

DISABILITY DISCRIMINATION IN EMPLOYMENT

1. What Laws Protect Against Discrimination?

- a. Federal laws include:
 - i. ADA (Americans with Disabilities Act), 42 U.S.C. § 12101 *et seq.*; enforcing regulations at 29 C.F.R. Part 1630.
 - ii. Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791, procedural regulations at 29 C.F.R. Part 1614.
 - iii. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; coordinating regulations at 45 C.F.R. Part 84 and 28 C.F.R. Part 41.
 - iv. Congressional Accountability Act of 1995—extends the employment protections of the ADA and § 501 to employees of the House, Senate, and certain specified arms of Congress. 2 U.S.C. § 1311. For additional information on this law, see <http://www.compliance.gov>.
- b. State law—protections vary, but some are better than federal laws, at least on certain issues.

2. What Employers Are Covered?

- a. ADA:
 - i. Under Title I, all private employers with 15 or more employees. 42 U.S.C. § 12111(5)(A).
 - ii. Under Title II (assuming it covers employment claims), state and local government employers of any size. 42 U.S.C. § 12131(1).
 - iii. Does *not* cover the federal government. 42 U.S.C. § 12111(5)(B). [Note, however, that ADA protections have been extended to employees of the House, Senate, and certain specified arms of Congress by the Congressional Accountability Act.]
 - iv. Does *not* cover private membership clubs. 42 U.S.C. § 12111(5)(B).
- b. Sec. 501
 - i. Applies to most federal agencies.

- ii. Applies to civilian employees of the military, but not uniformed military personnel. *Leistiko v. Secretary of Army*, 922 F. Supp. 66, 75 (N.D. Ohio 1996), and cases cited.
- c. Sec. 504
 - i. Applies to an agency or entity (whether public or private) that receives Federal financial assistance. 29 U.S.C. § 794(a).
 - ii. There is no minimum size requirement. *See, e.g., Schrader v. Ray*, 296 F.3d 698, 971–975 (10th Cir. 2002); 28 C.F.R. Part 35 App. A, § 35.140.
 - iii. Does not apply to procurement contractors, *e.g., Mass v. Martin Marietta*, 805 F. Supp. 1530, 1542 (D. Colo. 1992), but they are subject to the administrative remedies in § 503 of the Rehabilitation Act. *See* <http://www.dol.gov/compliance/laws/comp-rehab.htm>.
- d. Congressional Accountability Act of 1995—applies to the House, Senate, and those arms of Congress listed in 2 U.S.C. § 1301(3).
- e. Unclear if any of the above laws allow suits against individual supervisors.
 - i. Most cases say no. *See, e.g.,* 131 A.L.R. Fed. 221.
 - ii. There may be a stronger case for individual liability in claims for retaliation, and under state law for “aiding and abetting.”

3. Who Is Protected?

- a. Qualified individuals with an actual disability as defined by 42 U.S.C. § 12102(2)(A) (ADA) or 29 U.S.C. § 705(20)(B)(i) (Rehabilitation Act).
- b. Qualified individuals with a record of a disability as defined by 42 U.S.C. § 12102(2)(B) (ADA) or 29 U.S.C. § 705(20)(B)(ii) (Rehabilitation Act).
- c. Qualified individuals who are regarded as having a disability as defined by 42 U.S.C. § 12102(2)(C) (ADA) or 29 U.S.C. § 705(20)(B)(iii) (Rehabilitation Act).
- d. In some cases, the law protects persons *without* disabilities. *See* EEOC Compliance Manual, § 2-II(A)(4)(b), <http://www.eeoc.gov/policy/docs/threshold.html> (July 21, 2005), including:
 - i. Individuals associated with someone with a disability;

- ii. Individuals who are retaliated against for opposing unlawful discrimination, or for assisting someone in pursuing a discrimination claim (e.g., testifying in support of a discrimination charge);
- iii. Employees and applicants who are subject to medical inquiries and exams.

