

# Federal Circuit Bar Association

## BENCH & BAR

# Newsletter

### Member News!

Krish Gupta is now Senior Vice President for Intellectual Property and Intellectual Property Litigation at Dell Technologies. In this role Krish has worldwide responsibility for IP litigation, IP law and policy, technology licensing, patents, trademarks, copyrights, open source, standards and IP support for M&A activities for Dell Technologies. He was formerly Senior Vice President & Deputy General Counsel for EMC Corporation which has now merged with Dell.

*\*\*If throughout the 2016-2017 membership year, you would like to share changes in your career status or affiliations with the national and international Circuit community, please let us know. To be recognized in "Members News" (during any month - space, as available) or for any additional information, please contact Thomas Dawson, dawson@fedcirbar.org,*

## Accommodating Mentally Impaired Employees at Work: How to Alter Supervisory Methods as a Reasonable Accommodation Under the Americans with Disabilities Act

Jeffrey J. Lorek<sup>1 2</sup>

It is well-settled that an employer has no obligation to change a disabled employee's supervisor as an accommodation under the Americans with Disabilities Act (ADA) or Rehabilitation Act of 1973 (applicable to federal sector employment). The Equal Employment Opportunity Commission (EEOC), administrative judges, and federal courts all have repeatedly held that switching one's supervisor is not considered

a "reasonable accommodation."<sup>3</sup> Moreover, employees are not entitled to their preferred accommodation.<sup>4</sup>

<sup>3</sup>Benson v. Cal. Corr. Peace Officers' Ass'n, 2010 U.S. Dist. LEXIS 23454, 19 (Feb. 23, 2010) ("An employer, however, is not required to change a person's supervisor as a form of reasonable accommodation.") (citation omitted); Mitchum v. Dep't of Labor, 2014 MSPB LEXIS 2533, (Apr. 18, 2014) (finding that appellant's request for reassignment to a new job with a new supervisor was not reasonable accommodation), quoting U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002); Steinmetz v. U.S. Postal Serv., 2005 EEO PUB LEXIS 5999 (Dec. 29, 2005) ("we note that even if complainant had been covered by the Rehabilitation Act, according to the Commission's guidance, an employer does not have to provide an employee with a new supervisor as a reasonable accommodation.").

<sup>4</sup>See Swanson v. Vill. Of Flossmoor, 794 F.3d 820, 827 (7th Cir. 2015) ("even if 'light duty' would have been Swanson's preferred accommodation, the ADA does not entitle a disabled employee to the accommodation of his choice"); Handverger v. City of Winooski, 605 Fed. Appx. 68, 71 (2nd Cir. 2015) ("Employees are 'not entitled to hold out for the

<sup>1</sup>The views expressed in this article are the author's alone and should not be attributed to the Federal Circuit Bar Association or any other affiliates.

<sup>2</sup>The author has published a number of articles on various labor and employment law topics, including reasonable accommodations, sexual harassment, restrictive covenants in employment, budget-related furloughs, adverse employment actions related to security clearance and access issues, and formal discussions with bargaining unit employees. He has a B.S. in Finance from The Pennsylvania State University, a J.D. from The Cleveland-Marshall College of Law, Cleveland State University, and an LL.M. in labor law from The George Washington University Law School. The author currently practices labor and employment law as a Major in the U.S. Air Force Judge Advocate General's Corps. The views expressed in this article are solely those of the author, and do not represent the views of the Department of Defense, the U.S. Air Force, or the Judge Advocate General's Corps.

ACT SEE PAGE 3

## Investigation of Misappropriation and Use of Trade Secrets Under Section 337(a)(1)(A)

### WEBCAST

Monday, October 17, 2016

[REGISTER HERE](#)

Companies have been turning to subsection (a)(1)(A) of Section 337 more frequently to remedy unfair acts such as false advertising, common law trademark and trade dress infringement, false designation of geographic origin, and misappropriation of trade secrets. This program will review the authority of the U.S. International Trade Commission to issue remedial orders based on non-statutory causes of action, with particular focus on misappropriation of trade secrets, and provide practitioners' insights on litigating trade secret cases at the ITC. For additional information, [click here](#).

