

THE FOOD ALLERGY GENERATION GOES TO WORK

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Abstract: The number of children with a food allergy has doubled over the past two decades, affecting an estimated 5.6 million children. This food allergy generation is growing up and joining the workforce. The percentage of the workforce with a food allergy is thus bound to rapidly increase as well. But work can be a dangerous place for people with a food allergy. Food is often present at work—at mealtimes, in break rooms and other shared spaces, at office celebrations and holiday parties, when traveling or entertaining clients, or as a direct part of jobs in places such as restaurants. Allergic employees can face danger when their allergen is merely present in these circumstances, and the threat can be serious, even deadly.

Will the employment of the food allergy generation lead to a wave of workplace legal problems? Very few judicial rulings exist regarding food allergy at work, but a deeper dive into news reports and personal accounts and into court documents in more than forty pending and settled cases reveals a myriad of complaints and disputes. Food allergy can qualify as a disability under federal and analog state and local disability laws. This Article identifies and categorizes the types of disability-related legal issues that are arising as the food allergy generation goes to work. Naming and understanding the problem is a crucial first step to determining how to solve it.

INTRODUCTION

Each generation comes into the workforce with distinct values and traits.¹ Generation Z—comprising children born between approximately 1997 and

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¹ See Nicholas Pearce, *Leading the 6-Generation Workforce*, HARV. BUS. REV. (Apr. 4, 2024), <https://hbr.org/2024/04/leading-the-6-generation-workforce> [https://perma.cc/6E3X-CYUX].

2012²—is also bringing something employers might not be expecting: food allergies. Although the reasons are unclear, it is well-established that the prevalence of food allergy doubled between 1997 and 2011, with nut allergies tripling during that same approximate window,³ resulting in millions of children with one or more food allergies.⁴ Thus, in a real sense, Gen Z is also the food allergy generation.

These children have grown up with and around food allergies, particularly in the school setting. On average, every American classroom has two food-allergic children.⁵ Food permeates the school setting, from the lunchroom to the classroom and beyond. Children eat multiple meals and snacks at school. Food is used for celebrations, crafts, and science experiments. Sports and other extracurricular activities often involve the need for meals and snacks.⁶ Accommodations to address food allergy issues are common in schools, including, for example, nut-free tables in the cafeteria, bans on food in the classroom, and careful regulation of food at parties and celebrations.⁷ These measures can be controversial, sparking strong feelings and reactions from non-allergic students and their parents, who may see infringement on their rights.⁸ Children with food allergies are bullied in school at an astounding rate. One-third are

² *Age Range by Generation*, BERESFORD RSCH., <https://www.beresfordresearch.com/age-range-by-generation/> [<https://perma.cc/2SS2-698M>].

³ See KRISTEN D. JACKSON, LAJEANA D. HOWIE & LARA J. AKINBAMI, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, TRENDS IN ALLERGIC CONDITIONS AMONG CHILDREN: UNITED STATES, 1997–2011, at 2 (2013), <https://www.cdc.gov/nchs/data/databriefs/db121.pdf> [<https://perma.cc/VF4A-CRVS>]; Charles Feng & Jea-Hyoun Kim, *Beyond Avoidance: The Psychosocial Impact of Food Allergies*, 57 CLINICAL REVS. ALLERGY & IMMUNOLOGY 74, 74 (2019); Ruchi S. Gupta et al., *The Public Health Impact of Parent-Reported Childhood Food Allergies in the United States*, PEDIATRICS, Dec. 2018, at 1, 2, 7, 10; see also Eric C.K. Lee et al., *The Natural History and Risk Factors for the Development of Food Allergies in Children and Adults*, 24 CURRENT ALLERGY & ASTHMA REPS. 121, 121 (2024) (“The prevalence of food allergy has risen dramatically over the past 30 years.”); Scott H. Sicherer & Hugh A. Sampson, *Food Allergy: A Review and Update on Epidemiology, Pathogenesis, Diagnosis, Prevention, and Management*, 141 J. ALLERGY & CLINICAL IMMUNOLOGY 41, 41 (2018) (reporting “extensive data” suggesting that food allergies have increased in the last two to three decades).

⁴ *Facts and Statistics*, FOOD ALLERGY RSCH. & EDUC., <https://www.foodallergy.org/resources/facts-and-statistics> [<https://perma.cc/HS7U-ZXK5>] (stating that “5.6 million children under the age of 18” have food allergies); accord Gupta et al., *supra* note 3, at 6. For more statistics regarding the prevalence and rise of food allergies, see discussion *infra* Part I.B.

⁵ Lisa M. Bartnikas & Scott H. Sicherer, *Fatal Anaphylaxis: Searching for Lessons from Tragedy*, 8 J. ALLERGY & CLINICAL IMMUNOLOGY: IN PRAC. 334, 334 (2020); *Facts and Statistics*, *supra* note 4.

⁶ I have written extensively about issues regarding food allergies in school. For discussions about the prevalence of food in the school setting, see D’Andra Millsap Shu, *Food Allergy Bullying as Disability Harassment: Holding Schools Accountable*, 92 U. COLO. L. REV. 1, 3, 17–18 (2021) [hereinafter Shu, *Harassment*]; D’Andra Millsap Shu, *When Food Is a Weapon: Parental Liability for Food Allergy Bullying*, 103 MARQ. L. REV. 1465, 1467, 1476–78 (2020) [hereinafter Shu, *Weapon*].

⁷ See Shu, *Harassment*, *supra* note 6, at 18; Shu, *Weapon*, *supra* note 6, at 1477–78.

⁸ See Shu, *Harassment*, *supra* note 6, at 14–20; Shu, *Weapon*, *supra* note 6, at 1478–81.

bullied because of their allergy; they are teased, taunted, and excluded. And half of those children are bullied directly with their allergen—they are threatened with, touched with, or forced or tricked into eating their allergen.⁹

As these kids age into the workforce, will these same types of problems follow them to work? After all, food pervades the work environment as much if not more than at school. In many workplaces, employees eat meals together or at least share common food-related spaces, such as a breakroom, refrigerator, and microwave. Some employers regularly, or at least occasionally, provide meals or snacks for employees. Eating can be a part of many jobs, for instance, those that involve travel or entertaining clients. Jobs in places like restaurants and bakeries require working with food directly. Office holidays and other celebrations typically include food. Food is the social glue in many work settings: “In the workplace, food fuels long days, networking events, and happy hours; builds camaraderie[;] fosters belongingness[;] and break[s] barriers between workers’ formal and informal lives.”¹⁰

For an employee with a food allergy, however, the presence of their allergen in these contexts can endanger their health and well-being. Though it may seem like a simple matter for the employee to just not eat the dangerous food, the situation can be much more complicated. Ingesting a tiny amount of the allergen—such as 1/50th of a peanut—can cause an allergic reaction.¹¹ As a result, the presence of that food risks accidental ingestion from sources such as errant crumbs, shared serving utensils, or microwave splatters.¹² What is more,

⁹ See Rachel A. Annunziato et al., *Longitudinal Evaluation of Food Allergy-Related Bullying*, 2 J. ALLERGY & CLINICAL IMMUNOLOGY: IN PRAC. 639, 639 (2014) (finding that 32% of the allergic children surveyed had been bullied due to their food allergy); Jay A. Lieberman et al., *Bullying Among Pediatric Patients with Food Allergy*, 105 ANNALS ALLERGY, ASTHMA & IMMUNOLOGY 282, 282 (2010) (finding that 57% of those bullied were harassed with physical events involving their allergen). For more information about these studies and other corroborating studies, see Shu, *Harassment*, *supra* note 6, at 4 n.5. For a detailed examination of food allergy bullying in schools, see *id.* at 3–6, 20–35, and Shu, *Weapon*, *supra* note 6, at 1481–87. A comprehensive new study in 2024 of adolescents specifically confirmed extensive bullying based on food allergy. See Saurabh Kalra & Deepak Kalra, *Bullying Vulnerability Among Adolescents Reporting Food Allergies: A Nationwide US Study*, J. SCH. NURSING 696, 700 (2024) (“These findings are consistent with prior research conducted in allergy clinics and conferences, now validated through a nationally representative sample.”).

¹⁰ Benjamin Laker, Jack Tillotson, Kushagra Bhatnagar & Vijay Pereira, *Are Your Team Gatherings Inclusive for People with Food Allergies?*, HARV. BUS. REV. (Dec. 7, 2022), <https://hbr.org/2022/12/are-your-team-gatherings-inclusive-for-people-with-food-related-allergies> [<https://perma.cc/JYS4-5JXG>].

¹¹ Mary E. Bollinger et al., *The Impact of Food Allergy on the Daily Activities of Children and Their Families*, 96 ANNALS ALLERGY, ASTHMA & IMMUNOLOGY 415, 415 (2006); see also Laurent L. Reber, Joseph D. Hernandez & Stephen J. Galli, *The Pathophysiology of Anaphylaxis*, 140 J. ALLERGY & CLINICAL IMMUNOLOGY 335, 335 (2017) (explaining that “minute amounts” of a food allergen can trigger fatal anaphylaxis).

¹² See *Cross-Contact*, FOOD ALLERGY & ANAPHYLAXIS CONNECTION TEAM, <https://www.foodallergyawareness.org/food-allergy-and-anaphylaxis/cross-contact/cross-contact/> [<https://perma.cc/>]

some allergic individuals react to touching or breathing their allergen, meaning that mere proximity without any ingestion endangers them.¹³ And food allergy reactions can be deadly serious.¹⁴ In 2017, a thirteen-year-old London boy died after a bully threw cheese at him; the skin contact caused a severe allergic reaction, and he died almost two weeks later.¹⁵ In January 2024, a twenty-five-year-old dancer died after eating a mislabeled peanut-containing cookie.¹⁶ Thankfully, most reactions are not this serious, but the risk is ever-present and terrifying.

Given the ubiquity of workplace food and the potential danger to allergic workers, managing workplace food allergies can present an array of possible problems. For example, some employers might not be comfortable having allergic employees around or may not know how to handle a situation where the worker's job duties involve contact with food. Similar to the school setting, allergic employees might be taunted or name-called, and they may be excluded from social or professional events involving food. Coworkers and supervisors might intentionally expose a worker to the allergen—possibly even attempting

U5JH-X6H2] (describing how cross-contamination of pots, pans, and utensils can create allergic reactions); KARI NADEAU & SLOAN BARNETT, *THE END OF FOOD ALLERGY* 70–72 (2020) (discussing the risk of reactions caused by an allergen merely touching another food); see also Barbara K. Ballmer-Weber et al., *How Much Is Too Much? Threshold Dose Distributions for 5 Food Allergens*, 135 J. ALLERGY & CLINICAL IMMUNOLOGY 964, 965 (2015) (“[A]ccidental ingestion of offending foods remains a major cause of severe allergic reactions.”); David M. Fleischer et al., *Allergic Reactions to Foods in Pre-School Aged Children in a Prospective Observational Food Allergy Study*, 130 PEDIATRICS e25, e25 (2012) (demonstrating that accidental exposure causes many reactions); Stephanie A. Kubala et al., *Key Factors That Influence Quality of Life in Patients with IgE-Mediated Food Allergy Vary by Age*, ALLERGY: EUR. J. ALLERGY & CLINICAL IMMUNOLOGY 2812, 2813 (2024) (“[E]ven with careful adherence, allergic reactions are common. Approximately 40% of children and 50% of adults with [a food allergy] have experienced a severe allergic reaction.”).

¹³ See David P. Steensma, *The Kiss of Death: A Severe Allergic Reaction to a Shellfish Induced by a Good-Night Kiss*, 78 MAYO CLINIC PROC. 221, 221 (2003) (discussing allergic reactions from touching and inhaling allergens and reporting on a touch-based reaction from kissing someone who had eaten the allergen); Belen M. Tan, Mandel R. Sher, Robert A. Good & Sami L. Bahna, *Severe Food Allergies by Skin Contact*, 86 ANNALS ALLERGY, ASTHMA & IMMUNOLOGY 583, 586 (2001) (“Severe food allergic reactions can occur through noningestant exposure (skin contact or inhalation), even to minute quantities of the offending allergen.”); see also Bartnikas & Sicherer, *supra* note 5, at 335 (describing five instances of anaphylaxis from skin exposure to cow’s milk); G. Liccardi et al., *Severe Systemic Allergic Reaction Induced by Accidental Skin Contact with Cow Milk in a 16-Year-Old Boy. A Case Report*, 14 J. INVESTIGATIVE ALLERGOLOGY & CLINICAL IMMUNOLOGY 168, 168 (2004) (describing a severe allergic reaction from a milk drop splashing on a boy’s shoulder).

¹⁴ See Bollinger et al., *supra* note 11, at 415 (stating that 150 to 200 people die each year from food-induced anaphylaxis); see also *infra* notes 38–39 and accompanying text.

¹⁵ Bartnikas & Sicherer, *supra* note 5, at 334; Ru-Xin Foong, Paul J. Turner & Adam T. Fox, *Fatal Anaphylaxis Due to Transcutaneous Allergen Exposure: An Exceptional Case*, 8 J. ALLERGY & CLINICAL IMMUNOLOGY: IN PRAC. 332, 332 (2020).

¹⁶ Dave Bloom, *Family of Órla Baxendale Files Wrongful Death Suit Against Stew Leonard’s*, SNACK SAFELY (May 24, 2024), <https://snacksafely.com/2024/05/family-of-orla-baxendale-files-wrongful-death-suit-against-stew-leonards/> [<https://perma.cc/T8PS-BV2C>].

to have them eat it—because they do not understand the seriousness of a person's allergy or are testing to see if the allergy is real. Others might be resentful if accommodating the allergy inconveniences them, such as by preventing them from eating peanut butter at work, or might simply just refuse to stop exposing the allergic employee to the allergen.

In previous work, I have argued that food allergy is typically a disability under the Americans with Disabilities Act (ADA).¹⁷ Thus, food-allergic workers should qualify for workplace protection under Title I of the ADA¹⁸ and state and local analogs with the same standard, and employers must pay careful attention to any of these issues that arise.

Very few written judicial decisions involve food allergy workplace disability issues,¹⁹ but it would be a mistake to assume that a dearth of case law means workplace food allergy is a non-issue. Studying federal litigation in more than forty pending and settled cases without substantive written rulings, along with news reports and personal stories in blogs and other online sources, reveals a host of food allergy-related problems that are happening in workplaces right now. And this will likely only increase as the food allergy generation continues to age and enter the workforce. Two workers' stories demonstrate the depth and breadth of some of these issues.

The first involves a preschool teacher's assistant who is severely allergic to garlic.²⁰ She can react from smell alone and carries injectable emergency medicine (called an EpiPen) to treat the most serious kind of reaction (called anaphylaxis). The school prepares hot lunch for the children each day and serves it in the classroom. To limit her garlic exposure, the worker requested that she be allowed to leave the classroom while the children ate. She also requested that her coworkers use a microwave in a different room when heating their own food. The school refused these accommodations. The plaintiff had an allergic reaction in class, triggered by garlic in the children's lunch. She tried to leave the classroom, but her supervisor would not allow it and told her instead to "hold her breath."²¹ The worker requested another accommodation, that the school prepare the children's food without extra garlic, but the school refused, stating that the garlic was necessary for flavor. The worker had another allergic reaction and left the classroom to use her EpiPen. Her supervisor

¹⁷ See Shu, *Harassment*, *supra* note 6, at 40–60.

¹⁸ 42 U.S.C. §§ 12111–12117.

¹⁹ See Stefanie M. Renaud, *Employees' Food Allergies Are Nothing to Sneeze At!*, 27 No. 4 MASS. EMP. L. LETTER 6 (2016); Marlis Silver Sweeney, *Dealing with Food Allergies in the Workplace*, LAW.COM (June 3, 2015), <https://www.law.com/2015/06/03/dealing-with-food-allergies-in-the-workplace/?sreturn=20240512213359> [<https://perma.cc/5F5G-MYTU>].

²⁰ Compl. at 2, *Ascoli v. Macon Program for Progress, Inc.*, No. 1:18-cv-00339 (W.D.N.C. Nov. 20, 2018), ECF. No. 1.

²¹ *Id.* at 3.

followed her out, and the worker asked the supervisor to call 911. She refused, told the worker she could not use the EpiPen and had to use Benadryl instead, and literally pulled her back into the classroom. She continued pressing for accommodations. In response, a school representative told the worker, “[y]ou are not a priority.”²² When the accommodations were officially denied, the representative told the plaintiff she was denying her request because “it would take away everyone else’s rights.”²³ When the worker mentioned her own rights, the response was: “You’re just one person with a food allergy. There are more of them than you.”²⁴ The school then fired her “because she had an allergy that they could not control.”²⁵

The second story is about an assistant project manager at a glass company.²⁶ The worker has a severe shellfish allergy that can cause anaphylaxis from merely being near shellfish. Her supervisor and other employees teased the worker about her allergy, with comments such as her supervisor saying he “got her some shrimp as a present,” “hey I got you some crab legs,” and “I am going to get you crab for you[r] birthday.”²⁷ The behavior went beyond teasing. Despite her repeatedly reminding the company of her allergy, it frequently catered luncheons and other events with seafood. The worker suffered at least three allergic reactions from shellfish at company luncheons, one of which required her to use her EpiPen. One particularly notable company event was a client open house, which the worker was required to attend. She learned of the plans to serve shellfish and asked that the menu be changed, but she was told it was too late. Because of the shellfish, the worker did not attend the open house but stayed in her office with the door shut. Nevertheless, people came in her office and put their fishy trash in her trashcan, and this caused her to break out and experience breathing problems, requiring medication. She asked to leave work, but her request was denied, and she was reprimanded and told she “was not a team player.”²⁸ She was also reprimanded for using time off and going to medical appointments during work hours and demoted from a salaried to an hourly employee. She filed a charge with the U.S. Equal Employment Opportunity Commission (EEOC) asserting disability discrimination in addition to other unrelated complaints based on race, sex, and religion, and she was eventually fired for being “disruptive.”²⁹

²² *Id.* at 4.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ First Am. Compl. at 3, *Clare v. Exec. Glass Servs., Inc.*, No. 1:17-cv-00521 (E.D. Va. June 13, 2017), ECF No. 16.

²⁷ *Id.* at 6.

²⁸ *Id.*

²⁹ *Id.* at 10.

This Article studies these and the stories of many other food-allergic workers and then identifies and categorizes the disability-related workplace legal issues their experiences raise. These issues fall into five overarching groups of legal theories:

1. impermissible pre-employment inquiries,
2. disparate treatment (such as demotion, discipline, and termination),
3. failure to accommodate (such as modifying what and where coworkers can eat, regulating employer-provided food, and modifying job duties),
4. bullying and harassment (such as taunting and intentional allergen exposure), and
5. retaliation (such as termination for requesting accommodations or reporting mistreatment).

This is the first article to methodically pinpoint and classify these disability-related legal concerns involving food allergies in the workplace. My future scholarship will address how these issues should be analyzed and addressed, but naming and framing the problem is a necessary first step.

This Article proceeds in three Parts. Part I provides some important background information about food allergies and their prevalence and then discusses societal attitudes towards food allergies and those who have them.³⁰ Next, Part II argues that food allergies are a disability under the ADA. It reviews my prior work on this issue and updates the research with the most current case law analyzing food allergy as a disability.³¹ Finally, Part III presents the categories and subcategories of disability-related food allergy legal issues that are emerging as the food allergy generation goes to work.³²

I. FOOD ALLERGIES ARE A SIGNIFICANT MEDICAL AND SOCIETAL ISSUE

To understand how a food allergy can be a disability and how it can impact the workplace, it is first necessary to understand basic information about the mechanics and prevalence of food allergies as well as the ignorance and hostility that often surrounds them. Section A of this Part provides background on food allergies, including their medical causes and symptoms, and how allergic individuals must manage their daily lives in response.³³ Section B highlights the increasing prevalence of food allergies among both adults and chil-

³⁰ See *infra* notes 33–92 and accompanying text.

³¹ See *infra* notes 93–188 and accompanying text.

³² See *infra* notes 189–395 and accompanying text.

³³ See *infra* notes 36–56 and accompanying text.

dren.³⁴ Section C of this Part recognizes the ignorance and hostile attitudes towards individuals affected by food allergies.³⁵

A. Medical and Management Basics

A food allergy is an immune system malfunction where the body mistakenly treats a food as an enemy and attacks, causing an allergic reaction.³⁶ Allergic reactions can impact many body systems and cause a variety of symptoms including hives, congestion, vomiting, throat swelling, and impaired breathing.³⁷ Though rare, the most serious reaction is anaphylaxis, which can lead to respiratory distress, a drastic drop in blood pressure, unconsciousness, and even death.³⁸ Anaphylaxis can kill within minutes.³⁹

Food allergies are variable and unpredictable, both in how reactions are triggered and in the type and severity of reactions. Reactions can result from eating, touching, and/or inhaling the allergen.⁴⁰ The amount of the allergen necessary to generate a reaction varies between people and even within the same person; factors such as current medications, sickness, exercise, sleep, and stress can affect the reaction threshold.⁴¹ The reactions themselves are unpredictable as well. A prior mild reaction is no guarantee that the next one will be

³⁴ See *infra* notes 57–70 and accompanying text.

³⁵ See *infra* notes 71–92 and accompanying text.

³⁶ See Joshua A. Boyce et al., *Guidelines for the Diagnosis and Management of Food Allergy in the United States: Report of the NIAID-Sponsored Expert Panel*, 126 J. ALLERGY & CLINICAL IMMUNOLOGY (SUPP.) S1, S4, S8 (2010); *Food Allergy Basics*, FOOD ALLERGY & ANAPHYLAXIS CONNECTION TEAM, <https://www.foodallergyawareness.org/food-allergy-and-anaphylaxis/food-allergy-basics/> [<https://perma.cc/S8LE-AZ3P>]; Lee et al., *supra* note 3, at 121. A food allergy is distinguished from a food insensitivity or intolerance, which may cause discomfort and illness but does not cause an immune reaction and is not life threatening. See Divya Seth, Pavadee Poowutikul, Milind Pansare & Deepak Kamat, *Food Allergy: A Review*, 49 PEDIATRIC ANNALS e50, e50 (2020).

³⁷ Boyce et al., *supra* note 36, at S19; Edward G.A. Iglesia, Mildred Kwan, Yamini V. Virkud & Onyinye I. Iweala, *Management of Food Allergies and Food-Related Anaphylaxis*, 331 JAMA 510, 510 (2024).

³⁸ Boyce et al., *supra* note 36, at S4, S9–10; Reber et al., *supra* note 11, at 335.

³⁹ See Boyce et al., *supra* note 36, at S38 (“Failure to respond promptly [to anaphylaxis] can result in rapid decline and death within 30–60 minutes.”).

