

Americans with Disabilities Act Update

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OHIO ASSOCIATION OF COUNTY BOARDS
SERVING PEOPLE WITH
DEVELOPMENTAL DISABILITIES
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INTRODUCTION

- Americans with Disabilities Act (ADA) prohibits an employer from discriminating against an applicant or employee based upon a disability.
- Employers have to provide reasonable accommodations to disabled applicants or employees.

INTRODUCTION

- Broad overview of ADA since 01/01/09, including:
 - Whether an individual has an impairment;
 - Whether a major life activity is affected;
 - Whether an impairment is substantially limiting;
 - Short term conditions;
 - Substantial limitation in MLA of working;
 - Whether conditions are disabilities;
 - Essential Functions;
 - Reasonable accommodation issues.

Whether individual has an impairment

- Generally not an issue
- Disorder or condition that affects any body system, including neurological or musculoskeletal systems, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, lymphatic or endocrine systems, or the skin.

Whether individual has an impairment

- Mental or psychological disorders, including DD, emotional or mental illness, and certain learning disorders.
- **Examples:**
 - Bad back
 - Knee injuries
 - Erectile dysfunction
 - Chest pain
 - Depression and panic disorder

Whether individual has an impairment

- EEOC distinguishes between impairments and conditions:
 - Physical characteristics (left-handed) and normal deviations in height, weight, strength;
 - Personality traits (irresponsible or poor judgment);
 - Cultural, environmental, economic disadvantages;
 - Homosexuality, bisexuality, pregnancy
- Are not impairments

Whether individual has an impairment

- EEOC: Physical characteristics that are extreme or outside range of normal can be an impairment:
 - Simple obesity not caused by physiological disorder might not be an impairment but weight that far exceeds normal range may be considered an impairment.
 - In 2006, Sixth Circuit rejected this argument, and stated obesity must have a physiological cause in order to be an impairment.
 - Followed by 3rd Cir in 2010: "Neither Ni's obesity nor his broken ankle constitute a disability under the ADA. Except for rare circumstances, obesity is not considered a disability."
 - Ni v. Rite Aid, 2010 U.S. Dist. LEXIS 62531 (D.N.J. June 22, 2010).
 - Definition of impairment has not changed, although disability coverage has expanded.

Whether Major Life Activity is affected

- Pre-ADAA: "activities of central importance to daily life."
 - EEOC: Walking, seeing, hearing, speaking, breathing, learning, caring for oneself, and working, sitting, standing, lifting, and reaching, ordinary household activities.
 - Courts: cognitive functions; bodily waste functions, reproduction/sexual activity, childbearing, eating, sleeping, reading, writing, computer use (wait for texting!!).
 - Courts: Not MLA: cooking (although part of caring for oneself), grocery shopping, physical exertion, crawling, kneeling, squatting, participating in sports activities.

Whether Major Life Activity is affected

- Post-ADAA:
 - EEOC has created non-exhaustive list: includes learning, reading, concentrating, thinking, communication, and working.
 - MLAs include bodily functions such immune system, cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Whether Impairment is Substantially Limiting

- **Post-ADAA:**
 - Supreme Court's standard of "prevents or severely restricts" MLA is rejected.
 - EEOC has not provided a standard, although told to do so by Congress.
 - EEOC regulations: "focus is on how a MLA is substantially limited, not what an individual can do in spite of an impairment."
 - Ability to perform a MLA is compared to "most people in the general population."

Whether Impairment is Substantially Limiting

- **Employee has the burden of showing substantial limitation.**
- **Have to provide some evidence of limitation:**
 - Comparison between employee and ability of average person.
 - In walking, breathing, sleeping, lifting.
 - Medical evidence works, but must show individualized assessment of limitations (diagnosis of disability alone is not enough).
 - General assertions do not.
 - Percentage limitations do not.
 - 10% disability rating by BWC is not sufficient as it does not describe limitations on MLA or indicate duration of impairment.
 - Relevant but not dispositive.