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## Factors Affecting Success of Motions to Stay District Court Litigation Pending Inter Partes Review

### WEBCAST

Friday, October 21, 2016

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District courts have discretion to control their dockets by staying patent infringement cases pending resolution of post-grant review by the Patent Trial and Appeal Board. Some districts stay cases more frequently than others, and some factual circumstances prove more important to a grant. This program will include a discussion of recent data on stay orders, and provide some considerations related to overall litigation strategy when it is likely that a patent challenger will seek to stay the district court case pending review by the PTAB. For additional information, [click here](#).

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## Potential Effects of the Defend Trade Secrets Act on Section 337 Investigations – Analysis and Predictions

### WEBCAST

Tuesday, October 25, 2016

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The recent enactment of the Defend Trade Secrets Act (DTSA) may significantly affect Section 337 trade secret practice. This program will explore the potential ramifications of the DTSA's definition of trade secret misappropriation and the yet-to-be developed case law under the DTSA on Section 337 trade secret cases, with illustrations from recent cases. The program will also assess the DTSA's extra-territorial reach in comparison to that of Section 337 and consider the Federal Circuit's Tianrui (foreign misappropriation) and ClearCorrect (electronic importation) decisions in light of that comparison. The program will also raise the question of what impact the DTSA might have on forum choice and other strategic considerations related to initiating a trade secret case under Section 337. For additional information, [click here](#).

Rather, an employer need only grant a reasonable accommodation after engaging in the interactive process with the employee and ascertaining what type of accommodation is most mutually beneficial.

This is true even in cases where an employee's medical or mental health provider opines that the employee's disability results from, or is aggravated by, interactions with particular management officials.<sup>5</sup> For example, in the 2013 case *Belton v. Dep't of Veterans Affairs*, the EEOC held that an employee who was diagnosed with adjustment disorder, mixed anxiety and depression was not entitled to reassignment away from a particular supervisor even though the Commission acknowledged that the supervisor in question had actually exacerbated the employee's hostility in the workplace.<sup>6</sup> That being said, an employer may always choose to voluntarily assign an employee a new supervisor if it determines that to be the prudent course of action, consistent with its business needs. Usually, though, reassigning the employee to a new supervisor is not the best solution and such move sets a dangerous precedent for future cases.

While an employer need not change a disabled employee's supervisor, however, it may be required to alter supervisory methods as a form of reasonable accommodation.<sup>7</sup> In its Enforcement Guidance on the

most beneficial accommodation' (citation omitted), or even their preferred accommodation (citation omitted)"); *Brudnak v. Port Auth. of Allegheny Cty.*, 2012 U.S. Dist. LEXIS 129871, \*23 (Sep. 12, 2012) ("Simply because plaintiff did not receive what he requested ... that does not mean that the Port Authority's accommodation was not reasonable."), citing *EEOC v. Agro. Distrib., LLC*, 555 F.3d 462, 471 (5th Cir. 2009) ("Not all requested accommodations are appropriate, and the ADA only 'provides a right to a reasonable accommodation, not the employee's preferred accommodation.'"); *Ferguson v. U.S. Postal Serv.*, 1991 EEOC LEXIS 174, \*21 (May 30, 1991) ("[A]n employee is not necessarily entitled to the precise form of accommodation he or she might prefer."), citing *Carter v. Bennett*, 840 F.2d 63 (D.C. Cir. 1988).

<sup>5</sup>*Belton v. Dep't of Veterans Affairs*, 2013 EEOC LEXIS 893, \*5 (Apr. 2, 2013); *Famber v. Social Sec. Admin.*, EEOC Appeal No. 0120101703 (Aug. 15, 2012).