⁴⁰ See *supra* note 13 and accompanying text.

⁴¹ See Iglesia et al., *supra* note 37, at 514 (“There is no uniform minimum dose across all food allergens that induces allergic symptoms.”); NADEAU & BARNETT, *supra* note 12, at 80 (“Allergy thresholds can vary person to person and throughout a life; exercise, sleep, illness, stress, puberty, and even altitude can alter the amount of allergen your body can tolerate.”); Paul J. Turner et al., *Risk Factors for Severe Reactions in Food Allergy: Rapid Evidence Review with Meta-Analysis*, 77 ALLERGY: EUR. J. ALLERGY & CLINICAL IMMUNOLOGY 2634, 2647 (2022) (“[H]istory alone is not a good predictor [of anaphylaxis] because severity depends on multiple factors including dose of exposure and the presence or absence of cofactors (e.g. exercise, concurrent viral infections and some medications).”).

mild too or even of the same type.⁴² Anaphylaxis can strike someone who has never even had a serious reaction. Indeed, “[m]ost people who die from fatal food-anaphylaxis only have a history of previous mild reactions.”⁴³

Though more than 170 foods have been documented to cause allergic reactions,⁴⁴ the vast majority—ninety percent—come from nine allergens: peanut, tree nut, dairy, egg, fish, shellfish, wheat, soy, and sesame.⁴⁵ Gluten is also a particular concern. Celiac disease is a digestive disorder triggered by eating gluten from wheat and other sources,⁴⁶ and although not a food allergy, it raises similar issues because ingesting even a tiny amount of gluten can cause an immune response with serious health consequences.⁴⁷ Food allergy and celiac disease are often grouped and discussed together under the general food allergy umbrella,⁴⁸ and I will do the same in this Article.

The gold standard for food allergy treatment is strict avoidance and emergency management.⁴⁹ Because the amount needed to cause a reaction can be so small and because the consequences of a reaction so severe, eating any amount

⁴² See *Food Allergy*, AM. COLL. ALLERGY, ASTHMA & IMMUNOLOGY, <https://acaai.org/allergies/types/food-allergy> [<https://perma.cc/VX4Y-U6Q3>] (“Symptoms of a food allergy can range from mild to severe. Just because an initial reaction causes few problems doesn’t mean that all reactions will be similar; a food that triggered only mild symptoms on one occasion may cause more severe symptoms at another time.”); see also Turner et al., *supra* note 41, at 2635 (“An absence of prior anaphylaxis does not exclude its future risk.”).

⁴³ Turner et al., *supra* note 41, at 2635.

⁴⁴ *Food Allergies*, U.S. FOOD & DRUG ADMIN. (Jan. 6, 2025), <https://www.fda.gov/food/food-labeling-nutrition/food-allergies> [<https://perma.cc/95KF-LCVU>]; *The Top 9 Food Allergens*, FOOD ALLERGY & ANAPHYLAXIS CONNECTION TEAM, <https://www.foodallergyawareness.org/food-allergy-and-anaphylaxis/food-allergens/the-top-9-food-allergens/> [<https://perma.cc/MT8J-BXBN>].

⁴⁵ *The Top 9 Food Allergens*, *supra* note 44; Iglesia et al., *supra* note 37, at 510. This list of the top allergens used to contain only eight, and sesame was added as the ninth in 2021. See *Food Allergies*, *supra* note 44.

⁴⁶ See *What Is Celiac Disease?*, BEYOND CELIAC, <https://www.beyondceliac.org/celiac-disease/what-is-celiac-disease/> [<https://perma.cc/7C2Z-KVYV>]; *Food Allergies*, *supra* note 44.

⁴⁷ See Claudia Troch, Recent Development, *It’s Not Easy Being G-Free: Why Celiac Disease Should Be a Disability Covered Under the ADA*, 22 AM. U. J. GENDER, SOC. POL’Y & L. 219, 222–23, 230–31 (2013); *Celiac Disease*, MAYO CLINIC (Sept. 12, 2023), <https://www.mayoclinic.org/diseases-conditions/celiac-disease/diagnosis-treatment/drc-20352225> [<https://perma.cc/SY98-PHHZ>]. In one study, some patients suffered intestinal damage from ingesting only 10 mg of gluten, which is equivalent to 1/350th of a slice a bread—in other words, a crumb. See Carlo Catassi et al., *A Prospective, Double-Blind, Placebo-Controlled Trial to Establish a Safe Gluten Threshold for Patients with Celiac Disease*, 85 AM. J. CLINICAL NUTRITION 160, 164 (2007); Katarina Mollo, *Can a Small Amount of Gluten Make Somebody Sick?*, NAT’L CELIAC ASS’N, <https://nationalceliac.org/celiac-disease-questions/can-a-small-amount-of-gluten-make-somebody-sick/> [<https://perma.cc/DJ5W-3QVG>] (Oct. 21, 2022).

⁴⁸ See, e.g., *Food Allergies*, *supra* note 44; *Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies*, U.S. DEP’T OF JUST. (Jan. 25, 2013), https://www.ada.gov/q&a_lesley_university.htm [<https://perma.cc/93TA-WQKW>].

⁴⁹ Feng & Kim, *supra* note 3, at 75; Luca Pecoraro et al., *Nutritional and Psychosocial Impact of Food Allergy in Pediatric Age*, LIFE, June 2024, at 1, 1.

of an allergen is unsafe.⁵⁰ Emergency medicine, such as antihistamines, inhalers, and epinephrine autoinjectors (like the EpiPen), can treat symptoms, but they do not cure the allergy.⁵¹ And they are not foolproof. The dancer who ate the mislabeled cookie used her EpiPen, but it did not stop anaphylaxis from killing her.⁵² Some other treatments are in development or have been approved, and although they improve the quality of life for some (but not all) allergy sufferers, they are not a cure and can be expensive and time consuming.⁵³

In recent years, the medical profession has increasingly focused on food allergy's impact on quality of life.⁵⁴ Having a food allergy is burdensome. People typically eat multiple times a day, and every meal or snack must be carefully scrutinized. Constant vigilance is required to avoid accidentally eating an allergen, and determining if an allergen is hidden among other ingredients or may be present by cross-contact is challenging, to say the least.⁵⁵ The stress from hypervigilance is real. "For an individual with [a food allergy], everyday activities such as grocery shopping, ordering food, and grabbing a snack are imbued with the weight of life and death."⁵⁶

⁵⁰ See Ballmer-Weber et al., *supra* note 12, at 965 (describing how exposure to even tiny amounts of an allergen can cause reactions in some individuals); Iglesia et al., *supra* note 37, at 515 (identifying avoidance as the best course of action in light of the major potential consequences of exposure to even a small amount of an allergen).

⁵¹ See *Facts and Statistics*, *supra* note 4 (discussing rapid treatment options such as epinephrine); *Food Allergies*, *supra* note 44 (stating that there is no cure for food allergies).

⁵² Bloom, *supra* note 16.

⁵³ See *Food Allergies*, *supra* note 44 ("While promising prevention and therapeutic strategies are being developed, food allergies currently cannot be cured."); Kirsten P. Perrett, *The Hype and Hope of New Food Allergy Treatments*, 30 NATURE MED. 1528, 1528 (2024) (describing new treatments and therapies emerging to help sufferers of food allergies); see also Shu, *Harassment*, *supra* note 6, at 12 n.42 (stating that treatments are being developed that promise to "desensitize some people to certain allergens"); NADEAU & BARNETT, *supra* note 12, at 145–208 (discussing immunotherapy research). There also seem to be racial and socioeconomic disparities in the availability of these treatments. See Lindsay A. Gallagher et al., *Racial and Socioeconomic Disparities Exist in Patients Pursuing Peanut Oral Immunotherapy*, 12 J. ALLERGY & CLINICAL IMMUNOLOGY: IN PRAC. 2102, 2102 (2024).

⁵⁴ See generally, e.g., Theresa A. Bingemann et al., *Psychosocial Impact of Food Allergy on Children and Adults and Practical Interventions*, 24 CURRENT ALLERGY & ASTHMA REPS. 107 (2024); Marc Breidenbaugh & Emily McGowan, *Pediatric and Adult Food Allergy Is Associated with Anxiety in the 2021 National Health Interview Survey (NHIS)*, 153 J. ALLERGY & CLINICAL IMMUNOLOGY AB50 (2024); *Cross-Contact*, *supra* note 12; Roxanne Khamsi, *The Psychological Toll of Food Allergies*, 588 NATURE S4 (2020); Christopher Warren et al., *The Psychosocial Burden of Food Allergy Among Adults: A US Population-Based Study*, 9 J. ALLERGY & CLINICAL IMMUNOLOGY: IN PRAC. 2452 (2021).

⁵⁵ See Ballmer-Weber et al., *supra* note 12, at 965; Nha Uyen Nguyen-Luu et al., *Inadvertent Exposures in Children with Peanut Allergy*, 23 PEDIATRIC ALLERGY & IMMUNOLOGY 133, 133 (2012); Pecoraro et al., *supra* note 49, at 1–2.

⁵⁶ David Schelly, Alisha Ohl & Heidi Meramo, *College Students with Food Allergy: From Hypervigilance to Disclosure Fatigue*, 70 J. PEDIATRIC NURSING 32, 32 (2023). For more discussion regarding the burden of food allergies, see Shu, *Harassment*, *supra* note 6, at 12–14.

B. Prevalence Among Children and Adults

Thirty-three million Americans have at least one food allergy, including 5.6 million children.⁵⁷ That number represents an all-time high and is continuing to rise.⁵⁸ The cause for this explosion in food allergies is unclear,⁵⁹ but what is clear is that America, as is the rest of the world,⁶⁰ is in the midst of a food allergy “epidemic.”⁶¹

The number of children with a food allergy has more than doubled since 1997.⁶² This dramatic surge has led to significant attention in studying all aspects of how to explain and manage this problem.⁶³ Although the primary focus has been on children, this decades-long food allergy epidemic also means that more adults than ever have a food allergy.⁶⁴ Only recently has attention begun to shift to include issues related to adult food allergy.⁶⁵ Nearly eleven percent of all U.S. adults have one or more food allergies.⁶⁶ Though some children do outgrow their allergies, many fewer do than previously estimated, and many childhood food allergies persist into adulthood, especially peanut, tree nut, fish, and shellfish.⁶⁷ Moreover, recent studies regarding adult food allergy reveal that adult-onset food allergy is much more common than previously thought, particularly for fish and shellfish.⁶⁸ Nearly half of adults with food

⁵⁷ *Facts and Statistics*, *supra* note 4; Gupta et al., *supra* note 3, at 6.

⁵⁸ Lee et al., *supra* note 3, at 121; Bingemann et al., *supra* note 54, at 107.

⁵⁹ Lee et al., *supra* note 3, at 121; *see* MATTHEW SMITH, ANOTHER PERSON’S POISON: A HISTORY OF FOOD ALLERGY 179–81 (2015) (describing the lack of understanding around the increase in food allergies).

⁶⁰ *See* Bingemann et al., *supra* note 54, at 107; Domenico Azzolino et al., *Food Allergies in Older People: An Emerging Health Problem*, WORLD ALLERGY ORG. J., Sept. 2024, at 1, 1; Chanita Unhapitpong et al., *Adult IgE-Mediated Food Allergy Is on the Rise: A Review of Phenotypes, Pathophysiologic Mechanisms, Diagnosis, and Advances in Management*, 40 ASIAN PAC. J. ALLERGY & IMMUNOLOGY 308, 308–09 (2022).

⁶¹ M. Cecilia Berin & Hugh A. Sampson, *Food Allergy: An Enigmatic Epidemic*, 34 TRENDS IN IMMUNOLOGY 390, 390 (2013); Feng & Kim, *supra* note 3, at 74; Gupta et al., *supra* note 3, at 2.

⁶² *See supra* note 4 and accompanying text.

⁶³ *See* Ruchi S. Gupta et al., *Prevalence and Severity of Food Allergies Among US Adults*, JAMA NETWORK OPEN, Jan. 2019, at 1, 1; Stephanie Leeds, Mehr Mathew & Anna Nowak-Wegrzyn, *Adult and Pediatric Food Allergy: Identifying Key Differences*, 130 ANNALS ALLERGY, ASTHMA & IMMUNOLOGY 261, 261 (2023).

⁶⁴ Gupta et al., *supra* note 63, at 9; Leeds et al., *supra* note 63, at 261; Christopher Warren, Sai R. Nimmagadda, Ruchi Gupta & Michael Levin, *The Epidemiology of Food Allergy in Adults*, 130 ANNALS ALLERGY, ASTHMA & IMMUNOLOGY 276, 276 (2023).

⁶⁵ *See, e.g.,* Gupta et al., *supra* note 63, at 2; Lee et al., *supra* note 3, at 121; Warren et al., *supra* note 64, at 278; Unhapitpong et al., *supra* note 60, at 309.

⁶⁶ Gupta et al., *supra* note 63, at 1; Warren et al., *supra* note 64, at 279.

⁶⁷ Gupta et al., *supra* note 63, at 5; Scott H. Sicherer et al., *Food Allergy from Infancy Through Adulthood*, 8 J. ALLERGY & CLINICAL IMMUNOLOGY: IN PRAC. 1854, 1859 (2020); Warren et al., *supra* note 64, at 282.

⁶⁸ Gupta et al., *supra* note 63, at 2; Sicherer et al., *supra* note 67, at 1859; Warren et al., *supra* note 64, at 276.

allergies developed one during adulthood.⁶⁹ And adults are at a higher risk for severe reactions because of additional factors such as hormonal fluctuations, medication taken for other health problems, and alcohol consumption.⁷⁰

C. Negative Attitudes About Food Allergies

The unprecedented rise in food allergies, especially peanut allergy, has brought with it a more general awareness about the existence and danger of food allergies,⁷¹ and to be sure, many non-allergic people are sympathetic and accommodating. But, unfortunately, that is not universally true. A significant segment of society does not appreciate the prevalence or seriousness of food allergies.⁷² They may not understand how ingesting a small amount of any food or even being around it can be dangerous, much less life-threatening.⁷³ Skeptics doubt that food allergies exist at all or think the risks and prevalence are overstated rather than being a scientifically certain epidemic.⁷⁴ Many people are unwilling to restrict their food choices to accommodate an allergic person because they do not think it necessary—or they just do not care.⁷⁵ Re-

⁶⁹ Gupta et al., *supra* note 63, at 11; Lee et al., *supra* note 3, at 121.

⁷⁰ See Toral A. Kamdar et al., *Prevalence and Characteristics of Adult-Onset Food Allergy*, 3 J. ALLERGY & CLINICAL IMMUNOLOGY: IN PRAC. 114, 114 (2015) (finding that older age is associated with a higher risk of severe reactions); Lee et al., *supra* note 3, at 127 (finding that “adults tend to experience food-allergic reactions that are more systemic than in children”); Leeds et al., *supra* note 63, at 261 (identifying alcohol consumption and medications as potential causes of the difference in reactions between adults and children).

⁷¹ See DANYA GLABAU, *FOOD ALLERGY ADVOCACY: PARENTING AND THE POLITICS OF CARE* 10–11 (2022) (describing the lack of knowledge and general awareness of food allergy in the 1990s); SMITH, *supra* note 59, at 155 (describing how attention and awareness around peanut allergies increased with time).

⁷² See Ruchi S. Gupta et al., *Food Allergy Knowledge, Attitudes and Beliefs: Focus Groups of Parents, Physicians and the General Public*, 8 BMC PEDIATRICS 1, 1 (2008); Schelly et al., *supra* note 56, at 34–35. For more discussion regarding general skepticism and hostility about food allergy, see Shu, *Harassment*, *supra* note 6, at 14–17.

⁷³ See SMITH, *supra* note 59, at 153 (describing the death of a ten-year-old boy who had a peanut allergy and ate ice cream containing whipped peanut butter); Beth Teitell, *Skeptics Add to Food Allergy Burden for Parents*, BOS. GLOBE (Feb. 11, 2014), <https://www.bostonglobe.com/lifestyle/2014/02/11/with-one-child-food-allergy-restricting-another-allergy-moms-say-they-face-skepticism/Hi9h2AGwDyCzAB0NsCRX9O/story.html> [<https://perma.cc/FYJ8-8G48>] (citing the deaths of three young people within a two-year span in Massachusetts due to reactions to food allergies).

⁷⁴ See Lavanya Ramanathan, *It's Bad Enough to Have a Food Allergy. But Then You Have to Deal with the Skepticism*, WASH. POST (Sept. 25, 2018), https://www.washingtonpost.com/lifestyle/magazine/its-bad-enough-to-have-a-food-allergy-but-then-you-have-to-deal-with-the-skepticism/2018/09/21/80d2e1f8-89d6-11e8-8aea-86e88ae760d8_story.html [<https://perma.cc/Y4K4-NATQ>]; Schelly et al., *supra* note 56, at 34–35.

⁷⁵ See Michaela DeSoucey & Miranda R. Waggoner, *Another Person's Peril: Peanut Allergy, Risk Perceptions, and Responsible Sociality*, 87 AM. SOCIO. REV. 50, 51, 56 (2022); GLABAU, *supra* note 71, at 139; SMITH, *supra* note 59, at 154.

sistance even from family members is quite common.⁷⁶ Commercials, television shows, and movies often make light of food allergy reactions or joke about killing someone with their allergen.⁷⁷

These bad attitudes often translate into even worse behavior. It might be reasonable to anticipate some misbehavior from young children, and, as discussed above, food allergy bullying at school through acts such as teasing and physical threats with the allergen happens at an alarming rate.⁷⁸ But it's not just kids who act this way. Even in school, a stunning twenty percent of bullying of food-allergic children comes from adults such as teachers and coaches.⁷⁹ As for the kids doing the bullying, some undoubtedly learn the error of their ways or otherwise outgrow their behavior, but others do not. Food allergy bullying happens in middle school and high school, and these kids are on the brink of adulthood.⁸⁰ For example, in 2023, members of the Lake Travis, Texas high school varsity football team filmed themselves putting peanuts in their teammate's locker and flicking peanuts at him after learning of his peanut allergy, which he had told them could kill him.⁸¹ College students can bully as well—a college fraternity hazing incident in 2017 involved rubbing peanut

⁷⁶ See Khamsi, *supra* note 54, at 54 (describing grandparents who did not believe their grandchild's allergy, stating “[w]e didn’t have this in my day”); Schelly et al., *supra* note 56, at 35 (describing an individual's family who always thought she was “kidding” with them about her allergy).

⁷⁷ See Lianne Mandelbaum, *Enough Is Enough with the Food Allergy ‘Jokes,’* ALLERGIC LIVING (Jan. 29, 2022), <https://www.allergicliving.com/2022/01/29/enough-is-enough-with-the-food-allergy-jokes/> [<https://perma.cc/8J6P-Q7S2>] (describing comedians, TV show hosts, Twitter users, and others who make light of food allergies); Wendy Mondello, *Uber Eats Super Bowl Ad’s Allergy ‘Joke’ Called Out by FARE,* ALLERGIC LIVING (Feb. 7, 2024), <https://www.allergicliving.com/2024/02/07/uber-eats-super-bowl-ads-allergy-joke-called-out-by-fare/> [<https://perma.cc/PCW5-EMQS>] (discussing Uber Eats's use of a food allergy joke in its Super Bowl ad); see also Shu, *Harassment*, *supra* note 6, at 16 (detailing examples of media that has made light of food allergies).

⁷⁸ See *supra* note 9 and accompanying text.

⁷⁹ Lieberman et al., *supra* note 9, at 285; see also Shu, *Harassment*, *supra* note 6, at 28 n.117 (considering incidents of bullying by teachers and school staff).

⁸⁰ See, e.g., Greg Bradbury, *Banana Prank Sends Teacher to Hospital, Students to Court*, ABC NEWS (July 31, 2019), <https://abcnews.go.com/US/banana-prank-sends-teacher-hospital/story?id=64691960> [<https://perma.cc/B5AE-6Y8F>] (detailing incident in which three seventh-grade students rubbed a banana on the doorknob of teacher they knew had a severe banana allergy and threw bananas at her, sending her to the hospital for anaphylaxis); Marwa Eltagouri, *Three Teens Charged with Knowingly Exposing Allergic Classmate to Pineapple. She Was Hospitalized.*, WASH. POST (Jan. 27, 2018), <https://www.washingtonpost.com/news/education/wp/2018/01/26/3-teens-charged-with-knowingly-exposing-allergic-classmate-to-pineapple-she-was-hospitalized/> [<https://perma.cc/3HZ6-6NLP>] (describing a middle school girl who rubbed a pineapple on her hand before high-fiving an allergic classmate).

⁸¹ Gwen Smith, *Texas Football Peanut Allergy Incident: Mom on What Happened*, ALLERGIC LIVING (Nov. 16, 2023), <https://www.allergicliving.com/2023/11/16/texas-football-peanut-allergy-incident-mom-on-what-happened/> [<https://perma.cc/UM5W-Z8CH>]. His parents have since sued the school for disability-based harassment. Pl.’s First Am. Compl. at 20, 22–23, C.M. v. Lake Travis Indep. Sch. Dist., No. 1:24-cv-00367 (W.D. Tex. Apr. 29, 2024), ECF No. 3. For an in-depth discussion of how food allergy bullying in school can qualify as disability-based harassment, see generally Shu, *Harassment*, *supra* note 6.

butter on an allergic student's face.⁸² Adults outside of school have bullied with food. In 2021, a Missouri man was charged with first-degree assault for placing peanuts in a coffee can, a laundry soap container, and the underwear drawer of a man he knew was allergic to peanuts.⁸³

The public response to the Department of Transportation's (DOT) 2010 proposal to ban peanuts on airplanes demonstrates the wide range of views and how passionate and sometimes nasty allergy skeptics can be.⁸⁴ The DOT requested comments on its proposed regulations, which covered not only a peanut ban but many other issues.⁸⁵ It received more than two thousand responses, and sixty-five percent of the responses addressed the peanut issue.⁸⁶ Though most of these comments favored the ban, a passionate minority made its voice heard so loudly that the DOT abandoned the peanut ban proposal.⁸⁷ Critics discounted the risk of allergies in general and exposure to peanuts in particular and said it was not their obligation to protect someone else.⁸⁸ "If those people are so worried about flying let them stay home in their hermetically sealed houses or cars."⁸⁹ Many objected to any limitation on their "right" to eat whatever they wanted, essentially characterizing this as a moral issue or "reverse discrimination."⁹⁰ Some were quite aggressive in their opposition; for example, one person wrote: "If you impose a ban, I plan to stop at Costco before I fly, buy the biggest bag of peanuts and bring it on board to share with my new friends."⁹¹

A large portion of these people with ill-informed or negative attitudes about food allergies presumably have or will have jobs. What happens when their coworker or subordinate has a food allergy—especially if an accommoda-

⁸² See Roni Caryn Rabin, *In Allergy Bullying, Food Can Hurt*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/well/family/in-allergy-bullying-food-can-hurt.html> [<https://perma.cc/TLE2-6BN9>]. The perpetrator pleaded guilty to a charge of assault and battery. *Id.*

⁸³ Dave Bloom, *Missouri Man Charged with First Degree Assault for Using Peanuts with Intent to Harm*, SNACK SAFELY (Apr. 29, 2021), <https://snacksafely.com/2021/04/missouri-man-charged-with-first-degree-assault-for-using-peanuts-with-intent-to-harm/> [<https://perma.cc/26H4-VL9P>].

