

Dealing With Common Problems Under The Americans With Disabilities Act

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OVERVIEW

- The ADA is an anti-discrimination statute prohibiting discrimination:
 - In hiring, firing, advancement, training, compensation, and other terms and conditions of employment
 - By employers
 - Against “qualified individuals with a disability”

QUALIFIED INDIVIDUAL WITH A DISABILITY

- The ADA requires accommodations to qualified individuals with a disability to allow the performance of essential job functions
- A “qualified individual with a disability” is a person with a disability who, with or without an accommodation, can perform the essential functions of the job

ADAAA: THE ADA AMENDMENTS ACT

- Amended January 1, 2009
- Focus less on whether person is disabled or “protected”
 - Shifts focus away from a “disability” inquiry to:
 1. Whether discrimination occurred and
 2. Whether an accommodation is necessary
 - Focuses more on whether person can or is doing the job, with or without an accommodation
- Encourages use of interactive process to see if accommodation is available to allow disabled workers to perform the job

IMPACT OF ADA

- Increase in number of individuals in the workplace who are protected by the federal law
- Looks at the person “as is” without mitigating measures
- Significantly lowers the standard to be “regarded as” having a disability
- Result: An increase in litigation on issues of:
 - “Reasonable accommodations”
 - “Regarded as” disabled
 - Ability to perform essential functions
 - Direct threat
 - Undue hardship

THREE WAYS AN EMPLOYEE CAN SHOW A “DISABILITY”

1. Being disabled as defined by the statute
 - A person is disabled if he/she has an impairment that substantially limits a major life activity
2. Having a record of an impairment; or
3. Being regarded as having an impairment:
 - The employer either mistakenly believes the employee has an impairment when s/he does not, or
 - The employee has a non-limiting impairment that the employer mistakenly believes limits major life activities

“REGARDED AS”

- Old Test: Plaintiff had to show the employer actually regarded him/her as having a substantial imitation of a major life activity – Hard to prove!
- New Test: Plaintiff must show that s/he was subjected to an adverse employment action because of a perceived impairment regardless whether the impairment limits or is perceived to limit a major life activity
- According to the EEOC, this makes it “easier for individuals to establish coverage under ‘regarded as’” standard
- In essence there is no disability, so no accommodation is required

SUBSTANTIALLY LIMITS

- Does the impairment “substantially limit” a major life activity (“MLA”)?
- Very restricted definition under the prior version of ADA:
 - “Prevents or severely restricts” a MLA
 - “Unable to perform a MLA that most people in the general population can perform with little or no difficulty”

SUBSTANTIALLY LIMITS

- Does the impairment “substantially limit” a MLA?
- Under the ADAAA:
 - The term is to be construed broadly in favor of expansive coverage
 - The determination of whether an impairment substantially limits a major life activity requires an individualized assessment
 - “Substantially limits” requires a lower degree of functional limitation than the standard previously applied by the courts

SUBSTANTIALLY LIMITS

- An impairment does not need to significantly restrict or prevent a MLA to be considered “substantially limiting”
- With one exception (“ordinary eyeglasses or contact lenses”), the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of “mitigating measures,” such as medication or hearing aid
- For intermittent conditions, the determination of substantial limitation is to be made when the condition is active

QUALIFIED INDIVIDUAL WITH A DISABILITY

Essential functions – definition not changed by ADAAA:

1. The fundamental or core job duties
 - Not marginal or peripheral functions
2. “Essential” means:
 - The reason the position exists
 - There are a limited number of employees to whom the job function can be distributed
 - The function is highly specialized, and expertise or ability is required

QUALIFIED INDIVIDUAL WITH A DISABILITY

Evidence of essential functions includes:

- Employer's judgment
- Written job descriptions prepared before advertising or interviewing applicants for the job
- The amount of time spent performing the function
- The consequences of not performing the function
- The terms of a CBA
- The work experience of past incumbents
- The experience of incumbents in similar jobs

IMPORTANCE OF JOB DESCRIPTIONS IN ADA LITIGATION

- Whether or not something is listed in the job description can make or break an ADA case
- Regularly audit and update job descriptions to include ALL essential functions
 - Overtime
 - Physical requirements for desk jobs (or lack thereof)
 - Lighting & noise
 - Attendance
 - Behavioral expectations