<sup>6</sup>*Belton*, 2013 EEOC LEXIS 893 at \*6.

<sup>7</sup>U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002), available at <https://www.eeoc.gov/policy/docs/accommodation.html#types>. Other forms

ADA and Psychiatric Disabilities, the EEOC offers some illustrations of how supervisors can adjust their supervisory methods to effectively accommodate employees with mental impairments.<sup>8</sup>

A supervisor may, for example, alter the way in which he or she communicates expectations, tasks and assignments to the disabled employee. This necessarily requires some amount of deference to the employee in that the supervisor must learn what medium is most effective for a particular individual. An employer should ascertain whether the employee most effectively receives information in the form of typed or handwritten communication, verbal conversations, or electronic mail.<sup>9</sup>

The same inquiry applies to any training that an employer wishes to impart on the disabled employee. To constitute a valid reasonable accommodation, an employer needs to deliver training to the employee in the manner most effective for that particular employee. For some employees suffering from mental health issues, one-on-one, in-person

of reasonable accommodation that may apply in a particular case include, inter alia: acquiring or modifying equipment or devices; job restructuring; part-time or modified work schedules; reassignment to a vacant position; adjusting or modifying tests, training materials or employer policies; providing interpreters or readers; or otherwise taking actions to make the workplace more accessible to disabled persons. For a more detailed discussion of job restructuring as a reasonable accommodation, see JEFFREY J. LOREK, "Job Restructuring" as a Reasonable Accommodation in Federal Employment, *FedSmith.com* (Aug. 25, 2016), available at <http://www.fedsmith.com/2016/08/25/job-restructuring-as-a-reasonable-accommodation-in-federal-employment/>. For a detailed discussion of reassignment as a reasonable accommodation, see MURRAY AND LOREK, *The Americans with Disabilities Act and Reasonable Accommodation: Does an Employer Have a Duty to Reassign Disabled Individuals Who Can No Longer Perform their Jobs?*, Corporate Counsel's Guide to the Americans with Disabilities Act, Business Laws, Inc. (August/November 2005).

<sup>8</sup>U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (Mar. 25, 1997), available at <https://www.eeoc.gov/policy/docs/psych.html>.

<sup>9</sup>See id. at para. 26.

education works best. Yet for others, perhaps a large classroom format is more effective. A larger, seminar-type training session could benefit certain employees who learn better from hearing others' viewpoints, and having questions asked and answered by the trainer. Finally, some disabled employees benefit most from visual, online-based, or Powerpoint-type of training delivery. This latter format allows employees with social anxiety issues or attention deficit disorders to learn at their own pace and comfort level. They can pause the training whenever needed, re-read or rewind the material, and even get up out of their chairs and take breaks. For some employees, frequent breaks help them relieve anxiety and refocus their attention, thereby making them more productive when they return to their workstations.

In addition to changing the mode and manner of communication, instruction and training, altering supervisory methods as a reasonable accommodation could entail adjusting the "level of supervision or structure" over a particular employee.<sup>10</sup> The example the EEOC provides is the case of an employee with concentration problems.<sup>11</sup> An appropriate adjustment in the level of supervision might take the form of more frequent oversight and guidance (e.g., day-to-day), more performance feedback sessions than usual (e.g., five times per year versus three), or greater overall structure in the employee's work schedule (e.g., specified tasks linked to designated blocks of time).<sup>12</sup> Some

<sup>10</sup>See id.

<sup>11</sup>Id. Of course, a precursor to discussing reasonable accommodation in the form of adjusted supervisor methods is that the employee is actually suffering from a physical or mental impairment which affects his or her concentration. In the absence of medical documentation or pre-existing record of such a disability, the employer would have to "regard" the employee as disabled to fall within the ambit of the ADA or Rehabilitation Act. Because the burden is on the employee to demonstrate he or she is a person with a disability, it is not recommended that an employer regard a person as disabled. Rather, the employee should be required to submit some type of medical evidence.

