EMPLOYMENT DECISIONS AND THE AMERICANS WITH DISABILITIES ACT

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I. THE AMERICANS WITH DISABILITIES ACT OF 1990 ("ADA")

A. General Coverage: The ADA prohibits discrimination against disabled individuals in the workplace, public transportation, public accommodations and telecommunications. This outline will examine the protection provided by the ADA in the employment context.

B. Employers Covered by the ADA

1. As of July 26, 1994, the ADA applies to employers with 15 or more employees.

2. From July 26, 1992, until July 26, 1994, the ADA applied to employers with 25 or more employees.

C. Employees Protected by the ADA

1. Qualified applicants and employees who associate with an individual with a disability.

For example, an employer cannot terminate an employee who is performing his or her job because that employee has a relationship with someone with AIDS.

2. Applicants and employees who are "qualified individuals with disabilities."

The ADA defines a "qualified individual with a disability" as an individual with "a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8)

The following material is intended to provide information of a general nature concerning the broad topic of ADA. The material is not legal advice and is not a substitute for legal counsel.
a. A person with a disability is defined as a person who:

(1) has a physical or mental impairment that substantially limits one or more of the major life activities;

Major life activities include: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, and working.

(2) has a record of a disability; or

(3) is perceived to be disabled. 42 U.S.C. § 12102

RECENT CASES

INDIVIDUAL WITH A DISABILITY

* Voluntary Conduct Causing Or Exacerbating Disability

In the case of Cook v. State of Rhode Island Dept. of Mental Health, Retardation and Hospitals, 10 F.3d 17 (1st Cir. 1993), the Court rejected an employer’s argument that morbid obesity was not covered by Section 504 of the Rehabilitation Act because it could be caused or exacerbated by voluntary conduct. More specially, the Court held:

The Rehabilitation Act contains no language suggesting that its protection is linked to how an individual became impaired, or whether an individual contributed to his or her impairment. On the contrary, the Act indubitably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism, AIDS, diabetes, cancer resulting from cigarette smoking, heart disease resulting from excesses of various types, and the like. Id. at 24. Emphasis Added.

* Mental Disability

In Hindman v. GTE Data Services, Inc. 8 Fla. W. Fed. D. 259 (M.D. Fla. 1994), the employer, GTE Data Services, Inc., terminated
an employee for his unauthorized possession of a firearm on the Company’s premises. The employee brought suit against the employer pursuant to the ADA for the termination. The employee claimed that a chemical imbalance caused him to bring a loaded gun on the Company’s premises. The United States District Court for the Middle District of Florida held that if the employee is able to prove his misconduct was caused by a chemical imbalance, he would qualify as an individual with a disability as defined by the ADA.

* Back Injury

Whether a former assistant store manager with a knee and back injury was substantially limited in the major life activity of working as defined by the ADA is a question for the jury where there is medical testimony that the manager was limited to sedentary work because of his injuries. In that case there was also testimony from a vocational rehabilitation specialist that said sedentary jobs consist of approximately ten percent of all jobs in the national economy. *Haysman v. Food Lion, Inc.* 893 F.Supp. 1092 (S.D. Ga 1995).

* But Compare

An order selector for a grocery warehouse who was unable to perform the required tasks of his job (which included lifting cartons that weigh over 70 pounds and standing for lengthy periods of time) due to a work-related back injury was not a qualified individual with a disability for purposes of the ADA. The court reasoned that the inability to perform a single particular job does not constitute an impairment that substantially limits one or more major life activities. The court stated, "the mere fact that the average person on the street could not play fullback on the New York Giants without some assistance does not mean that he or she is handicapped as defined by the ADA." *Bolton v. Scrivner, Inc.* 836 F.Supp 783 (W.D. Okla 1993).

* Side Effects Of Medication

An individual who was extremely sensitive to heat due to his medication for depression
may have a disability as defined by the ADA. Fehr v. McLean Packaging Corp., 860 F.Supp 198 (E.D. Pa. 1994). In Fehr, the court held that: "[I]t makes no difference whether the major life function is affected directly by a disability or indirectly by the side effects of medication taken for a medical or physical condition." Id. at 200.

* Inability To Bear Children

In McWright v. Alexander, 982 F.2nd 222 (7th Cir. 1992) the court held that sterility was a disability as defined by the Rehabilitation Act.

