IMPLICATIONS OF THE AMERICANS WITH DISABILITIES ACT FOR FACULTY AND STAFF

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Background on the ADA

1. Who is protected?

Any "qualified individual with a disability" is entitled to reasonable accommodation under the ADA, provided the individual, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," (42 U.S.C. sec. 12111 (8)), and provided that the accommodation does not create an "undue hardship" for the employer (42 U.S.C. sec. 12111 (10)(A)). The terms are intertwined and cannot be defined individually: an accommodation is only reasonable if it does not pose an undue hardship. Therefore, reasonable accommodation can only be discussed (and evaluated) in light of whether the individual is "qualified" under the Act and in conjunction with the undue hardship standard.

2. How does the employer determine who is a "qualified individual with a disability?"

It is a two-step process. First, the person must have a "disability," which the law defines as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such
individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment (42 U.S.C. sec. 12102(2)).

Secondly, the person must be "qualified," which means "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. sec. 12111(8). The employer's determination of what are essential functions is given deference by the EEOC and the courts, but is not wholly dispositive.

3. Once it has been determined that the employee is covered by the ADA, what is the employer's responsibility?

The employer must provide a "reasonable accommodation" for the "known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee" (42 U.S.C. sec. 12112(b)(5)(A)). The ADA does not specifically define reasonable accommodation, but gives examples of possible accommodations:

The term "reasonable accommodation" may include

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position,
acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities (42 U.S.C. sec. 12111(9)).

Although the examples given suggest that Congress intended that employers consider a wide range of possible accommodations, the employer's duty is limited in two ways. First, the accommodation must actually enable the individual to perform the essential functions of the job and secondly, if the accommodation is unduly expensive or difficult for the employer, it need not provide it.

The Equal Employment Opportunity Commission (EEOC), the federal agency that enforces the ADA, has issued regulations that interpret the law's requirements (29 C.F.R. part 1630). The regulations create three categories of reasonable accommodation:

(1) accommodations that are required to ensure equal opportunity in the application process;
(2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired;
(3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities (29 C.F.R. 1630.2 (o) (Interpretive Guidance)).

The regulations state that the employer need only make the
accommodation that enables the worker to do the job; the employer is not required to implement the accommodation that the employee requests if there is an appropriate accommodation that is less costly and/or less disruptive.

Furthermore, employers need only accommodate those disabilities of which they are aware; in other words, the burden is on the employee to notify the employer of a disability. Such notice triggers the employer's duty to attempt accommodation. But if the employer becomes aware of the disability without notice from the worker, it is still the employer's obligation to attempt accommodation unless the worker refuses it. The employer is permitted to require the individual with a disability to provide documentation of the need for the accommodation.

4. How does an employer determine what is an "unreasonable" accommodation?

The ADA does not define "reasonable" but does, in effect, define "unreasonable" by defining the concept "undue hardship." The law defines "undue hardship" in this manner:

(a) In General.--The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be Considered.--In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

(i) the nature and cost of the accommodation needed
under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity (42 U.S.C. sec. 12111 (10) (A and B)).

There is no monetary cap on the cost of the accommodation; during debates in Congress, efforts by some legislators to impose a cap (such as a percentage of the employee's annual wage, as is the case in some state civil rights laws) were defeated. Thus, the law directs that it is not the cost alone of the accommodation that must be examined; it is the employer's ability to bear the cost (House of Representatives Report No. 485, reprinted in 1990 U.S. Code Cong. and Admin. News, p. 457).
5. What if the employer is concerned that the employee with a disability may pose a safety hazard?

The regulations state that an employer must demonstrate that there is a direct threat to the safety of the individual or others. "Direct threat" is defined as a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation" (29 C.F.R. sec. 1630.2 (r)). A slightly increased risk will not be viewed as an undue hardship. The regulations require the employer to make an individualized determination based on the applicant or worker's "present ability to safely perform the essential functions of the job." The determination must be made on the basis of "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence" (29 C.F.R. sec. 1630.2 (r)).