REASONABLE ACCOMMODATIONS

Include:

- Modifying non-core job duties
- Acquiring or modifying job-specific equipment
- Changing some policies
- Reassignment to a vacant equivalent position, or lower paid position if none is available
- More frequent breaks
- Allowing others to perform some work functions

MODIFIED WORK SCHEDULES

- A modified or part-time schedule may be needed as a reasonable accommodation
- A modified schedule may involve adjusting arrival or departure times, providing periodic breaks or altering when certain functions are performed
- Permitting an employee to perform his or her job duties at home in some instances may be a reasonable accommodation – depends on the job and the business

REDUCED OR PART-TIME SCHEDULE

- Is full-time attendance, and/or overtime an essential function?
 - If not, there may be a duty to accommodate absent undue hardship
- Would modifying hours significantly disrupt operations or cause little or no impact on the operations, or the ability of other employees to perform their jobs?
- EEOC: An employee receiving a part-time schedule as a reasonable accommodation is entitled only to the benefits, including health insurance, that other part-time employees receive

REASONABLE ACCOMMODATIONS

Do not include:

- Changing the essence of the job
- Removing essential functions
- Creating a new position
- Bumping another employee
- Requiring others to work harder or do essential functions
- Requiring a change in performance standards
- Hiring an assistant
- Removing a supervisor

UNDUE HARDSHIP

- No need to accommodate if it would create an “undue hardship”
- Significant difficulty or expense considered in light of the following factors:
 - Overall financial resources of the covered entity, the effect on expenses and resources, the number of employees and the number, type and location of facilities
 - Net cost of the accommodation, taking into consideration tax credits, deductions, or outside funding
- That decision may not be yours to make. Provide all pertinent facts and confer with the decision maker

DIRECT THREAT

- No need to accommodate if it would create a “direct threat:”
 - A significant risk of substantial harm to the health or safety of the individual or others
 - Cannot be eliminated or reduced by reasonable accommodation
 - Based on a reasonable medical certainty -- most current medical knowledge and on the best available objective evidence
- Balancing test:
 - The duration of the risk
 - The nature and severity of the potential harm
 - The likelihood that the potential harm will occur, and
 - The imminence of the potential harm

REASONABLE ACCOMMODATIONS AND THE INTERACTIVE PROCESS

- “Interactive process” must be initiated once the employer has reason to believe employee with a known disability needs an accommodation to perform the work. An employee request creates such a reason
- Requires a meeting between HR and/or the decision maker, the employee and, if applicable, a union representative
- All pertinent medical information should be available and discussed at the meeting; In rare cases, may want to include medical personnel
- Without an interactive meeting, the EEOC will presume the decision not to accommodate is improper

REASONABLE ACCOMMODATIONS AND THE INTERACTION PROCESS

- Interactive Process
 - Informal (but document)
 - Should be job-focused
 - Discussion of barriers and employee's abilities and limitations
 - Discuss possible accommodations
 - Accommodations suggested by employee do not have to be implemented. The employer must have a better idea for an accommodation or a good explanation/reason for any refusal
 - Employee must provide medical information if requested

INTERACTIVE PROCESS MEETING

During the meeting:

1. Ask why the employee has asked for an accommodation

OR discuss the job-specific observations that have caused a belief that an accommodation may be needed
2. Ask whether an accommodation is in fact needed
 - If the employee admits s/he can perform the job without an accommodation, no further action is needed
3. Discussion of employee's abilities, limitations and barriers, if any, to job performance
4. Discuss possible accommodations
5. Review available medical information

INTERACTIVE PROCESS MEETING

- If the meeting reveals that no reasonable accommodation exists in the employee's current job:
 1. Document why an accommodation is not possible

e.g., burden on other employees, violation of a collective bargaining agreement provision, undue hardship, etc.
 2. Consider whether the employee can be reassigned to a vacant equivalent position
- Summarize the results of the meeting in writing:
 - Include date, names, what was discussed, and resolution
 - Send documentation to the employee and employee's medical file