But see, Zatarain v. WDSU-Television, Inc., 881 F.Supp. 240 (E.D. LA. 1995), in which the court held that a female broadcaster’s infertility would not substantially limit her ability to work, therefore, she failed to establish that she was disabled under the ADA.

* Carpal Tunnel Syndrome

Automobile assembly employee with Carpal Tunnel Syndrome ("CTS") was not disabled under the ADA. Employee was unable to establish that CTS significantly restricted her ability to pursue other employment opportunities or care for herself. McKay v. Toyota Motor Mfg. U.S.A., Inc., 878 F.Supp 1012 (E.D. KY 1995).

* Combined Effect Of Multiple Impairments

The combined effect of cranial disfigurement plus deafness as a result of surgery from a brain tumor meets the definition of disability pursuant to the ADA. Sawinski v. Bill Currie Ford, Inc., 866 F.Supp. 1383 (M.D. Fla. 1994).

b. An individual is qualified for a job if:

(1) the individual meets legitimate requisites of the job desired or held; and

(2) the individual can perform essential functions of the job with or without a reasonable accommodation. 29 C.F.R. 1630.2(m)
c. An individual is not qualified for a job if:

(1) the individual poses a "direct threat to the health or safety of the individual or others in the workplace." 42 U.S.C. § 12113(6)

(2) direct threat is defined as:

a significant risk that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. § 1630.2 (r)

(3) factors to consider when determining whether an individual would pose a direct threat include:

(a) the duration of the risk;

(b) the nature and severity of the potential harm;

(c) the likelihood that the potential harm will occur; and

(d) the imminence of the potential harm. 29 C.F.R. § 1630.2(r)

RECENT CASES

* Hearing Impairment And Driving

A training school for truck drivers did not have to fundamentally alter the nature of the school’s intensive training program to accommodate an individual with a hearing impairment. Breece v. Alliance Tractor-Trailer Training, Inc., II, 824 F.Supp. 576 (E.D. Va. 1993). Further, the court held that an individual with a hearing impairment would pose a direct threat to the safety of himself, his instructor and the public at large on the public highway system.

* Possession of Weapon

Whether an employee who brings a gun on company premises due to a chemical imbalance poses a direct threat is a question of fact where the employee was not on the company’s
property when the gun was found and the company failed to evaluate any medical evidence of the chemically imbalanced employee's disability. *Hindman v. GTE Data Services, Inc.*, 8 Fla. W. Fed. D. 259 (M.D. Fla. 1994).

d. Essential functions of the job are fundamental job duties that are not marginal functions of the job.

For example: A file clerk job description may state that the person holding the job answers the telephone; but, if in fact the basic functions of the job are to file and retrieve written materials while telephones are actually or usually handled by other employees, then a person whose hearing impairment prevents use of a telephone but who is qualified to do the basic file clerk functions should not be considered unqualified for this position. EEOC Technical Assistance Manual page II-13.

* Attendance As An Essential Function

Attendance was not an essential function of the job because the company had no policy on unscheduled absenteeism. *Carlson v. Inacon Corp.*, 885 F.Supp. 1314 (D. Neb. 1995).

While attendance is necessary to any job, the degree to which the number of absences makes an employee unqualified is one of degree. *EEOC v. AIC Security Investigation, LTD.*, 823 F.Supp 571 (N.D. Ill. 1993).

e. Reasonable accommodation is a modification or adjustment to a job application process and/or work environment that enables a qualified individual with a disability to perform essential functions of the job and enjoy all benefits of employment. 29 C.F.R. 1630.2(0)(i-iii)

A reasonable accommodation must be determined on a case by case basis; however, common types of accommodation may include:

(1) making facilities readily accessible to and usable by an individual with a
disability;

(2) restructuring a job by reallocating or redistributing marginal job functions;

(3) altering when or how an essential job function is performed;

(4) part-time or modified work schedules;

(5) obtaining or modifying equipment or devices;

(6) modifying examinations, training materials or policies;

(7) providing qualified readers and interpreters;

(8) reassignment to a vacant position;

(9) permitting use of accrued paid leave or unpaid leave for necessary treatment;

(10) providing reserved parking for a person with a mobility impairment;

(11) allowing an employee to provide equipment or devices that an employer is not required to provide. EEOC Technical Assistance Manual page III-6.