4. Disability

a. Definition

- i. There are no “listed” disabilities, and probably no *per se* ones.
- ii. The term “disability” means, with respect to an individual: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.
- iii. Citations:
 - (1) ADA—42 U.S.C. § 12102(2) and 29 C.F.R. 1630.2(g).
 - (2) §§ 501 and 504—29 U.S.C. § 705(20)(B); § 504 coordinating regulations at 28 C.F.R. § 41.31 and 45 C.F.R. § 84.3(j).
- iv. For more information, see the separate paper on *Proving Disability*.

b. Elements:

- i. Impairment—per 29 C.F.R. § 1630.2(h), a physical or mental impairment means:
 - (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; OR
 - (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
- ii. Substantially limits
 - (1) According to the definition at 29 C.F.R. § 1630.2(j)(1), “substantially limits” means:

- (a) Unable to perform a major life activity that the average person in the general population can perform; or
 - (b) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
- (2) Under federal law, must be assessed in light of mitigating measures. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (eyeglasses); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (medication); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (body's internal compensating mechanisms).

iii. Major life activity

- (1) Defined by 29 C.F.R. § 1630.2(i) as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”
- (2) There are other major life activities.
- (3) Working is a major life activity, but:
 - (a) Working is normally looked at only if no other activity is substantially limited, because
 - (b) For working, the impairment must significantly restrict a class or broad range of jobs, not just one job.
- (4) Successful diabetes cases often focus on the major life activities of eating and caring for oneself, and to a lesser extent, working, but other activities may also be implicated. See Shereen Arent & Brian Dimmick, *Background Materials on Diabetes and Functional Limitations For Lawyers Handling Diabetes Discrimination Cases* (April 2007), <http://web.diabetes.org/advocacy/legalmaterials/ad-background-materials-for-lawyers-0707.pdf>.

5. Qualified—means two things:

- a. The employee satisfies the skill, experience, education, and other job-related requirements for the job. 29 C.F.R. § 1630.2(m)
- b. The employee can perform the essential functions of the job with or without a reasonable accommodation. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m)

- i. Essential functions are defined and interpreted at 29 C.F.R. § 1630.2(n).
- ii. Generally, essential functions are the fundamental job duties that employees must be able to perform, either on their own or with the help of a reasonable accommodation.
- iii. An employer cannot refuse to employ people whose disabilities prevent performing nonessential duties.
- iv. As to whether “performing the job safely” is an essential job function (thus shifting the burden of proving safety to the plaintiff), see § 9(d)(ii)(4) below.
- v. Reasonable accommodations are discussed below at § 7.

6. What Kinds of Discrimination Are Prohibited?

- a. Disparate treatment
 - i. Examples: termination, constructive discharge (i.e., forcing someone to quit), failure to hire, failure to promote, unequal pay, demotions.
 - ii. Elements of a claim:
 - (1) Plaintiff had a disability
 - (2) Plaintiff was qualified
 - (3) Plaintiff was subjected to adverse action (or action that violates the statute)
 - (4) The action complained of was because of the disability, and
 - (5) Plaintiff suffered (or will suffer) harm.
- b. Harassment—to prove a claim of disability-based harassment, the plaintiff must prove that:
 - i. Plaintiff had a disability;
 - ii. Plaintiff was subjected to unwelcome harassment;
 - iii. The harassment was based on the disability;
 - iv. The harassment either:

- (1) Was done by a supervisor and resulted in a tangible employment action (like demotion or firing), or
 - (2) The harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment, and the employer knew or should have known of the harassment and failed to take prompt, remedial action.
- v. Some case law: *Lanman v. Johnson County, Kansas*, 393 F.3d 1151, 1155 (10th Cir. 2004); *Shaver v. Independent Stave Co.*, 350 F.3d 716, 719–720 (8th Cir. 2003); *Fox v. General Motors Corp.*, 247 F.3d 169, 176 (4th Cir. 2001); *Flowers v. Southern Regional Physician Services Inc.*, 247 F.3d 229, 232–235 (5th Cir. 2001).
- c. Disparate impact—refers to the “disparate” or unequal *impact* of facially neutral policies, e.g., physical requirements for the job which are not necessary to the job. *See, e.g.*, 42 U.S.C. §§ 12112(b)(3) and (b)(6). Note that there may be a defense if the employer can show that its policy or criterium is job-related and consistent with business necessity. 29 C.F.R. §1630.15(b)(1), and (c).
- d. Failure to provide a reasonable accommodation. 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9. See § 7 below.

