



5TH NCCCO FOUNDATION Industry Forum

Testing Accommodations: *When Do They Un-level the Playing Field?*

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Americans with Disabilities Act (ADA)

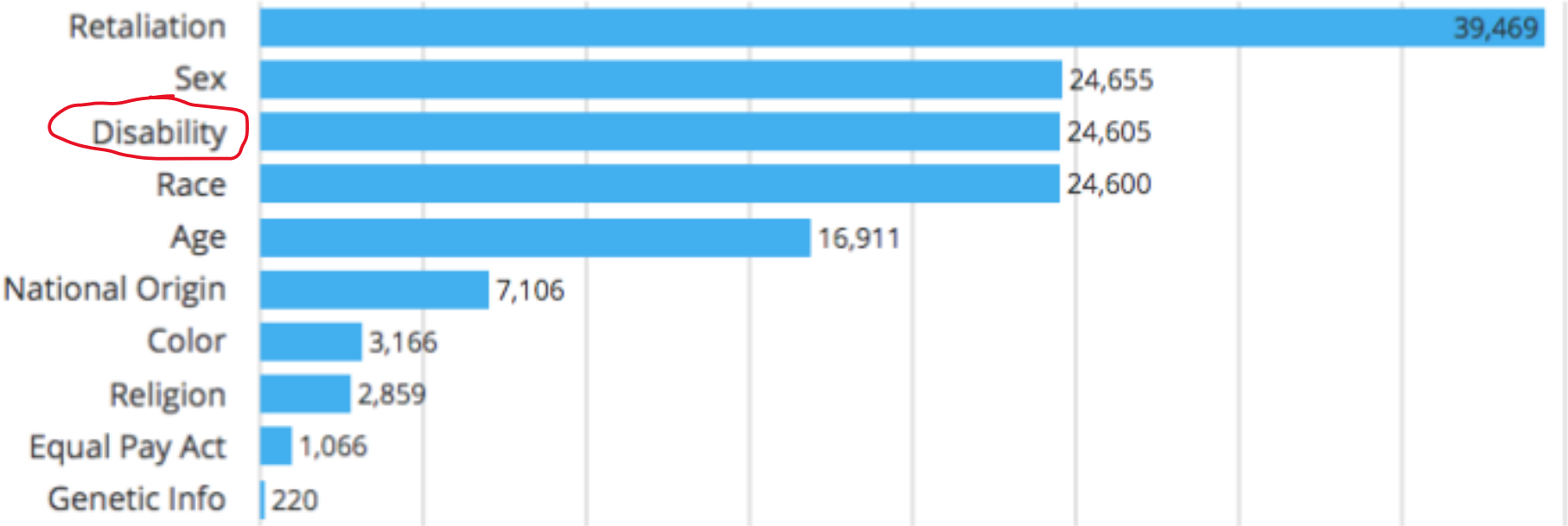
- **Title I – Employment** – reasonable accommodations to applicants and employees
 - Applies to employers with 15 or more employees; enforced by U.S. EEOC
- **Title II – Public Services: State and Local Government**
 - Programs, services and activities must be accessible to individuals with disabilities
- **Title III – Public Accommodations by Private Entities**
 - Requires places of “public accommodations” and prohibits discrimination
- **Title IV – Telecommunications**
 - Applies telephone and internet companies; requires closed captions; regulated by FCC
- **Title V – Miscellaneous Provisions**

Other Federal and State Statutes

- Other federal disabilities laws
 - Fair Housing Act, Individuals with Disabilities Education Act, etc.
- State disabilities laws (e.g., California)
 - Fair Employment and Housing Act (FEHA) – broader than ADA
 - Unruh Civil Rights Act – includes any ADA violation
- Some states have different definitions
- Some states provide an agency for investigation or enforcement
- Some state provide different remedies