A toll free hot line in Morgantown, Virginia is available for employers to call for advice and suggestions as to what reasonable accommodations can or should be accomplished. 800-526-7234.

RECENT CASES

Obligation to accommodate applies only when the employer knows about the disability and the need for accommodation. Landefeld v. Marion General Hospital, 994 F.2d 1178 (6th Cir. 1993).

REASONABLE ACCOMMODATION REQUIRED

* Leave of Absence

As a reasonable accommodation an employer may be obligated to provide a leave of absence
to an employee, despite the employee's unauthorized possession of a firearm on company premises, if the employee's misconduct is a symptom of a chemical imbalance. Hindman v. GTE Data Services, Inc., 8 Fla. W. Fed. D. 259 (M.D. Fla. 1994).

Leave of absence for alcoholic truck driver to obtain medical treatment is a reasonable accommodation if it is likely that following treatment, the truck driver would have been able to safely perform his duties. Schmidt v. Safeway, Inc., 864 F.Supp 991, 996 (D.C. Or. 1994).

* Absenteeism

An employer may be required to bear absenteeism and other miscellaneous burdens involved in making reasonable accommodations in order to permit the employment of disabled persons. Cook v. State of Rhode Island Dept. of Mental Health, Retardation and Hospitals, 10 F.3d 17 (1st Cir. 1993).

It may be a reasonable accommodation to allow an employee to use vacation time for unscheduled absences caused by his disability after that employee has exhausted his sick leave. Dutton v. Johnson County Board of County Commissioners, 859 F.Supp. 498 (D.C. Kan. 1994).

* Teacher's Aid

A school district may be obligated to provide a disabled teacher with a teacher's aid as a form of a reasonable accommodation under the Rehabilitation Act. Borkowski v. Valley Central School District, 63 F.3rd 131 (2d Cir. 1995). In Borkowski, a library teacher had a disability that caused her to have difficulties with memory and concentration. The teacher claimed that if the school district provided her with a teacher's aid to assist her in maintaining classroom control, she could perform her job. The court noted that a reasonable jury may conclude that providing a teacher's aid to the plaintiff would be a reasonable accommodation. Further, the court noted that the regulations implementing section 504 of the Rehabilitation Act explicitly

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contemplate that teachers with disabilities may require the assistance of teacher’s aids. Other factors relevant in determining whether providing a teacher’s aid would be a reasonable accommodation include availability of teacher’s aids within the school district, and the age of the students that were being taught by the plaintiff.

REASONABLE ACCOMMODATION NOT REQUIRED

* Job Restructuring

An employer did not violate the ADA when it refused to change the fundamental requirements of a clerk-typist job by removing duties that necessitate the ability to cope with inherent stressors at the job for an employee with a bipolar disorder. Carrozza v. Howard County, Maryland, 847 F. Supp. 365 (D.C. MD. 1994).

* Schedule Changes

In Jackson v. Veterans Administration, 22 F.3d 277 (11th Cir. 1994), the court held that an employer is not required to provide a regular day off to a temporary housekeeping aid with an arthritic condition. Neither is the employer required to delay the start of the plaintiff’s shift so the plaintiff could receive bi-weekly treatments; nor is the employer required to allow the aid to swap off days with other employees; to delay shift starting time; or to defer more physically demanding and less time sensitive job duties until the next day in the event of a flare-up of the aid’s condition. However, the court indicated that the employer’s obligation to reasonably accommodate the employee and his absences may be different if the employee’s job could be performed off-site or deferred until a later day.

* Work at Home

State government agency not required to accommodate a secretarial employee by allowing her to work at home. Zande v. Wisconsin State Dept. of Administration, 44 F. 3d 538 (7th Cir. 1995)
The court in *Tyndall v. National Education Centers*, 31 F.3d 209, 213 (4th Cir. 1994) held that "In addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis. Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee "who does not come to work cannot perform any of his job functions, essential or otherwise."