Whether Impairment is Substantially Limiting

- **Short-term conditions:**
 - Not as clear as it once was.
 - Broken ankle not disability;
 - One month illness not a disability;
 - Inability to work for 38 days insufficient amount of time to show substantially limited in MLA of working
 - ADA does not specify length of time a condition must last to be substantially limiting.
 - ADA does state that an individual is not regarded as disabled if the condition is minor and lasts for less than six (6) months.
 - Leaves open coverage under actual or "record of" disability claims.
 - EEOC has stated that impairment may substantially limit a MLA even if it lasts, or is expected to last, for fewer than six months."
 - Best that can be said is condition must last for several months.

Whether Impairment is Substantially Limiting

- **Medication or mitigating measure as cause of SL:**
 - Supreme Court: negative effects of mitigating measures must be taken into account in determining whether individual is SL in a MLA.
 - EEOC has instructed its investigators to analyze whether an individual's mitigating measures cause limitations in a MLA.
 - ✦ Certain medications may limit the ability to think, concentrate, or eat.

Whether individual is substantially limited in MLA of working

- **Substantial change:**
 - An impairment substantially limits MLA of working if it substantially limits an individual's ability to perform, or to meet the qualifications for, the "type of work" at issue.
 - Replaces "class" or "broad range" of jobs .
 - Type of work includes job the individual has been performing, or for which the individual is applying, and jobs with similar qualifications or job-related requirements which the individual would be substantially limited in performing because of the impairment.

Whether individual is substantially limited in MLA of working

- **Type of Work**
 - Type of work may be determined by reference to **nature of the work** an individual is substantially limited in performing because of an impairment as compared to most people having comparable training, skills, and abilities
 - Examples of types of work:
 - ✦ Commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs

Whether individual is substantially limited in MLA of working

• Type of Work

- Type of work may be determined by reference to **job-related requirements** that an individual is substantially limited in meeting because of an impairment as compared to most people performing those jobs
- Examples of job-related requirements that are characteristic of types of work include, but are not limited to, jobs requiring:
 - ✦ Repetitive bending, reaching, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; driving; working under certain conditions, such as in workplaces characterized by high temperatures, high noise levels, or high stress; or working rotating, irregular, or excessively long shifts.

Whether particular conditions are disabilities

• Impairments that will consistently meet definition of disability

- Deafness;
- Blindness;
- Intellectual disability (formerly termed mental retardation);
- Partially or completely missing limbs;
- Mobility impairments requiring the use of a wheelchair;

Whether particular conditions are disabilities

- Autism (communicating, interacting with others, or learning)
- Cancer(normal cell growth)
- Cerebral palsy (walking, performing manual tasks, speaking, or functions of the brain)
- Diabetes (functions of the endocrine system (e.g., the production of insulin)

Whether particular conditions are disabilities

- Epilepsy (functions of the brain or, during a seizure, seeing, hearing, speaking, walking, or thinking)
- HIV or AIDS (functions of the immune system)
- Multiple sclerosis and muscular dystrophy (neurological functions, walking, performing manual tasks, seeing, speaking, or thinking)

Whether particular conditions are disabilities

- Major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, or schizophrenia (functions of the brain, thinking, concentrating, interacting with others, sleeping, or caring for oneself.)

Whether particular conditions are disabilities

- Impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
 - ✕ Epilepsy, hypertension, multiple sclerosis, asthma, cancer, and psychiatric disabilities such as depression, bipolar disorder, and post-traumatic stress disorder.
 - Not exclusive list.

Whether particular conditions are disabilities

- List of impairments and major life activities affected are not exclusive
- Individual may have other impairments or be substantially limited in other MLAs

Regarded as disabled

- Regarded as disabled if individual has been subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a MLA.
 - Transitory and minor impairments are not covered.
 - ✦ Actual or expected duration of less than 6 months.

Regarded as disabled

- Avoid issues with ADA and Genetic Information Non-Discrimination Act ("GINA"):
 - Tell managers and supervisor to stay out of medical file.
 - HR alone should be dealing with medical issues.
 - Supervisor: What can I do to help? As soon as mention medical issue, refer to HR.
 - Supervisors should not be asking questions about treatment (leads to problems under GINA).
 - If a reasonable accommodation is required, tell employees that the County Board is modifying an employee's job to comply with federal law, but federal law prohibits further disclosure.
 - ✦ Or acting for legitimate business reasons or in compliance with federal law.