7. Failure-to-Accommodate Claims

- a. The law affirmatively requires the employer to make reasonable accommodation to enable the employee to do the essential functions of the job. 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9. For more information on the accommodation obligation, see *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*, <http://www.eeoc.gov/policy/docs/accommodation.html> (Oct. 17, 2002).
- b. Definitions
- i. Per 29 C.F.R. § 1630.2(o)(1), reasonable accommodation means a modification or adjustment:
- (1) To the job application process so a qualified applicant with a disability can be considered for a desired job; or
 - (2) To the work environment, or to the manner or circumstances under which a job is customarily performed, so a qualified individual with a disability can perform the essential job functions; or

- (3) That enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.
 - ii. The Supreme Court says that “reasonable” means that an accommodation seems reasonable on its face, i.e., ordinarily or in the run of cases. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–402 (2002).
- c. Examples—according to 42 U.S.C. § 12111(9) and 29 C.F.R. § 1630.2(o)(2), reasonable accommodations may include:
 - i. Making existing facilities used by employees readily accessible to and usable by persons with disabilities; and
 - ii. Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications 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 for individuals with disabilities.
- d. Choosing among accommodations—the employer gets to choose which accommodation to provide, but it must be effective. 29 C.F.R. Part 1630 App. § 1630.9.
- e. Elements of a failure-to-accommodate claim. *See, e.g., Stone v. City of Mt. Vernon*, 118 F.3d 92, 96–97 (2d Cir.1997).
 - i. Plaintiff had a disability
 - ii. Plaintiff was qualified
 - iii. Plaintiff needed an accommodation
 - iv. A reasonable accommodation existed that would have worked (or likely would have worked)
 - v. Plaintiff disclosed the disability (or limitations)—the disability must be known to the employer, although it does not have to be the employee who discloses it.
 - vi. Plaintiff requested an accommodation (or was excused from doing so)
 - (1) Usually the plaintiff must request an accommodation
 - (2) But no “magic words” required

- (3) Request can be oral
- (4) Request can be made by a third party
- (5) Some possible excuses for failing to request an accommodation:
 - (a) The request would be futile;
 - (b) The employer does not give the employee a chance to make a request;
 - (c) The job duties requiring accommodation were adopted to target an employee's disability;
 - (d) The employer was already providing some accommodation;
 - (e) The employee's disability interferes with the ability to make such a request;
 - (f) The employee's disability and the need to accommodate are sufficiently obvious.
- vii. Employer did not accommodate Plaintiff.
- f. Recommendations for an accommodation request (although not all are required):
 - i. Put request in writing (and keep a copy).
 - ii. Disclose the disability.
 - iii. Request a "reasonable accommodation" (using those words) and give examples of accommodations desired, if possible. For example, if the client seeks a reassignment, say so and point out the open job desired.
 - iv. Offer to discuss the issues further. Both parties must engage in a flexible, interactive process. 29 C.F.R. § 1630.2(o)(3). This means that the plaintiff must be prepared to provide reasonable information and documentation upon request.
 - v. If the parties are having trouble, consider contacting the following for assistance (or suggesting the employer do so):
 - (1) Job Accommodation Network (JAN) at 1-800-526-7234, <http://www.jan.wvu.edu/>.

- (2) The regional ADA Technical Assistance center (sometimes called DBTACs), listed at <http://www.dbtac.vcu.edu/>.

g. Defenses to failure-to-accommodate claims:

- i. Plaintiff failed to participate in a flexible, interactive process designed to identify a reasonable accommodation. See 29 C.F.R. § 1630.2(o)(3).