⁸⁴ See DeSoucey & Waggoner, *supra* note 75, at 51.

⁸⁵ *Id.*

⁸⁶ *Id.* at 58.

⁸⁷ *Id.* at 51, 58.

⁸⁸ See *id.* at 51, 63; see also Brian Smith, 'Nut-Free' Elementary School Decision Upheld by Michigan Court of Appeals, MLIVE (July 31, 2013), https://www.mlive.com/news/2013/07/nut-free-elementary_school_dec.html [<https://perma.cc/YH7U-ZQ5U>] (discussing a parent's lawsuit against a school that prevented her child from bringing peanut butter, with the parent arguing they had no obligation to change their child's nutrition due to another's allergy).

⁸⁹ DeSoucey & Waggoner, *supra* note 75, at 66.

⁹⁰ *Id.* at 68; accord *id.* at 51, 66–69 (highlighting the belief by some that they have the right to eat peanuts despite the dangers to others).

⁹¹ *Id.* at 68.

tion requires action on their part such as not eating a favorite food at work?⁹² Workplace issues are arising already, as will be discussed below. But first, it is important to establish more information about the legal status of food allergy as a disability.

II. FOOD ALLERGY AS A DISABILITY

In previous work, I explained the history of courts' treatment of food allergy as a disability under the ADA and thoroughly analyzed why, under a proper application of the law, a food allergy should generally be considered a disability.⁹³ I will not repeat that history and analysis in detail but will instead summarize it to provide context for an update on developments in the law since 2019, when I completed my prior research.⁹⁴ Section A of this Part provides a summary of that prior research,⁹⁵ and Section B considers developments in case law since the completion of that research.⁹⁶

A. Prior Work on Food Allergy as a Disability

The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities" of an individual.⁹⁷ Shortly after it was passed, the Supreme Court began restricting the Act. It strictly interpreted it, stating that "substantially limits" was a "demanding standard."⁹⁸ Limitations were to be assessed only after looking at the impacts of so-called "mitigating measures" such as medicine, assistive equipment, or behavioral modifications.⁹⁹ For example, under this view, blood pressure well controlled

⁹² Professor Doron Dorfman has referred to these and other types of accommodations that require others (besides the covered entity) to change their behavior to accommodate disabled individuals as "third-party accommodations." Doron Dorfman, *Third-Party Accommodations*, 123 MICH. L. REV. (forthcoming 2025) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4742287 [<https://perma.cc/48MB-ZV3P>]. He analyzes how the law treats these types of accommodations in several contexts, including smoking, food allergy, and masking, and proposes a framework for how courts should evaluate requests for third-party accommodations. *Id.* (manuscript at 19–72).

⁹³ See Shu, *Harassment*, *supra* note 6, at 40–60.

⁹⁴ I will provide some cites in this Section to support my summary, but the article provides much more detail.

⁹⁵ See *infra* notes 97–121 and accompanying text.

⁹⁶ See *infra* notes 122–188 and accompanying text.

⁹⁷ 42 U.S.C. § 12102(1)(A).

⁹⁸ *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002); see also Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383, 388 (2019) (explaining that because of these Supreme Court cases, "the protected class shrunk substantially").

⁹⁹ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 480 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999).

with medicine would not be a disability.¹⁰⁰ Courts further limited the scope of disability for episodic or intermittent conditions; those conditions could be disabling only if they became active frequently enough, regardless of how severe the symptoms were when active.¹⁰¹

Under these old principles, the few cases that discussed food allergy (or analogous conditions involving other types of allergies or food issues) as a disability mostly concluded that food allergy was not covered.¹⁰² Courts looked to the availability of emergency medicine like inhalers and EpiPens and behavioral adaptations like allergen avoidance—all of which are types of mitigating measures—in determining that the allergies were not substantially limiting.¹⁰³ They also considered frequency and said that because the plaintiffs only had reactions when exposed and were not exposed constantly, their limitations were not substantial.¹⁰⁴

Three of these older cases have lingering effects and thus merit special attention. First, and most significant, is *Land v. Baptist Medical Center* from 1999, in which the Eighth Circuit concluded that a girl who was denied day care services because of her peanut allergy did not have a disability.¹⁰⁵ The court reasoned that her breathing and eating were not substantially impaired because she reacted only when she ate peanuts and had no other limitations on eating or breathing.¹⁰⁶

Second, *Slade v. Hershey Co.*, decided in 2011 by the Middle District of Pennsylvania, involved a woman with a nut allergy who worked at a Hershey chocolate factory.¹⁰⁷ Her situation will be discussed in more detail in the next Section because it involves an employment issue.¹⁰⁸ For now, it is sufficient to note that in rejecting her claim, the court emphasized that she had no trouble breathing except when exposed to nuts and that a hypothetical future exposure

¹⁰⁰ See *Murphy*, 527 U.S. at 518–19.

¹⁰¹ See *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 507 F.3d 1306, 1315 (11th Cir. 2007) (concluding that cancer was not a disability because most of the individual's periods of severe limitations were short term and temporary); see also Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2039 (2013) (“[M]ost courts prior to the ADAAA found chronic illnesses that are episodic in nature are not disabling.”).

¹⁰² See *Shu, Harassment*, *supra* note 6, at 42–45.

¹⁰³ See, e.g., *Land v. Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999); *Slade v. Hershey Co.*, No. 1:09-cv-00541, 2011 WL 3159164, at *5 (M.D. Pa. July 26, 2011); *Bohacek v. City of Stockton*, No. S-04-0939, 2005 WL 2810536, at *4 (E.D. Cal. Oct. 26, 2005).

¹⁰⁴ See, e.g., *Land*, 164 F.3d at 425 (finding that an individual's allergy impacted her life only “a little bit”); *Bohacek*, 2005 WL 2810536, at *3 (holding that an individual must show that their life is impacted “on a regular basis by severe problems”).

¹⁰⁵ 164 F.3d at 424–25.

¹⁰⁶ *Id.* at 425.

¹⁰⁷ 2011 WL 3159164, at *1.

¹⁰⁸ See *infra* notes 238 & 313 and accompanying text.

was not relevant.¹⁰⁹ The court relied on *Land* in rejecting disabilities based on “an avoidable allergic reaction,” emphasizing that she “can cure her breathing problems through simple measures such as avoiding exposure to nuts and keeping medication on her person.”¹¹⁰

The final case is *Fraser v. Goodale*, decided in 2003 by the Ninth Circuit, which is not a food allergy case but concerned a woman with a severe type of diabetes known as brittle diabetes.¹¹¹ Brittle diabetes is very difficult to control and involves medicine and strict dietary management.¹¹² In the course of holding that her condition was a disability, the court recognized that dietary management is a mitigating measure and compared her severe dietary restrictions to what it called “ordinary” dietary restrictions, which it said are not substantially limiting.¹¹³

Congress disagreed with the Supreme Court’s and other narrow interpretations of the ADA and amended the statute in 2008 with the ADA Amendments Act (ADAAA).¹¹⁴ Congress clarified that the scope of what is included as a disability should be broadly, not narrowly, interpreted.¹¹⁵ It eliminated the old mitigating measures rule, stating 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.”¹¹⁶ For episodic impairments or those in remission, they should now be assessed based on when the condition is active.¹¹⁷

These changes were good news for those advocating for food allergy as a disability. The amendments eviscerated the reasoning in cases like *Land*, *Slade*, and *Fraser* because courts are now required to assess the impact of an allergy based on what happens when the person is exposed to the allergen—not

¹⁰⁹ *Slade*, 2011 WL 3159164, at *5.

¹¹⁰ *Id.* at *4–5.

¹¹¹ 342 F.3d 1032, 1035 (9th Cir. 2003).

¹¹² *Id.*

¹¹³ *Id.* at 1041.

¹¹⁴ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

¹¹⁵ 42 U.S.C. § 12102(4)(A)–(B).

¹¹⁶ *Id.* § 12102(4)(E)(i).

¹¹⁷ *Id.* § 12102(4)(D). The ADAAA made other important changes too, particularly in specifying that eating and breathing are major life activities and adding the operation of major bodily functions (such as the immune and respiratory systems) as part of the definition of major life activities. ADA Amendments Act of 2008 § 4; see Shu, *Harassment*, *supra* note 6, at 46–47. I discuss those in my prior article but not here because those changes are not as important to understanding the particular case law updates I provide in the next Section. For a comprehensive discussion of the ADAAA’s changes, see Nicole Buonocore Porter, *Troubling Trends: ADA Definition of Disability Cases 2019–2023*, PEPP. L. REV. (forthcoming 2025) (manuscript at 6–10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4997349 [<https://perma.cc/R3DH-X4VD>].

on the frequency of past reactions or what the person could do to avoid exposure or treat a reaction.¹¹⁸

Based on my research through 2019, the law was generally more favorable to food allergy plaintiffs after the ADAAA.¹¹⁹ Food allergy cases that would most likely have been dismissed before the ADAAA survived, along with cases involving other allergy or food-related issues.¹²⁰ But some courts still got it wrong, relying on old cases like *Land* and considering factors such as frequency of reactions and mitigating measures such as allergen avoidance and emergency medicines.¹²¹

B. New Case Law on Food Allergy as a Disability

Though there are still not very many food allergy disability cases overall, the previous pattern has continued over the past five years, with some courts applying the correct post-ADAAA law but also many getting the law and analysis wrong.¹²²

Starting on the positive side, three recent cases have done excellent work in analyzing food allergy as a disability. The first two involve workers with shellfish allergies.¹²³ Both courts stressed that even though the workers had emergency medicine available and could attempt to avoid exposure, they had a disability because of the risk of anaphylaxis and because of the other symptoms they suffered when exposed.¹²⁴ Both courts also noted the important changes Congress made when passing the ADAAA and rejected relying on pre-ADAAA cases.¹²⁵ One criticized other courts that continue to cling to outdated rationales in cases like *Land* about sporadically occurring symptoms not being covered.¹²⁶ The third case is against Dunkin' Donuts and alleges discrim-

¹¹⁸ See Shu, *Harassment*, *supra* note 6, at 47.

¹¹⁹ *Id.* at 47–49.

¹²⁰ *Id.*

¹²¹ *Id.* at 49–50.

¹²² Nicole Porter has analyzed court decisions from 2019–2024 addressing whether a condition qualified as a disability and determined that 18% of the 1,205 decisions were incorrect. See Porter, *supra* note 117, at 13–14. This is down slightly from her analysis of the previous five-year period, where courts were incorrect 21.5% of the time. *Id.* at 14; see Porter, *supra* note 98, at 392–409.

¹²³ See Op. & Order Granting Def.'s Mot. for Summ. J. at 1, *Gillespie v. Detroit Ent., L.L.C.*, No. 2:22-cv-11186 (E.D. Mich. Aug. 22, 2024), ECF No. 34; *Dale v. McDonough*, No. 1:22-cv-10815, 2024 WL 1662904, at *1 (E.D. Mich. Feb. 28, 2024), *report and recommendation adopted*, 2024 WL 1660525 (E.D. Mich. Apr. 17, 2024).

¹²⁴ See *Gillespie* Summ. J. Order, *supra* note 123, at 10–11; *Dale*, 2024 WL 1662904, at *7–8.

¹²⁵ See *Gillespie* Summ. J. Order, *supra* note 123, at 10; *Dale*, 2024 WL 1662904, at *7; see also *Ruiz v. KeratinBar, Inc.*, No. 17-cv-2216, 2019 WL 13328409, at *7 (S.D.N.Y. July 1, 2019) (finding fact issue as to whether celiac disease is a disability and citing law requiring an assessment of episodic impairment when active).

¹²⁶ See *Dale*, 2024 WL 1662904, at *7.

ination against those with lactose intolerance and dairy allergies in Dunkin's practice of charging higher prices for non-dairy alternatives in coffee beverages.¹²⁷ This court also clearly laid out the post-ADAAA law regarding broad coverage for disabilities and the requirement to assess limitations based on when an episodic impairment is active, without regard to mitigating measures.¹²⁸ It granted a motion to dismiss but with leave to amend because the plaintiffs' allegations were not sufficiently specific.¹²⁹

Some courts analyzing analogous conditions such as other types of allergies have also applied correct post-ADAAA law. One particularly good example involves a college professor with an allergic condition that causes him to periodically lose his voice because of atmospheric mold.¹³⁰ This mold exists in Georgia, and when he lived there, he would lose his voice for days at a time, multiple times a year.¹³¹ He worked remotely from California for several years, and during that time, he only had one flare up.¹³² The lawsuit arose when the university, located in Georgia, rescinded his permission to work remotely. The parties both moved for summary judgment on the issue of whether his mold allergy was a disability; the court denied the defendant's motion and granted the plaintiff's, holding that his condition was a disability as a matter of law.¹³³ It matters not that the professor loses his voice only periodically; the court "rejected [this argument] out of hand" because the impact of the impairment must be assessed when active.¹³⁴ And his ability to avoid losing his voice by moving to California is irrelevant because this avoidance tactic is a mitigating measure, which cannot be considered in determining whether a condition is a disability.¹³⁵ Several other courts have also applied correct law in assessing sporadic allergic-type conditions when active¹³⁶ and in rejecting mitigating measures such as being able to avoid exposure.¹³⁷

¹²⁷ *Garland v. Dunkin Donuts LLC*, No. 23-cv-06621, 2024 WL 2808653, at *1 (N.D. Cal. May 31, 2024).

¹²⁸ *See id.* at *5–6.

¹²⁹ *Id.* at *7–8.

¹³⁰ *Greene v. Bd. of Regents of the Univ. Sys. of Ga.*, 742 F. Supp. 3d 1271, 1276–77 (N.D. Ga. 2024).

¹³¹ *Id.* at 1277.

¹³² *Id.*

¹³³ *Greene v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 1:22-cv-04309, 2024 WL 3912696, at *5–6, *10–11 (May 20, 2024), *report and recommendation adopted*, 742 F. Supp. 3d 1271 (N.D. Ga. 2024).

¹³⁴ *Id.* at *5.

¹³⁵ *Id.* at *5–6, *10.

¹³⁶ *See McCrae v. H.N.S. Mgmt. Co.*, No. 3:22-cv-00217, 2024 WL 1973431, at *17–19 (D. Conn. May 3, 2024) (sensitivity to workplace cleaning chemicals; periodic reactions of rash, swollen eyes, headaches, nausea, and facial swelling sufficient; denying summary judgment); *Carter v. Eagle Railcar Servs. Longview, Tex., LLC*, No. 9:21-cv-00289, 2022 WL 17489167, at *3 (E.D. Tex. Dec. 7, 2022) (allergic reactions while servicing specific railcars; explaining ADAAA changes and stating

But not every court has gotten it right. A magistrate judge in the District of South Carolina recommended a ruling that a plaintiff with celiac disease did not have a disability because the condition merely causes him to have bathroom emergencies and because he can manage it by avoiding gluten.¹³⁸ The court adopted this recommendation, adding in a quotation from the pre-ADAAA *Fraser* case about the brittle diabetic and holding that the plaintiff's claim "is merely of a dietary restriction" and thus not a disability.¹³⁹ But avoiding gluten is a mitigating measure that must not be considered in making the disability determination, and *Fraser's* comment about ordinary dietary restrictions is rooted in the old mitigating measures rule.¹⁴⁰ Further, the court downplayed the plaintiff's allegations related to his celiac disease, which included damage to his small intestine and severe digestive distress.¹⁴¹

Similar problems have occurred in analogous cases involving other types of allergies. In *Whitesell*, the court granted summary judgment against a plaintiff with a severe fragrance allergy that causes migraines, vocal cord dysfunction, and severe breathing problems.¹⁴² Though it cited some correct post-ADAAA law about evaluating episodic impairments,¹⁴³ the court misunder-

that "[c]ase law on what constitutes a 'disability' under the ADA before the 2008 amendments is therefore no longer instructive"; denying summary judgment); Order Granting Def.'s Mot. to Strike and Granting in Part and Denying in Part Def.'s Mot. for Summ. J. at 21–24, *Wood v. Siegwirk USA, Inc.*, No. 4:18-cv-00108 (S.D. Iowa June 18, 2019), ECF No. 50 (asthma from workplace chemical exposure; stating that "pre-ADAAA opinions provide limited guidance in determining whether an individual is disabled for ADA purposes" and concluding severe breathing issues when exposed to the chemicals is sufficient to create a fact issue); see also *West v. Sec'y of Veterans Affs.*, No. 3:22-cv-292, 2024 WL 2132418, at *2, *4–5 (S.D. Ohio May 13, 2024) (dust allergy; recognizing that the impairment must be assessed when active but granting summary judgment based on questionable analysis that "violent" coughing that happens "all the time" does not constitute any explanation as to how the plaintiff's dust allergy impacts her breathing).

¹³⁷ See *Smith v. Smith Transp., Inc.*, No. 3:20-cv-00250, 2023 WL 6389073, at *4–7 (W.D. Pa. Sept. 29, 2023) (smoke allergy; rejecting *Slade* and other cases analyzing whether a plaintiff can avoid the allergen because avoidance is a mitigating measure; fact issue on disability issue but summary judgment granted on other grounds); *Wallace v. N.H. Ball Bearings, Inc.*, No. 19-cv-1049, 2022 WL 279676, at *6 (D.N.H. Jan. 31, 2022) (latex allergy; avoiding latex is a mitigating measure which cannot be considered, and plaintiff risks anaphylaxis with any exposure; denying summary judgment on disability element but granting on others).

¹³⁸ *Holt v. Rural Health Servs., Inc.*, No. 1:21-2802, 2023 U.S. Dist. LEXIS 234554, at *22 (D.S.C. June 21, 2023), *report and recommendation adopted*, 2024 U.S. Dist. LEXIS 18830 (D.S.C. Feb. 1, 2024).

¹³⁹ *Holt v. Rural Health Servs., Inc.*, No. 1:21-2802, 2024 U.S. Dist. LEXIS 18830, at *6 (D.S.C. Feb. 1, 2024).

¹⁴⁰ See 42 U.S.C. § 12102(4)(E); *Fraser v. Goodale*, 342 F.3d 1032, 1039 (9th Cir. 2003); see also *supra* notes 113 & 118 and accompanying text.

¹⁴¹ See Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J. at 2–3, 21, *Holt v. Rural Health Servs., Inc.*, No. 1:21-02802 (D.S.C. May 4, 2023), ECF No. 52.

¹⁴² *Whitesell v. FMS Fin. Mgmt. Servs., LLC*, No. 3:18-cv-00496, 2020 WL 2770017, at *5, *9 (M.D. Tenn. May 28, 2020).

¹⁴³ See *id.* at *6.

stood that law. The court recognized that the plaintiff's reactions were severe and "clearly" affected her "ability to breathe when they are occurring," but it emphasized that "these reactions occur only when certain substances are present."¹⁴⁴ It seemed persuaded by "admittedly a pre-ADAAA opinion" regarding episodic impairments requiring the court "to consider the overall effects of the plaintiff's impairment, not just when those effects were the most severe."¹⁴⁵ This is the very opposite of the new episodic impairment rule, which directs courts to assess the impact of the impairment when active.¹⁴⁶

Another court stated the law correctly when analyzing the plaintiff's allergy, recognizing the new mitigating measures and episodic impairment rules.¹⁴⁷ But it misapplied that law in concluding that the plaintiff's four prior serious workplace reactions and her breathing difficulties, which require medical intervention if prolonged, and risk of anaphylaxis were not sufficient to even plead that she had a disability.¹⁴⁸ The court undervalued the plaintiff's risks and held her to an unreasonably high standard. Conversely, another court reached the right outcome in refusing to dismiss a mold allergy plaintiff's suit, but it got the law completely wrong; it relied on *Land* and many other cases involving supposedly avoidable allergens but concluded that the plaintiff there could not avoid mold exposure and thus raised a fact issue as to whether she was disabled.¹⁴⁹ This is, of course, flawed analysis because the ability to avoid exposure is a mitigating measure, which cannot be considered.¹⁵⁰

Outside the allergy context, the Sixth Circuit recently issued an extremely flawed decision holding that a woman with asthma did not have a disability.¹⁵¹ Food allergies can impact breathing, so this case is significant because the court's reasoning regarding asthma—a breathing impairment—can potentially be applied in food allergy cases. The plaintiff has had asthma since childhood

¹⁴⁴ *Id.* at *7.

¹⁴⁵ *Id.* at *8.

¹⁴⁶ See 42 U.S.C. § 12102(4)(D).

¹⁴⁷ See *Innes v. Cnty. of Warren*, No. 1:22-cv-641, 2024 WL 865864, at *8 (N.D.N.Y. Feb. 29, 2024).

¹⁴⁸ *Id.* at *8–9.

¹⁴⁹ *Clark v. Sarpy Cnty.*, 453 F. Supp. 3d 1273, 1280–81 (D. Neb. 2020).

¹⁵⁰ See 42 U.S.C. § 12102(4)(E); *Greene v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 1:22-cv-04309, 2024 WL 3912696, at *5–6, *10 (May 20, 2024), *report and recommendation adopted*, 742 F. Supp. 3d 1271 (N.D. Ga. 2024); *Smith v. Smith Transp., Inc.*, No. 3:20-cv-00250, 2023 WL 6389073, at *4–7 (W.D. Pa. Sept. 29, 2023); *Wallace v. N.H. Ball Bearings, Inc.*, No. 19-cv-1049, 2022 WL 279676, at *6 (D.N.H. Jan. 31, 2022); see also Shu, *Harassment*, *supra* note 6, at 56 nn.274–75. Some courts continue to ignore the ADAAA or cite old law in non-allergy contexts as well, as Nicole Porter and Deborah Widiss have documented. See Porter, *supra* note 117 (manuscript at 17–21); Deborah A. Widiss, *Still Kickin' After All These Years: Sutton and Toyota as Shadow Precedents*, 63 DRAKE L. REV. 919, 936–42 (2015).