D. Conditions Not Protected By ADA:

1. Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, and other sexual behavior disorders;

2. Compulsive gambling, kleptomania, or pyromania;

3. Psychoactive substance use disorders resulting from current illegal drug use;

4. Homosexuality and bisexuality;

5. Simple physical characteristics such as eye or hair color, left-handedness, height or weight;

6. Personality traits such as poor judgment, quick temper or irresponsible behavior;

7. Environmental, cultural or economic disadvantages, such as lack of education or a prison record;


E. Prohibited Discrimination

1. Discrimination in regard to the terms, conditions or privileges of employment. The following employment processes are encompassed by the ADA:

   - application
   - testing
   - hiring
   - assignments
   - evaluation
   - disciplinary action
   - training
   - promotion
   - medical examinations
   - lay off/recall
   - termination
   - compensation
   - leave
   - benefits
RECENT CASES

* Termination Due to Misconduct

Termination of an employee for unauthorized possession of a firearm on company premises may be a violation of the ADA if the employee's misconduct was a symptom of a chemical imbalance. Hindman v. GTE Data Services, Inc., 8 Fla. W. Fed. D. 259 (M.D. Fla. 1994).

* Termination Due To Arrest For Drunk Driving

The University of Tennessee did not violate the Rehabilitation Act when it terminated an assistant football coach with alcoholism for being arrested for drunk driving. The court held "employers subject to the Rehabilitation Act and ADA must be permitted to take appropriate action with respect to an employee on account of egregious or criminal conduct, regardless of whether the employee is disabled." Maddox v. University of Tennessee, 62 F.3d 843, 847 (6th Cir. 1995).

* Refusal to Hire Due to Weight

An employer's refusal to hire a morbidly obese applicant based on the perception that her weight would limit her ability to perform her job, and increase her risk for health problems (i.e., increasing the likelihood of worker's compensation claims and absenteeism) violated the ADA where the applicant did meet the legitimate requisites of the job position. Cook v. State of Rhode Island Dept. of Mental Health, Retardation and Hospitals, 10 F.3d 17 (1st Cir. 1993).

2. Failure to provide a reasonable accommodation.

An employer is obligated to reasonably accommodate a known physical or mental limitation of an otherwise qualified individual with a disability unless the accommodation would cause an undue hardship.
Factors when considering whether an accommodation is an undue hardship:

a. nature and cost of accommodation;

b. overall financial resources of facility and entity making accommodation, number of employees at facility and entity and the effect on expenses and resources on the facility and entity; and

c. impact of accommodation on the facility and entity. 29 C.F.R. 1630.2(p)(2)(i-v)

F. Pre-employment Disability Related Inquiries and Medical Examination under the ADA

1. Generally, an employer can not elicit information about a disability at the pre-offer stage. Therefore, an employer is prohibited at the pre-offer stage of the hiring process from making any medical inquiries or examination of an individual. However, an employer may ask an individual at a pre-offer stage about his/her ability to perform specific job related functions.

2. In May of 1994 the EEOC issued an enforcement guidance on pre-employment disability related inquiries and medical examinations under the ADA. The following are examples from this guidance of permissible and non-permissible pre-offer inquiries as they relate to questions regarding the applicant's absenteeism.

Example A: R may ask an applicant, "How many days were you absent from work last year?" or "Did you have any unauthorized absences from your job last year?"

Example B: R asks an applicant, "How many days were you absent from work last year?" The applicant answers that she was absent 30 days from work. R may not ask an unlawful pre-offer follow-up question such as "Were you sick?"

Example C: R may ask an applicant, "How many Mondays or Fridays were you absent last year on leave other than approved vacation leave?" Such inquiries are not prohibited pre-offer inquiries.

Example D: At the pre-offer stage, R may not ask
an applicant questions such as, "How many days were you sick last year?" or "How many separate episodes of sickness did you have last year?"

Example E: At the pre-offer stage, R may not ask, "How often will you require leave for treatment of your disability?" Enforcement Guidance: Pre-employment Disabilities-Related Inquiries and Medical Examinations under the Americans with Disabilities Act of 1990, page 19, 915.002.

3. At the pre-offer stage, inquiries concerning applicants' workers compensation history and job-related injuries are prohibited.

4. An employer may test for illegal use of drugs by applicants and employees at the pre-offer stage.

G. Post-Employment Inquiries

1. Post-offer medical examinations or inquiries are permissible. However, they must be:
   a. job related and consistent with business necessity; and
   b. given to all employees.

H. Confidentiality Requirement: Information obtained regarding medical condition or history must be kept in separate files and treated as confidential.

I. Posting Requirement: Employers must post notices provided by the EEOC regarding the ADA.