- ii. Accommodation would have been an “undue hardship.” 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.15(d).

- (1) Definition of undue hardship—a significant difficulty or expense, when considered in light of the factors set forth below. 42 U.S.C. § 12111(10)(A); 29 C.F.R. § 1630.2(p)(1).

- (2) Factors to be considered per 42 U.S.C. § 12111(10)(B) and 29 C.F.R. § 1630.2(p)(2):

- (a) 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;

- (b) The overall financial resources of the facility or facilities involved, the number of persons employed at such facility, and the effect on expenses and resources;

- (c) The overall financial resources of the employer, the overall size of the business (number of employees, and the number, type and location of its facilities);

- (d) The type of operation or operations (composition, structure and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer); and

- (e) 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.

- iii. Good faith accommodation defense. 42 U.S.C. § 1981a(a)(3).

- (1) This is only a partial defense, preventing an award of compensatory and punitive damages if the employer demonstrates that it made good faith efforts to identify and make a reasonable accommodation.

- (2) The burden of proving this defense is on the employer, and it often presents a fact issue.
- (3) The employer's good faith efforts must include consultation with the person who has the disability.

8. Limitations on Medical Inquiries—these limitations are expressly set out in the ADA at 42 U.S.C. § 12112(d), and in the ADA employment regulations at 29 C.F.R. §§ 1630.13 and 1630.14. Note, however, that the same limitations should apply under § 504. *See* 29 U.S.C. § 794(d) (adopting the ADA liability standards). *See also* 45 C.F.R. § 84.14; 28 C.F.R. § 41.55.

a. A medical inquiry or exam is one that seeks information about the existence of a disability, or the nature or severity of a disability. 42 U.S.C. §§ 12112(d)(2)(A) and (d)(4)(A); 29 C.F.R. § 1630.13. They include questions likely to elicit information about a disability. *ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations*, text at n. 9 (EEOC Oct. 10, 1995), <http://www.eeoc.gov/policy/docs/preemp.html>.

b. Limitations:

i. *Pre-offer*—employer may not ask disability-related questions and require medical examinations of an applicant before giving the applicant a conditional job offer. 42 U.S.C. § 12112(d)(2); 29 C.F.R. §§ 1630.13(a) and 1630.14(a). *See also ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, supra*, text at n. 9.

(1) Example of questions that are *prohibited before a conditional offer*:

- (a) How many days an applicant was sick in a prior job
- (b) Whether applicants can perform major life activities, such as standing, lifting, walking, etc.
- (c) About workers' compensation history
- (d) About lawful drug use, except when an applicant tests positive for illegal drug use
- (e) Whether they will need reasonable accommodation to perform the functions of the job, unless
 - (i) the employer reasonably believes the applicant will need reasonable accommodation because of an obvious disability; or

- (ii) the employer reasonably believes the applicant will need reasonable accommodation because of a disability that the applicant has voluntarily disclosed; or
 - (iii) an applicant has voluntarily disclosed to the employer the need for a reasonable accommodation to perform the job.
- (2) Examples of questions that are OK before a conditional offer:
 - (a) An applicant's ability to perform job functions
 - (b) An applicant's non-medical qualifications and skills, such as the applicant's education, work history, and required certifications and licenses
 - (c) Employers may ask applicants to describe or demonstrate how they would perform job tasks, if:
 - (i) all applicants in the job category are asked to do this, or
 - (ii) the employer could reasonably believe that an applicant will not be able to perform a job function because of a known disability
 - (d) Whether they will need reasonable accommodation for the hiring process, and if so, for documentation of his/her disability
 - (e) Whether an applicant can meet the employer's attendance requirements, or questions about an applicant's prior attendance record
 - (f) About arrest or conviction records
 - (g) About current illegal drug use
 - (h) Whether the applicant drinks alcohol, or has been arrested for driving under the influence.
 - (i) Voluntary questions for certain affirmative action programs.
- ii. *Post-Offer*—see 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b). *See also ADA Enforcement Guidance: Preemployment Disability-Related Questions*

and Medical Examinations, supra, text at n.19. Once a conditional job offer is made, the employer may ask disability-related questions and require medical examinations as long as:

- (1) This is done for all entering employees in that job category, and
- (2) If the question or examination screens out an individual because of a disability, the employer demonstrates that the reason for the rejection is “job-related and consistent with business necessity”

iii. *Inquiries of current employees*

- (1) Employer may only require a medical examination and/or inquiry of a current employee if the inquiry or examination is job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4); 29 C.F.R. §§ 1630.13(b) and 1630.14(c). *See also Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> (EEOC July 27, 2000).
 - (2) Exception: an employer may ask questions related to a voluntary health program. 42 U.S.C. § 12112(d)(4)(B); 29 C.F.R. § 1630.14(d).
- c. Privacy concerns—the ADA provides specific direction for maintaining the privacy of an employee’s medical records. 42 U.S.C. § 12112(d)(3)(B) and (C), and 42 U.S.C. § 12112(d)(4)(C); 29 C.F.R. §§ 1630.13(b). The ADA generally allows disclosure on a “need to know” basis, with narrow exceptions. See the section on “Confidentiality” in the *ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, supra*.

9. Some Common Arguments Urged by Employers in Diabetes Cases

- a. Plaintiff does not have a disability.
- b. Plaintiff is not qualified because he/she could not do the essential job functions safely.
- c. Waiving the bar to those using insulin would be an unreasonable accommodation, or would be an undue hardship.
- d. One of the “safety defenses.” For one court’s view of the differences between the safety defenses, see *EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000).
 - i. Business necessity. 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b)(1) and (c).

- ii. Direct threat. 42 U.S.C. § 12113(b); 29 C.F.R. §§ 1630.2(r) and 1630.15(b)(2).
 - (1) Requires proof that an employee poses a significant risk of substantial harm to self or others.
 - (2) Requires proof that the risk cannot be reduced below the direct threat level through reasonable accommodation.
 - (3) Must be based on an individualized assessment supported by “reasonable medical judgment relying on the most current medical knowledge and/or on the best available objective evidence.”
 - (4) The burden of proof is generally on the employer, *Branham v. Snow*, 392 F.3d 896, 906 (7th Cir.2004), unless the essential job duties necessarily implicate the safety of others. *Jarvis v. Potter*, ___ F.3d ___, 2007 WL 2452686, at *7 (10th Cir. Aug. 30, 2007) (exception inappropriate for custodial job).

10. Remedies

- a. In general:
 - i. Title I of the ADA (the subchapter on employment discrimination) adopts Title VII remedies. See 42 U.S.C. § 12117(a) (“The . . . remedies . . . set forth in section[] . . . 2000e-5 . . . of this title shall be the . . . remedies . . . this subchapter provides”).
 - ii. Sec. 501 also adopts Title VII remedies. 29 U.S.C. § 794a(a)(1).
 - iii. Sec. 504 adopts the remedial scheme of Title VI of the Civil Rights Act (at 42 U.S.C. § 2000d). 29 U.S.C. § 794a(a)(2).
 - iv. Title II of the ADA (the subchapter dealing with state and local governments) also adopts the remedial scheme of Title VI of the Civil Rights Act (at 42 U.S.C. § 2000d). See 42 U.S.C. § 12133.
- b. Back pay and benefits. See 42 U.S.C. § 2000e-5(g)(1) (Title VII).
 - i. Plaintiff must make reasonable efforts to mitigate (by seeking other employment);
 - ii. After-acquired evidence may limit the duration, but is not a bar;
 - iii. There is no cap on back pay and lost benefits.