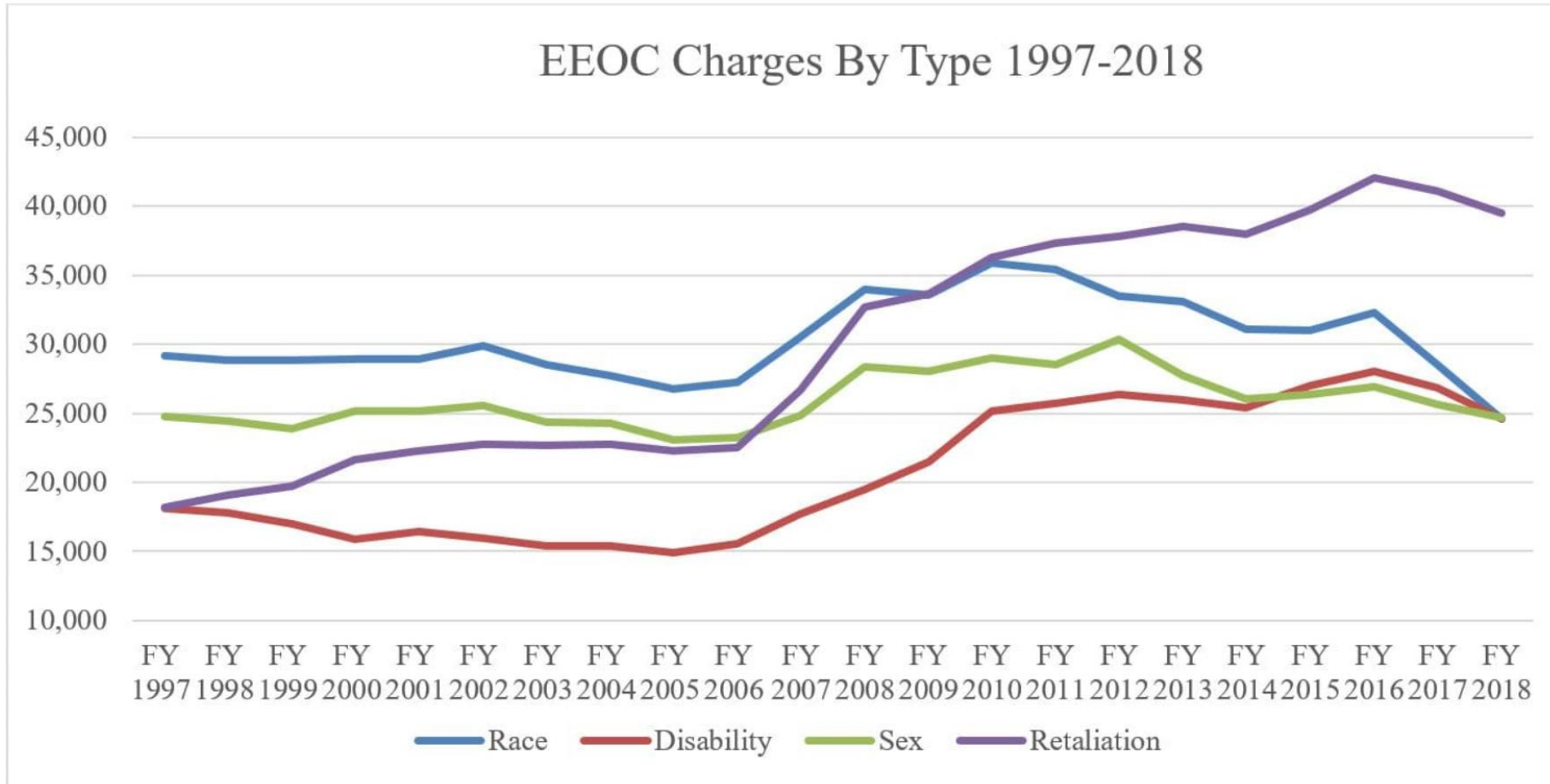
Title I Disability Charges Brought to EEOC

