

EMPLOYMENT LAW AND REASONABLE ACCOMMODATION

**Job Applicants,
Disclosure, and
Employment
Discrimination**

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At-Will employment

- MOST employees are considered “at-will”
- This means that an employee can be terminated without warning, with or w/o cause.
 - Employee can leave at any time for any reason
- Exceptions: employment contract; union member; public policy; **discrimination**
- Discrimination laws protect employees from decisions made on the basis of **protected status**
- **‘Disagreement’ with decision not enough**

Workplace Protections – discrimination based on disability

Discrimination is prohibited in ANY facet of employment, including:

- Job application procedures and recruitment
- Hiring / Firing
- Benefits and Compensation
- Advancement
- Training
- Any terms, conditions, or privileges of employment

Workplace Protections – unique to disability

State and federal disability laws also include a requirement that employers provide:

REASONABLE ACCOMMODATION

Defined as: Any change or adjustment to
a job or work environment that allows
a person to:

- Participate in the job application process, or
- Perform “**Essential Functions**” of the job

Laws that apply – federal and state

- ADA (1991) - employers with **15 or more** employees
- State laws – coverage varies
- Rehabilitation Act of 1973 – Federal employees and employers that receive federal money
- Protections are often, but not always, similar

Protected Individuals



An employee is protected under the ADA if:

- They have a physical or mental **impairment** that causes a **substantial limitation** of one or more **major life activities**.
- **Or**, Have a record of such an impairment, (e.g. a cancer survivor; a learning disability diagnosis);
- **Or**, Are “regarded as” having such an impairment and are subjected to discrimination because of the perceived impairment (i.e. a mistaken belief).
 - But, no Reasonable Accommodation under ‘regarded as’ prong of definition.

ADA Amendments Act of 2008

- Repudiation of ‘bad’ Supreme Court decisions
- Underlying definition of disability unchanged
- Major life activities includes operation of major bodily functions (immune, cell, brain, neurological, etc.)
- Do not consider mitigating measures
- Impairments that are episodic or in remission are covered IF substantially limiting when active
- More of a common sense approach; emphasis should be on reasonable accommodation, not on whether individual is covered

A Few Important Points

Most cases do not involve ‘direct evidence’ of discrimination.

The employee must be:

- **Qualified** to do the **essential job functions of the job** with or without a **reasonable accommodation**
 - **Correctly and within employer’s expectations**
 - **Safely**
 - **As required by rules, policies, or law**
- No requirement for employer to lower production standards
 - **Whether quantitative or qualitative**
- **AND**, disability-related workplace issues must be decided on a **case by case** basis. This requires an **individualized assessment**. *Every individual and each situation are unique.*

A Few Important Points

After ADA Amendments Act, employers now focus on terms “qualified” and “reasonable.”

Can employee do job w/ or w/o accommodation?

- Minimum job requirements
- Essential functions of the job
- Job Performance
- Timing of RA request
- Participation in interactive process
- **Don't allow documentation of poor perf to accumulate; don't reject alternatives**

DISCLOSURE

- An applicant or employee is **not obligated** to mention that they have a disability unless or until they request a reasonable accommodation.
- The following question is permissible on a job application or at an interview:

*** Are you able to do the essential functions of the job with or without a reasonable accommodation?**

- The timing of your disclosure should depend on the nature of your disability and the type of accommodation you may need.

Why Disclose at All?

- Societal stigma and discrimination against people with disabilities is widespread.
- An applicant or employee is under no obligation to disclose unless s/he needs a reasonable accommodation
- BUT, not disclosing a disability is also risky as the ADA only applies to **known disabilities**.
- So, you must determine:
 - NEED for disclosure -> is RA necessary?
 - WHEN to disclose -> pre- or post- hire?
 - HOW to disclose -> formal/informal? to whom?

Observable Disabilities

- Employers generally cannot ask medical questions of applicants, even those who have readily-apparent or already-disclosed disabilities.
- However, where it is clear that an individual's disability may pose difficulties with performing a specific job task, the person may be asked to describe how they might perform the task.
- This conversation may lead to a discussion of reasonable accommodation.

STAGES OF EMPLOYMENT

- Application
- Interview
- Conditional Job Offer
- Employment

Job Application Process

- Employers must provide reasonable accommodations to enable an applicant to be considered for a job opening.
 - Adjustments to application policies/procedures/tests
 - Written materials in accessible format
 - ASL interpreter
 - Accessible location
 - Modifications to equipment or devices

Job Application Process

- Examples of reasonable accommodations during a job application process
 - Sarah has a brain injury and applies for a job which requires problem solving skills. She can perform the job functions in a quiet environment. If the employer requires applicants to demonstrate their skills, it must provide Sarah with a quiet space to take the test.
 - A large industrial employer requires applicants to line up outside its building to apply. Jim has a neurological condition and cannot be outside in the heat for long periods of time. The company should allow Jim to wait indoors where it is cooler.

Interview Questions – OK or Not?

- Do you have certification as a child care provider?
- Do you have a drivers license?
- Have you ever missed more than 5 consecutive days of work due to an illness?
- Were you ever fired from a job because of attendance problems?
- Were you ever fired from a job because of inappropriate workplace behavior?

Job Applicants and Documentation

- Employers may ask an applicant for documentation of his/her disability if a request for reasonable accommodation is made during the hiring process...
- As long as disability is not obvious ...
- And, request is not overly burdensome
- *A note from a doctor or other health care professional should suffice.*

Conditional job offer

Employers have more leeway to ask disability-related questions and/or require medical exams after extending a *conditional job offer*. But,

- May require medical exam or ask questions *only* if same process is applied to all others
- Exam should be designed to measure ability to perform essential functions of job
- Accommodations must be made
- Cannot withdraw job offer *solely* because exam revealed existence of a disability

Let's see what we've learned so far!