- c. Reinstatement (or in some case, “front pay” as an alternative). 42 U.S.C. § 2000e-5(g)(1).
- d. Damages. 42 U.S.C. § 1981a(a)(2) and (b) (applicable to ADA Title I and § 501); *Barnes v. Gorman*, 536 U.S. 181 (2002) (private action for damages available under ADA Title II and § 504). For more information, see *Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991* (EEOC July, 1992), <http://www.eeoc.gov/policy/docs/damages.html>.
 - i. Actual, compensatory damages (including mental anguish);
 - ii. Punitive damages (not available against government employers or under § 504);
 - iii. The actual and punitive damages are “capped,” i.e., combined, they cannot exceed the following totals (which depend on the size of the employer):

<u>employer size</u>	<u>max. actual & punitive damages</u>
100 or less	\$50,000
101-200	\$100,000
201-500	\$200,000
501+	\$300,000
- e. Attorneys’ fees, litigation expense, and court costs. 42 U.S.C. § 12205; 29 U.S.C. § 794a(b).
- f. Other injunctive relief. 42 U.S.C. § 2000e-5(f) and (g)(1) (Title VII).

11. Administrative Exhaustion and Time Limits

- a. Under the ADA:
 - i. In general, the ADA adopts Title VII exhaustion requirements and limitations. See 42 U.S.C. § 12117(a) (“The . . . procedures set forth in section[] . . . 2000e-5 . . . of this title shall be the . . . procedures this subchapter provides”).
 - ii. The person complaining *must* file an administrative “charge of discrimination” *within 180 days* of the action complained of (or within 300 days of that date in states with a state or local fair employment practices agency). 42 U.S.C. § 12117(a), adopting 42 U.S.C. § 2000-5(e)(1).
 - iii. The charge is filed with the EEOC. (In some cases it may be filed with a state or local FEP agency.) A directory of EEOC offices is at <http://www.eeoc.gov/offices.html>.

- iv. General recommendations:
 - (1) Consider dual-filing with both the federal and state agency
 - (2) Consider filing under both the federal and state law
 - (3) Check all of the applicable boxes (e.g., state law, retaliation)
 - (4) Specifically mention the following terms (if at all applicable):
 - (a) Disability (actual, record of, and regarded as)
 - (b) Failure to accommodate
 - (c) Harassment
 - (d) Medical inquiries violations
 - (e) Retaliation
 - (f) Disparate impact
- v. Filing with the employer's in-house HR person or EEO officer may be useful, but it does *not* satisfy the requirement of filing an EEOC charge, nor does it toll the time limits.
- vi. When the administrative investigation is complete and the case has not settled, the employee will receive a Notice of Right to Sue, and must then file a lawsuit within 90 days under federal law. Suit cannot be filed before the right-to-sue notice.
- vii. Early "right to sue" letters
 - (1) By regulation, the EEOC may issue a Notice of Right to Sue at any time after the expiration of 180 days from the charge filing, or even earlier in certain circumstances, upon request. 29 C.F.R. § 1601.28(a).
 - (2) Requesting a right to sue before the expiration of 180 days may be risky, however. Although the cases are divided, 150 U. Pa. L. Rev. 689 (2001), there is some very troubling precedent. *See, e.g., Martini v. Federal National Mortgage Ass'n*, 178 F.3d 1336 (D.C. Cir. 1999), *cert. dismiss'd*, 528 U.S. 1147 (2000).
- b. Under § 501 of the Rehabilitation Act for federal employees. *See Federal EEO Complaint Processing Procedures*, <http://www.eeoc.gov/federal/fedprocess.html>.