Charges brought to EEOC in 2018, by Category



<https://www.traliant.com/blog/2019/04/19/metoo-impacts-sexual-harassment-charges-filed-with-eeoc/>

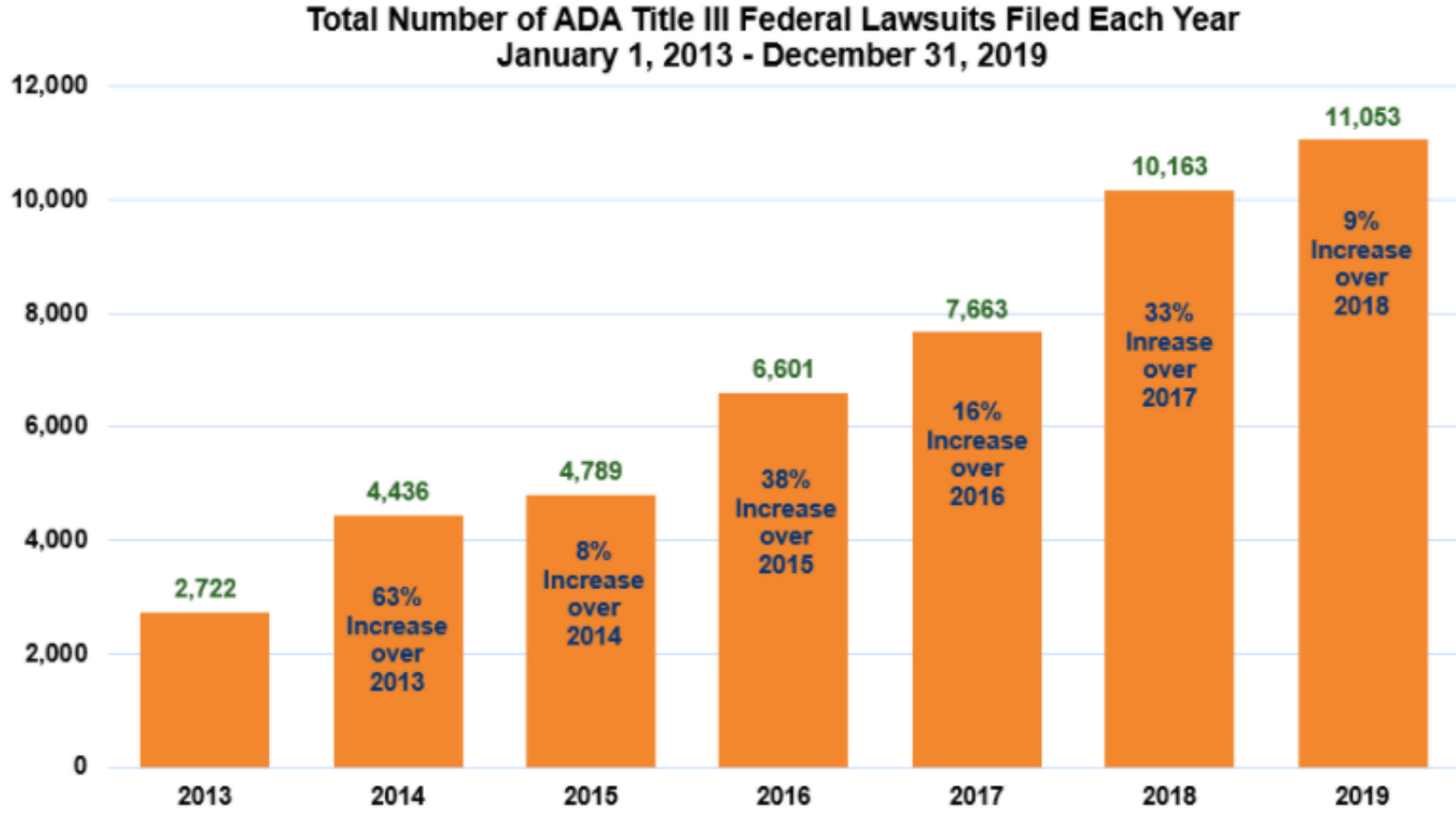
Trend in Title I Disability EEOC Charges