Sample Cases involving Faculty and Staff

Faculty with Disabilities

Nedder v. Rivier College, 1995 U.S. Dist. LEXIS 12095
(D.N.H. 1995)—assistant professor's contract was not renewed after three years of full-time and several prior years of part-time teaching in Dept. of Religious Studies. Plaintiff sought preliminary injunction and order of reinstatement pending trial. Court refused to grant preliminary injunction on grounds that
that plaintiff was unlikely to prevail. Although plaintiff alleged that her disability—morbid obesity (she was 5'6" tall and weighed 380 pounds) was the reason for her nonrenewal, the college provided several nondiscriminatory reasons: 1) she did not have the proper educational background for the courses they wanted her to teach; 2) there had been numerous student complaints about her teaching; 3) students refused to enroll in her courses. Court found her unlikely to prevail on ADA claim because 1) her obesity did not limit her ability to teach and 2) the college had provided several legitimate nondiscriminatory reasons for the nonrenewal. The court also noted that, because the same two individuals made the decision to hire and also to nonrenew the plaintiff, an inference of discriminatory motive was more difficult for the plaintiff to establish.

Redlich v. Albany Law School, 1995 U.S. Dist. LEXIS 14706 (N.D.N.Y. 1995). Plaintiff, a tenured law professor, claimed that he received smaller annual salary increases than his colleagues and alleged that the school's motive was disability discrimination. He sued under the ADA and the Rehabilitation Act, and the school sought summary judgment. Plaintiff had suffered a stroke in 1983 which left him unable to use his left hand, arm, and leg. He argued that his disability did not affect his ability to teach, to publish (he had published 3 law articles since his stroke), nor had it required him to teach less than a full course load. Law school stated that plaintiff was in the
"lowest third" of faculty in performance, and that his class preparation was poor, his student evaluations were weak, and that his scholarship and community service were inadequate, compared with those of his faculty colleagues. Court granted summary judgment for law school, ruling that although plaintiff was disabled for purposes of the Rehabilitation Act (he had failed to file his ADA claim in a timely fashion), he was not "substantially affected" by his disability and thus not protected by the Rehabilitation. Nor was the plaintiff able to prove that the law school "regarded" him as disabled, given the many valid, nondiscriminatory reasons given for the law school for its salary decisions. Court dismissed his ADA claim as untimely, and awarded summary judgment for the law school on the Rehabilitation Act claim.

**Guertin v. Hackerman**, 25 Fair Empl. Prac. Cases 207 (S.D. Tex. 1981). Assistant professor denied tenure claimed that his hearing disability was the reason for the tenure denial. Rice University argued that denial was based on narrowness of plaintiff's scholarly research and its lack of promise in the field of physics, as well as on plaintiff's failure to collaborate with the departmental research group.

**Runyon v. Massachusetts Institute of Technology**, 871 F. Supp. 1502 (D. Mass. 1994)--Orthopedic surgeon employed by MIT was laid off from a part-time position after retuning from a two-
month leave of absence for a coronary bypass. MIT sought summary judgment on Runyon's age and disability discrimination claims. Court granted summary judgment on both claims because there was neither direct nor indirect evidence of discrimination by MIT. Runyon had not established that he met the legal definition of "disabled;" furthermore, he had signed a statement that he was physically able to work. MIT provided evidence that Runyon saw fewer patients, was late for appointments, and was less productive than other surgeons who were retained.

Tyndall v. National Education Centers, 31 F.3d 209 (4th Cir. 1994). Part-time instructor in the medical assistant program of Kee Business College suffered from lupus erythematosus (a disease of the immune system that may cause joint pain, urinary and intestinal disorders, and fatigue). In the 2 1/2 years that Tyndall was employed at Kee, she was given additional sick leave, extra breaks during class, a shorter work day than that of other faculty, and other accommodations. In her last year of employment, she missed nineteen days of work, took a four-week leave to care for her son, and notified the school that she was unable to return at the beginning of fall semester because her son was still ill. The department head asked her to resign and reapply when she could work on a regular basis. Tyndall filed an ADA claim. The court ruled that, although Tyndall's condition met the definition of disability, she was not "qualified" because she could not perform the essential functions of her job because,
although her teaching evaluations were good, she could not maintain regular attendance. The court said, "an employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA."


Relevant Staff Cases

Lewis v. Board of Trustees of Alabama State University, 874 F. Supp. 1299 (M.D. Ala. 1995). Librarian suffering from polycystic kidney disease was frequently tardy to work because her disease interfered with her sleep. She made several requests for a modified work schedule; her requests were refused. She filed a an EEOC claim and then a lawsuit under the ADA, claiming that the university had failed to provide her with a reasonable accommodation. The University argued that her claim was untimely because it was filed more than 180 days after the university refused to change her work schedule. The court ruled that the university's repeated refusal to alter her work schedule was "an ongoing policy to discriminate against Lewis on the basis of her
disability and a continuing state of nonaccommodation of Lewis' disability." Furthermore, ruled the court, her disorder met the definition of "disability" under the ADA, and thus the University's request for summary judgment was denied.

