

# **The Current State of Disability Law: Dealing with Employees with Physical and Learning Disabilities**

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## **I. Overview**

Employees with physical and learning disabilities who are terminated or not accommodated to their satisfaction continue to file claims of discrimination against their employers, as evidenced by the statistics of the Equal Employment Opportunity Commission (EEOC)<sup>1</sup> and by the fact that the EEOC resolved just under 17,000 disability discrimination charges in fiscal year 2003 and recovered over \$45 million for claimants out of court. Universities are faced with a double-edged sword: on the one side is a growing population of employees with physical disabilities (a population both knowledgeable and litigious) and the other side is a morass of case law and statutory law that is incoherent and hard to apply to real-life situations.

This paper will utilize the law school IRAC rubric<sup>2</sup> as applicable to a university team approach for managing the physical/learning disabilities of its employees. It will include discussions of court interpretations of the laws, including hot topics, suggestions for management, record keeping, and alternative dispute resolution, including sample forms and provisions.

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<sup>1</sup> <http://www.eeoc.gov/stats/ada-receipts.html>

These statistics show that in fiscal year 2003, the percentages of filed claims in the physical disability area were highest in the area of back impairments (14.5%) and other orthopedic impairments (9%), cardiovascular (3.9%) and neurological (3%), diabetes (3.9%), hearing impairments (2.9%), vision impairments (2.5%), and cancer (2.5%). Claims in the “regarded as disabled” category were very high (10.5%) and “having a record of a disability” clocked in at 3.5%. The “other disabilities” category was the highest with 21% of the claims. The combined claims of alcoholism and drug addictions were 2.4%. Learning disability claims appear low (1.6%), but that may be as a result of counting a corresponding disability primary as the primary one.

<sup>2</sup> Issue, Rule, Application, Conclusion – discussed herein.

## II. Introduction

First year law school students learn to “brief a case” by using the rubric of IRAC:

- Issue: state the legal **Issue** that you need to analyze
- Rule: identify the legal **Rule(s)** to follow in your analysis
- Application: **Apply** the facts of your particular case to the Rule
- Conclusion: reach a **Conclusion**

This is a helpful formula for analyzing most legal issues with which we are faced and it is used here with a team-approach to handle the particular issue. Although a university team is often much larger, involving an equal opportunity officer, ADA coordinator, and others, for purposes of this paper, the “**Team**” will consist of the employee’s **Supervisor**, the **Director** of human resources, and the general **Counsel**.

### A. Issue

The broad legal issue that we are asked to analyze is: How is a university to respond when there are varying requests by employees with physical/learning disabilities?

### B. Rules

The Americans with Disabilities Act of 1990, along with its implementing regulations, (ADA)<sup>3</sup> and the Rehabilitation Act of 1973 (Secs. 503, 504) are the primary laws designed to protect qualified individuals with disabilities. They prohibit discrimination against disabled individuals by private institutions of higher education as both a private employer and a public accommodation operated by a private entity.

These laws offer protection against discrimination to qualified persons with physical or mental impairments that substantially affect major life activities, those with records of such impairments and those who are regarded as so impaired.

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<sup>3</sup> 42 U.S.C. §§ 12101-12213, 47 USC sec. 225 and 611; 29 CFR Part 1602, 1630, 1640, 1641; 56 Fed. Reg. 35,726-35,756 (July 26, 1991)

The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with enforcement, guidance, and coordination with the Departments of Justice and Labor, as well as with state and local agencies. Before filing a lawsuit, an employee must first file a discrimination charge with the EEOC or a state/local agency within strict time requirements. Available remedies may be reinstatement, back pay, lost benefits, attorneys' fees, court costs, and compensatory and punitive damages. Other laws that need to be applied for dealing with disabled employees are the Family and Medical Leave Act (FMLA)<sup>4</sup> and state worker's compensation laws.<sup>5</sup>

### **Americans with Disabilities Act**

As with any law, each individual statutory component must be met for an employee claimant to have successful case against its employer. The Americans with Disabilities Act (ADA) defines a **disability** as: A physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, [or] being regarded as having such impairment.<sup>6</sup>

### **C. Application**

This section will apply different fact patterns to the various components of the law.