Liability Under Title III of the ADA

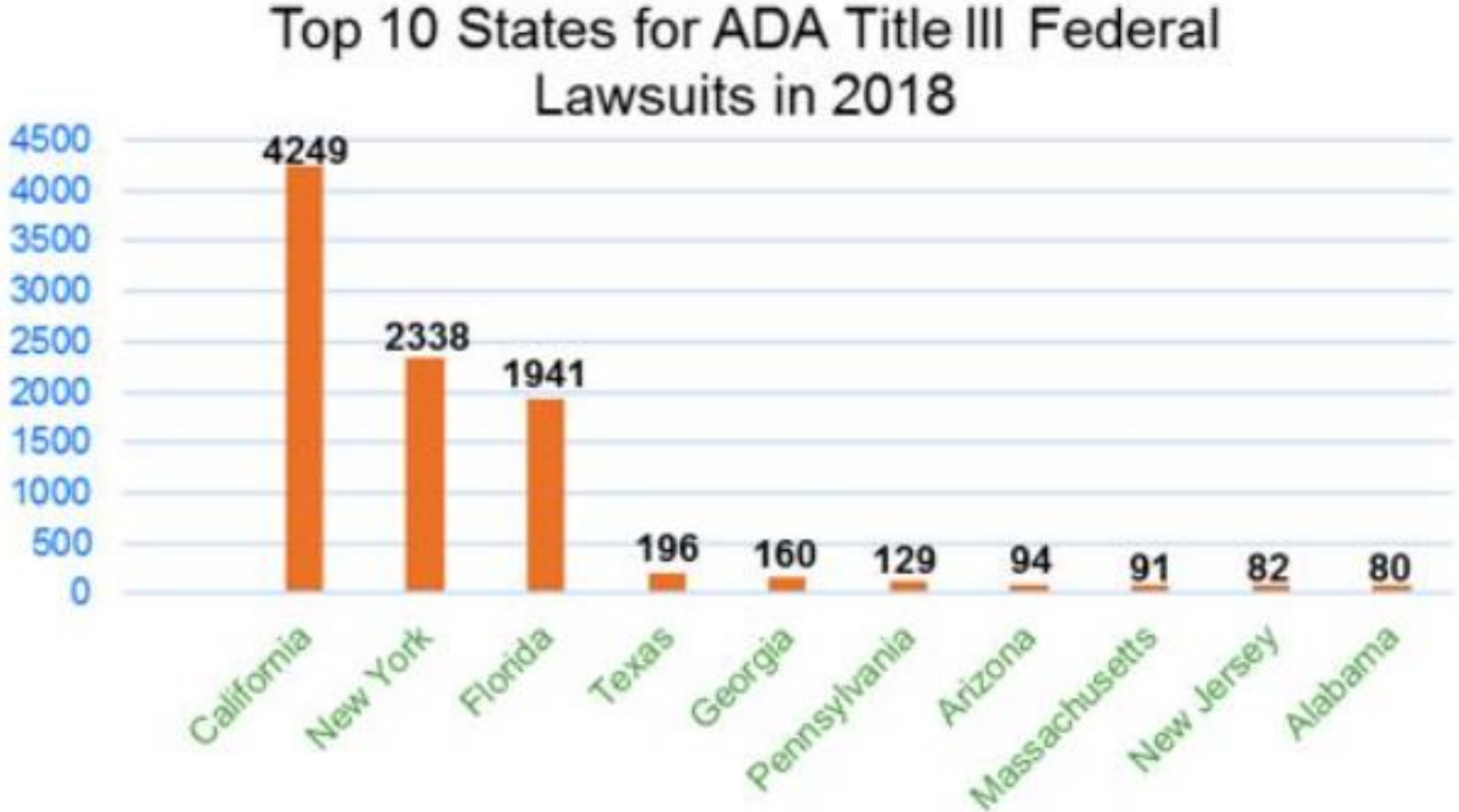
- “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodation of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S. Code § 12182.
- Includes businesses generally open to the public and that fall into one of 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices.
- **Applies to places of public accommodations as well as commercial facilities** (privately owned, nonresidential facilities such as factories, warehouses, or office buildings).