Mackey v. Cleveland State University, 837 F. Supp. 1396 (N.D. Ohio 1993). Head basketball coach was arrested and charged with driving under the influence of alcohol and having an open container of alcohol in the car. Shortly after arrest, coach held press conference and admitted need for treatment for alcoholism. Six days later, he was discharged. He was subsequently indicted for cocaine abuse and alcohol intoxication. After completing rehabilitation, coach sued university under Rehabilitation Act for disability discrimination, based on his alcoholism. University filed motion to dismiss, asserting that Mackey was fired for his criminal misconduct, not for his alcoholism. Court denied motion to dismiss, stating that university would have to demonstrate that it discharged Mackey because of his arrest, not because of his disability.

Doe v. University of Maryland Medical System Corporation, 50 F.3d 1261 (4th Cir. 1995). Doe, neurosurgical resident at the University of Maryland Medical System Corporation (UMMSC), was stuck with a needle while treating an individual who may have been infected with HIV. Doe later tested positive for HIV; upon learning of this, UMMSC suspended Dr. Doe from the practice of
surgery, pending the recommendations of its panel of experts on blood-borne pathogens. The panel recommended that Doe be permitted to perform surgery, with some exceptions, and following strict infection control procedures. Senior administrators at UMMSC rejected the panel's recommendations and permanently suspended Doe from surgical practice, offering him residencies in pathology and psychiatry. Doe rejected these alternatives, and insisted that he be reinstated to full surgical privileges. UMMSC then terminated him from its residency program. Doe sued UMMSC under section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act. The trial court determined that Doe was not "otherwise qualified" to perform surgery, and ruled for UMMSC. Using the test developed in School Board of Nassau County v. Arline, 480 U.S. 273 (1987), the court determined that Doe posed a significant risk to patient safety that could not be eliminated by reasonable accommodation. Because the safety risk could not be eliminated, the court affirmed the finding of the trial court that Doe was not a "qualified" individual with a disability.

Schwartz v. Northwest Iowa Community College, 881 F. Supp. 1323 (N.D. Iowa 1995). Schwartz, a library clerk, alleges constructive discharge on the basis of her age (63) and disability (night blindness) when the college changed her schedule from a day shift to a noon-9:00 p.m. shift. Both her doctor and one retained by the college found visual problems that
affected her depth perception. Her visual condition did not affect her ability to do her job, but did make driving at night more difficult. The court, using Iowa's nondiscrimination law, entered summary judgment for the college on the disability discrimination claim (but not on the age discrimination claim). The court ruled that Schwartz's visual impairment did not disqualify her from a wide range of jobs, and thus it did not substantially limit her ability to work. Nor did the impairment affect her performance at work. Because the court found that Schwartz was not disabled for purposes of the disability discrimination law, the college did not have an obligation to attempt to find a reasonable accommodation for Schwartz.

Suggestions for dealing with faculty and staff with disabilities:
1. If your institution has a policy for dealing with faculty or staff with disabilities, consult that first. If your institution has no such policy, it should develop one immediately.

2. Make sure that workload policies and practices are clear and are followed consistently, documenting deviations from standard practice (faculty given special projects, research leaves, etc).

3. Develop a policy, if none exists, on how the academic unit will handle tardiness, absences from class, etc. Will the unit close ranks? What are the consequences for frequent or repeated tardiness or absences?
4. Respond immediately to student complaints of tardiness, absences, cancelled classes, unprofessional behavior, or other disruptions of the academic program. Document all complaints, and observe the faculty member's class or monitor his/her attendance in and promptness for class.

5. If the institution does not have policies regarding attendance and promptness, develop them.

6. Consider adopting, either intact or after modification, the AAUP "Statement on Professional Ethics."

7. Confront faculty whose performance is problematic for the academic unit, particularly with respect to disruptive behavior or inappropriate conduct in class, with the need to follow the institution's policies, seek medical or psychiatric assistance, or request a disability leave.

8. Consider what the "essential functions" of a faculty member are, and develop a policy or handbook provision that makes these explicit. Must all faculty conduct research and publish? Must they all perform service to the community, the institution, or the profession/discipline? May a faculty member "trade off" additional teaching for the right not to conduct research or engage in service?
References


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