¹⁵¹ See *Andrews v. Tri Star Sports & Ent. Grp., Inc.*, No. 23-5700, 2024 WL 3888127, at *1 (6th Cir. Aug. 21, 2024), *en banc reh'g denied*, No. 23-5700 (Oct. 21, 2024).

and uses three daily medications and an inhaler as needed to keep her asthma under control.¹⁵² Even though the court quoted the ADAAA rule that the disability determination should be made without considering mitigating measures,¹⁵³ the court did precisely the opposite. It focused on the plaintiff's physical activities—for example, that she regularly exercised—and that she had only visited the hospital twice for her asthma as reasons to hold that her asthma did not substantially limit her breathing.¹⁵⁴ A vigorous dissent pointed out that this analysis is flat wrong under the ADAAA: “The majority’s determination . . . wrongfully assumes that those who are ‘truly’ disabled cannot find ways to participate in everyday activities and blatantly contradicts the 2008 amendments to the ADA.”¹⁵⁵ The focus on her physical activity and low frequency of serious asthma flares is misguided. “The appropriate inquiry is instead whether [her] asthma would substantially limit a major life activity when active—without the consideration of the relief she gets from using her inhaler and other medications.”¹⁵⁶

Sometimes courts appear to create categories of disfavored plaintiffs and shortcut analyzing their claims. I previously noted this problem in relation to incarcerated people with food allergies or other food-related conditions,¹⁵⁷ and that problem persists. For example, a woman incarcerated for three months lost thirty pounds because she could not get appropriate accommodations for her gluten, soy, and corn allergies, but the court cursorily ruled she did not have a disability, characterizing her situation as merely “a restriction in food choices.”¹⁵⁸ And a new disfavored group seems to have arisen: plaintiffs resisting vaccinations based on allergy concerns. Some of these cases involve COVID-19 vaccinations, and others involve flu vaccinations (or sometimes both). The plaintiffs have requested vaccination exemptions based on past allergic reactions or being allergic to egg, which has historically been a contraindication for

¹⁵² *Id.*

¹⁵³ *Id.* at *3.

¹⁵⁴ *See id.* at *4–5.

¹⁵⁵ *Id.* at *6 (Clay, J., dissenting).

¹⁵⁶ *Id.* at *8.

¹⁵⁷ *See Shu, Harassment, supra* note 6, at 50 n.240.

¹⁵⁸ *See Hope v. Berg*, No. 5:21-cv-1308, 2022 WL 80322, at *1–2, *4 (N.D. Ohio Jan. 7, 2022); *see also Zongo v. Brott*, No. 21-407, 2022 WL 2182196, at *9 n.9 (Mar. 30, 2022) (relying on *Land* to conclude that a detainee’s lactose intolerance was not a disability), *report and recommendation adopted*, 2022 WL 2181759 (D. Minn. June 16, 2022); *Alphonsis v. Century Reg’l Det. Facility*, No. 17-03650, 2019 WL 8105336, at *9 (C.D. Cal. Jan. 18, 2019) (denying a motion to dismiss a prisoner’s claim based on her allergies to several foods, stressing that this ruling applies only to “this stage” and citing *Land* with a parenthetical regarding granting summary judgment); *Hampton v. Wetzel*, No. 1:12-cv-0434, 2014 WL 1312013, at *1, *8–9 (M.D. Pa. Mar. 31, 2014) (granting summary judgment on a prisoner’s claim based on documented, lifelong onion and shellfish allergies with basically one line of analysis).

some vaccinations.¹⁵⁹ Most courts have rejected these claims on the basis of past reactions being too long ago or too infrequent¹⁶⁰—even in the case of a plaintiff who reacted every one of the three times she was vaccinated.¹⁶¹ One court required a plaintiff to prove with certainty that she would have had another allergic reaction if vaccinated.¹⁶²

Why do courts continue to make these mistakes more than fifteen years after the ADAAA? I and other scholars have questioned courts' competency and noted their potential hostility towards ADA claims, especially from certain groups such as people who are incarcerated.¹⁶³ We have also pointed to issues with plaintiffs, who might be pro se, or if they do have counsel, who may only "dabble" in disability law, as Nicole Porter puts it; they often fail to invoke the ADAAA, properly plead their claims, or adequately explain the burdens and risks of living with food allergies.¹⁶⁴

But another potential source of the problem has not been explored in as much depth: defense counsel. The concerns here go beyond even the plaintiff-side issues of not citing the ADAAA; many defense lawyers in disability cases are affirmatively relying on outdated law and making legally incorrect arguments, often leading courts to confusion and legal error. Many are citing *Land*,¹⁶⁵ *Slade*,¹⁶⁶ or other pre-ADAAA cases¹⁶⁷ or are otherwise making ar-

¹⁵⁹ See Dave Bloom, *CDC Publishes New Flu Vaccine Guidelines with Change for People with Egg Allergies*, SNACK SAFELY (Aug. 30, 2023), <https://snacksafely.com/2023/08/cdc-publishes-new-flu-vaccine-guidelines-with-change-for-people-with-egg-allergies/> [<https://perma.cc/U4JH-M6VJ>]. For additional discussion of egg allergies and vaccinations, see *infra* note 199 and accompanying text.

¹⁶⁰ See *Jacobs v. Mercy Health*, 719 F. Supp. 3d 894, 909–10 (E.D. Mo. 2024); *Richardson v. Grays Harbor Cnty. Pub. Hosp. Dist. No. 1*, No. 20-5814, 2021 WL 9649848, at *4–5 (W.D. Wash. Oct. 20, 2021); *Norman v. NYU Langone Health Sys.*, 492 F. Supp. 3d 154, 163–65 (S.D.N.Y. 2020), *aff'd on other grounds*, No. 20-3624-cv, 2021 WL 5986999 (2d Cir. Dec. 17, 2021); see also *Robertson v. Arthur M. Blank Fam. Off.*, No. 1:23-cv-2588, 2023 WL 11969893, at *6 (Oct. 26, 2023) (recommending that a motion to dismiss be granted, relying on *Land*), *report and recommendation adopted*, 2024 WL 4688247 (N.D. Ga. Jan. 3, 2024). Some courts, however, have ruled in favor of these plaintiffs, at least preliminarily. See *Swanson v. Lilly USA, LLC*, No. 1:23-cv-00831, 2024 WL 125978, at *4 (S.D. Ind. Jan. 10, 2024); *Sambrano v. United Airlines, Inc.*, 707 F. Supp. 3d, 652, 667 (N.D. Tex. 2023); see also *Doe(s) v. Pittsburgh Reg'l Transit*, 684 F. Supp. 3d 417, 427–28 (W.D. Pa. 2023) (relying on *Slade* but nevertheless denying the defendant's motion to dismiss).

¹⁶¹ See *Norman*, 492 F. Supp. 3d at 159–61, 163–64.

¹⁶² See *Richardson*, 2021 WL 9649848, at *5.

¹⁶³ See Shu, *Harassment*, *supra* note 6, at 50 n.240; Porter, *supra* note 117 (manuscript at 16–21, 50–57); Porter, *supra* note 98, at 392–409.

¹⁶⁴ See Shu, *Harassment*, *supra* note 6, at 59–60; Porter, *supra* note 117 (manuscript at 28–31); Porter, *supra* note 98, at 392–409; Widiss, *supra* note 150, at 938–39.

¹⁶⁵ See *Clark v. Sarpy Cnty.*, 453 F. Supp. 3d 1273, 1281 (D. Neb. 2020); Mem. in Support of Def.'s Mot. to Dismiss Pl.'s First Am. Compl. at 6, *King v. Exact Scis. Corp.*, No. 4:22-cv-00615 (W.D. Mo. Nov. 29, 2022), ECF No. 19; Def.'s Mem. in Support of Its Mot. to Dismiss Plaintiff's Complaint for Failure to State a Claim Upon Which Relief Can Be Granted at 6, *Penn v. Dot's Pretzels, LLC*, No. 2:21-cv-02269 (D. Kan. July 6, 2021), ECF No. 6; Mem. in Support of Defs.' Mot. to Dismiss Pl.'s Compl. at 18, *Robertson v. Arthur M. Blank Fam. Off.*, No. 1:23-cv-2588 (N.D. Ga.

guments that are wholly incompatible with the ADAAA's rules on mitigating measures and episodic impairments.¹⁶⁸ Although some courts have recognized the problem and not been fooled,¹⁶⁹ many have followed defense counsel down the path of citing incorrect law and relying on faulty legal analysis.¹⁷⁰

One particular defense argument deserves special attention. Though technically not contesting that the plaintiff's shellfish allergy is a disability, defense counsel's palpable disdain for the plaintiff and her condition shone through in the summary judgment briefing. Her story will be explained in more detail in the next Section,¹⁷¹ but for now, it is sufficient to understand that she had a severe shellfish allergy, and her working conditions repeatedly exposed her to shellfish and caused several reactions.¹⁷² She alleged that the employer's purported accommodations were insufficient and that she eventually quit reporting her reactions because it did no good.¹⁷³ In summary judgment briefing, the employer's counsel had this to say:

She claims she was “deathly allergic” to shellfish, but she alleges that she worked around it regularly, *yet she not only survived*, but

July 28, 2023), ECF No. 5-1; Def.'s Mem. of Law in Support of Mot. to Dismiss Pl.'s Am. Compl. at 10, *Swanson v. Eli Lilly & Co.*, No. 1:23-cv-00831 (S.D. Ind. July 14, 2023), ECF No. 24; Mem. in Support of Mot. for Summ. J. at 12–13, *Whitesell v. FMS Fin. Mgmt. Servs., LLC*, No. 3:18-cv-00496 (M.D. Tenn. June 14, 2019), ECF No. 23.

¹⁶⁶ See Def.'s Br. in Support of Mot. to Strike and to Partially Dismiss Am. Compl. at 13, *Doe(s) v. Pittsburgh Reg'l Transit*, 684 F. Supp. 3d 417 (W.D. Pa. 2023) (No. 2:22-cv-01736).

¹⁶⁷ See *Carter v. Eagle Railcar Servs. Longview, Tex., LLC*, No. 9:21-cv-00289, 2022 WL 17489167, at *3 (E.D. Tex. Dec. 7, 2022); Def.'s Mot. for Summ. J. & Br. in Support at 21, *Thomas v. Gray Television Grp., Inc.*, No. 4:22-cv-00375 (E.D. Tex. Apr. 26, 2023), ECF No. 33; Mot. for Summ. J. at 11, *Wentzel v. Williams Scotsman, Inc.*, No. 2:18-cv-02101 (D. Ariz. Nov. 22, 2019), ECF No. 80; Def.'s Mem. in Support of Mot. for Summ. J. at 28, *Wood v. Siegwark USA, Inc.*, No. 4:18-cv-00108 (S.D. Iowa Feb. 1, 2019), ECF No. 35.

¹⁶⁸ See *Hampton v. Wetzel*, No. 1:12-cv-0434, 2014 WL 1312013, at *8–9 (M.D. Pa. Mar. 31, 2014); *Innes v. Cnty. of Warren*, No. 1:22-cv-641, 2024 WL 865864, at *7–9 (N.D.N.Y. Feb. 29, 2024); *Wallace v. N.H. Ball Bearings, Inc.*, No. 19-cv-1049, 2022 WL 279676, at *6 (D.N.H. Jan. 31, 2022).

¹⁶⁹ See *Carter*, 2022 WL 17489167, at *3; *Wallace*, 2022 WL 279676, at *6; *Wood* Summ. J. Order, *supra* note 136, at 21–24; see also *Innes*, 2024 WL 865864, at *9 (rejecting the defendant's assertion of improper law but still reaching the wrong decision).

¹⁷⁰ See *Doe(s)*, 684 F. Supp. 3d at 427–28; *Clark*, 453 F. Supp. 3d at 1281; *Hampton*, 2014 WL 1312013, at *8–9; *Robertson v. Arthur M. Blank Fam. Off.*, No. 1:23-cv-2588, 2023 WL 11969893, at *6 (Oct. 26, 2023), *report and recommendation adopted*, 2024 WL 4688247 (N.D. Ga. Jan. 3, 2024); *Wentzel v. Williams Scotsman, Inc.*, No. 2:cv-18-02101, 2020 WL 1158547, at *8 (D. Ariz. Mar. 10, 2020); *Whitesell v. FMS Fin. Mgmt. Servs., LLC*, No. 3:18-cv-00496, 2020 WL 2770017, at *6–9 (M.D. Tenn. May 28, 2020).

¹⁷¹ See *infra* notes 280, 304, 331, 346, 379 and accompanying text.

¹⁷² Am. & Supp. Compl. for Failure to Accommodate, Battery, and Retaliatory Termination at 2–12, *Bergeron v. LCMC*, No. 2:21-cv-00507 (E.D. La. Aug. 11, 2021), ECF No. 11.

¹⁷³ *Id.* at 11.

only had one reported reaction after Defendant implemented the accommodations.¹⁷⁴

It most certainly is not the law that an allergic worker must die to have a valid claim based on a food allergy.

This poor defense briefing raises significant ethical and professionalism issues. The ABA Model Rules on competency and meritorious claims and defenses as well as Federal Rule of Civil Procedure 11 regarding frivolous claims and defenses require lawyers to know the correct law, either through their own research or by affiliating with a lawyer who does.¹⁷⁵ That means they must learn about changes in the law, including amendments to statutes.¹⁷⁶ Undoubtedly, some of this poor defense-side briefing arises because the lawyers do not understand the law or know it has changed. But ignorance of the law is no excuse.¹⁷⁷ Professionalism rules and Rule 11 impose duties of reasonable research to ensure correct knowledge of the law.¹⁷⁸ And ignorance of the law seems less likely with briefing from nationally recognized employment law specialty firms.¹⁷⁹

Lawyers also have a duty to correct prior misstatements of the law made to courts.¹⁸⁰ In two situations where prominent employment defense counsel

¹⁷⁴ Def.'s Reply Mem. in Support of Mot. for Summ. J. at 2–3, *Bergeron v. LCMC*, No. 2:21-cv-00507 (E.D. La. Apr. 8, 2022), ECF No. 41 (emphasis added).

¹⁷⁵ See MODEL RULES OF PRO. CONDUCT r. 1.1 & cmts. 1–2 (AM. BAR ASS'N 2023); *id.* r. 3.1 & cmt. 2; FED. R. CIV. P. 11(b); STEVEN S. GENSLER, 1 FED. R. CIV. P.: RULES AND COMMENTARY, RULE 11 (2024) [hereinafter RULE 11 COMMENTARY].

¹⁷⁶ See MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (stating that “a lawyer should keep abreast of changes in the law”); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 111 & cmts. b–d (AM. L. INST. 2000) (stating that misstatements of the law include “asserting the existence of authority known to have been repealed,” requiring a lawyer “to indicate when [a statute] has been amended or otherwise substantially limited by subsequent legislation” in section 111(2), and providing a duty to disclose “legal authority” including statutes as well as cases).

¹⁷⁷ See RULE 11 COMMENTARY, *supra* note 175 (“The fact that a lawyer sincerely misunderstands the law is no justification; Rule 11(b)(2) contains no ‘empty-head pure-heart’ excuse for not knowing the law.”).

¹⁷⁸ See MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8, 3.1 cmt. 2; RULE 11 COMMENTARY, *supra* note 175; RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. §§ 110 cmt. c, 111 cmt. c.

¹⁷⁹ See *King* Mot. to Dismiss, *supra* note 165, at 15; *Thomas* Mot. for Summ. J., *supra* note 167, at 35; *Wentzel* Mot. for Summ. J., *supra* note 167, at 13; *Whitesell* Summ. J. Mem., *supra* note 165, at 25. In one of these cases, defense counsel dropped a footnote in the motion noting that *Land* has not been explicitly overruled. *King* Mot. to Dismiss, *supra* note 165, at 6 n.4. That might be technically true, but the entire foundation of the case has been repudiated, and no court has ruled that *Land*'s analysis is sound in light of the ADAAA. The absence of a red flag on Westlaw or Lexis does not mean the law is still good. See *Widiss*, *supra* note 150, at 941–42 (“[T]he conclusions reached in [pre-ADAAA] decisions . . . need to be rethought in light of the amendments (even though these lower court decisions may not themselves be ‘red-flagged’ on Lexis or Westlaw).”). Incorrect arguments in these circumstances might have an outsized impact because courts might naturally rely on these employment specialty firms to have the law right.

¹⁸⁰ MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1).

relied on pre-ADAAA law, the worker's lawyer pointed out the error in responsive briefing.¹⁸¹ The defense replies were less than helpful: a short, conclusory footnote that they win under the new standard as well (with no citations or explanation) and a statement that some of their cases were new too.¹⁸² It is questionable whether such bare and lackluster briefing is sufficient to satisfy the duty to correct a prior misstatement of law and, in any case, provides little aid to the court in understanding the law.

If these actions of citing incorrect law and making non-viable arguments are taken deliberately, that raises additional ethical and professionalism issues. Lawyers owe a duty of candor to the court.¹⁸³ This duty includes citing the correct law, even if that law is adverse to the client.¹⁸⁴ That means if the plaintiff's lawyer is ignorant about the ADAAA and does not cite it, defense counsel must do so, even if doing so hurts their case.¹⁸⁵ Our legal system is premised on advocates educating the court about the law and making arguments within the bounds of the law.¹⁸⁶ Knowingly failing to cite the appropriate standard and knowingly citing bad law are both misrepresentations and violate the professionalism rules and Rule 11.¹⁸⁷ And doing so undermines the integrity of the

¹⁸¹ See Pl.'s Resp. in Opp. & Br. in Support Thereof to Def.'s Mot. for Summ. J. at 2, 12–15, *Thomas v. Gray Television Grp., Inc.*, No. 4:22-cv-00375 (E.D. Tex. May 17, 2023), ECF No. 36; Pl.'s Resp. & Mem. in Opp. to Def.'s Mot. for Summ. J. at 6–7, *Whitesell v. FMS Fin. Mgmt. Servs., LLC*, No. 3:18-cv-00496 (M.D. Tenn. July 8, 2019), ECF No. 31.

¹⁸² See Def.'s Reply in Support of Its Mot. for Summ. J. at 6, *Thomas v. Gray Television Grp., Inc.*, No. 4:22-cv-00375 (E.D. Tex. May 24, 2023), ECF No. 37; Reply Mem. in Support of Mot. for Summ. J. at 5 n.1, *Whitesell v. FMS Fin. Mgmt. Servs., LLC*, No. 3:18-cv-00496 (M.D. Tenn. July 15, 2019), ECF No. 34.

¹⁸³ MODEL RULES OF PRO. CONDUCT r. 3.3 & cmt. 2.

¹⁸⁴ *Id.* r. 3.3(a)(2); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 111(2).

¹⁸⁵ See Widiss, *supra* note 150, at 937 (“[D]efense counsel should also be expected to craft their arguments under the revised legal standard [the ADAAA], whether or not plaintiffs properly cite it.”).

¹⁸⁶ See MODEL RULES OF PRO. CONDUCT r. 3.1 cmt. 1 (“The law, both procedural and substantive, establishes the limits within which an advocate may proceed.”); *id.* r. 3.3 cmt. 2 (“A lawyer acting as an advocate . . . has an obligation to present the client’s case with persuasive force. Performance of that duty . . . , however, is qualified by the advocate’s duty of candor to the tribunal.”); *id.* r. 3.3 cmt. 4 (“The underlying concept [of our legal system] is that legal argument is a discussion seeking to determine the legal premises *properly applicable* to the case.” (emphasis added)); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 111 cmt. b (“Tribunals must be able to rely upon advocates for reasonably accurate statements of law.”); *id.* § 111 cmt. c (“[T]he advocate’s role is to present the client’s cause within the framework of the law”); see also Widiss, *supra* note 150, at 937 (“Our adversarial system relies primarily on lawyers to identify relevant law . . .”).

¹⁸⁷ MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1); FED. R. CIV. P. 11(b)(2); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 111(1); see also MODEL RULES OF PRO. CONDUCT r. 3.1 (providing the prohibition against frivolous claims). The rules, of course, allow parties to make a good faith argument for a change or extension of the law. MODEL RULES OF PRO. CONDUCT r. 3.1; FED. R. CIV. P. 11(b)(2); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 111(1). But such arguments must be non-frivolous and also are tempered by the duty of candor. MODEL RULES OF PRO. CONDUCT r. 3.1; RULE 11 COMMENTARY, *supra* note 175. Asking the court to change the law is not the same as presenting an argument based on outdated law as if that law is binding.

judicial system. "It deprives the court of useful information and serves no interest of the client other than obtaining a result not provided for by the law."¹⁸⁸

Of course, employers' lawyers, like all lawyers, have a duty to zealously advocate on behalf of their clients, but there are limits. Those arguments must be made within the parameters of valid law, even if the other side does not know about it. Incorrect defense arguments based on bad law raise either competency issues (if they do not realize the law is bad) or candor issues (if they do). Either way, defense counsel should strive to do better and zealously advocate for their clients within the bounds of post-ADAAA law.

III. FOOD ALLERGY AT WORK

Whether for social interaction, as part of work responsibilities, or just simply eating lunch, food permeates the workplace. With the high and increasing rates of food allergy among not only children but adults too, some bumps in the road navigating how to address food allergy at work seem inevitable. The issue is flying somewhat under the radar because the food allergy generation has only just started working in recent years, and there is not yet much case law addressing food allergy at work. This Part discusses how food relates to the workplace, how food allergy disability issues are increasingly arising, and the role of education in helping to address these issues.

Section A considers the central role of food in the typical modern American workplace.¹⁸⁹ Then, Section B identifies and categorizes legal problems related to food allergy as a disability in American workplaces, including impermissible pre-employment inquiries, disparate treatment, failure to make reasonable accommodations, bullying and harassment, and retaliation.¹⁹⁰ Finally, Section C highlights the importance of workforce education in addressing the issues identified in Section B.¹⁹¹

A. The Role of Food at Work

Food is an inextricable part of the typical American workplace. Most employees are at work during at least one mealtime, usually lunch. Lunch provides a good lens for understanding the variety of ways food issues arise at work. People may bring their lunch, with food stored, prepared, and eaten in shared settings; the company kitchen or break room will likely have communal appliances such as refrigerators and microwaves and group eating areas. Employees might go out to lunch together. An employer might provide lunch rou-

¹⁸⁸ RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS, § 111 cmt. c.

¹⁸⁹ See *infra* note 192 and accompanying text.

¹⁹⁰ See *infra* notes 193–382 and accompanying text.

¹⁹¹ See *infra* notes 383–395 and accompanying text.

tinely in a company cafeteria or on a special occasion, such as to reward reaching a goal or to celebrate a holiday. Lunch might be served as part of a training session or other employer-required activity. Workers could have business lunches for interviewing job applicants or entertaining clients. Networking events and conferences often occur over lunchtime. And for lunch that is served at work, workers may be responsible for setting up, serving, and cleaning up the food. These scenarios all raise different challenges and concerns for a worker with a food allergy.