#### **1. Physical or mental impairment**

"Mental impairment" is discussed in Barbara Lee's paper, herein. "Physical impairment" is defined in the ADA broadly to include any physiological disorder, cosmetic disfigurement, or anatomical loss affecting one of the body systems.<sup>7</sup>

Because of the trio of Supreme Court cases, Sutton, Murphy, and Albertsons, the class of potential ADA plaintiffs is now considerably narrower than it once was because **mitigating measures** used by disabled employees, such as glasses, medications,

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<sup>4</sup> 29 U.S.C. § 2601 *et seq.*; 29 C.F.R. Part 825.100 *et seq.*; 60 Fed. Reg. 66,229 (Dec. 21, 1995)

<sup>5</sup> For a good hands-on manual utilizing these various laws, see United Educators' publication entitled "Employees with Disabilities", by D. Frank Vinik.

<sup>6</sup> 42 U.S.C. §§ 12101

<sup>7</sup> See 29 C.F.R. § 1630.2(g)(1998).

therapy, self-accommodations, artificial devices, etc. must be taken into consideration.<sup>8</sup>

In Sutton, The Supreme Court held that two severely myopic women, whose vision was fully correctable, were not considered disabled for purposes of coverage under the ADA when the airline failed to hire them as pilots since they did not meet the minimum requirement of uncorrected visual acuity of 20/100 or better. The plaintiffs claimed discrimination under on the theory that they were "regarded as" having a disability. The Supreme Court rejected this argument and held that the women in question did not meet the definition of "disabled" under the law.<sup>9</sup> Under the Court's reading of the law, whether an individual is disabled should be made *with* reference to measures that mitigate the impairment:

Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures -- both positive and negative -- must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."<sup>10</sup>

In a companion case, the Court held that "mitigation measures" extend to those undertaken, whether consciously or not, with the body's own systems. Therefore, a person who has compensated or self-accommodated for his/her disability may not be "disabled" under the law.<sup>11</sup>

*Issue: Facilities maintenance worker had a herniated disc of the lumbar spine and after a surgical discectomy was restricted from lifting over 40 pounds. Does he have a protected disability as defined by the ADA?*

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<sup>8</sup> Approximately 40 million Americans are now covered by the statute, instead of an estimated 160 million

<sup>9</sup> The EEOC had issued an "Interpretive Guidance" which stated that "the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." The Department of Justice had issued substantially similar guidance. The Court clearly rejected this approach, stating that no agency had been given the authority to interpret the term "disability."

<sup>10</sup> Sutton, 527 U.S. at 475.

<sup>11</sup> Albertsons, Inc. v. Hallie Kirkingburg, 527 U.S. 555 (1999)

## Team Approach

**Supervisor** asks employee to put in writing his request for a reasonable accommodation (form 1 in Appendix A). **Director** reviews request and sends questionnaire to employee's health care provider (form 2 in Appendix A). **Counsel** reviews all forms and concludes that general lifting restriction does not constitute a protected physical impairment.<sup>12</sup>

### 2. Substantially limits

This means a significant restriction as compared to an average person in the general population.<sup>13</sup> Factors considered in assessing whether impairment is "substantial" include its severity, duration, and long-term impact.<sup>14</sup> Under the ADA, determining whether one's impairment is "substantially limiting" requires an individualized assessment, not using assumptions or stereotypes.<sup>15</sup>

In the pivotal case of Toyota Motor Mfg., Ky., Inc. v. Williams,<sup>16</sup> the Court held that held that to be covered by the ADA, a person must have substantial limitations on abilities that are *central to daily life* and not just the workplace. The facts are as follows: plaintiff worked in the manufacturing plant was diagnosed with bilateral carpal tunnel syndrome and bilateral tendonitis. She was placed in modified duty jobs. After being rotated to a position that aggravated her underlying condition, plaintiff requested an accommodation that would allow her to perform only those jobs that would not aggravate her condition, which was not granted and she sued. Plaintiff claimed the impairment affected her ability to perform manual tasks, and caused some limitation in housework, playing with her children, gardening, lifting and working. In

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<sup>12</sup> Based on Brunko v. Mercy Hospital, No. C96-342 MJM, U.S. Dist. Ct., No. Dist. Iowa

<sup>13</sup> 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(j)

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., Talk v. Delta Airlines, 165 F.3d 1021 (5th Cir. 1999)(some difficulty walking because of an orthopedic shoe is not a substantial limitation); but see, Workman v. Frito-Lay, Inc., 165 F.3d 460 (6th Cir. 1999) (irritable bowel syndrome is substantially limiting).

<sup>16</sup> 534 U.S. 184 (January 8, 2002),

an unanimous decision, the Supreme Court held that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives, and that the impairment must be permanent or long term.