ADA Title III Litigation in the U.S.



<https://www.jdsupra.com/legalnews/2019-was-another-record-breaking-year-75717/>

Top States for ADA Title III Litigation



Potential Liabilities Under the ADA

- **42 U.S. Code § 12188(b)(2) – Enforcement**
 - Equitable relief, including injunctions
 - Require changes and corrections
 - May award monetary damages to aggrieved persons
 - May assess civil penalties not to exceed \$50,000 for a first violation
 - Civil penalties not to exceed \$100,000 for any subsequent violation
- **28 C.F.R. § 36.505 – Attorney’s fees**
 - May allow prevailing party a “reasonable attorney’s fee”
 - Including litigation expenses and costs

Vexatious Litigation Under the ADA?

- Peter Strojnik, Sr. filed **hundreds of nearly identical lawsuits** and claims against hotels in the last few years.
- On August 13, 2019, he filed *Strojnik v. SCG America Construction Inc.*, U.S.D.C., C.D. Cal., Case No. 8:19-cv-01560-JVS-JDE. The complaint was similar to hundreds of lawsuits Strojnik **filed in the last few years as a pro se plaintiff after his license to practice law was suspended for unethical conduct.**
- Strojnik alleged that he is disabled and regularly travels to and in California. He alleged that he is deterred from visiting this hotel because it is not accessible under federal and state law based on his own visit to the hotel and/or because the hotel's website lacks a sufficient description of accessible features.
- On April 19, 2020, Judge James V. Selna of the U.S. Central District of California, granted defendant's motion and **declared Mr. Strojnik a vexatious litigant.**
- Strojnik is now required to obtain permission of the Court before filing any future accessibility lawsuits with the Court.

The ADA and Digital Access

- What is **digital accessibility**?
 - Removing barriers that prevent individuals with disabilities from fully interacting with websites and mobile applications
 - Offering equal access, through design and coding, to information and functionality via assistive technology devices
- Examples of digital accessibility issues
 - Reading screen and viewing images
 - Understanding soundtracks to videos
 - Being unable to use a mouse
- Web Content Accessibility Guidelines (WCAG) 2.0 issued by nonprofit World Wide Web Consortium (W3C)



The ADA and COVID-19

- Onslaught of new legislation
- Some states have enacted liability shields
- Employee's **COVID-19 infection may qualify as disability**
- EEOC has issued guidance
- The ADA allows employers to follow CDC guidelines
- Employer may be required to provide reasonable accommodations
- However, exception if employee poses a “direct threat”

What is a “Disability” Under the ADA?

- Broadly defined
- Person with a physical or mental impairment that substantially limits one or more of the major life activities
- Person with a history of such a physical or mental impairment
- Person who is regarded as having such an impairment



Expanded Definition of Disability (2008)

- In 2008, Congress amended the ADA and broadened the definition of “disability” by providing that the “determination of whether an impairment substantially limits a major life activity shall be made *without regard to the ameliorative effects of mitigating measures such as ... medication.*”
- Therefore, courts have held that applicants cannot be required to take prescribed medication while being evaluated for accommodations.