And lunch is just the tip of the iceberg. These same concerns can arise with other meals that occur during an employee's worktime. Dinners after hours still implicate employment when they are required for business reasons or are part of the office culture, such as a holiday party or awards banquet. Employees who are required to travel have additional needs for meals and may have other food-related travel needs. And work-related food is not limited to just meals. Workers bring in their own snacks, and employers provide snacks and treats for situations like birthday celebrations or perhaps routinely in the break room or in a vending machine. Happy hours are common, sometimes directly sponsored by employers.

In addition to eating at work or as part of work, many jobs require employees to work directly with food. Most obvious are jobs preparing or serving food in places like restaurants and bakeries. Employees serve food in institutional settings too, such as to schoolchildren and hospital patients. Workers clean food from tables and wash dishes in kitchens. Events where food is served, such as conferences and banquets, involve employees supervising its preparation and service. Even something as simple as an office lunch or birthday celebration will likely involve someone handling the food to set it up and clean up after. Factories employ workers who manufacture and package food. Workers in retail establishments such as grocery stores touch and are otherwise near food constantly.¹⁹²

¹⁹² For some other descriptions of how food and work interrelate, see *Meetings, Conferences and Business Trips*, FOOD ALLERGY RSCH. & EDUC., <https://www.foodallergy.org/resources/meetings-conferences-and-business-trips> [<https://perma.cc/9N7V-3GEH>]; Laker et al., *supra* note 10; Colette Martin & Kristi Hedges, *Food Allergies in the Workplace Are Not Always What They Seem*, FORBES (May 14, 2012), <https://www.forbes.com/sites/work-in-progress/2012/05/14/food-allergies-in-the-workplace-are-not-always-what-they-seem/> [<https://perma.cc/WXE6-MDVR>]; Tracy Stuckrath, *Feeding Employees at Work: An Opportunity to Enhance Wellbeing*, THRIVE! MEETINGS & EVENTS (May 16, 2017), <https://thrivemeetings.com/2017/05/feeding-employees-at-work/> [<https://perma.cc/4AYK-J5XC>].

*B. Identifying and Categorizing Disability-Related Legal
Issues Regarding Food Allergy at Work*

Despite the paucity of written rulings on food allergy workplace disability issues, deeper digging exposes emerging problems. Research reveals some news reports and personal narratives on blogs and other internet sources. But the real data goldmine is federal court dockets. By searching federal court dockets on Bloomberg, I found more than forty cases involving food allergy at work that have either settled or are currently pending but without substantive written rulings appearing on Westlaw or Lexis. Analyzing all these dockets hits, in combination with the few existing cases and news and personal accounts of workplace food allergy issues, uncovers the real story of workplace food allergy issues.

A few caveats about my research and methodology. First, I limited my search to federal court dockets because they are much more accessible than state court dockets; further, because the ADA is a federal statute, many of these cases will be in federal court. Second, I rely extensively on complaints, which of course, are not evidence and do not tell both sides of the story. Even so, they represent the kinds of allegations being made and the legal issues arising regarding workplace food allergies. I will present the facts as the workers do. Third, an individual story or lawsuit may implicate several categories, and so I may use one person's story to illustrate multiple categories of potential disability claims, which will often (but not always) mirror claims alleged in their lawsuits. I am not suggesting that every allegation does or should give rise to a viable claim. These situations can be quite nuanced, and the employer will inevitably have its own story and may have defenses to raise, some of which I will briefly touch on below. But my primary focus here is to categorize the allegations to showcase the potential legal claims. Fourth, I have chosen to focus this Article only on disability issues. Potential workers' compensation,¹⁹³ occupational safety,¹⁹⁴ criminal,¹⁹⁵ and tort issues (such as negligence¹⁹⁶ and bat-

¹⁹³ See Rebecca Batisto, *Are Allergies Covered by Your Workers' Compensation Policy?*, NORMANDY (Mar. 12, 2020), <https://www.normandyins.com/blog/2020-03-12-are-allergies-covered-by-your-workers-compensation-policy> [<https://perma.cc/RBW8-VDSC>]; Keven Moore, *Accommodating Food Allergies in the Workplace—Here Are Some Tips That Will Help*, N. KY. TRIB. (July 6, 2016), <https://www.nkytribune.com/2016/07/kevin-moore-accommodating-food-allergies-in-the-workplace-here-are-some-tips-that-will-help/> [<https://perma.cc/3PDC-87J3>]; Second Am. Compl. at 36, *Rainville v. Boxer Blake & Moore PLLC*, No. 2:20-cv-00051 (D. Vt. Apr. 28, 2021), ECF No. 61.

¹⁹⁴ See Yuma Fukutomi, *Occupational Food Allergy*, 19 CURRENT OP. ALLERGY & CLINICAL IMMUNOLOGY 243, 243 (2019); see also David C. Yamada, *Expanding Coverage of the U.S. Occupational Safety and Health Act to Protect Workers from Severe Psychological Harm*, 56 SUFFOLK U. L. REV. 393, 393–95 (2023) (discussing how occupational safety laws might cover workplace bullying).

¹⁹⁵ See Pl.'s First Am. Compl. at 6, *Barrett v. iQor, Inc.*, No. 2:11-cv-02078 (D. Ariz. Feb. 24, 2012), ECF No. 18; First Am. Compl. & Jury Demand at 3–4, *Reed v. McLeod USA Telecomms.*

tery¹⁹⁷) are not covered. Neither are workplace food choice issues that might arise based on religious, dietary, or cultural preferences or on other medical conditions (such as pregnancy or Crohn's disease).¹⁹⁸ Finally, I have excluded issues involving employees seeking exemptions from vaccine requirements based on an egg allergy because the vaccine issues are so distinct from other food allergy disability workplace issues and because the medical guidance on egg allergy and vaccine interaction has changed, which means this issue will likely die out.¹⁹⁹

With these caveats in mind, I have identified five categories of workplace disability issues involving food allergy: (1) impermissible pre-employment inquiries,²⁰⁰ (2) disparate treatment,²⁰¹ (3) failure to accommodate,²⁰² (4) bullying and harassment,²⁰³ and (5) retaliation.²⁰⁴ I explain and illustrate, and in some instances subcategorize, each of these in turn. In doing so, I briefly overview some basic legal principles governing each area, but a deep dive into the legal analysis of each issue is beyond the scope of this Article and is being left for future articles. The point of this Article is to frame the problem in detail, which I turn to now.

1. Pre-Employment Inquiries

The ADA prohibits an employer from asking job applicants if they have a disability or about the nature and extent of their disability before making an

Serv., Inc., No. 2:08-cv-14034 (E.D. Mich. Dec. 11, 2008), ECF No. 15; Dave Bloom, *Peanut "Prank" Sends Rookie Cop to the Hospital*, SNACK SAFELY (Dec. 20, 2023), <https://snacksafely.com/2023/12/peanut-prank-sends-rookie-cop-to-the-hospital/> [<https://perma.cc/JN3A-64UA>].

¹⁹⁶ See *Rainville Compl.*, *supra* note 193, at 97–99.

¹⁹⁷ See First Am. Compl. for Damages at 24, *Amini v. Cnty. of Ventura*, No. 2:22-cv-05420 (C.D. Cal. Dec. 20, 2022), ECF No. 16; *Bergeron v. LCMC Urgent Care, LLC*, No. 21-507, 2022 WL 1238616, at *4, *6 (E.D. La. Apr. 27, 2022).

¹⁹⁸ See *Laker et al.*, *supra* note 10; Tracy Stuckrath, *Lessons for Human Resources Professionals: Supporting Employees with Special Dietary Needs—Part Three*, THRIVE! MEETINGS & EVENTS (June 8, 2017), <https://thrivemeetings.com/2017/06/employees-with-dietary-needs/> [<https://perma.cc/52ZJ-MTQ7>]; First Am. Compl. & Demand for Jury Trial, *Mahmoud v. Big Water Emergency Physicians, LLC*, No. 2:23-cv-14106 (S.D. Fla. June 8, 2023), ECF No. 17.

¹⁹⁹ See *generally* Compl., *Equal Emp. Opportunity Comm'n v. Child.'s Healthcare of Atlanta, Inc.*, No. 1:24-cv-04089 (N.D. Ga. Sept. 12, 2024), ECF No. 1; Compl., *Cesare v. PACT MSO, LLC*, No. 3:23-cv-00253 (D. Conn. Feb. 24, 2023), ECF No. 1; *Eubanks v. Mercy Med. Ctr., Inc.*, No. 15-513, 2015 WL 9255326 (D. Md. Dec. 17, 2015). Though the guidelines have recently changed, for decades, people with egg allergy were advised to avoid flu vaccines. See *Flu Vaccines and People with Egg Allergies*, CDC, <https://www.cdc.gov/flu/vaccines/egg-allergies.html> [<https://perma.cc/HP53-3G7K>]; Bloom, *supra* note 159.

²⁰⁰ See *infra* notes 205–212 and accompanying text.

²⁰¹ See *infra* notes 213–271 and accompanying text.

²⁰² See *infra* notes 272–327 and accompanying text.

²⁰³ See *infra* notes 328–368 and accompanying text.

²⁰⁴ See *infra* notes 369–382 and accompanying text.

employment offer.²⁰⁵ An employer may ask if the applicant can perform essential job functions and may request that the applicant demonstrate how they would do so.²⁰⁶ An employer may only ask disability-related questions after making a conditional job offer.²⁰⁷ This process helps isolate an employer's consideration of an applicant's disability from their job qualifications.²⁰⁸

I found two examples regarding pre-employment inquiries about food allergies. First, a man applying for an account clerk position was asked in his interview about his celiac disease.²⁰⁹ He had not disclosed the condition, but the prospective employer had somehow found out about it and some other personal information before the interview.²¹⁰ The applicant did not receive a job offer.²¹¹ Second, a plaintiff's attorney who handles disability and food allergy cases reported stories she has heard about fast food restaurants asking applicants whether they have a food allergy.²¹² Employers can inquire if there is any reason an applicant could not handle a food item if doing so is an essential job function, but that is not the same thing as a general inquiry about whether a worker has a food allergy.

2. Disparate Treatment

At its most basic level, the ADA protects against disparate treatment on the basis of disability.²¹³ This means that an employer cannot make hiring, firing, and other decisions regarding the terms and conditions of employment on the basis of disability.²¹⁴ Disparate treatment could be allowed in some situations if the particular workplace scenario is simply too dangerous for the allergic employee; this can be addressed through the direct threat defense, which

²⁰⁵ 42 U.S.C. § 12112(d)(2)(A); *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 10, 1995), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical> [<https://perma.cc/SK7S-4X3Q>]; LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* § 4:18 (4th ed. 2024).

²⁰⁶ 42 U.S.C. § 12112(d)(2)(B); 29 C.F.R. § 1630.14(a) (2024); *Enforcement Guidance*, *supra* note 205; ROTHSTEIN & IRZYK, *supra* note 205, § 4:18.

²⁰⁷ *Enforcement Guidance*, *supra* note 205.

²⁰⁸ *See id.*

²⁰⁹ *Kelly v. Kingston City Sch. Dist., Inc.*, No. 1:16-cv-00764, 2017 WL 976943, at *1 (N.D.N.Y. Mar. 13, 2017).

²¹⁰ *See* Compl. at 2–3, *Kelly v. Padalino*, No. 1:16-cv-00764 (N.D.N.Y. June 27, 2016), ECF No. 1.

²¹¹ *Kelly*, 2017 WL 976943, at *1.

²¹² *See* Nicole Smith, *On-the-Job Rights with Food Allergies*, ALLERGIC LIVING (May 15, 2018), <https://www.allergicliving.com/2018/05/15/on-the-job-rights-with-food-allergies/> [<https://perma.cc/H26S-5CGY>].

²¹³ 42 U.S.C. § 12112(a); PETER BLANCK, *ADVANCED INTRODUCTION TO U.S. DISABILITY LAW* 24 (2023); MARK C. WEBER, *UNDERSTANDING DISABILITY LAW* § 3.03 (4th ed. 2024).

²¹⁴ 42 U.S.C. § 12112(a); ROTHSTEIN & IRZYK, *supra* note 205, § 4:19; *see* WEBER, *supra* note 213, at 57–58.

allows what might otherwise be discriminatory actions if employing the worker presents a significant risk to the health and safety of the worker or others that cannot be eliminated with reasonable accommodation.²¹⁵ Further, disparate treatment based on disability is distinct from whether an employer has failed to accommodate a disability—that is a separate category of discrimination that I will discuss in the next Subsection.²¹⁶ But sometimes, the factual allegations between those types of claims overlap because, for example, an employer refuses to accommodate an employee and instead terminates them. Thus, accommodations will be mentioned in this Subsection within the context of explaining a disparate treatment allegation but will be dealt with in detail in the next Subsection.

In the workplace food allergy context, I have found examples of disparate treatment falling into three factual categories: failure to hire, termination or constructive discharge, and working conditions.

a. Failure to Hire

One instance of failure to hire appeared in news stories. A woman was offered a job in Boston Children's Hospital's outpatient dental clinic as a scheduling coordinator and quit her current job.²¹⁷ During her post-offer onboarding, she disclosed her peanut allergy on a health form.²¹⁸ The hospital questioned her extensively and then rescinded the offer, stating it "could not offer her a safe work environment," even though the woman had not requested any accommodations and was qualified to perform the job, which was similar to the job she had been safely performing for thirteen years with a different employer.²¹⁹ In another

²¹⁵ See 29 C.F.R. § 1630.2(r) (2024); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 76 (2002). The portion of the regulation allowing consideration of the worker's safety is an extension of the statutory language, which mentions only the safety of others. Compare 42 U.S.C. § 12113(b), with 29 C.F.R. § 1630.2(r); see also WEBER, *supra* note 213, at 85–88. Though the Supreme Court upheld the validity of the regulation in *Echazabal*, the regulation may be subject to challenge in the future in light of its decision in *Loper Bright Enterprises v. Raimondo*, which overruled the bedrock decision regarding deference to agency regulations. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 411–12 (2024).

²¹⁶ See *infra* Part III.B.3.

²¹⁷ *Woman Says She Was Denied Job Due to Peanut Allergy*, ABC NEWS (Aug. 13, 2014), <https://abcnews.go.com/Health/woman-denied-job-due-peanut-allergy/story?id=24946169> [<https://perma.cc/Z2GE-2ADZ>]; Janet Wu, *Woman Says Peanut Allergy Cost Her Hospital Job Offer*, WCVB (Aug. 11, 2014), <https://www.wcvb.com/article/woman-says-peanut-allergy-cost-her-hospital-job-offer/8206405> [<https://perma.cc/J6JH-PFMY>].

²¹⁸ *Woman Says She Was Denied Job Due to Peanut Allergy*, *supra* note 217; Wu, *supra* note 217.

²¹⁹ *Woman Says She Was Denied Job Due to Peanut Allergy*, *supra* note 217; accord Wu, *supra* note 217.

case, a provisional worker with a corn allergy was not hired for a permanent position because of her absences relating to workplace allergic reactions.²²⁰

b. Termination and Constructive Discharge

Quitting is legally equivalent to termination when it is based on sufficiently intolerable working conditions to rise to the level of a constructive discharge.²²¹ Many cases and stories involve allergic employees either being terminated or quitting.

Employers have fired employees after finding out about their allergy, basically throwing up their hands and saying, “We can’t help you,” sometimes with little or no effort to actually be helpful.²²² This happened to the preschool teacher’s assistant with a garlic allergy.²²³ The school refused to accommodate her by either letting her leave the classroom during lunch or refraining from using garlic, and the worker had several severe allergic reactions. Rather than accommodate her garlic allergy, the school fired her “because she had an allergy that they could not control.”²²⁴ Similarly, Kroger fired a twenty-year employee with a nut allergy who had a reaction after a coworker ate a nut candy bar near her.²²⁵ The employee had never before had a reaction and was temporarily working in a new department after recovering from a work-related injury. Kroger said, “With your allergy, there is no place for you here at Kroger.”²²⁶ Another employee, who was hired as an airport customer service agent, had several allergies, including to chocolate.²²⁷ She complained about coworkers eating chocolate repeatedly during an extended company training program.²²⁸ The company fired her on the grounds that it could not find any job at the airport that did not potentially expose her to airborne allergens.²²⁹ The EEOC sued on behalf of an allergic worker for a products company whose job includ-

²²⁰ Compl. for Damages at 5–11, 15, *Bessette v. Wellstar Health Sys. Inc.*, No. 1:24-cv-02945-ELR-WEJ (N.D. Ga. July 2, 2024), ECF No. 1.

²²¹ MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 895–96 (6th ed. 2019).

²²² Issues regarding the need for accommodations—as in what an employer might be requested to do—for these food allergy issues will be addressed in the next Section. *See infra* notes 272–327 and accompanying text.

²²³ *Ascoli* Compl., *supra* note 20, at 2–4.

²²⁴ *Id.* at 4.

²²⁵ Verified Compl. at 2–3, *Stivers v. Kroger Co.*, No. 3:18-cv-00154 (W.D. Ky. Mar. 12, 2018), ECF No. 1-1.

²²⁶ *Id.*

²²⁷ Compl. at 1, *Daniel v. GAT Airline Ground Support, Inc.*, No. 2:23-cv-01160 (D.S.C. Sept. 12, 2024), ECF No. 32.

²²⁸ *Id.* at 3.

²²⁹ *Id.* at 5.

ed handing out food samples at festivals.²³⁰ Rather than grant her accommodations, such as allowing her to wear gloves, the company fired her on the grounds that “she could not safely interact with the general public.”²³¹

Workers have been fired when their allergy impacted a job duty. An employee in a pretzel factory had no issues when working in the packing department.²³² When she moved into the baking department, however, she began to have severe allergic reactions.²³³ It was eventually determined that a powder used on the pretzels contained tomato, and she was allergic to tomato.²³⁴ She requested to work only in the packing department, as she had before, but the company refused and told her to “suffer through it” and wrap towels around her arms, which did not solve the problem.²³⁵ The company then fired her, stating that she would receive “no special accommodation.”²³⁶ A woman with nut allergies worked at a Hershey chocolate factory.²³⁷ After she experienced two allergic reactions, the company fired her based on its concern, which it did not actually well document, that nut particles would be present everywhere in the entire plant and so she could do no job there safely.²³⁸ A cashier at a market was fired after telling her boss she could not wash the coffee pots again because the sink was near seafood and working at that sink caused her to break out in hives.²³⁹

Allergic reactions sometimes cause performance problems, and employees have been fired for those performance problems. An attorney with a severe wheat allergy accidentally ate a few bites of a regular pizza when the paralegal who ordered lunch told her she would order her a gluten-free pizza but forgot to do so.²⁴⁰ This gluten ingestion caused a spiral of serious health problems, which also affected the attorney’s work quality.²⁴¹ She was forced to quit after her employer failed to accommodate her through measures such as flexible work hours or remote work.²⁴² Similarly, a man with a severe nut allergy went

²³⁰ See generally *Compl., U.S. Equal Emp. Opportunity Comm’n v. Cosmic Concepts Ltd.*, No. 1:15-cv-02975 (D. Md. Sept. 30, 2015), ECF No. 1.

²³¹ *Id.* at 4.

²³² *First Am. Compl. at 1, Penn v. Dot’s Pretzels, LLC*, No. 2:21-cv-02269 (D. Kan. July 27, 2021), ECF No. 12.

²³³ *Id.*

²³⁴ *Id.* at 1–2.

²³⁵ *Id.* at 2.

²³⁶ *Id.* at 10.

²³⁷ *Slade v. Hershey Co.*, No. 1:09-cv-00541, 2011 WL 13350910, at *2–3 (M.D. Pa. Apr. 15, 2011).

²³⁸ *Id.* at *1–5.

²³⁹ *Compl. at 4–6, Godwin v. Union Mkt.*, No. 1:18-cv-10501 (S.D.N.Y. Nov. 12, 2018), ECF No. 1.

²⁴⁰ *Rainville Compl., supra* note 193, at 32.

²⁴¹ See *id.* at 33–42, 47–48.

²⁴² *Id.* at 53–56.

into anaphylactic shock at a work-sponsored event, and the side effects of the reaction and medication caused his performance to suffer.²⁴³ He was placed on a performance improvement plan and requested time off or remote work, but he was fired instead.²⁴⁴ An office worker with a severe shellfish allergy had multiple allergic reactions stemming from coworkers using the microwave to heat their clam chowder.²⁴⁵ She was fired after the employer refused to do anything about it and she took matters into her own hands and yelled at one of her coworkers.²⁴⁶

On-the-job allergen exposures or allergic reactions may require an employee to leave work, and employees have been fired for doing so. A Chili's bartender who had a severe allergic reaction from accidental strawberry exposure at work went to seek emergency medical treatment—with her manager's permission—and was fired the next day for abandoning her shift.²⁴⁷ An employee left work to deal with a flare of her celiac disease symptoms after eating unsafe food in the employer cafeteria (the employer refused to allow her to bring her own food), and she was fired for missing work.²⁴⁸ A woman who was allergic to seafood went to her car in the parking lot to do her work because seafood in the office was causing her to experience a reaction; she worked the rest of the day in her car, and the next day, she requested to work at home while recovering from the allergic reaction.²⁴⁹ She was fired that day after being reprimanded for working in her car.²⁵⁰

When employers do not accommodate allergic workers, those workers may quit or be forced to go on long-term leave because they do not feel safe in the workplace. That happened with a human resources associate who worked at a warehouse with a cafeteria that frequently served shellfish.²⁵¹ She worked for months with her employer to arrive at a mutually agreeable solution, and when her employer would not make sufficient accommodations, she quit rather

²⁴³ Compl. for Damages at 11–12, *Lam v. Neustar, Inc.*, No. 3:19-cv-01514 (N.D. Cal. Mar. 22, 2019), ECF No. 1, Ex. A.

²⁴⁴ *Id.* at 12–13.

²⁴⁵ Am. Compl. at 2, *Littleton v. Katalyst Surgical, LLC*, No. 4:20-cv-01792 (E.D. Mo. Jan. 11, 2021), ECF No. 13-1.

²⁴⁶ *Id.*

²⁴⁷ Compl. at 2–4, *Steele v. Brinker Int'l, Inc.*, No. 1:23-cv-03830 (N.D. Ill. June 16, 2023), ECF No. 1.

²⁴⁸ Compl. at 3–4, *Schmalz v. TK Behavioral, LLC*, No. 1:24-cv-04410 (N.D. Ill. May 29, 2024), ECF No. 1.

²⁴⁹ Compl. at 5–6, *Wilson v. City of New York*, No. 1:23-cv-09102 (E.D.N.Y. Dec. 12, 2023), ECF No. 1.

²⁵⁰ *Id.* at 6.