The Court stated "When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job."<sup>17</sup>

*Issue: Administrative assistant has a debilitating back injury and her doctors placed her on work restrictions precluding repetitive motions or prolonged standing/sitting without a break. Does she have an impairment that substantially limits her the major life activity of working as defined by the ADA?*

### **Team Approach**

**Supervisor** works with employee to conduct an individualized assessment and asks employee to put in writing her request for a reasonable accommodation.

**Director** reviews request along with health care provider's suggested restrictions.

**Counsel** reviews materials and concludes that administrative assistant is qualified for a wide range of secretarial/clerical positions because of her education, skills, and work experience.<sup>18</sup>

### **3. Major life activity**

According to the broad view of the EEOC regulations, major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>19</sup> The EEOC includes in its definition any activity that "an average person can perform with little or no

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<sup>17</sup> Id.

<sup>18</sup> Based on Andrews v. College Board, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, 2001 U.S. Dist. LEXIS 13158, August 27, 2001, Decided, August 28, 2001.

<sup>19</sup> 29 C.F.R. § 1630.2(i).

difficulty."<sup>20</sup> Other recognized major life activities include reproduction,<sup>21</sup> and sleeping.<sup>22</sup> Some courts have generally rejected arguments by claimants that their symptoms, such as the "ability to get along with others," are themselves major life activities.<sup>23</sup> However, the Second Circuit found that employees have ADA rights if they have **trouble initiating contact** and responding at the most basic level.<sup>24</sup>

When addressing the major life activity of **performing manual tasks**, the central inquiry should be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job. To show a substantial limitation in the major life activity of **working**, a claimant must prove that s/he is considerably restricted in the ability to perform not just that particular job, but also a wide class of jobs, considering his/her education, training, skills, abilities, and location.<sup>25</sup>

In a Second Circuit case, the court recently ruled that "interacting with others" is a major life activity under the ADA, but that in order for such activity to be "substantially limited" within the meaning of the statute, an individual must have a mental or physical impairment which severely limits his or her basic ability to communicate with others. This decision is at odds with First Circuit's conclusion that "interacting with others" should not be a major life activity and rejects the Ninth Circuit's ADA protection of employees who fail to communicate effectively with managers/coworkers due to common personality traits.<sup>26</sup>

*Issue: Receptionist has a head injury and has difficulty concentrating; she also claims to have an anxiety disorder and she cannot work with her new supervisor, the university president. Is she protected by the ADA?*

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<sup>20</sup> EEOC Technical Assistance Manual, ¶100, 120 § 2.1(a)(ii).

<sup>21</sup> Bragdon v. Abbott, 526 U.S. 1131, 118 S. Ct. 2196 (1998)

<sup>22</sup> Pack v. Kmart Corp., 166 F.3d 1300 (10th Cir. 1999)

<sup>23</sup> Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 15 (1st Cir. 1997)

<sup>24</sup> Jacques v. DiMarzio, Inc., 2002 U.S. Dist. LEXIS 3399 (E.D. N.Y. 2002)

<sup>25</sup> See, e.g., Thornton v. McClatchy, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 292 F.3d 1045; 2002 U.S. App. LEXIS 11096

<sup>26</sup> Jacques v. DiMarzio, Inc., 386 F.3d 192 (2d Cir. 2004)

### **Team Approach**

**Supervisor** works with employee to understand her individual situation and in particular what she means by “difficulty concentrating” and “anxiety disorder.”

**Director** reviews written job description to ensure that all essential qualifications are included (See Appendix B), interviews her supervisor to get a sense of their working relationship, and reviews the doctor’s suggested restrictions and employee’s requests.

**Counsel** reviews materials and concludes that receptionist’s difficulty with concentrating, by itself, is only a component of a major life activity of learning, that she is not unable to work in a broad class of jobs as a result of her disability.

Determines that this employee worked well with the previous supervisor but does not get along with this hot-tempered supervisor. Conclusion is that employee could work in another class of jobs and that it would not be a reasonable accommodation to place her with a more even-tempered supervisor.<sup>20</sup>

#### **4. A Record of Such Impairment**

This includes an impairment not limiting a major life activity, but **treated as disabled** by the employer. Having a "record" of a substantially limiting impairment means that one has either a history of such impairment or one has been wrongly classified as having such impairment. Employment decisions should not be made because of an employee’s history or classification of disability.