POOR PERFORMANCE AFTER ACCOMMODATION GIVEN OR DENIED

- Performance problems should continue to be addressed without discussing physical or mental condition
- Use the normal evaluation and/or disciplinary process to address
- Document everything
- Seek corroboration of the performance concerns

ROLE OF MEDICAL INFORMATION

The employer should ask the employee's doctor about:

- The nature, severity and duration of the employee's impairment
- The activity or activities that the impairment limits
- The extent to which the impairment limits the employee's ability to perform those activities
- Why the individual requires reasonable accommodation or the particular reasonable accommodation requested, and
- How the accommodation will assist the individual to perform the essential functions of the job

ROLE OF MEDICAL INFORMATION

- If the medical information provided is insufficient, an employer may be entitled to obtain further information from the employee's doctor and/or require that the employee be examined by a doctor of the employer's choosing
- An employer should proceed with the interactive process even where it has not received medical documentation from the employee

CASE STUDIES

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CASE STUDY # 1

Casey works at Packing Company as a Packing Inspector on the night shift. Several times Casey was observed falling asleep at her work station and was once found asleep in the bathroom during her shift. Casey received several warnings about her behavior and finally was “suspended pending termination” under the company’s progressive discipline policy. She was told that the company would decide whether to immediately terminate and that she must bring forward any additional information she wanted the company to consider in their termination decision process.

A few days later, Casey informed HR that her performance issues may be related to a medical condition. HR gave her a letter regarding the ADA and gave her paperwork to have her doctor complete. That same day, the HR manager to whom she’d been speaking recommended that Packing Company terminate Casey.

Casey’s doctor filled out the paperwork and checked the box that said Casey had a disability under the ADA. The HR manager believed that this check box was insufficient to establish Casey had a disability and was only that doctor’s opinion. The HR manager proceeded with Casey’s termination.

One month later, Casey was definitively diagnosed with narcolepsy.

CASE STUDY # 1

Did Packing Company violate the ADA by terminating Casey?

- A. No. The termination process began before Casey alleged any type of disability. Casey cannot protect herself from termination by vaguely alleging a disability.
- B. Yes. Packing Company knew from her behavior that she likely had narcolepsy or some other sleep disorder.
- C. No. The paperwork Casey provided did not create sufficient notice that she was disabled because the paperwork did not identify what the disability was or provide any information on what reasonable accommodations were required.
- D. Yes. Casey's doctor's note put the employer on notice that she had a disability under the ADA and they were required to engage in the interactive process. Packing Company should have sought additional information from the doctor.

CASE STUDY # 2

For several years, Supervisor Andy has allowed the administrative employees in the office to work through their lunch periods in order to leave a half hour early every day. Supervisor Andy was subsequently replaced by Supervisor Brenda who informed the employees that they could no longer leave work early and had to take their lunches at the scheduled time.

Eventually, all employees complied except for Judy, who continued to work through lunch in order to leave early. Judy provided a note from her physician, which read: "Patient to benefit by not stopping for lunch. Appropriate treatment for this problem is to allow her to work through lunch so she can leave early."

The HR manager emailed Judy requesting that she bring in further medical documentation of her condition and the need for an accommodation. Judy did not send anything in and also refused to submit to a medical examination. After a series of warnings about her early departures, Judy was fired for leaving work early.

CASE STUDY # 2

Has the Employer violated the ADA?

- A. Yes. Judy's note from her physician was sufficient to document her disability and her need for an accommodation. She should have been allowed to work through lunch as a reasonable accommodation.
- B. No. You can make reasonable inquiries to determine whether her condition qualifies as a disability and the nature of the accommodation needed.
- C. Yes. The company must continue to provide the accommodation because it has done so in the past.
- D. No. She was properly terminated for violation of the attendance policy.

CASE STUDY # 3

Angelina worked at an animal shelter as a kennel attendant. Her job required her to clean the shelters, feed and transport the animals and assist with animal adoptions. Angelina injured her wrist while moving a dog and had to undergo surgery and physical therapy. Angelina was restricted in her ability to lift. The animal shelter had no light duty work positions available but Angelina's supervisor kept her on staff anyway. To help her, he limited her duties and exempted her from working weekends. As a result Angelina's co-workers were forced to work more and on weekends to compensate. They eventually started to complain.