²⁵¹ Compl. & Jury Demand at 3, *Salgado-Rodriguez v. Arrow Elecs., Inc.*, No. 3:22-cv-00123 (D. Nev. Mar. 7, 2022), ECF No. 1.

than risk working in this unsafe environment.²⁵² A similar problem happened with an administrative support worker for Monster Energy with an airborne-triggered seafood allergy when the company refused to give her a workspace that was not directly above a seafood restaurant, and she was forced onto indefinite unpaid leave.²⁵³

c. Working Conditions

Changes in working conditions short of the most drastic actions like withdrawing a job offer or termination can form the basis for discrimination claims in some circumstances.²⁵⁴ Many of these less drastic actions have arisen in food allergy situations.

In looking for alternative job assignments, employees have been encouraged to accept a demotion in terms such as pay or responsibilities. This happened to two workers with shellfish allergies. The first one worked at a Disney restaurant. When her restaurant began serving shellfish and she requested relocation, every suggestion Disney made involved reduced pay and sometimes fewer job responsibilities.²⁵⁵ The other employee had a similar experience, where all the new jobs involved a demotion or transfer to a location with inadequate staffing.²⁵⁶

Allergic employees sometimes keep their jobs but are deprived of important work opportunities. An FBI special agent went to Quantico for training.²⁵⁷ He had several food allergies and notified his superiors in advance, who

²⁵² *Id.* at 3–10.

²⁵³ Second Am. Compl. at 3–10, *LeMaire v. Monster Energy Co.*, No. 5:17-cv-05104 (W.D. Ark. Oct. 24, 2017), ECF No. 23.

²⁵⁴ Exactly what type of other employment actions qualify for protection is up in the air right now since the U.S. Supreme Court's April 2024 decision in *Muldrow v. City of St. Louis*, 601 U.S. 346, 350 (2024), which held that Title VII of the Civil Rights Act of 1964 protects against discriminatory transfers of employment even when the transfer does not result in a significant employment disadvantage. See Robert Iafolla, *Supreme Court's New Test for Bias Claims Still Needs Hashing Out*, BLOOMBERG L. (Apr. 18, 2024), <https://news.bloomberglaw.com/daily-labor-report/supreme-court-new-test-for-bias-claims-still-needs-hashing-out> [<https://perma.cc/C9B8-Q4HS>]; David Weisenfeld, *Door Opens Wider for Workplace Discrimination Claims*, LEGAL DIVE (May 15, 2024), <https://www.legaldive.com/news/SCOTUS-Muldrow-lateral-transfer-discrimination-some-harm-DEI-document-transfer-decisions/716182/> [<https://perma.cc/9EAU-3ZYC>].

²⁵⁵ Compl. for Damages at 3–11, *May v. Walt Disney Parks & Resorts U.S., Inc.*, No. 8:21-cv-00968 (C.D. Cal. May 28, 2021), ECF No. 1-3.

²⁵⁶ Compl. & Demand for Jury Trial at 2–4, *Green v. Tchrs. Credit Union*, No. 3:19-cv-00632 (N.D. Ind. Aug. 15, 2019), ECF No. 1. Although a demotion may be permissible in some circumstances, such as if no safe equivalent job is available, PETER BLANCK, *DISABILITY LAW & POLICY* 118 (2d ed. 2024), my purpose here is to focus on the cause of action raised by the plaintiff's allegations.

²⁵⁷ Compl. at 2, *Nash v. Garland*, No. 1:24-cv-02165 (N.D. Ill. Mar. 15, 2024), ECF No. 1.

assured him he would be accommodated.²⁵⁸ Because trainees are not allowed to leave base and have no way to obtain their own food, the Quantico cafeteria would need to provide safe food.²⁵⁹ But when he arrived for training, no one on site knew of his allergies.²⁶⁰ He was told that they could not accommodate him and that he needed to “figure it out,” which was, of course, impossible because he had no way to get alternative food.²⁶¹ He was forced to leave the training.²⁶² Another employee had a severe allergic reaction to alcohol at a work event, and afterwards, his employer would not let him continue to work on that or similar projects.²⁶³

A United Airlines pilot’s working conditions suffered in many ways when his employer refused to provide gluten-free food while he was working on long flights and would not allow him to stay at hotels offering gluten-free foods when he had layovers.²⁶⁴ He sometimes had no food to eat and so went hungry during his flights.²⁶⁵ At times, he was charged for meals that he could not safely eat, and he often incurred additional expenses for obtaining his own gluten-free food, including on layovers when he was unable to stay at a hotel offering safe food.²⁶⁶

Many employees have been reprimanded for actions related to their food allergies. The glass company worker with a shellfish allergy had had several severe allergic reactions at work from being near seafood at company luncheons, including the client open house she was required to attend.²⁶⁷ She had requested that something else be served or that she be excused from attending, and the employer refused both requests and reprimanded her when she did not attend out of fear for her own safety.²⁶⁸ A human resources representative was repeatedly disciplined for closing her office door—which was right next to the company cafeteria that often served shellfish—and for avoiding entering the cafeteria to speak with employees.²⁶⁹ A worker was reprimanded by a new supervisor for going to lunch earlier than other employees so she could take medicine to ameliorate the effects of her celiac disease; her previous supervisor had

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Verified Compl. at 11–14, *Shukla v. Google LLP*, No. 1:24-cv-02470 (S.D.N.Y. Apr. 1, 2024), ECF No. 1, Ex. A.

²⁶⁴ Compl. & Jury Demand at 4–8, *MacKenzie v. United Airlines, Inc.*, No. 1:24-cv-02218 (D. Colo. Aug. 12, 2024), ECF No. 1.

²⁶⁵ *Id.* at 5.

²⁶⁶ *Id.* at 4–8.

²⁶⁷ *Clare Compl.*, *supra* note 26, at 3, 5–6.

²⁶⁸ *Id.* at 5–6.

²⁶⁹ *Salgado-Rodriguez Compl.*, *supra* note 251, at 3–5, 10.

allowed the early lunch without incident for almost two years.²⁷⁰ Two other employees were disciplined for using leave to deal with food allergy reaction symptoms or other related medical needs.²⁷¹

3. Failure to Accommodate

The ADA defines discrimination to include failure to make reasonable accommodations to the known limitations of a qualified disabled worker unless doing so would impose an undue hardship.²⁷² Thus, in addition to protecting disabled workers from disparate treatment based on disability, the ADA provides a separate cause of action for failure to accommodate.²⁷³ Accommodations must be reasonable.²⁷⁴ The statute does not define what is reasonable but gives examples such as job restructuring, modified work schedules, and training.²⁷⁵ Even so, the universe of potential accommodations is unlimited so long as the accommodation is reasonable and does not cause an undue hardship.²⁷⁶ An undue hardship “means an action requiring significant difficulty or expense.”²⁷⁷ Whether an accommodation is even possible, and if so, whether the accommodation is reasonable or would cause an undue hardship, is to be assessed on a case-by-case basis through an interactive process between the employer and employee.²⁷⁸

Workers with a food allergy can have a plethora of accommodations needs. Some of these were previewed above when discussing the disparate treatment claims, which makes sense considering that accommodations claims are often brought alongside disparate treatment claims when the failure to accommodate is a step on the path to disparate treatment, usually termination.

I have identified food allergy accommodations issues in six factual categories: (1) coworker food; (2) employer-provided food; (3) posting signs or other notice issues; (4) changes in jobs, job duties, or where a job is per-

²⁷⁰ Compl. at 2–3, *Harris v. Insight Eyecare Specialties, Inc.*, No. 4:24-cv-00515 (W.D. Mo. Aug. 7, 2024), ECF No. 1.

²⁷¹ *Lang v. Astrue*, No. 09-cv-1083, 2011 WL 2149914, at *1–3 (S.D. Cal. June 1, 2011); *First Am. Civ. Action Compl.* at 3–5, *Van Winkle v. Exel, Inc.*, No. 5:23-cv-00449 (E.D. Pa. May 22, 2023), ECF No. 17.

²⁷² 42 U.S.C. § 12112(b)(5)(A).

²⁷³ WEBER, *supra* note 213, at 62; *see* BLANCK, *supra* note 213, at 63–74.

²⁷⁴ *See* 42 U.S.C. § 12112(b)(5)(A); *see also* Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1426 (2015) (stating that the ADA’s reasonable accommodation mandate “represents a major innovation in anti-discrimination law”).

²⁷⁵ 42 U.S.C. § 12111(9); *see also* BLANCK, *supra* note 256, at 112–25.

²⁷⁶ *See* BLANCK, *supra* note 256, at 110–11; *see also* ROTHSTEIN & IRZYK, *supra* note 205, § 4:20 (extensively discussing various types of accommodations).

²⁷⁷ 42 U.S.C. § 12111(10)(A).

²⁷⁸ *See* 29 C.F.R. § 1630.2(o)(3) (2024); BLANCK, *supra* note 256, at 110–11; WEBER, *supra* note 213, § 3.05[D].

formed; (5) taking leave or other work-scheduling issues; and (6) using self-help measures such as medication.

a. Coworker Food

Coworkers storing, preparing, or eating food that another worker is allergic to raises many accommodations issues. Allergic employees often fear accidental ingestion from cross-contact with this food or that they will react by breathing it or accidentally touching it.²⁷⁹ Requests for the offending food to be banned or restrictions on where it can be prepared or eaten are common. Examples abound of coworkers refusing to stop eating the allergen, even in the face of reactions from their allergic colleague.²⁸⁰ And it's not always just the coworkers endangering the allergic employee. A school principal insisted on eating popcorn and Doritos around a teacher with a severe corn allergy, causing her to have reactions.²⁸¹ A hair stylist's supervisor and coworkers constantly ate gluten close to him in his workspace and mocked his anxiety and reac-

²⁷⁹ See *supra* notes 11–16, 40–43, 50, 52, 55 and accompanying text for discussions of reactions from small ingestions, cross-contact, accidental ingestion, touch, and breathing.

²⁸⁰ See, e.g., *Amini v. Cnty. of Ventura*, No. 2:22-cv-05420, 2024 WL 5217926, at *2 (C.D. Cal. Aug. 12, 2024) (coworkers intentionally and repeatedly brought nuts and citrus fruit into the plaintiff's workspace, despite her pleas to stop); *Barrett Compl.*, *supra* note 195, at 5–6 (coworkers refused to stop eating peanuts around the plaintiff, despite her reactions, and a supervisor encouraged them to continue to see if she was faking her allergy); *Bergeron v. LCMC Urgent Care, LLC*, No. 21-507, 2022 WL 1238616, at *1–2 (E.D. La. Apr. 27, 2022) (coworkers refused to stop eating seafood for lunch, even with the plaintiff's adverse reactions); *Daniel Compl.*, *supra* note 227, at 3–4 (coworkers continued to bring chocolate into the training room despite the plaintiff's allergy); *Compl. for Decl. & Inj. Relief & Damages, Drew-Hoke v. Viverette*, No. 7:20-cv-00033 (M.D. Ga. Mar. 4, 2020), ECF No. 1 (coworkers insisted on eating peanuts in a workspace shared with an allergic individual); *Friedman v. St. John Health*, No. 05-74402, 2006 WL 8432931, at *1–2 (E.D. Mich. Sept. 29, 2006) (coworkers brought in nutty meals and snacks, even after a doctor ordered a nut-free environment); *Harris Compl.*, *supra* note 270, at 3 (a new supervisor contaminated the plaintiff's work environment by eating gluten products near the plaintiff, her workspace, and her work materials); *Pl.'s Third Am. Compl.* at 9–10, *Friesinger ex rel. Estate of Hufford v. JP Mgmt. Grp., Inc.*, No. 3:20-cv-00022 (S.D. Ohio Apr. 8, 2022), ECF No. 59 (a supervisor refused to ban seafood in the office, despite the plaintiff's multiple allergic reactions); *Reed Compl.*, *supra* note 195, at 3 (coworkers continued to bring in specific cheeses that triggered the plaintiff's allergy); *Scott v. Valley Elec. Contractors, Inc.*, No. 15-cv-14281, 2016 WL 7100250, at *2 (E.D. Mich. Dec. 6, 2016) (the employer brought in fish for lunch multiple times, despite the plaintiff's allergy and past reactions); *Compl. for Employment Discrimination* at 30, *Shamburger v. Miss. Dep't of Hum. Servs.*, No. 3:21-cv-00378 (S.D. Miss. June 2, 2021), ECF No. 1 (coworker refused to stop eating peanuts and said she "didn't give a damn" about the plaintiff's allergy); *Stivers Compl.*, *supra* note 225, at 2–3 (the employer fired the plaintiff rather than banning a coworker from eating nuts near the plaintiff); *Compl.* at 4–5, *Warren v. Kokua Support Servs. Corp.*, No. 2:18-cv-00545 (E.D. Va. Oct. 11, 2018), ECF No. 1 (the plaintiff had multiple allergic reactions from coworkers eating seafood in the plaintiff's work area).

²⁸¹ *Essah v. Governing Bd. of L.A. Unified Sch. Dist.*, No. 2:20-cv-02628, 2023 WL 4304771, at *8 (C.D. Cal. Feb. 23, 2023); *First Am. Fed. Compl.* at 12–13, *Essah v. Governing Bd. of L.A. Unified Sch. Dist.*, No. 2:20-cv-02628 (C.D. Cal. Apr. 20, 2021), ECF No. 37.

tions.²⁸² One woman's supervisor intentionally put his peanut butter smoothie on her computer desk nearly every morning.²⁸³ Sometimes employers refuse to ban or regulate other workers' eating on the grounds that it would violate their "right[s]."²⁸⁴ Other times, an employer will ban or regulate an allergen, only then to fail to enforce the policy.²⁸⁵ Issues with shared appliances such as microwaves are common. The preschool teacher's assistant with the garlic allergy wanted her coworkers to use a microwave in a different room, but the employer refused.²⁸⁶ Another woman's coworkers would not stop heating clam chowder in the office microwave, despite the woman's resulting allergic reactions.²⁸⁷

b. Employer-Provided Food

Employers provide food in many different contexts, all of which may give rise to food allergy accommodations issues, both in terms of exposing allergic employees to dangerous allergens and ensuring that they can eat when food is provided.

Some workplaces have onsite cafeterias, including ones that provide free food as an employee benefit. Concerns can arise when the cafeteria serves allergens. For example, the human resources representative who was disciplined for keeping her door closed and not wanting to enter the cafeteria did all of this because the cafeteria frequently served shellfish, and she reacted to breathing

²⁸² Second Am. Compl. at 5–8, *Ruiz v. KeratinBar Inc.*, No. 1:17-cv-002216 (S.D.N.Y. July 12, 2019), ECF No. 98.

²⁸³ *A Commonwealth Employee Describes Ongoing Torment That Threatened Her Life*, DIGNITY TOGETHER (Feb. 26, 2020), <https://www.dignitytogether.org/blog/a-commonwealth-employee-describes-ongoing-torment-that-threatened-her-life> [<https://perma.cc/3BNV-KAEU>] [hereinafter *Commonwealth Employee*].

²⁸⁴ *Dale v. McDonough*, No. 1:22-cv-10815, 2024 WL 1662904, at *2 (Feb. 28, 2024), *report and recommendation adopted*, 2024 WL 1660525 (E.D. Mich. Apr. 17, 2024); *accord* *Wilson Compl.*, *supra* note 249, at 3–6.

²⁸⁵ *How to Thrive at Work with a Food Allergy*, INVISIBLY ALLERGIC (Nov. 11, 2022), <https://invisiblyallergic.com/2020/02/17/work-with-a-food-allergy/> [<https://perma.cc/G3XC-RTLS>] [hereinafter *How to Thrive*]; *Stuckrath*, *supra* note 198.

²⁸⁶ *Ascoli Compl.*, *supra* note 20, at 3–4.

²⁸⁷ *Littleton Compl.*, *supra* note 245, at 2; *see also* *Verified Compl. for Inj. & Other Relief* at 11, *Reed v. Lake Tr. Credit Union*, No. 2:24-cv-10759 (E.D. Mich. Mar. 25, 2024), ECF No. 1 (employee microwaved fish in a designated fish-free microwave, causing the plaintiff to have a reaction). In a situation analogous to coworker food issues, an employer refused to ban a coworker from spraying perfume at work when this perfume contained a corn ingredient, which caused a corn-allergic worker to have reactions. *Bessette Compl.*, *supra* note 220, at 8–10. A similar situation happened with a woman with a citrus allergy and a coworker wearing a citrus-based perfume. *See* Pl. Sheila Amini's Separate Statement of Genuine Disputes in Support of Opp. to Def.'s Mot. for Summ. J., or, in the Alternative, Partial Summ. J. at 42–43, *Amini v. Cnty. of Ventura*, No. 2:22-cv-05420 (C.D. Cal. May 20, 2024), ECF No. 127-1.

it.²⁸⁸ And she could not use the cafeteria like all other employees did to eat lunch there.²⁸⁹ Another employer required employees to eat in the cafeteria but would not provide gluten-free food for an employee with celiac disease or allow her to bring her own lunch.²⁹⁰

Job duties can require that employers provide food. That is the case with the United Airlines pilot who needed gluten-free food to eat on long flights and permission to stay in hotels that provided gluten-free food when he had layovers, but United would not provide either.²⁹¹ And consider the FBI Special Agent who needed to train at Quantico. All meals were provided at the training facility, and trainees could not leave to get their own food, but no safe food was provided.²⁹² The attorney who became so sick after eating what was supposed to be gluten-free pizza was eating that pizza because her team was working through lunch.²⁹³ The employee who was reprimanded for not attending the client open house where seafood was being served asked the employer to serve something else so she could attend or to excuse her attendance, and the employer refused to do either.²⁹⁴ An employer insisted on serving seafood at training luncheons and other company events, despite an allergic employee's repeated requests to alter the menu.²⁹⁵

Outside of job duties, employers sometimes provide lunch or other food for purposes such as team building and boosting morale. Similar problems have arisen at these lunches where employers either forget about a worker's allergy and fail to provide safe food²⁹⁶ or refuse to change the menu to either avoid exposure to an allergen or to ensure an allergic employee can eat.²⁹⁷ The same is

²⁸⁸ *Salgado-Rodriguez Compl.*, *supra* note 251, at 3.

²⁸⁹ *Id.* at 3–6; *see also Barrett Compl.*, *supra* note 195, at 4 (a worker did not use the company cafeteria to avoid peanut exposure).

²⁹⁰ *Schmalz Compl.*, *supra* note 248, at 3–4.

²⁹¹ *MacKenzie Compl.*, *supra* note 264, at 4–10; *see also Cosmic Concepts Compl.*, *supra* note 230, at 4 (employer refused to help an allergic employee by arranging for safe food to eat during work-related travel).

²⁹² *Nash Compl.*, *supra* note 257, at 1–2.

²⁹³ *Rainville Compl.*, *supra* note 193, at 36–37.

²⁹⁴ *Clare Compl.*, *supra* note 26, at 5–6.

²⁹⁵ Second Am. Compl. at 6–10, *Mora Santiago v. Janssen Ortho, LLC*, No. 3:19-cv-01657 (D.P.R. Mar. 13, 2020), ECF No. 26; Pl.'s Opp. to Def.'s Mem. of Law in Support of Mot. for Summ. J. at 2–4, *Mora Santiago v. Janssen Ortho, LLC*, No. 3:19-cv-01657 (D.P.R. Dec. 18, 2020), ECF No. 56; *see also Compl. & Demand for Jury Trial* at 9, *Wentzel v. Williams Scotsman, Inc.*, No. 2:18-cv-02101 (D. Ariz. July 3, 2018), ECF No. 1 (company refused to provide gluten-free meals at company functions).

²⁹⁶ *Bergeron Compl.*, *supra* note 172, at 1; Am. Compl. at 29–30, *Smith v. Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers*, No. 1:24-cv-01443 (D.D.C. May 16, 2024), ECF No. 1, Ex. 3.

²⁹⁷ *Clare Compl.*, *supra* note 26, at 7; Compl. for Damages, Equitable and/or Inj. Relief at 4–5, *Silverman v. Petaluma Animal Servs. Found.*, No. 4:18-cv-00451 (N.D. Cal. Jan 19, 2018), ECF No. 1.

true when an employer provides snacks and treats, such as for a birthday celebration. One employer repeatedly brought in nutty ice cream for the department, which excluded the plaintiff.²⁹⁸ Employers have failed to accommodate allergic employees at special events like awards ceremonies and holiday parties. For example, an employee with a fish allergy had a reaction at the company holiday party after several people at her table had salmon, which forced her to be near it.²⁹⁹ She had learned in advance that salmon was on the menu and asked the employer to change it, but the employer refused, stating it would not change the menu for one employee and that no one had ordered it so there was no issue.³⁰⁰ Another employee had to leave a Thanksgiving lunch at a hibachi restaurant when shrimp was placed on the grill, even though he had gone out of his way to remind his employer about his allergy when the lunch was being planned.³⁰¹

c. Signs/Notice Issues

Accommodations issues may involve providing notice, either to the allergic employee that an allergen is present or to others to avoid the allergen. Some employers resist posting or post unhelpful signs. In one instance, it took three and a half years to get a sign to ban the allergen posted, and the sign was later removed.³⁰² In another case, the employer's sign misidentified the allergen, and the employer refused to replace the sign.³⁰³ On the flip side, employers have implemented measures to notify the allergic employee when others are eating the offending food, but these do not always solve the problem. One employer's sole accommodation was to have coworkers post a sign when seafood was present, but that did not prevent the allergic worker from being exposed to its smell.³⁰⁴ Another employer allowed an employee to work remotely on days when seafood was being served at work, and it agreed to provide her

²⁹⁸ *Commonwealth Employee*, *supra* note 283.

²⁹⁹ *Hufford Compl.*, *supra* note 280, at 9–10.

³⁰⁰ *Id.*

³⁰¹ *Warren Compl.*, *supra* note 280, at 5; *see also* Am. Compl. for Employment Discrimination at 8, *Garcia v. Am. Funds Distribs., Inc.*, No. 1:20-cv-05278 (E.D.N.Y. Mar. 31, 2022), ECF No. 56 (coworker attempted to force the allergic worker to eat a shrimp dish served at a national sales meeting, despite being informed of the allergy); Tracy Stuckrath, *Two Men with Food Allergies Bullied*, THRIVE! MEETINGS & EVENTS (Feb. 28, 2017), <https://thrivemeetings.com/2017/02/two-men-bullied/> [<https://perma.cc/7TN7-BPMG>] (describing an allergic individual's difficulty in safely eating at a company awards ceremony).

³⁰² *Stuckrath*, *supra* note 198.

³⁰³ *Friedman v. St. John Health*, No. 05-74402, 2006 WL 8432931, at *1 (E.D. Mich. Sept. 29, 2006).