*Issue: A psychotherapist in the university counseling center disclosed in her interview that he suffered from a form of Parkinson’s disease. He is unable to keep up with typing the dictation of patient notes and the counseling director wants to terminate his employment. Does he have a protected record of impairment?*

### **Team Approach**

**Supervisor** speaks with employee about why he cannot keep up with her notes, which are critical to the Center. **Director** reviews what is written in employee’s records about the Parkinson’s disease. **Counsel** reviews materials and concludes that employee would probably not be considered “disabled” but likely would be able to sue

under the theory of having a "record" of impairment; counsels that they work on proposing a reasonable accommodation. 27

## **5. Being Regarded As Having Such Impairment**

With respect to a "regarded as" claim, mere knowledge of an employee's impairment by an employer is not enough to establish protection under the ADA. Instead, the employer must actually **perceive** the employee as being impaired. Also, if the employee has an impairment that does not substantially limit any major life activities, but the employer treats the employee as though it does, it could be actionable. In a 4<sup>th</sup> Circuit case, the court held that an employee cannot use his own failure to provide medical information as the basis for a "regarded as" claim – even if the employee was already out on medical leave.<sup>28</sup>

*Issue: Public Safety employee, like all others in DPS, is required to participate in a drug test. He tests positive for cocaine and, rather than being terminated, was allowed to resign. He reapplied for a job three years later, attaching reference letters stating that he had been successfully rehabilitated from his drug addiction. Application rejected because of university policy of not rehiring former employees who either had been terminated for misconduct or resigned in lieu of termination. This former employee files written complaint that he is discriminated against based on a perceived disability. What does the university do?*

### **Team Approach**

**Supervisor** wants to continue to require drug and alcohol testing of prospective and continuing employees but was unhappy with this former employee's work performance (as well as being upset about the drugs). **Director** believes that this is a legitimate, nondiscriminatory reason for refusing to rehire an employee terminated for violating workplace conduct rules. **Counsel** is concerned that the company's "no-rehire policy" might bar the reemployment of drug addicts who have been

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<sup>27</sup>Based on Davidson v. Midelfort Clinic, 133 F.3d 499 (7th Cir. 1998)

<sup>28</sup>Haulbrook v. Michelin North America, Inc., et al., 2001 WL 558152 (4th Cir. May 24, 2001)

rehabilitated and therefore might be viewed as a pretext for discrimination. Concludes that blanket “no-rehire policy” should be eliminated and recommends that former employee should be interviewed and considered along with all other applicants, especially since he will probably not be selected in light of previously documented work performance problems.<sup>29</sup>

#### **D. IRAC Conclusion**

It is important to look at what a potential plaintiff would put forth as a complete case, thus allowing us to determine a course of action after applying the law to the facts.

##### **1. Establishing a *Prima Facie* Case by a Disabled Employee**

Under the ADA, a plaintiff must establish a *prima facie* case of discrimination by showing:

- (1) he or she is **disabled as defined** in the ADA;
- 2) he or she is qualified to perform the **essential functions** of the job with or without a **reasonable accommodation**; and
- (3) he or she was discriminated against **because of** his or her disability.<sup>30</sup>

##### **a. Essential Functions**

The first prong was described in the definition section above. In analyzing the second prong of the *prima facie* case, courts conduct a two-step analysis. First, it determines if the person can perform the **essential functions of the job**. If the answer is no, the court then determines whether a **reasonable accommodation** by the employer would allow the plaintiff to perform the essential job functions.<sup>31</sup> In determining whether

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<sup>29</sup> Based on Raytheon Company v. Hernandez, No. 02-749, (December 2, 2003), in which U.S. Supreme Court granted certiorari and sent the case back to the Ninth Circuit to properly conduct an analysis of the employee’s allegation and to decide whether the ADA grants to disabled employees preferential rehiring rights

<sup>30</sup> Mason, 357 F.3d at 1118

<sup>31</sup> Sec. 101(8)

someone is qualified, an employer may be able to require prospective employees to submit to tests. The plaintiff bears the burden of demonstrating that he/she is able to perform the essential functions of a particular job. The "**essential functions**" are "the fundamental job duties of the employment position the individual with a disability holds or desires."<sup>32</sup>

With regard to **whether a function is essential**, courts consider the:

- (1) employer's judgment as to which **functions** are essential;
- (2) written **job descriptions** prepared before advertising or interviewing applicants;
- (3) **time** expended on the job performing the function;
- (4) **consequences of not requiring** the incumbent to perform the function;
- (5) work **experience of past employees** in the job.<sup>33</sup>