- i. Federal employees must contact an EEO counselor at the federal agency they work for within 45 days of the discriminatory action. 29 C.F.R. § 1614.105(a)(1). The time limit may be extended only in very narrow circumstances. 29 C.F.R. § 1614.105(a)(2).
 - ii. The employee may participate in EEO counseling, or in alternative dispute resolution (ADR) if offered. Ordinarily, counseling must be completed within 30 days and ADR within 90 days. At the end of counseling, or if ADR is unsuccessful, the individual may then file a formal complaint with the agency.
 - iii. Certain complaints have issues that must be appealed to the Merit Systems Protection Board (MSPB). Those are called “mixed cases,” and they are processed under the MSPB’s procedures. For all other EEO complaints, once the agency finishes its investigation, the complainant may request a hearing before an EEOC administrative judge or an immediate final decision from the agency.
 - iv. Either the client or the agency may appeal the ALJ decision to the EEOC. In a “mixed case,” the client may appeal to the MSPB or ask the Board for a hearing. Once the Board issues its decision, the client may petition EEOC for review of the Board decision concerning the discrimination claims.
- c. Claims under § 504 (except against federal agencies) do not require administrative exhaustion, but you may choose to file an administrative complaint within 180 days with the federal funding agency.
 - d. Claims under ADA Title II do not require administrative exhaustion, but you may choose to file an administrative complaint within 180 days with the DOJ. The courts are divided on whether employment discrimination claims can be brought under Title II.

12. Do state employees get any protection after *Garrett*?

- a. The Supreme Court has held that suits against the states in federal court to recover money damages under Title I of the ADA are barred by the 11th Amendment. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).
- b. The *Garrett* holding is limited.
 - i. It only confirms the immunity of the states; local government entities are not protected by the 11th Amendment. *Garrett, supra*, 531 U.S. at 369.
 - ii. It only prevents suits for money damages—it does not bar claims brought under the *Ex parte Young* theory. *Garrett, supra*, 531 U.S. at 374, n. 9.

- (1) *Ex parte Young* actions must be brought *against state officials* (in their official capacity), and not against the state agency itself.
 - (2) *Ex parte Young* actions may seek prospective injunctive relief (e.g., reinstatement, court-ordered reasonable accommodation, or court-ordered policy change) and attorneys’ fees, but not back pay or damages.
- c. Other ways to proceed against the state
- i. Under state law, if your state law waives sovereign immunity.
 - ii. Under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.
 - (1) Every Circuit has now held that the states have waived their immunity from § 504 claims by accepting federal funds. *See, e.g., Miller v. Texas Tech University Health Sciences Center*, 421 F.3d 342 (5th Cir. 2005) (*en banc*).
 - (2) Note that § 504 applies only if the employer is a particular department or agency that receives or distributes federal financial assistance. *Lightbourn v. County of El Paso, Texas*, 118 F.3d 421, 427 (5th Cir. 1997). The State as a whole is not a “program or activity” under § 504. *Id.*
 - (3) Substantive provisions of § 504 are similar to those of the ADA. 29 U.S.C. § 794(d). *See also* 42 U.S.C. § 12117(b) (ADA requires agencies with enforcement authority under Title I and Rehabilitation Act to develop procedures to prevent inconsistent standards).

13. Differences Between the ADA and § 504

- a. Some advantages of § 504 over the ADA include:
 - i. No administrative exhaustion requirement against non-federal defendants; limitations period is the same as the state personal injury statute (except in the 4th Circuit); this may be important if ADA charge was not timely filed.
 - ii. No damage caps in § 504 employment cases.
 - iii. May avoid ADA argument that damages are unavailable for retaliation claims [as the court held in *Kramer v. Banc of America Securities, LLC*, 355 F.3d 961 (7th Cir.), *cert. denied*, 542 U.S. 932 (2004)].
 - iv. Waiver of state’s 11th Amendment immunity. See § 12(c)(ii)(1) above.

- v. Applies to recipient employers no matter how small. See § 2(c)(ii) above.
- b. Disadvantages of § 504
 - i. May need to show intent to recover compensatory damages. *Compare Davoll v. Webb*, 194 F.3d 1116, 1141–1142 (10th Cir. 1999).
 - ii. No punitive damages. *Barnes v. Gorman*, 536 U.S. 181 (2002).
 - iii. May have to prove disability was the “sole cause” of the action complained of. *Compare Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 157–158 (3d Cir. 1995) (need not show sole cause), *with Soledad v. U.S. Dept. of Treasury*, 304 F.3d 500, 503–505 (5th Cir. 2002) (must prove sole cause).