, an employee is only entitled to an accommodation if a reasonable accommodation exists that is not an undue hardship or that does not create a direct threat to safety. 42 U.S.C. §§12112(b)(5)(A), 12113(b). Direct threat “means a significant risk to the health or safety of others that cannot be eliminated by a reasonable accommodation.” 42 U.S.C. §12111(3). Undue hardship is an amorphous term which easily lends itself to different interpretations. Except for the extreme ends of the analysis, the outcome is left to the subjective views of a court or jury. The regulations promulgated by the EEOC (at 29 C.F.R. §1630.2(p)) provide the following factors to be considered:

1. The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

2. The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

3. The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
(4) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(5) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

Some courts treat the plaintiff’s burden to establish the reasonableness of an accommodation as the same as defendant’s burden to establish undue hardship. This confused approach was described by the court in the Reed v. Lepage Bakeries decision. However, a majority of circuits appear to require the plaintiff to first demonstrate the existence of a reasonable accommodation, and if the plaintiff meets his or her burden, the defendant may as an affirmative defense attempt to establish that the accommodation would place an undue hardship on the employer. Reed, supra, 102 F.Supp.2d at 37.

The lack of any concrete formula for establishing the existence of an undue hardship presents a high degree of uncertainty. While courts utilize the parameters set out in the regulations, many courts take a “you know it when you see it” type of approach. In Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998), the court found that a plaintiff had demonstrated that an indefinite, temporary leave was reasonable because her physician had testified that the temporary leave would provide him sufficient time to design an effective treatment program for Criado’s depression that would allow her to return to work at IBM at some point in the near future. The uncertainty of the length of leave did not appear to overly concern the court. The court also found that IBM could not establish that a temporary leave (even one that is somewhat
indefinite in terms of the length of time) would place an undue hardship on the company, as IBM provided all employees with up to 52 weeks of paid disability leave.

CONCLUSION

Although the disability-caused misconduct issue has not yet been fully settled, most courts support an employer’s effort to maintain an appropriate work environment. They affirm the right of all employers to discipline employees for misconduct, even if triggered by a disability, if the misconduct is related to current alcohol or illegal drug use, criminal activity, and other egregious misconduct (such as explosive behavior). Employers should take notice though that some courts require employers to react less severely to non-egregious disability-caused misconduct and require employers to explore whether a reasonable accommodation exists that would enable the employee to perform the essential functions of the job.
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