For example, in a recent case, an employer did not violate the ADA by requiring that applicants take the Minnesota Multiphasic Personality Inventory I (MMPI) to be considered **qualified** for a management position with the company.<sup>34</sup> In another case, a nurse was not entitled to reinstatement by her employer medical school at end of her FMLA leave because she was not able to perform the **essential duties** of the job. The nurse's employment was conditioned upon her completion of an accredited treatment program and submitting weekly progress reports; however, she did not satisfactorily complete the treatment program and was unable to treat patients, a required function of her position, without reinstatement of her license.<sup>35</sup>

*Issue: University librarian is handicapped by rheumatoid arthritis and asks as an accommodation that she not be required to do paging/retrieval and shelving. How does the university respond?*

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<sup>32</sup> 29 C.F.R. § 1630.2(n)(1).

<sup>33</sup> 29 C.F.R. § 1630.2(n)(3).

<sup>34</sup> Karraker v. Rent-A-Center Inc., 316 F. Supp. 2d 675 (C.D. Ill. 2004)

<sup>35</sup> Geromanos v. Columbia University, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 322 F. Supp. 2d 420; 2004 U.S. Dist. LEXIS 11558 S.D.N.Y., July 6, 2004

## **Team Approach**

**Supervisor** looks over written job description (generic form in Appendix C) to see whether those functions are included as essential functions of the reference librarian job. **Director** reviews employee's written request for accommodation. **Counsel** asks whether a reasonable accommodation could be tailored for the librarian without undue hardship to the university. University presents written proposal to librarian to do computer entry for library as a reasonable accommodation since keeping track of materials is an essential function of the job and it doesn't require manual lifting.<sup>36</sup>

### **b. Reasonable Accommodation**

An employer must provide a “**reasonable accommodation**” for a qualified person with a disability, consisting of a change in the work environment resulting in an equal employment opportunity for that employee.<sup>37</sup> This may include modifications of facilities, redefining of jobs, revising work schedules, providing special equipment, training, or assistance, etc. If an employee rejects a reasonable accommodation (as in the example above), s/he would no longer be considered a qualified individual with a disability. A business may avoid a reasonable accommodation only if it would cause “**undue hardship**” to the employer.<sup>38</sup> The hardship must be significant and could consist of an extremely high financial expense, a disruption or a fundamental change in the nature/operation of the business. In one case, the court held that it was unreasonable to accommodate an employee with depression/anxiety disorders by placing him in a low stress position without conflicts that could inflame his symptoms.<sup>39</sup> An employer may have a business necessity that requires that certain criteria be met and that will not allow for an accommodation for a disabled employee. In this case, the employer would have to prove that its exclusionary criteria are consistent with that necessity.<sup>40</sup>

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<sup>36</sup>Based on Cargill v. Harvard University, APPEALS COURT OF MASSACHUSETTS , 60 Mass. App. Ct. 585; 804 N.E.2d 377; 2004 Mass. App. LEXIS 251, March 8, 2004

<sup>37</sup>Sec. 101(9)

<sup>38</sup>42 U.S.C. §§ 12111(9), 12112(b)(5)(A) (1994); 29 C.F.R. § 1630.2(o) (1996)

<sup>39</sup>Gaul v. AT&T, Inc., 6 Americans with Disabilities Cases (BNA) 705 (1997)

<sup>40</sup>42 U.S.C. § 12112(b)(6) (1994); 29 C.F.R. §§ 1630.10, 1630.14(b)(3), 1630.15(b) (1996).

*Issue: A nurse in your health center cuts her finger. The university requires that she submit to a blood test to determine if she has hepatitis and HIV. She does not want to have this test and believes it is discriminatory. What do you do?*

### **Team Approach**

**Supervisor** reviews job description for nurses in the health center to make sure that nurses are required to perform functions that could cause them to come in contact with others' blood. **Director** works with supervisor to be sure that such invasive tests would be necessary and that other university health centers have similar policies. **Counsel** reviews all paperwork and concludes that this would be defensible as job-related and meeting the "business necessity" test.<sup>41</sup>

#### **c. Intentional Discrimination**

In meeting the requirements of a *prima facie* case, other requirements of the plaintiff are to show **intentional discrimination** and **an adverse employment action**. In one case, a state university fired its employee who had multiple sclerosis but because of a reorganization and hiring freeze, it had a legitimate, nondiscriminatory reason for its action.<sup>42</sup> It has been held that asking a 410-pound police officer to undergo a fitness-for-duty examination was not an "adverse employment action."<sup>43</sup>

Constructive discharge is considered an adverse employment action. In Pennsylvania State Police v. Suders, the Supreme Court held that the Faragher/Ellerth affirmative defense (taking immediate corrective action upon receipt of a complaint in sexual harassment cases) might be available to employers defending against **constructive discharge** cases, but only if the discharge is not triggered by "official acts" - such as

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<sup>41</sup> Based on Boyer v. KRS Computer and Business School, Civil No. 00-1039 (RHK/JMM), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, 2001 U.S. Dist. LEXIS 17479; 12 Am. Disabilities Cas. (BNA) 439, September 17, 2001.