<sup>12</sup>See id.

**ACT FROM PAGE 3**

employees tend to perform better when they have more autonomy and less supervisory intervention or oversight. An anxious person, for example, may perform poorly when he is always nervous about a supervisor “breathing down his neck.” On the other hand, an employee whose mental disability manifests itself in the inability to focus and organize her affairs might benefit from greater supervisory input and structure over her daily work assignments. Unlike the employee who performs well autonomously, this particular employee may require more supervisory involvement.

Ultimately, in disability cases, there is no one-size-fits all approach to choosing a supervisory method—whether it be the manner of communication or the level of supervision—that will ultimately suffice as a reasonable accommodation for an employee with a mental impairment. This is why the interactive process that occurs between the employee and supervisor plays such a vital role in the selection of a reasonable accommodation. Only through discussions with an employee concerning his or her unique impairment, and by asking

tailored and targeted questions, will an employer be able to ascertain how to effectively alter supervisory methods to accommodate various mental impairments. Communication and open-mindedness facilitates the employer’s arrival at the most mutually beneficial reasonable accommodation under the ADA or Rehabilitation Act of 1973.

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# FCBA September Events

## Recap Photos



Please visit our [Calendar of Events](#) to participate in upcoming programs and events.

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## LET'S KEEP IN TOUCH!

### UPDATE & VERIFY YOUR MEMBER PROFILE

**LOG-IN HERE** today to verify and/or change your mailing address, contact phone number, firm and/or email on your member profile.

For inquiries regarding membership, please contact Fran Robertson at [robertson@fedcirbar.org](mailto:robertson@fedcirbar.org) or 202-391-0622.

# Serious Topics Discussed by FCBA Membership

FCBA membership discussed three serious topics last week: Extraterritorial Application of U.S. Law under the Defend Trade Secrets Act, Current State of the Law under 35 U.S.C. 101, and Use of Fact and Expert Witnesses at the PTAB: Costs, Strategies, and Pitfalls. We would like to share information on what was discussed, and offer you the opportunity to listen to the audio of the discussions.

Thursday, September 22, 2016

## **Extraterritorial Application of U.S. Law under the Defend Trade Secrets Act**

The Defend Trade Secrets Act of 2016 creates a federal civil right of action for trade secret misappropriation. The new civil claim is subject to U.S.-nexus requirements that seem easy to satisfy. Many acts of misappropriation occurring overseas may now be actionable in U.S. courts. This program explored questions of the constitutionality of enforcement for overseas actions, as well as the impact on legal and industrial strategies for foreign importers and manufacturers.

Friday, September 23, 2016

### **Part I - Current State of the Law under 35 U.S.C. 101?**

Panelists discussed the Supreme Court decisions in *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.* and *Alice Corp v. CLS Bank Int'l* that have left the state of the law of patentable subject matter under 35 U.S.C. 101 in an extreme state of flux. Myriad overturned 40 years of precedent in the USPTO and in the Courts. Alice created great uncertainty, particularly in the patentability of business methods and software patents. How is the USPTO applying these two important decisions, and how will the law in this area further develop?

### **Part II: Use of Fact and Expert Witnesses at the PTAB: Costs, Strategies, and Pitfalls**

In part 2 of Friday's webcast, panelists discussed strategies that all patent owners and petitioners should consider in any PTAB proceeding. The panel delved into the costs and benefits of various approaches to PTAB proceedings from the perspective of (1) an in-house practitioner trying to make recommendations to its senior management and (2) a seasoned PTAB practitioner trying to select the most effective approaches based on the newest practice trends and rules. Some topics covered included the strategic implications of (a) recent amendments to the PTAB trial guide—such as allowing patent owners to submit expert testimony to the PTAB before an IPR institutes, (b) different approaches for establishing priority date or printed publication status, and (c) experts in litigation versus PTAB proceedings.

[Become a member today](#) to listen to these sessions, in addition to all past webcasts.