The animal shelter then received a medical notice that Angelina's physical restrictions were permanent. When asked what Angelina could do at the animal shelter, one supervisor said "she can't do much of anything." In reply to an inquiry about what jobs she could still perform, another shelter official said that it "did not have a job for that." Angelina's direct supervisor said "Angelina cannot use her right hand."

Following their discussion, the shelter terminated Angelina. Angelina claims they regarded her as disabled and unable to perform the major life activity of working.

CASE STUDY # 3

Did the animal shelter regard Angelina as disabled?

- A. No. The shelter's comments all related to Angelina's ability to perform her current job, not a broad range of jobs.
- B. Yes. All of the supervisor's comments referenced Angelina's ability to perform her job. They perceived her as disabled due to her diminished ability to perform work.
- C. No. The job restrictions due to her medical condition were proof of a disability.
- D. Yes. There was no apparent review of medical records and no interactive meeting with the employee to discuss and review actual limitations.

CASE STUDY # 4, 5 AND 6

Anna worked as an EMT for Clark Emergency Services. Anna was a good employee with no disciplinary actions on her record. One day she began an affair with a married co-worker, Alan. The relationship was tumultuous and Anna's co-workers began noticing her behavior being affected at work. They viewed frequent arguments with her and Alan. She was witnessed crying in the parking lot and arguing with Alan via text message or phone while operating the ambulance. On one occasion, Anna got in an argument with her co-worker Cynthia about Anna's sexual behavior. Following the argument, Anna refused to provide Oxygen to a patient when Cynthia asked for Anna's help.

Hearing about the oxygen-incident and Anna's use of her cell phone while driving the ambulance, Anna's boss told Anna that in order to continue working for Clark Emergency Services, Anna must undergo counselling. Although he admittedly never had had a problem with Anna in terms of patient care, he could see that her life was a mess and thought counselling could help her.

CASE STUDY # 4

Did Clark Emergency Services “regard her” as having a disability?

- A. Yes. There was no objective information that Anna suffered from any limitation of a major life activity.
- B. No. The employer is able to get to the bottom of any observed significant changes in performance and behavior.
- C. Yes. A general concern that she needed help was not enough to require such action.
- D. No. The employer had legitimate business reasons to require proof Donna could perform the job.

CASE STUDY # 5

Same Facts –

Did Clark Emergency Services violate the ADA by requiring her to get counselling?

- A. Yes. Steve did not have a reasonable belief based on objective evidence that Anna's behavior threatened vital company business.
- B. Yes. Steve never had a problem with Anna regarding her patient care.
- C. No. Steve had knowledge that Anna was a "direct threat" to her co-workers.
- D. No. Steve had knowledge that Anna had engaged in serious misconduct by using her cell phone while driving and refusing to assist a patient.

CASE STUDY # 6

Same Facts –

Would Clark Emergency Services have been better off terminating her?

- A. No. Given the significant changes in behavior it was reasonable to inquire as to a disability.
- B. Yes. Anna was an at-will employee and could be fired at any time, for any reason.
- C. No. Before termination Clark should follow any evaluation and progressive disciplinary procedure.
- D. Yes. With no prior evidence of a disability or medical condition, termination would be easy to justify.

CASE STUDY # 7

Daniel has Down Syndrome and works at Mega Mart bagging groceries. Daniel received vocational tutoring at Mega Mart and a manager provided Daniel with training on his daily tasks and ways to calm down when frustrated. Mega Mart instituted supervision policies that only applied to Daniel. The supervisor would evaluate Daniel daily – much more frequently than the other employees. Once, while collecting shopping carts from the parking lot, Daniel was found directing Mega Mart customers how to park their cars. After this, Mega Mart exempted Daniel from collecting the shopping carts.

Daniel had trouble following work rules, such as cursing in front of supervisors or customers and stealing an American flag pin. Mega Mart discussed these infractions with Daniel. After the theft incident, Daniel's parents asked Mega Mart to bring in a job coach to help Daniel, but Daniel's supervisor did not think it was necessary. A month later, Daniel cursed at another employee and was terminated.