³⁰⁴ *Bergeron v. LCMC Urgent Care, LLC*, No. 21-507, 2022 WL 1238616, at *1 (E.D. La. Apr. 27, 2022); *see also Salgado-Rodriguez Compl.*, *supra* note 251, at 7 (placing the burden on the allergic worker to determine if shellfish was present and not enter the cafeteria if it was).

menus in advance.³⁰⁵ But those menus frequently either did not arrive on time or contained inaccurate information about which day seafood was scheduled.³⁰⁶

d. Changes in Job, Duties, or Location

Allergic workers often need accommodations relating to their actual jobs. It could be adjustments in particular job tasks or a different job altogether. Or the job itself could be no problem, but the worker needs to perform the job in a different location for safety reasons. Problems have arisen in all these contexts.

Some employees with jobs that involve contact with food have faced resistance in getting accommodations. That might involve a job where the food nexus is marginal. For example, in the company that served seafood at its open house, the allergic worker asked to be excused from attending this single event, but the company refused.³⁰⁷ The preschool teacher's assistant needed to leave the classroom when the school lunch contained garlic, but she was not allowed to; her supervisor told her to "hold her breath."³⁰⁸ The store clerk needed only to be excused from washing the coffee pot because the sink was near a seafood area.³⁰⁹ The HR employee in the warehouse with the cafeteria that often served seafood just needed to avoid entering the cafeteria to talk to employees during lunch.³¹⁰ An employee could need a shift change to avoid harmful contact, such as a table busser who wanted to be scheduled on any day except Monday, when the casino buffet he worked for had Seafood Monday, but the employer refused.³¹¹ The pretzel factory employee wanted to go back to her old packing job instead of the new baking department job because the tomato powder used in baking caused severe allergic reactions, but the employer would not make the change and told her to "suffer through it."³¹² The nut-allergic Hershey factory employee asked for a job in a nut-free area in the factory, and the company terminated her without seriously studying if any part of the factory would be safe for her.³¹³

Even when the work itself does not involve food, some workers need to work in a different place to avoid dangerous exposure. That was the case with the Disney restaurant worker: her job duties did not involve handling food, but

³⁰⁵ *Reed Compl.*, *supra* note 287, at 5, 9.

³⁰⁶ *Id.* at 5–7.

³⁰⁷ *Clare Compl.*, *supra* note 26, at 5–6.

³⁰⁸ *Ascoli Compl.*, *supra* note 20, at 2–4.

³⁰⁹ *Godwin Compl.*, *supra* note 239, at 5–6.

³¹⁰ *Salgado-Rodriguez Compl.*, *supra* note 251, at 3–5.

³¹¹ *Compl. & Demand for Jury Trial by Jury* at 2–8, *Gillespie v. Detroit Ent., LLC* No. 2:22-cv-11186 (E.D. Mich. May 31, 2022), ECF No. 1.

³¹² *Penn Compl.*, *supra* note 232, at 1–2, 7–10.

³¹³ *Slade v. Hershey Co.*, No. 1:09-cv-00541, 2011 WL 13350910, at *2–5 (M.D. Pa. Apr. 15, 2011).

when the restaurant began serving shellfish, she needed to change locations but had significant difficulties securing that relocation.³¹⁴ Remote work can be an option to avoid allergen exposure. When the warehouse human resources worker was unable to secure accommodations that made her feel safe being near the cafeteria that frequently served shellfish, she eventually requested but was denied remote work.³¹⁵ Similarly, when an office worker's workspace was moved to be directly above a seafood restaurant, she asked to work from home to avoid that airborne exposure; her employer would not agree to this request.³¹⁶

Finally, some allergic workers have requested transfers to avoid their supervisors. These supervisors have refused their accommodations requests and have been hostile towards the worker and their allergy. That happened to two employees, both of whose transfer requests were denied.³¹⁷

e. Leave and Scheduling Flexibility

Food allergies can lead to workers needing to take leave or having other scheduling issues for a variety of reasons. Several workers requested and were denied either remote work or other schedule flexibility to deal with the repercussions of on-the-job allergic reactions.³¹⁸ Others had difficulty in scheduling doctor's appointments or seeking medical care related to their allergies,³¹⁹ even when the reactions happened at work.³²⁰ Celiac gastrointestinal symptoms can flare and make working in an office difficult for short time periods, and many workers have been denied flexible or remote work to help manage these flares

³¹⁴ *May Compl.*, *supra* note 255, at 3–11; *see also* *Dale v. McDonough*, No. 1:22-cv-10815, 2024 WL 1662904, at *4 (Feb. 28, 2024) (the plaintiff requested a transfer in part to avoid repeated shellfish exposure from coworkers who insisted on bringing shellfish), *report and recommendation adopted*, 2024 WL 1660525 (E.D. Mich. Apr. 17, 2024); *Reed Compl.*, *supra* note 195, at 3 (the plaintiff requested that her workstation be moved as far away from the kitchen as possible after coworkers continued to bring allergens into work).

³¹⁵ *Salgado-Rodriguez Compl.*, *supra* note 251, at 6–7.

³¹⁶ *LeMaire Compl.*, *supra* note 253, at 5–10. For a detailed analysis of remote work as a disability accommodation, *see* D'Andra Millsap Shu, *Remote Work Disability Accommodations in the Post-Pandemic Workplace: The Need for Evidence-Driven Analysis*, 95 TEMP. L. REV. 201 (2023).

³¹⁷ *Bergeron v. LCMC Urgent Care, LLC*, No. 21-507, 2022 WL 1238616, at *2 (E.D. La. Apr. 27, 2022); *Commonwealth Employee*, *supra* note 283.

³¹⁸ *Lam Compl.*, *supra* note 243, at 11–12; *Rainville Compl.*, *supra* note 193, at 53–56; *Wilson Compl.*, *supra* note 249, at 5–6.

³¹⁹ *Van Winkle Compl.*, *supra* note 271, at 3–5.

³²⁰ *Steele Compl.*, *supra* note 247, at 2–4; *see also* *Bessette Compl.*, *supra* note 220, at 8–11 (a worker with a corn allergy was discouraged from taking time off work to treat workplace allergic reactions); *Compl.* at 7–8, *Gruelle v. Hill, Barth & King LLC*, No. 4:19-cv-02566 (N.D. Ohio Nov. 1, 2019), ECF No. 1 (a pregnant worker with celiac was disciplined after leaving work to get food to avoid a blood sugar change and possible fainting spell).

or other similar issues.³²¹ These workers also sometimes need flexibility regarding access to bathrooms—such as being closer to a bathroom or having permission for more frequent bathroom breaks—but have been denied those accommodations as well.³²² One worker with celiac disease needed to take an early lunch so she could maintain a medication schedule that helped regulate her symptoms, but a new supervisor denied this request, even though the worker had done so successfully for past two years.³²³

f. Self-Help Measures

People with a food allergy typically carry emergency medicine and also engage in a variety of measures to protect themselves from having reactions or to treat reactions when they occur. Some employers have interfered with workers' ability to use these self-help measures. The company that required workers to eat in the cafeteria refused to allow the worker with celiac disease to bring her own safe food, even though eating in the cafeteria made her sick.³²⁴ A worker had a service dog that helped her in many ways, including alerting when she was exposed to allergens; it took more than two years for the employer to finally deny her request to use her dog at work.³²⁵ The supervisor of the preschool teacher's assistant with the garlic allergy would not let her use her EpiPen or call 911 during an allergic reaction and instead insisted that she use only Benadryl.³²⁶ The airport employee with the chocolate allergy was not allowed to bring disinfectant items into the workplace because she had to pass through airport security.³²⁷

³²¹ Civ. Compl. at 3–5, *Bogers v. Rossman & Graham Cmty. Ass'n Mgmt., Inc.*, No. 2:10-cv-02523 (D. Ariz. Nov. 22, 2010), ECF No. 1; *Lang v. Astrue*, No. 3:09-cv-01083, 2011 WL 2149914, at *1–2 (S.D. Cal. June 1, 2011); *Peterson v. Kelly Servs., Inc.*, No. 2:15-cv-0074, 2016 WL 5858688, at *1–2 (E.D. Wash. Oct. 5, 2016), *rev'd on other grounds*, 730 F. App'x 471 (9th Cir. 2018) (mem.); First Am. Compl. at 11–16, *Stewart v. Wendy's Co.*, No. 2:21-cv-04449 (E.D. Pa. Jan. 6, 2022), ECF No. 25.

³²² Compl. at 8–9, *Carachure v. Interstate Mgmt. Co, LLC*, No. 8:22-cv-00020 (C.D. Cal. Jan 6, 2022), ECF No. 1-2, Ex. A; Compl. at 3, *Holt v. Rural Health Servs., Inc.*, No. 1:21-cv-2802 (D.S.C. Aug. 30, 2021), ECF No. 1-1; *Miranda v. Hess*, No. 5:19-cv-107, 2019 WL 13290925, at *1 (N.D. Fla. Nov. 21, 2019).

³²³ *Harris Compl.*, *supra* note 270, at 2–4.

³²⁴ *Schmalz Compl.*, *supra* note 248, at 3–4.

³²⁵ *Reed Compl.*, *supra* note 287, at 3–26.

³²⁶ *Ascoli Compl.*, *supra* note 20, at 3–4; *see also Reed Compl.*, *supra* note 195, at 3–4 (EpiPen worker kept in her desk was tampered with).

³²⁷ *Daniel Compl.*, *supra* note 227, at 3.

4. Bullying and Harassment

A cause of action for disability-based harassment is cognizable under the ADA.³²⁸ The theory is that disability harassment, similar to race- or sex-based harassment, is a form of disability discrimination.³²⁹ A disability harassment claim based on a hostile work environment requires a showing, among other things, that the conduct was unwelcome, severe or pervasive, and based on the disability.³³⁰ Workers with a food allergy often face hostility, bullying, and other mistreatment that arguably falls within the ambit of disability harassment. This conduct sometimes is limited to words, but other times extends to physical actions intended to expose the worker to their allergen.

a. Words

Supervisors and coworkers verbally harass allergic employees in a variety of ways. Particularly prevalent are taunts or “jokes” about their allergy.³³¹ Allergic employees are ridiculed for what they cannot eat. “Too bad you can’t eat this,” laughing.³³² “[H]ey I got you some crab legs”³³³ “[N]ut girl.”³³⁴ Coworkers and a manager laughed and said “they were going to give [plaintiff] a peanut bracelet for Christmas.”³³⁵ This same manager assigned the allergic

³²⁸ See *Enforcement Guidance on Harassment in the Workplace*, EQUAL EMP. OPPORTUNITY COMM’N (Apr. 29, 2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#_Toc1648080071 [<https://perma.cc/TR8H-98C7>]; BLANCK, *supra* note 256, at 63–64; see also Arlene S. Kanter, *Remote Work and the Future of Disability Accommodations*, 107 CORNELL L. REV. 1927, 1974 & n.162 (2022) (collecting authorities); ROTHSTEIN & IRZYK, *supra* note 205, § 4:19 (collecting cases).

³²⁹ See MARK C. WEBER, *DISABILITY HARASSMENT* 26–28 (2007).

³³⁰ See *Flowers v. S. Reg’l Physician Servs. Inc.*, 247 F.3d 229, 235–36 (5th Cir. 2001); *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 177 (4th Cir. 2001); WEBER, *supra* note 329, at 27–30.

³³¹ See, e.g., *Bergeron Compl.*, *supra* note 172, at 9 (a coworker ridiculed the plaintiff about her seafood allergy); *Peterson v. Kelly Servs., Inc.*, No. 2:15-cv-0074, 2016 WL 5858688, at *1 (E.D. Wash. Oct. 5, 2016) (a supervisor mocked the plaintiff’s celiac condition while eating cake), *rev’d on other grounds*, 730 F. App’x 471 (9th Cir. 2018) (mem.); *Scott v. Valley Elec. Contractors, Inc.*, No. 15-cv-14281, 2016 WL 7100250, at *2 (E.D. Mich. Dec. 6, 2016) (several executives mocked the plaintiff’s seafood allergy when fish was brought in again after the plaintiff had a reaction); *Wentzel Compl.*, *supra* note 295, at 9 (male coworkers ridiculed the plaintiff because of her celiac disease).

³³² *Ruiz Compl.*, *supra* note 282, at 6.

³³³ *Clare Compl.*, *supra* note 26, at 6. This comment came from her supervisor. He would also make other comments such as he “got her some shrimp as a present” and “I am going to get you crab for you[r] birthday.” *Id.*

³³⁴ *Friedman v. St. John Health*, No. 05-74402, 2006 WL 8432931, at *2 (E.D. Mich. Sept. 29, 2006).

³³⁵ *Compl. at 5*, *Maldonado v. Panera, LLC*, No. 1:15-cv-01341 (N.D.N.Y. Nov. 12, 2015), ECF No. 1; see also *Commonwealth Employee*, *supra* note 283 (“[T]wo of my coworkers stood in the hallway outside my office door and sang and joked about how much they love almond joy candy bars and that they were going to have them every day.”); *Garcia Compl.*, *supra* note 301, at 8 (ridiculing the plaintiff’s shrimp allergy after he could not eat the food served at national sales meeting dinner).

worker to teach his coworkers how to make the store's new peanut butter shakes and laughed when the worker said he was uncomfortable doing that.³³⁶ Allergic employees are mocked for what they must eat. "[W]hat are you going to have for lunch today?; oh, let me guess, lettuce again."³³⁷ A supervisor discussed a worker's celiac disease with coworkers, saying that her "food situation is out of control."³³⁸ A coworker "quipped about the need for the special meal and joked about the need for epinephrine."³³⁹ Allergic employees are teased for their allergies and workplace allergic reactions. "Bug girl" (because of her swollen eyes).³⁴⁰ "Who hit you?" (because her eyes were puffy and red).³⁴¹ "You don't look like you have Celiac Disease. You look like you have AIDS."³⁴²

The comments and behavior can get malicious. One worker was told "it would be funny to see [her] go into anaphylaxis."³⁴³ Allergic workers are sometimes explicitly excluded from events, on top of the exclusion that occurs indirectly through teasing and other uncomfortable situations.³⁴⁴ "[D]id we forget to include you again?," accompanied by laughter as coworkers went out to lunch.³⁴⁵ Coworkers and supervisors callously prioritize their food prefer-

³³⁶ *Maldonado Compl.*, *supra* note 335, at 7.

³³⁷ *Silverman Compl.*, *supra* note 297, at 5 (internal quotations omitted). The boss made this and other similar sarcastic comments about her "special food" and referred to her as "the 'little hummingbird' and a '[prima donna]' that can only eat 'lettuce.'" *Id.* In another case, the COO joked that the plaintiff "eats like a bird" and, when told she had celiac, said "oh, one of them." Second Am. Compl. at 4, *Sorg v. Common Plea Catering, Inc.*, No. 2:24-cv-00157 (W.D. Pa. Apr. 24, 2024), ECF No. 14-1.

³³⁸ Compl. at 9, *Maillet v. Endophys Holdings, LLC*, No. 2:24-cv-06901 (C.D. Cal. Aug. 14, 2024), ECF No. 1-3.

³³⁹ *Stuckrath*, *supra* note 301.

³⁴⁰ *Friedman v. St. John Health*, No. 05-74402, 2006 WL 8432931, at *2 (E.D. Mich. Sept. 29, 2006). Another worker with a shellfish allergy was attempting to complain about the ongoing shellfish exposure and harassment she was experiencing, and the boss interrupted her "with a joke, inquiring why her eyes were so red and tearing." *Wilson Compl.*, *supra* note 249, at 4.

³⁴¹ Def.'s Mot. Summ. J. at 41, *Dale v. McDonough*, No. 1:22-cv-10815 (E.D. Mich. Aug. 31, 2023), ECF No. 16-3, Ex. 2 (Dale Dep.); *see also Warren Compl.*, *supra* note 280, at 5 (a plaintiff was ridiculed after a workplace allergic reaction).

³⁴² *Ruiz Compl.*, *supra* note 282, at 7; *see also Holt Compl.*, *supra* note 322, at 3-4 (a supervisor made jokes of a sexual nature related to a complication from the plaintiff's celiac disease).

³⁴³ *Commonwealth Employee*, *supra* note 283. She was also told that if she did go into anaphylactic shock, they would not call her family. *Id.*

³⁴⁴ *See Barrett Compl.*, *supra* note 195, at 4 (a worker did not use the company cafeteria to avoid peanut exposure); *Daniel Compl.*, *supra* note 227, at 3 (an employee ate in her car to avoid allergen exposure because her company would not provide a safe space to eat); *Commonwealth Employee*, *supra* note 283 (a worker was repeatedly excluded from ice cream celebrations because the supervisor brought nutty ice cream); *How to Thrive*, *supra* note 285 (an allergic worker used PTO on holidays because unsafe food permeated the office on those days); *Silverman Compl.*, *supra* note 297, at 5 (a worker began eating lunch alone in her car to escape constant harassment); *Wilson Compl.*, *supra* note 249, at 5-6 (an employee worked from the car to avoid seafood exposure at catered office event).

³⁴⁵ *Commonwealth Employee*, *supra* note 283; *see also Mora Summ. J. Opp.*, *supra* note 295, at 3-4 (an employee could not participate in company events because no safe food was available, and a supervisor viewed that as the employee's problem, not the company's).

ences over the allergic employee's medical needs. The company will "never stop serving shellfish on [your] account," said one worker's supervisor.³⁴⁶ One teacher stated, in front of students, that she "didn't give a damn" about another teacher's peanut allergy and "was not going to stop eating peanuts" because it was her "right."³⁴⁷ Many others have echoed the "right" of others to eat what they want, regardless of the consequences to the allergic employee.³⁴⁸ The preschool teacher's assistant with the garlic allergy was told that she was "not a priority" and that they would not limit garlic in the children's meals because "it would take away everyone else's rights" and that she was "just one person with a food allergy."³⁴⁹

Allergic workers have been accused of faking their allergies, even after suffering reactions at work,³⁵⁰ and experienced hostility from disgruntled coworkers if accommodations have in fact restricted their food choices.³⁵¹ When a worker was experiencing an allergic reaction at work, she asked her supervisor for help, but her supervisor refused, telling the worker she wasn't having an allergic reaction but was instead feeling sick from the heat—on a seventy degree day.³⁵² One man's coworker at Panera threatened to "poison" him "by sneaking peanut butter

³⁴⁶ *Mora Compl.*, *supra* note 295, at 10; *see also* *Bergeron v. LCMC Urgent Care, LLC*, No. 21-507, 2022 WL 1238616, at *2 (E.D. La. Apr. 27, 2022) (a worker was told that coworkers "didn't give a damn" and "were going to eat their seafood"); *Commonwealth Employee*, *supra* note 283 ("I was told by a coworker that she was sorry I had this allergy but that she was not going to be careful around me and will have peanut butter in the office every day if she wanted to.").

³⁴⁷ *Shamburger Compl.*, *supra* note 280, at 30. In another case, more seafood was ordered for lunch after the plaintiff disclosed her allergy, and "[t]he abnormal frequency of these orders became a joke." *See Wilson Compl.*, *supra* note 249, at 4.

³⁴⁸ *See, e.g., Dale v. McDonough*, No. 1:22-cv-10815, 2024 WL 1662904, at *2 (Feb. 28, 2024) (a supervisor "brushed off" the plaintiff's request not to bring in shellfish, "insisting that she and others had 'a right' to eat shellfish"), *report and recommendation adopted*, 2024 WL 1660525 (E.D. Mich. Apr. 17, 2024); Stefanie Renaud, *Don't Be the Unfortunate Boss Who Shrugs Off a Food Allergy*, BUSINESSWEST.COM (Oct. 15, 2016), <https://businesswest.com/blog/dont-unfortunate-boss-shrugs-off-food-allergy/> [<https://perma.cc/YMP5-VA9Q>] (an allergic employee complained to her boss that coworkers put peanut butter on her desk, and her boss "shrugged it off and told her he 'didn't think [she] should be able to dictate what others can eat'"); *Wilson Compl.*, *supra* note 249, at 6 (denying an accommodation request for not ordering shellfish because that "would be limiting the dietary choices of the other staff members," which "wouldn't be fair").

³⁴⁹ *Ascoli Compl.*, *supra* note 20, at 4; *see also May Compl.*, *supra* note 255, at 10 ("Your allergy is not our problem.").

³⁵⁰ *Barrett Compl.*, *supra* note 195, at 5–6 (a supervisor responded to a doctor's note regarding a workplace allergic reaction by saying "it was all in her . . . head," followed by the supervisor telling coworkers to eat peanuts in the plaintiff's presence to see if she was faking her allergy); *Hufford Compl.*, *supra* note 280, at 10 (a boss told the plaintiff she did not believe she was allergic to fish "because she believed that African Americans primarily ate chicken and fish").

³⁵¹ *Amini Statement of Disputes*, *supra* note 287, at 95–96; *Daniel Compl.*, *supra* note 227, at 5; *Warren Compl.*, *supra* note 280, at 6–7.

³⁵² *Amini Statement of Disputes*, *supra* note 287, at 98–99.

into his coffee” and otherwise tricking him into eating peanuts.³⁵³ And the coworker succeeded in tricking him, as will be seen in the next Subsection.

b. Physical Actions

The most dangerous form of bullying and harassment involves physically using the allergen. Small exposures can have outsized consequences, such as anaphylaxis, which can kill.³⁵⁴ And yet, stories abound of allergic employees being forced or tricked into being near, touching, or even eating their allergen. All three of these things happened to the Panera worker who was allergic to peanuts. His coworkers, led by his supervisor, put peanut butter near the office door as a “prank.” They once told him to put his hands out so they could give him something, and when he did, they filled his hands with Reese’s Peanut Butter Cups, causing an allergic reaction. They tricked him into biting into a cookie that contained nuts after assuring him the cookie was nut-free; he had to medicate, even after rinsing the single bite from his mouth.³⁵⁵

Many other workers have had coworkers or supervisors eat their allergens close to them, deliberately, to cause them discomfort—or worse.³⁵⁶ In one instance, the plaintiff’s supervisor was convinced she was faking her allergy, so she instructed some coworkers to eat peanuts near the plaintiff as a test. They did so repeatedly, even though it caused allergic reactions.³⁵⁷ The principal of the teacher with the corn allergy intentionally opened Doritos and other corn-based snacks in front of her.³⁵⁸ A coworker ate a nut candy bar at an allergic employee’s desk, threw the wrapper in her trash, and then tried to type on her keyboard, causing an allergic reaction.³⁵⁹ The coworkers and supervisors of a

³⁵³ *Maldonado Compl.*, *supra* note 335, at 6–7; *see also Reed Compl.*, *supra* note 195, at 3 (coworkers threatened to continue bringing allergens to work and in fact did so).