# Fastcase Octoberfest

Join us for a series of live Fastcase legal research training. Learn to enhance your legal research skills and maximize the use of FCBA's free member benefit. (Bring your own lunch.)

Where: Federal Circuit Bar Association Conference Room  
1620 I Street NW, Suite 801  
Washington, DC 20006

Instructor: Ebube Okoli, Fastcase Reference Attorney

Session 1: [Introduction to Legal Research on Fastcase](#)

October 11, 2016 12:00-1:00 pm

[\[Registration\]](#)

Session 2: [Introduction to Boolean Searches](#)

October 12, 2016 12:00-1:00 pm

[\[Registration\]](#)

Session 3: [Advanced Tips for Enhanced Legal Research on Fastcase](#)

October 18, 2016 12:00- 1:00 pm

[\[Registration\]](#)

Pricing

FCBA Members - Complimentary

[MD and VA CLE credit will be available through Fastcase.](#)

For additional information, contact Hee Kim, [kim@fedcirbar.org](mailto:kim@fedcirbar.org).

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## Pro Bono Program

Thank you for your continued service to the Federal Circuit Bar Association's pro bono programs. Our pro bono programs are an excellent way to diversify your practice, build inroads to prospective clients, and achieve personal fulfillment through helping others. We are always looking to grow attorney participation in our programs, and encourage current participants to bring others on board.

Our circulation of MSPB and CAFC appeals to attorneys for proffering is pretty steady throughout each week.

The PTO pro bono program circulates patent prosecution matters for proffering less frequently, about once every two months. We are expecting to circulate another invention summary in October.

For more information, please see the FAQs regarding our PTO pro bono program. If you have any questions or concerns about the pro bono programs, please contact Cliff Chambliss at [chambliss@fedcirbar.org](mailto:chambliss@fedcirbar.org) or (202) 558-6483.



Click [HERE](#) for more information about the PTO Pro Bono Program



# SPOTLIGHT ON COMMITTEES

## Patent and Trademark Office Committee

### Committee Co-Chairs

Patrick Keane, Buchanan Ingersoll & Rooney PC  
John Vandenberg, Klarquist Sparkman LLP

### Committee Vice Chairs

John Dragseth, Fish & Richardson PC  
Philip Segrest, Husch Blackwell LLP

### Committee Board Liaisons

Nicholas Canella, Fitzpatrick, Cella, Harper & Scinto  
Sarah Harris, United States Patent & Trademark Office

The Patent and Trademark Office Committee studies decisions of the Federal Circuit related to decisions of the PTO, makes recommendations to the Board on issues that need to be addressed, and assists in developing programs for regional and national meetings.

The PTO Committee is planning on submitting a comment letter for Patent and Trademark Office's Post-Prosecution Pilot (P3) program. The initial conference call was made in the morning of September 30th to identify questions to be raised for the comment letter. The Committee also plans to publish the APA Guideline for Patent Practitioners.

The PTO Committee also coordinates activities with the PTAB and TTAB Committee and Patent Litigation Committee in matters which will be of mutual interest. In September, the Patent and Trademark Office Committee held a joint Major Regional Program with the PTAB and TTAB Committee on the topic of Current State of the Law under 35 U.S.C. 101 and Use of Fact and Expert Witnesses at the PTAB: Costs, Strategies, and Pitfalls. The event, which was held live at the Federal Circuit Bar Association headquarter and via webcast, had a great turnout.

## Increasing Committee Member Involvement

Association Committees reflect the commitment, energy, and insight of the community through the engagement of their leaders and members. Committees contribute professional insight and host relevant programs throughout the member-year. Have yet to join a Committee? Check out the Committees home page on the Association website to learn more! Already a Committee member and want to get more involved? Contact your Committee leaders to find out ways you can contribute! If you have any questions, please feel free to contact Hee Kim, Committee Coordinator, at

[kim@fedcirbar.org](mailto:kim@fedcirbar.org) or via phone at (202) 536-4160.