Regarded as disabled

- Employer does not regard employee as disabled when:
 - Asks an employee if he/she needs a reasonable accommodation when it appears employee is having difficulty performing a job.
 - Asks an employee for medical information as part of the reasonable accommodation "interactive process;"
 - Permitted where the disability and/or the need for accommodation is not obvious and would not trigger "regarded as" coverage.
 - Seeks medical information to determine whether someone poses a direct threat, as long as the employer's request is founded on a reasonable belief, based on objective evidence, that the individual may pose a direct threat.

Essential Job Functions

- First, is it a function or a way of performing a function?
- EEOC looks at following framework to determine whether function is essential:
 - Position exists to perform the function;
 - There are a limited number of employees available who could perform the function; or
 - The function is highly specialized.

Essential Job Functions

- Evidence that function is essential v. marginal:
 - **Employer's judgment:**
 - When made, uniformity, effect on business.
 - **Job Description:**
 - Inaccurate JD can hurt;
 - Where is punctuality or attendance listed?
 - Under essential functions or general requirements?

Essential Job Functions

- Evidence that function is essential v. marginal:
 - Amount of time spent performing the function:
 - EF need not encompass the majority of the employee's time, or even a significant quantity of time.
 - Consequences of not having the function performed:
 - Even if infrequently performed, can be essential as long as serve a valid employer interest.
 - Ability to handle individuals in emergency, crisis, or behavior situation.

Essential Job Functions

- Evidence that function is essential v. marginal:
 - Terms of Collective Bargaining Agreement.
 - Actual experience of incumbents and prior employees.
 - Look to all employees, not just individual in question.
 - If don't perform the function, then not really essential.
 - Bending, stooping and twisting not essential when employees testified that did not perform those functions.
 - I question whether those are functions.

Essential Job Functions

- Evidence that function is essential v. marginal:
 - Actual experience of incumbents and prior employees.
 - If delegate duties or don't perform the function (arranged for transportation as opposed to drive), then not really essential.
 - Not essential if fail to uniformly apply.
 - Driving not essential when two other employees excused from driving until license restored after DUIs.

Essential Job Functions

- Evidence that function is essential v. marginal:
 - Burden on employer to show that functions are essential.
 - Burden is on the employee to show that he/she can perform essential functions of job, with or without a reasonable accommodation.

Whether particular functions are essential

- Essential:
 - Ability to get along with others, including supervisor or subordinates.
 - Ability to work independently.
 - Attendance/punctuality.
 - EEOC says no. Courts say yes. Often depends on the job.
 - Ability to work full-time or overtime.
 - Courts are split. Can depend on the job.

Whether particular functions are essential

- Essential:
 - Ability to work a specific shift.
 - EEOC inconsistent. Shift is not a function. But EEOC Technical Assistance Manual implies otherwise.
 - Courts agree that can be an essential function.
 - Lifting.
 - Depends upon the job.
 - Might not be if:
 - Employer does not inquire or screen during hiring process as to ability to lift;
 - Only do so sporadically during course of employment, and other mechanisms were available to assist.

Reasonable accommodations

- **Involve removal of workplace barriers.**
 - Physical obstacles (facilities/equipment) or rules/procedures.
- **Can include preferences for disabled individual, so that the person can obtain the same workplace opportunities as non-disabled employees automatically enjoy.**

Reasonable accommodations

- **Content of request:**
 - What does an employee have to say?
 - ✦ “I need 6 weeks off to get treatment for my back problem.”
 - ✦ “I need an adjustment or change because of a medical condition.”
 - ✦ No magic language.
 - Courts require request to be sufficiently direct and specific that an accommodation is needed to working conditions or duties due to a disability, unless the disability, limitations and necessary accommodations are “open, obvious, and apparent.”

Reasonable accommodations

- **Content of request:**
 - Employer’s obligation to engage in interactive process can be triggered even when request is ambiguous as to precise nature of disability or desired accommodation:
 - Can seek clarification but cannot remain in the dark.
 - Vague statements are problematic:
 - ✦ Need time off because “ill” or “not feeling well” does not constitute a request for leave as an accommodation because it does not mention a disability.