³⁵⁴ *See supra* notes 11–16, 38–43, 50–52 and accompanying text.

³⁵⁵ *Maldonado Compl.*, *supra* note 335, at 4–6.

³⁵⁶ *See Amini v. Cnty. of Ventura*, No. 2:22-cv-05420, 2024 WL 5217926, at *10 (C.D. Cal. Aug. 12, 2024) (coworkers intentionally brought allergens into the plaintiff’s workspace with intent to harm her); *Dale v. McDonough*, No. 1:22-cv-10815, 2024 WL 1662904, at *3 (Feb. 28, 2024) (an employee deliberately got close to the plaintiff after eating shellfish); *report and recommendation adopted*, 2024 WL 1660525 (E.D. Mich. Apr. 17, 2024); *Commonwealth Employee*, *supra* note 283 (a supervisor put a peanut butter smoothie on an allergic worker’s desk most mornings and laughed); *Drew-Hoke Compl.*, *supra* note 280, at 5 (graduate students “haz[ed]” the plaintiff by deliberately eating peanuts in the graduate student shared office); MICHELE PAYN, FOOD BULLYING: HOW TO AVOID BUYING B.S. 10 (2020) (“I have had a co-worker place an open jar of peanuts on her desk every time that I was planning to meet with her in her office. The open peanuts meant I couldn’t enter due to risk of severe reaction.”).

³⁵⁷ *Barrett Compl.*, *supra* note 195, at 4–6.

³⁵⁸ *Essah v. Governing Bd. of L.A. Unified Sch. Dist.*, No. 2:20-cv-02628, 2023 WL 4304771, at *8 (C.D. Cal. Feb. 23, 2023); *Essah Compl.*, *supra* note 281, at 12–13.

³⁵⁹ *Villalobos v. Basis Educ. Grp. LLC*, No. cv-20-00850, 2022 WL 3647832, at *3 (D. Ariz. Aug. 24, 2022).

hairdresser with celiac disease deliberately ate gluten-containing food in or near his workstation, laughing at his discomfort and repeated reactions.³⁶⁰

Many of these workplace incidents have gone beyond making the worker be near the allergen—they have involved forced touching or eating. A peanut-allergic worker found a big glob of peanut butter smeared under her desk after she began to experience reaction symptoms and discovered peanut butter on her hand; her boss was unconcerned and said she could not dictate what others could eat.³⁶¹ The coworkers whose supervisor encouraged them to expose the allergic worker as a test once chased her, trying to touch her with peanuts, another time put peanuts on her desk and the floor around her desk, and finally placed peanuts directly on her. She had to go to urgent care because her throat closed, and she had difficulty breathing. Within one hour of returning to work, the supervisor summoned the plaintiff to her desk while eating a peanut candy bar and “joked” that if the plaintiff survived this exposure, it proved she was faking.³⁶² The plaintiff had another reaction, including difficulty breathing and vomiting; the supervisor just watched her rather than calling 911. The plaintiff was able to call 911 on her own, and she was taken to the emergency room by ambulance and hospitalized.³⁶³

The most serious incidents involve attempts to make the allergic person eat the allergen. Workers have been pressured. For example, at an office birthday celebration, a woman could not eat the birthday cake, but her boss called her out in front of the room and told her “just eat a piece of damn cake.”³⁶⁴ Another employee who had experienced a severe allergic reaction from alcohol at a work function was repeatedly pressured to drink at later work events.³⁶⁵ Even worse, workers have been deceived. A worker with a mushroom allergy found mushrooms hidden in her salad after the cook had prepared and specially wrapped a mushroom-free salad for her.³⁶⁶ A fire station captain willfully placed onions in an allergic employee’s meal without his knowledge, causing a severe allergic reaction.³⁶⁷ A Reddit post contained a story about a coworker

³⁶⁰ *Ruiz Compl.*, *supra* note 282, at 5–6.

³⁶¹ *Renaud*, *supra* note 348.

³⁶² *Barrett Compl.*, *supra* note 195, at 7.

³⁶³ *Id.* at 5–7; *see also Shamburger Compl.*, *supra* note 280, at 30 (a coworker said she “didn’t give a damn” about the plaintiff’s peanut allergy and handled a doorknob that then caused the plaintiff to suffer an allergic reaction, leading her to suspect the coworker intentionally contaminated the door-knob).

³⁶⁴ *Stuckrath*, *supra* note 301.

³⁶⁵ *Shukla Compl.*, *supra* note 263, at 34; *see also Garcia Compl.*, *supra* note 301, at 8 (the plaintiff was ridiculed and pressured to eat a shrimp dish even after informing the work dinner group of his allergy).

³⁶⁶ *Beyer v. Miami-Dade Cnty.*, No. 11-24285, 2019 WL 9512986, at *4 (S.D. Fla. Feb. 12, 2019).

³⁶⁷ *Cheatham v. Dekalb Cnty., Ga.*, 682 F. App’x 881, 882–83 (11th Cir. 2017).

who suspected an allergic colleague of repeatedly stealing her lunch from the office refrigerator; in response, she deliberately put the coworker's allergen in her lunch.³⁶⁸ Stealing a coworker's lunch is unacceptable, but it does not warrant a potential death penalty.

5. Retaliation

The ADA prohibits employers from retaliating against employees who engage in protected activity such as complaining about discrimination or requesting accommodations.³⁶⁹ The employee need not prove the underlying violation as long as the employee's complaint is based on a good faith, reasonable belief of discrimination or that they were entitled to accommodations.³⁷⁰

Retaliation allegations often overlap with disparate treatment and harassment claims, particularly when supervisors are involved in the misconduct. The same conduct can easily support a disparate treatment or harassment claim on the one hand and retaliation on the other.

Some retaliation allegations are tied to a supervisor mistreating an employee in a way specific to their allergy as opposed to misconduct directly related to working.³⁷¹ In two instances, a supervisor was directly involved in dangerous actions targeted toward the allergic employee, allegedly in retaliation for the employee having requested accommodations or complaining about the supervisor. In the case where the supervisor ate peanut candy in front of the plaintiff and quipped that if she survived it would prove the plaintiff was faking her allergy, the plaintiff ascribed this and other hostility in part to her complaints about the supervisor and requests for accommodation.³⁷² In the other situation involving a supervisor tormenting a worker with a nut candy bar after the worker had complained—where the supervisor brought it to the plaintiff's desk and ate some of it, threw the wrapper in her trash, and then tried to type on her computer—the plaintiff had a reaction and went to urgent care.³⁷³

³⁶⁸ Lucy Notarantonio, *Woman Using Peanuts to Catch Allergic Office 'Food Thief' Cheered*, NEWSWEEK, <https://www.newsweek.com/woman-puts-peanut-food-colleague-allergic-1871664> [<https://perma.cc/DZ8J-NF3Q>] (Feb. 20, 2024). The woman's Reddit post posed this question: "Am I wrong for putting peanuts in my food and not putting an allergen label on it, knowing that the food thief is allergic?" *Id.*

³⁶⁹ See 42 U.S.C. § 12203(a)–(b); Nicole Buonocore Porter, *Disabling ADA Retaliation Claims*, 19 NEV. L.J. 823, 826 (2019).

³⁷⁰ See BLANCK, *supra* note 256, at 62–63; WEBER, *supra* note 213, § 7.04[A] at 247.

³⁷¹ *Bergeron v. LCMC Urgent Care, LLC*, No. 21-507, 2022 WL 1238616, at *2, *11 (E.D. La. Apr. 27, 2022); *Mora Compl.*, *supra* note 295, at 7–12.

³⁷² *Barrett Compl.*, *supra* note 195, at 6–7.

³⁷³ *Villalobos v. Basis Educ. Grp. LLC*, No. 20-00850, 2022 WL 3647832, at *3 (D. Ariz. Aug. 24, 2022).

Retaliation against allergic employees frequently manifests in distinct employment-related actions. Allergic employees have been reprimanded unfairly³⁷⁴ or more closely monitored or micromanaged³⁷⁵ after complaining or requesting accommodations. The Panera worker whose coworkers and manager taunted, touched, and tricked him with peanuts was transferred to a store 120 miles away from his house after he complained.³⁷⁶ The Disney restaurant worker was demoted after her restaurant began serving shellfish, and her supervisor told her they were considering firing her rather than finding a place she could safely work that was not a demotion.³⁷⁷ The Seafood Monday table busser was furloughed during COVID-19, along with many of his coworkers, but others with much less seniority than this twenty-year employee were recalled sooner.³⁷⁸

A substantial number of allergy-related retaliation allegations involve termination for requesting accommodations or complaining about mistreatment based on their allergy,³⁷⁹ particularly if they have complained about their su-

³⁷⁴ *Clare Compl.*, *supra* note 26, at 6; *Salgado-Rodriguez Compl.*, *supra* note 251, at 5, 10.

³⁷⁵ *See Compl. & Jury Demand* at 5–8, 19–20, *Dale v. McDonough*, No. 1:22-cv-10815 (E.D. Mich. Apr. 16, 2022), ECF No. 1 (hostility, delay in implementing accommodations, increased work scrutiny, reprimands); *Essah v. Governing Bd. of L.A. Unified Sch. Dist.*, No. 2:20-cv-02628, 2023 WL 4304771, at *8 (C.D. Cal. Feb. 23, 2023) (increased classroom observations after a plaintiff complained about the principal eating an allergen in her presence); *LeMaire Compl.*, *supra* note 253, at 4–5 (previously acceptable work was nitpicked after the plaintiff made allergy-related complaints and requested accommodations).

³⁷⁶ *Maldonado Compl.*, *supra* note 335, at 8.

³⁷⁷ *May Compl.*, *supra* note 255, at 10.

³⁷⁸ *Gillespie Compl.*, *supra* note 311, at 2–3, 7–9.

³⁷⁹ *See Bergeron v. LCMC Urgent Care, LLC*, No. 21-507, 2022 WL 1238616, at *5–6 (E.D. La. Apr. 27, 2022) (a worker was fired after allergy-related complaints, supposedly for the minor offense of stealing three face masks); *Daniel Compl.*, *supra* note 227, at 5, 7 (a plaintiff was fired after requesting an accommodation for a chocolate allergy; the employer said it could not accommodate her allergy); *Godwin Compl.*, *supra* note 239, at 5–6 (a cashier was fired after requesting to not perform a task at work—washing a coffee pot—that put her near her allergen and caused a reaction); *Harris Compl.*, *supra* note 270, at 3–4 (a worker was fired within days of initiating a formal accommodations request process after a new supervisor withdrew previous accommodations relating to celiac); *Holt Compl.*, *supra* note 322, at 3, 12 (a worker with celiac was fired after complaining about being denied restroom accommodations for his celiac flares); *Littleton Compl.*, *supra* note 245, at 2 (a plaintiff was fired after complaining about coworkers who refused to stop heating clam chowder in the office microwave); *Mora Compl.*, *supra* note 295, at 10 (a plaintiff was terminated on the orders of a supervisor who had been extremely hostile to the plaintiff's shellfish accommodation requests); *Reed Compl.*, *supra* note 195, at 3–4 (a plaintiff was fired after complaining about the lack of accommodations and making a police report about someone tampering with her EpiPen); *Wilson Compl.*, *supra* note 249, at 5–6 (an individual was fired after working from her car to prevent further reactions to seafood in the office and requesting to work remotely the next day to continue her recovery); *see also Salgado-Rodriguez Compl.*, *supra* note 251, at 10 (a plaintiff was forced to resign based on retaliatory actions and failures to accommodate her seafood allergy).

pervisor.³⁸⁰ Allergic employees have been fired over disputes relating to taking leave or having absences related to their allergies³⁸¹ or after being forced to take leave and the leave running out.³⁸²

C. Education and Empathy Are Needed

Regardless of all these legal issues that arise when workplace allergy situations go awry, prevention is the best policy. Empathy is what's needed, and the key to empathy is education. The mean-spiritedness seen in some of these stories might not be fixable, but for many, the root of their hostility and unwillingness to be inconvenienced is ignorance or misinformation. Surely, for many people, if they understood that food allergies are real and deadly serious and that their actions could directly endanger a colleague's health and wellbeing, perhaps even their life, they would be more willing to be accommodating.

Employers should be proactive in preparing their workplaces for the food allergy generation. Statistically, virtually every workplace will soon have at least one allergic employee. Employers should not stick their heads in the sand and wait until a sticky situation arises before considering how to handle workplace food allergies. The key first step in getting ahead of the problem is food allergy education and training.³⁸³ At least two companies offer training ser-

³⁸⁰ *Essah v. Governing Bd. of L.A. Unified Sch. Dist.*, No. 2:20-cv-02628, 2023 WL 4304771, at *8 (C.D. Cal. Feb. 23, 2023); *Peterson v. Kelly Servs., Inc.*, No. 2:15-cv-0074, 2016 WL 5858688, at *2–3 (E.D. Wash. Oct. 5, 2016), *rev'd on other grounds*, 730 F. App'x 471 (9th Cir. 2018).

³⁸¹ See *Bessette Compl.*, *supra* note 220, at 8–11 (an individual was fired for attendance-related issues arising from workplace reactions to corn exposure); *Clare Compl.*, *supra* note 26, at 7–8, 15 (a plaintiff was reprimanded for taking leave related to medical care for a seafood allergy); *First Am. Compl.* at 2, *Conklin v. ABEC, Inc.*, No. 5:24-cv-00857 (E.D. Pa. July 15, 2024), ECF No. 16 (a worker was fired after requesting leave because of celiac); *Emerick v. Regus Mgmt. Grp., LLC*, No. 3:18-cv-1576, 2020 WL 569299, at *1 (S.D. Cal. Feb. 5, 2020) (a worker with celiac and food allergies took medical leave and was terminated); *Peterson*, 2016 WL 5858688, at *2–3 (a supervisor pressured a worker with celiac to take medical leave or quit rather than seeking accommodation before firing her); *Salgado-Rodriguez Compl.*, *supra* note 251, at 4–5 (an employee was reprimanded for absences from the workplace due to allergic reactions); *Schmalz Compl.*, *supra* note 248, at 3–4 (an individual was fired for missing work due to a celiac flare caused by being forced to eat unsafe food in the company cafeteria); *Stewart Compl.*, *supra* note 321, at 11–16 (a worker was fired for missing work due to a celiac flare).

³⁸² *Bogers Compl.*, *supra* note 321, at 3–5; *LeMaire Compl.*, *supra* note 253, at 5–7, 10.

³⁸³ See Cinnamon Janzer, *How to Handle Food Allergies in the Workplace*, TRINET (Apr. 25, 2022), <https://www.trinet.com/insights/how-to-handle-food-allergies-in-the-workplace> [<https://perma.cc/AB92-L8ZK>] (describing the importance of open communication and educating oneself on the needs of an employee who has a food allergy); Moore, *supra* note 193 (detailing the importance of an open “interactive process” an employer should have with its allergic employee to educate itself on the best possible accommodation); Renaud, *supra* note 348 (describing the importance of educating oneself on the ADA protocol for evaluating and granting accommodations). Indeed, workplace education can be a type of reasonable accommodation. See Johnny C. Taylor Jr., *Ask HR: How Does Someone with Food Allergy Navigate the Workplace? How to Handle Office Noises?*, USA TODAY (Oct. 16, 2018), <https://>

vices on this exact topic.³⁸⁴ The Department of Labor's Job Accommodation Network (JAN) is a free resource that helps employers develop disability-inclusive and compliant workplaces,³⁸⁵ and JAN has a publication focused specifically on accommodating food allergies.³⁸⁶ Websites for food allergy advocacy groups such as Food Allergy Research and Education (FARE)³⁸⁷ and the Food Allergy and Anaphylaxis Connection Team (FAACT)³⁸⁸ contain a wealth of information, including specifically about food allergies in the workplace. In addition to using these types of resources to educate themselves and their workers, employers can be proactive in other ways, such as offering more bonding and social activities that do not revolve around food or making a special point to coordinate with allergic employees when events involve food.³⁸⁹

Steps like these can go a long way in making the workplace better for food-allergic workers. One-third of the millions (and growing) adult workers with a food allergy feel uncomfortable and unsafe at work because of issues related to their allergy, and sixty percent of allergic millennials feel anxiety at work because of their allergies.³⁹⁰ These workers may have performance and attendance problems due to lack of accommodations or the psychological

www.usatoday.com/story/money/careers/2018/10/16/ask-hr-food-allergy-navigate-workplace-office-noise/1618966002/ [<https://perma.cc/W2VG-Q68K>] (considering the importance of educating the entire staff on the implications of a food allergy on the affected individual).

³⁸⁴ See *Food Allergies in the Workplace Under the ADA*, LORMAN, <https://www.lorman.com/training/employment-labor/food-allergies-in-the-workplace-under-the-ada> [<https://perma.cc/6QWN-E88S>]; Tracy Stuckrath, *Discrimination in the Workplace: What's Food & Beverage Got to Do with It?*, BAMBOOHR (Nov. 8, 2018), <https://www.bamboohr.com/virtual/basecamp/video/discrimination-in-the-workplace-whats-food-and-beverage-got-to-do-with-it/> [<https://perma.cc/D7GT-89S2>].

³⁸⁵ See generally JOB ACCOMMODATION NETWORK, <https://askjan.org> [<https://perma.cc/UA9R-MTSR>].

³⁸⁶ See JOB ACCOMMODATION NETWORK, ACCOMMODATION AND COMPLIANCE SERIES: A TO Z BY DISABILITY: ALLERGIES 4–8 (2024). For additional resources on accommodating allergic workers, see Janzer, *supra* note 383, Laker et al., *supra* note 10, and Moore, *supra* note 193.

³⁸⁷ See generally FOOD ALLERGY RSCH. & EDUC., <https://www.foodallergy.org> [<https://perma.cc/KLG9-ASJS>]. For information specific to employers, see *Information for Employers*, FOOD ALLERGY RSCH. & EDUC., <https://www.foodallergy.org/resources/information-employers> [<https://perma.cc/S3SD-BTWA>].

³⁸⁸ See generally FOOD ALLERGY ANAPHYLAXIS CONNECTION TEAM, <https://www.foodallergyawareness.org> [<https://perma.cc/J23W-2GKB>]. For employment-specific information, see *Empowered Adults in the Workplace: Managing Food Allergies in the Work Environment*, FOOD ALLERGY & ANAPHYLAXIS CONNECTION TEAM, <https://www.foodallergyawareness.org/education/adults-with-food-allergies/food-allergies-in-the-workplace/> [<https://perma.cc/FG55-YUQ5>].

³⁸⁹ See *Is Your Company Culture Causing Unintended Suffering for Allergic Staff?*, ALLERGY-CHOICES (Nov. 25, 2020), <https://www.allergychoices.com/blog/is-your-company-culture-causing-unintended-suffering-for-allergic-staff/> [<https://perma.cc/6WAB-A9DW>] (proposing that at least half of a company's "culture enhancing activities" not involve food); Laker et al., *supra* note 10 (describing the importance of policies that make office social events more inclusive for those with food allergies).

³⁹⁰ Laker et al., *supra* note 10; see also *Commonwealth Employee*, *supra* note 283 (discussing the writer's anxiety and depression from workplace bullying for her allergies).

stress of being mistreated, and that's in addition to the eventual lawsuits—none of which are the ideal situation for either the worker or the employer.³⁹¹ Employers should strive for positive workplace morale because happier workers tend to be more loyal and productive, which is good for the bottom line.³⁹² Efforts to make the workplace safer for allergic employees create overall goodwill in the workplace by showing that the employer cares about employee well-being and inclusiveness.³⁹³

Some employers are already taking these kinds of actions. One woman recounted how her employer volunteered to implement a no-peanut policy and even asked the vending machine company to take peanut-containing snacks out of the machines.³⁹⁴ Another worker explained how her coworker began bringing cashews instead of peanuts to work after listening to her story about how dangerous peanuts were for her.³⁹⁵ Some people can change if we give them a chance, and education is a big part of that equation.

CONCLUSION

The signs are clear that an undercurrent of food allergy disability issues exist in the workplace and will only intensify as the food allergy generation continues to age and go to work. Doubtless some employers are doing a good job with allergic workers, but this is new territory for many, and, as my research has revealed, things are not always going well. Now that I have identified these legal issues, my future scholarship will turn to how to analyze them, in particular, the accommodations and harassment issues because those two seem to be the most complained-of areas. Though there is not yet much case

³⁹¹ See *Managing Food Allergies in the Workplace*, ALLERGIC DIAGNOSTIC & TREATMENT CLINIC (Oct. 24, 2018), <https://www.pflanzermd.com/managing-food-allergies-in-the-workplace> [<https://perma.cc/K4LR-5UXH>] (stating that “the business loses” when allergic employees are forced to take days off due to a lack of accommodations); Renaud, *supra* note 19 (stating that “the business loses” when allergic employees are forced to take days off due to a lack of accommodations); Stuckrath, *supra* note 192 (describing the situation of an allergic employee forced to lose two weeks of work over a three-month period because of reactions); Tracy Stuckrath, *Lessons for Human Resources Professionals: Legal Implications—Part Four*, THRIVE! MEETINGS & EVENTS (June 15, 2017), <https://thrivemeetings.com/2017/06/lessons-hr-legal-implications/> [<https://perma.cc/H3VE-YFX7>] (describing the significant impacts of an allergy-related disability lawsuit on a business).

³⁹² See Jennifer Moss, *Creating a Happier Workplace Is Possible—and Worth It*, HARV. BUS. REV. (Oct. 20, 2023), <https://hbr.org/2023/10/creating-a-happier-workplace-is-possible-and-worth-it> [<https://perma.cc/7HHD-BPXT>] (highlighting research from Oxford that found a link between happier workers and a 13% increase in productivity).

³⁹³ See Stuckrath, *supra* note 192.

³⁹⁴ See *How to Thrive*, *supra* note 285.

³⁹⁵ See *The Food Allergy Spectrum Explained & Handling Food Bullying*, INVISIBLY ALLERGIC (Nov. 13, 2021), <https://invisiblyallergic.com/2022/11/13/the-food-allergy-spectrum-and-food-allergy-bullying/> [<https://perma.cc/P8UV-4BS2>].

law specific to food allergies, accommodations law generally and law on analogous areas such as chemical and scent sensitivity and environmental allergies will inform the analysis. The same is true for analyzing food allergy harassment claims, which will draw on generally disability harassment cases as well as racial and sexual harassment cases, where the law is fairly well established.

It's inevitable that we will see more of these issues arise, but hopefully, employers can educate themselves and their workforce to nip some of these problems in the bud. We can also hope that judges and lawyers will learn more about how to litigate and rule on these issues to help ensure the law develops in an appropriate manner. Given the boom of food-allergic employees heading into the workforce, it's vital that everyone learn what a serious problem this is and take appropriate steps to address it.