But, Some Limits on the Definition of Disability

- **Migraines caused by a particular supervisor**
 - In *Woolf v. Strada* (2d Circuit, 2020), plaintiff claimed his work environment was the “primary trigger” for his migraines and requested a transfer. The employer denied request and he was eventually fired. He sued under the ADA. The Court ruled for the employer, on the grounds that plaintiff did not have a “disability” since migraines only occurred during specific work circumstances and did not extend into major life activities.
- **Obesity**
 - In *Lumar v. Monsanto Company* (5th Circuit, 2020), employee alleged that employer created a hostile work environment due to his obesity. The Court ruled that, even if employee’s obesity was due to a physiological impairment, it did not rise to the level of a disability because he failed to show it limited “major life activities.”

Disabilities and *Testing* Accommodations

- A private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall:
 - offer such examinations or courses in a **place and manner** accessible to persons with disabilities or offer alternative accessible arrangements.
 - administer an ADA-covered examination to **“best ensure” that its results reflect “the individual’s aptitude or achievement level** or whatever other factor the examination purports to measure,” rather than a disability.
 - provide **“appropriate auxiliary aids” or modifications** for those with disabilities.
 - Request **“reasonable” documentation** to show proof of disability.

28 C.F.R. § 36.309; *see also* 42 U.S.C. § 12189.

Key Defenses Under the ADA

- Reasonable accommodations are required unless the modifications would “**fundamentally alter the measurement of the skills or knowledge the examination is intended to test**” or “**would result in an undue burden.**”
28 C.F.R. § 36.309(b)(3)
- “A blind person cannot be an airline pilot, nor can one with advanced Parkinson’s disease be a neurosurgeon.”
(6th Circuit, 2017)

Fundamentally Altering the Measurement

- Does the accommodation change **what** a test measures, or simply **how** it does the measuring?
- Persons with disabilities who receive testing accommodations are required to take the same assessment and demonstrate the same proficiency.
- *Example:* hypothetical marksmanship certification

Examples of Undue Burden or Hardship

- Reduces workplace safety
- Displaces or infringes on another employee
- Removes essential job functions from position
- Lowers job efficiency in other areas of the business
- Breaks another law
- Excessive cost to employer

NCCCO Testing Accommodations Policy

POLICIES

- <https://www.nccco.org/nccco/about-nccco/policies/testing-accommodations>
- *See also* <https://www.nccco.org/nccco/about-nccco/policies/religious-accommodations-policy>

TESTING ACCOMMODATIONS GUIDELINES

- [https://www.nccco.org/docs/default-source/policy-statements/guidelines-for-documenting-a-request-for-testing-accommodations_1018a-\(1\).pdf?sfvrsn=7dd5c70e_2](https://www.nccco.org/docs/default-source/policy-statements/guidelines-for-documenting-a-request-for-testing-accommodations_1018a-(1).pdf?sfvrsn=7dd5c70e_2)

TESTING ACCOMMODATIONS APPLICATION

- https://www.nccco.org/docs/default-source/policy-statements/nccco-application-for-testing-accommodations_1018a.pdf?sfvrsn=79d5c70e_2

NCCCO Testing Accommodations Procedures

- **Panel of consulting experts**
 - Vision
 - Hearing
 - Physical Impairment
 - ADHD
 - Learning/reading Disorder
 - Psychological/psychiatric/neurological
 - Other
- **Report prepared**
- **Appeals to Administrative Appeals Committee**

NCCCO Potential Testing Accommodations

- Reader to read test items
- Scribe to record responses
- Additional time
- Additional/extended breaks
- Separate testing room
- Enlarged font
- Other equipment or accommodations

NCCCO Testing Accommodations:

What is Un-reasonable?

- **Public safety considerations**
- **Written exam testing accommodations**
 - Reading disorders / ADHD
 - Problems with documentation?
 - Relevance of prior accommodations?
- **Practical exam testing accommodations**
 - “Spotter” to give instructions during exam?



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THANK YOU FOR YOUR ATTENTION

October 29, 2020