**CLICK HERE  
TO VISIT THE  
COMMITTEE HOMEPAGE**

Committees are an excellent way to get involved, providing opportunities to network with members and take on leadership roles. Join up to three:

- Amicus Committee
- Bench & Bar Planning Committee
- Corporate Counsel Committee
- Dispute Resolution Committee
- Diversity Committee
- Federal Circuit Bar Association Journal Committee
- Friedman Memorial Committee
- Global Fellows Committee
- Global Series Committee
- Government Contracts Committee
- Government Employees Pro Bono Committee
- Hutchinson Writing Contest Committee
- International Trade Committee
- Law Clerks & Students Committee
- Legislation Committee
- Membership Committee
- MSPB Appeals Committee
- Patent Litigation Committee
- Patent & Trademark Office Committee
- Patent Trial and Appeal Board Committee
- PTO Pro Bono Committee
- Regional Programs Committee
- Rules Committee
- Scholarship Committee
- Veterans Appeals



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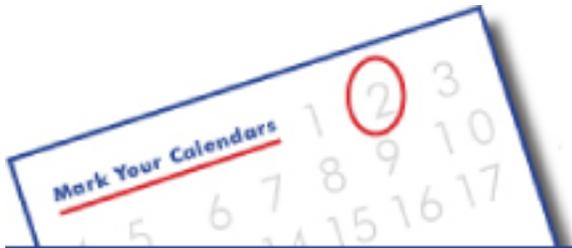
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#### **SESSION SPONSORS**



#### **INDIVIDUAL CONTRIBUTORS**

Claudia Wilson Frost, Esq.



## CALENDAR OF EVENTS

October 3-7, 2016	Federal Circuit Sitting in Los Angeles, CA
October 4-7, 2016	Global Fellows: Leadership Training (Washington)
October 6-7, 2016	CPIP 4h Annual Fall Conference Held at GMU (FCBA Co-Sponsor)
October 11, 2016	CBP's New Evasion Investigation Regulations: A Panel Discussion
Oct. 11,12,18, 2016	Fast Track Training for Members
October 13-14, 2016	Global Series (Paris)
October 17, 2016	Webcast: Investigation of Misappropriation and Use of Trade Secrets Under Section 337(a)(1)(A)
October 18, 2016	The Honorable Ronald M. Whyte Symposium
October 21, 2016	Webcast: Factors Affecting Success of Motions to Stay District Court Litigation Pending Inter Partes Review and Covered Business Method Review
October 25, 2016	Webcast: Potential Effects of the Defend Trade Secrets Act on Section 337 Investigations – Analysis and Predictions
November 18, 2016	Friedman Lecture on Excellence in Appellate Advocacy (CAFC)
November 18, 2016	2016 Annual Dinner
March 7-10, 2017	Global Fellows: Leadership Training (Munich)

*\*Dates are subject to change. Webcasts may be added and/or rescheduled at any time, check [www.fedcirbar.org](http://www.fedcirbar.org) for calendar of events.*

## THANK YOU

The members of the Association and supporters of the Charitable and Educational Fund encourage a broad variety of activities in support of the legal community of the United States Court of Appeals for the Federal Circuit. Our membership creates scholarly articles, analyzing the legal impact of the court's decisions, as well as current legal educational programs. They plan and attend our regional and national conferences, including the Bench & Bar. Thank you for this ongoing support.

A number of sponsors have chosen to participate on an annual basis in these outreaches through "The Leaders Circle." We also want to express our appreciation to those who have chosen this important way to participate.

For additional information on sponsorship, please contact Pam Twiford at [twiford@fedcirbar.org](mailto:twiford@fedcirbar.org).

### Like the look of the newsletter?

Send comments and suggestions to [publications@fedcirbar.org](mailto:publications@fedcirbar.org).

Federal Circuit Bar Association  
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Published by

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