Daniel's parent's sued alleging that Mega Mart failed to accommodate Daniel's disability by denying him a job coach when Daniel's mother suggested it.

CASE STUDY # 7

Did Mega Mart fail to accommodate Daniel's disability in violation of the ADA by denying Daniel a job coach?

- A. Yes. Mega Mart was required to further engage in the interactive process and provide an accommodation assisting Daniel to follow work rules while performing his duties.
- B. No. Daniel's parents' tentative request for a job coach did not imply a request for an accommodation for inappropriate verbal outbursts that violate its harassment policy.
- C. No. Mega Mart accommodated Daniel several times and had no requirement to do so again.
- D. Yes. Since Mega Mart had provided training to help Daniel calm down when he was frustrated before, Mega Mart should have provided similar training again.

QUESTIONS?

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Thank You



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LEGAL DISCLAIMER

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ADDITIONAL RESOURCE SLIDES

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WHAT IS AN IMPAIRMENT?

- Physical or mental impairment means:
 - Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
 - Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities
- Symptoms generally are not sufficient
- Temporary conditions of short duration generally are not impairments

WHAT IS NOT AN IMPAIRMENT?

Per existing case law:

- Non-genetic predisposition to illness or disease due to environmental, economic or social conditions
- Physical abnormalities without a physiological cause
 - e.g., obesity, extreme height
- Behavioral characteristics or common personality disorders
 - e.g., being suspicious, distrustful, irritability, chronic lateness, poor judgment, failure to perform well under stress
- Physical characteristics
 - e.g., left handedness
- Homosexuality, bisexuality
- Stress or inability to get along with others

WHAT IS A MAJOR LIFE ACTIVITY (“MLA”)?

- A major life activity is defined as those things that are of central importance to most people’s daily life
 - Includes “bodily functions”
- A major life activity must be affected or limited by the impairment

WHAT ARE MAJOR LIFE ACTIVITIES?

A non-exhaustive list of major life activities:

Caring for oneself
Performing manual tasks
Seeing
Hearing
Eating
Sleeping
Learning
Concentrating & thinking
Walking & standing
Reading
Lifting
Bending
Speaking
Breathing
Communicating
Working

Major life activities also include the operation of “major bodily functions”

Immune system
Normal cell growth
Digestive
Bowel
Bladder
Reproductive functions
Neurological
Brain
Respiratory
Circulatory
Endocrine

Only one major life activity need be impacted.

Can look at *abilities vs. limitations* but only as to the major life activity **involved**.

WHAT DOES NOT COUNT AS A MAJOR LIFE ACTIVITY?

Not a major life activity:

Driving

Ladder climbing

Knitting, crocheting, sewing, braiding own hair

Hair curling

Tennis

Mowing a lawn

Driving a manual transmission

Working in stairwells on ladders or on ledges

Weight lifting

Playing in the park with family

Participating in sporting activities

Cleaning (except possibly basic chores)

Shoveling or gardening

Commuting to work

Cooking

Getting along with others

SUBSTANTIALLY LIMITS

- Does the impairment “substantially limit” the major life activity?
- Very restricted definition under the *prior* version of ADA:
 - “Prevents or severely restricts” a MLA
 - “Unable to perform a major life activity that most people in the general population can perform with little or no difficulty
- Broad Definition under ADAAA:
 - ADAAA requires that the term “substantially limits” be interpreted consistently with the findings and purposes of the Act
 - Not as narrow as the Supreme Court had been previously interpreting it
 - An impairment that substantially limits a MLA need not also limit other MLAs in order to be considered a disability

EEOC'S LIST OF DISABILITIES

According to the EEOC the following impairments will consistently meet the definition of disability:

- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV or AIDS
- Multiple sclerosis
- Muscular dystrophy
- Major depression
- PTSD
- Bipolar disorder
- Obsessive compulsive disorder
- Schizophrenia

QUALIFIED INDIVIDUAL WITH A DISABILITY

New focus on ability to perform job

- A “qualified” individual with a disability is a person with a disability who, with or without an accommodation, can perform the essential functions of a job
- If an individual cannot perform the essential functions of the job with reasonable accommodation, the individual is not qualified and is not protected by the ADA