Reasonable accommodations

- Duty to engage in interactive process.
- Employer required to analyze job functions to establish essential functions, identify the barriers to job performance by consulting with employees to learn about the precise limitations, and to learn the types of accommodations that would be most effective.
 - Meet this burden if the employer meets with the employee, requests information about the limitations, considers the employee's requests, and discusses alternatives if the employee's request is too burdensome.
 - EEOC wants employers to act expeditiously.
 - Should not simply reject employee's requested accommodation unless consider and offer other alternatives.

Reasonable accommodations

- Employee must cooperate in interactive process.
 - Willing to try an accommodation, willing to discuss alternatives, and providing needed documentation.
- Employer obligated to provide reasonable accommodation, not the one that the employee wants.
 - So generally, employer can reject employee's "ideal" accommodation, as long as it offers a reasonable accommodation that allows employee to do the job.
 - Employee cannot reject employer's offers of reasonable accommodation.

Types of reasonable accommodations

- Unpaid leave.
 - Definite period, not indefinite.
 - Courts will look to see if particular amount of time constitutes an undue hardship, whether the employer's policy or benefits package addresses leave, ability to have the job completed.
 - EEOC says job must be held open.
 - Don't have to put up with unreliable or unpredictable attendance.
- Job Restructuring.
 - Reallocate or redistribute non-essential, marginal job functions.
 - Change the way a job is performed (use of equipment, or sitting v. standing).
 - **Never have to reallocate essential job functions.**

Types of reasonable accommodations

- **Transitional Duty.**
 - Not required, because not required to create a new job.
 - If have light duty jobs already, however, may have to reassign the employee temporarily (or permanently if it wants).
- **Changing an employee's supervisor/co-workers.**
 - **Not a reasonable accommodation.**
- **Rescission of Discipline.**
 - **Not a reasonable accommodation.**
 - May uniformly impose discipline even if employee later reveals that misconduct was a result of the disability.
 - EEOC: RA does not include "waiving warranted discipline, even if disability played a role in causing the conduct that is worthy of discipline."

Types of reasonable accommodations

- **Rescission of Discipline.**
 - Even prior notice of disability does not prevent discipline, where employee does not indicate need for a reasonable accommodation.
 - Don't have to rescind past discipline but can provide RA to prevent future discipline (attendance, tardiness).
- **Work from home.**
 - EEOC/most courts view that *where* work is performed is just a policy that needs modified for certain jobs.
 - Look to see whether it is possible;
 - Factors: employer's ability to adequately supervise employees; employee's need to work with certain tools or equipment that cannot be replicated at home; need for face-to-face interaction and coordination of work with other workers, clients, or customers is necessary; need for access to documents or information located only in workplace.

Types of reasonable accommodations

- **Modified work schedule.**
 - Altering arrival/departure times;
 - Providing periodic breaks;
 - Changing when certain functions are done.
- **Shift change.**
 - EEOC and courts are split. May depend upon the job.
 - Can be considered a job modification or a reassignment.

Types of reasonable accommodations

- **Reassignment.**
 - Yes, based upon clear language of statute.
 - Available only to current employees, not applicants or former employees.
 - Employer does not have to bump an employee from a job in order to create a vacancy.
 - Employer does not have to promote an employee as a reassignment.
 - Individual must only be reassigned to a job for which he/she is qualified with or without a reasonable accommodation.

Types of reasonable accommodations

- **Reassignment.**
 - Reassign when accommodation is not possible in current position.
 - Courts are split as to whether employees must request reassignment specifically.
 - Must be to a vacant position that is equivalent in terms of pay, status, location, etc.
 - Vacant means available at time of request for RA, or it will soon be available (not 6 months).
 - If no vacancy in an equivalent position, employer must look for lower-level vacancies.

Types of reasonable accommodations

- **Reassignment.**
 - Generally not required to violate a seniority system, provided the system is genuine and not subject to employer discretion.
 - General rule is that, if qualified (even if not most qualified), the employee gets the position, and does not have to compete for the vacant position.

QUESTIONS?

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THANKS FOR ATTENDING!