Protected Individuals



- John has been hospitalized twice in the past year for symptoms related to a prior head injury. He has no symptoms at the present time.
- Carol has been feeling sad because she recently broke up with her boyfriend. For the past week she hasn't been sleeping well.
- Dan has epilepsy which is controllable with medication. For the past week he has been out sick with the flu. His employer fires him.

Testing



- An applicant for a job involving a great deal of lifting is required to lift a 25 pound box and carry it 30 feet.
 - What if his blood pressure is taken afterwards?
- An employer has given five applicants conditional job offers, subject to medical exams.
 - What if only one person is required to take the exam?
 - What if all five take the exam and one is screened out?

Third Stage of Employment

Post-Hire: After employment begins

- Employer must provide **REASONABLE ACCOMMODATION**
- Change or adjustment to a job or a workspace that allows a person with a disability to perform the essential functions of his or her job.

Examples of Reasonable Accommodations

- Modified work schedules
- Job restructuring; retraining; eliminating non-essential functions
- Job reassignment (as a last resort)
- Leave of absence
- Making the workplace accessible
- Providing readers and interpreters
- Providing or modifying equipment or devices
- Changes to workplace policies

Reasonable Accommodation Requirements and Limits (Defenses)

- Reasonable Accommodations must be provided unless there's an **undue hardship** or a **health and safety risk (actual, not speculative)** to the employee or to others
- An **undue hardship** is defined as requiring significant difficulty or expense
- Employers must provide an **effective accommodation**, not necessarily the exact accommodation requested

Reasonable Accommodation: Responsibility of Employees

The Employee usually makes the request for a reasonable accommodation; or

Someone else may make the request for the person

- The request need not be in writing but **it is a good idea to have the request written, dated, and signed.**
- The request should include:
 - ❖ Nature of the disability
 - ❖ Reason for the request
 - ❖ Requested accommodation
 - ❖ If possible, include a doctor's note explaining the disability and accommodation

The Reasonable Accommodation Process

- The employer may ask for documentation describing the impairment and how it relates to the reasonable accommodation request if the impairment is not readily apparent.
- The employer is not entitled to request information regarding:
 - ❖ General medical information
 - ❖ Medical conditions or impairments unrelated to the reasonable accommodation request.

The Interactive Process

- The “**Interactive Process**” is key to the provision of reasonable accommodations.
- Does the employer agree that the accommodation is reasonable and effective? Do other possible accommodations need to be examined?
- Utilize available resources in determining an effective accommodation (e.g. www.jan.wvu.edu).
- Maintain a paper trail. No ‘bright line’ test.
- If an effective, reasonable accommodation is agreed upon, it should be implemented and there should be follow-up to ensure its effectiveness.

Employment Accommodations

- Job Restructuring
 - Bill has trouble sleeping well due to frequent headaches and tinnitus. Being alert early in the morning is difficult for him. He applies for a job as a school bus driver, and during the interview is asked whether he's available to drive mornings between 7:00 and 9:00 and afternoons between 3:00 and 5:00.
 - Is this a permissible interview question?
 - Is Bill a qualified individual?
 - Can the employer reasonably accommodate him?

Employment Accommodations

- **Job Coach**

- ❖ An employer is probably not required to provide a job coach throughout employment process but would need to consider as part of learning the job.
- ❖ Use of internal supports for employee (assign staff to work one-on-one when learning new tasks)

- **Acquisition/Modification of Equipment or Devices**

- ❖ Tape recorder to record/review instructions
- ❖ Computer software
- ❖ Lighting or environmental changes

Employment Accommodations

- Modified Work Schedule
 - Natalie is an administrative assistant, and sees a therapist for major depressive disorder. The therapist can only see her in the morning and she is occasionally late for work. In order to complete her work on some days, she has to stay late.
 - Does she have a disability?
 - What advice would you give her?
 - What if her employer fires her before she requests an accommodation?

Employment Accommodations

- Leave of absence
 - Steve incurs a brain injury and needs time off to recover. He has no FMLA rights because his company has only 30 employees.
 - Is there an accommodation his employer can provide?
 - Can his employer claim giving him a leave of absence would be too difficult or expensive?
 - What if Steve doesn't ask for the time off and makes numerous mistakes at work?

Employment Accommodations

- Modification of Supervisory Process
 - ❖ Review tasks to be completed on daily basis and provide in writing versus orally
 - ❖ Supervisor providing a demonstration of what needs to be done versus describing orally what the employee is expected to do
 - ❖ More frequent feedback regarding performance
 - ❖ Allowing individual to bring someone to support them during review of performance or disciplinary meetings
 - ❖ Change supervisor?

Employment Accommodations

- Modification of Policies/Procedures
 - ❖ Workplace conduct rules
 - Modify those that are not job related and consistent with business necessity
 - Most are job related
 - ❖ Never required to tolerate violent or abusive behaviors that are inconsistent with uniformly applied conduct rules
 - ❖ Examples: Service animal; work at home; dress code; methods of communication

Practical Tips

- It is best for employees to obtain the medical information rather than having the employer speak to the doctor.
- If an employee speaks openly in the workplace about a disability, confidentiality may no longer be protected.
- Disclose/Request an accommodation prior to performance problems arising.

Enforcement and Legal Issues

- Filing a complaint of employment discrimination:
 - E.E.O.C.: (800) 669-4000
Timeframe: 180/300 days
 - State FEPA
 - Federal employee EEO process:
http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm
 - Timeframe: 45 days to contact EEO counselor