<sup>42</sup> Walser v. Ohio University, CASE NO. 2003-03680, COURT OF CLAIMS OF OHIO, 2004 Ohio 4722; 2004 Ohio Misc. LEXIS 482, September 2, 2004

<sup>43</sup> Bunyon v. Henderson, Civil Action No. 01-242 (JMF), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 206 F. Supp. 2d 28; 2002 U.S. Dist. LEXIS 11435; 13 Am. Disabilities Cas. (BNA) 955, June 26, 2002.

reduced pay, demotion, creation of an intolerable working environment – that force the employee to resign. A California appellate court rejected a university’s motion for summary judgment because a factual issue existed as to whether the university’s treatment of an employee exacerbated her preexisting medical condition to the extent that she could no longer work. In another case, even though the employee applied for and was granted a disability retirement for objective medical conditions of fibromyalgia and rheumatoid arthritis, she was not precluded from recovering damages or from reinstatement. Her constructive discharge allegation was that the working conditions were so intolerable that her preexisting medical condition worsened to the point where she was no longer able to function in her duties and needed to remove herself from her job.<sup>44</sup>

### **III. Steps for Managing Employees with Physical/Learning Disabilities**

#### **A. Individualized and Interactive Assessments**

The requirement for an interactive process with regard to reasonable accommodations is contained in a regulation promulgated under the ADA. The regulation states:

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.<sup>45</sup>

When faced with a request for an accommodation under the ADA or when an employee complains of discrimination in the workplace because of their disability, employers are obligated to make individualized and interactive assessments of impairments. The law seeks to prevent employers from basing job decisions on myths or stereotypes regarding an employee’s actual or perceived physical or mental

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<sup>44</sup> Colores v. Board of Trustees of Calif. State University, COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE, 105 Cal. App. 4th 1293; 130 Cal. Rptr. 2d 347; 2003 Cal. App. LEXIS 150 (Cal. App. 2 Dist.), February 12, 2003

<sup>45</sup> 29 CFR § 1630.2 (o) (3).

impairments. A court's first inquiry should be whether the employer actually engaged in the interactive process of accommodation required by the ADA.<sup>46</sup>

Guidelines for Individualized Assessment:

- The request for a reasonable accommodation is not a unilateral burden imposed on the disabled employee, rather it is an “interactive process” to be undertaken over time between the employer and the employee.
- This “interactive process” does not need to be formally initiated or follow some set procedure, but the employer does have a duty to engage in an interactive process with the employee to determine an appropriate accommodation.
- The initial request for reasonable accommodation and/or notification of the extent of the disability by the employee may be interpreted as the initiation of process.
- If a formal employment transfer procedure or seniority system exists, the interactive process need not follow it.
- A reasonable accommodation usually involves a change in the status quo.

Employees facing possible termination often ask that individuals from outside the workplace accompany them to these interactive meetings with their managers. They may reach out to spouses, religious leaders, neighbors and attorneys. Employers are not required to allow these third parties to attend workplace meetings.<sup>47</sup>

During the interactive process, you may ask for documentation that describes the individual's disability and why the requested accommodation is needed. Specify what information you need about the disability and specific accommodation. Include what you will need to know (e.g., type of impairment, how the impairment limits a major life activity (i.e., sitting, standing, performing manual tasks). Ask how the accommodation would allow the employee to perform job-related tasks. It might be

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<sup>46</sup> Zivkovic v. Southern California Edison Company UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 302 F.3d 1080; 2002 U.S. App. LEXIS 18707; 53 Fed. R. Serv. 3d (July 1, 2004).

<sup>47</sup> Ammons v. Aramark Uniform Services, Inc., 2004 U.S. App. LEXIS 10061 (7th Cir., May 21, 2004)

helpful to provide the employee's health care provider with a copy of the job description (listing essential functions) to help get relevant answers.

If you have observed the employee's job performance or you have received reports from others that give you a reasonable belief that the employee's ability to perform essential job functions is impaired by a medical condition or that the employee poses a direct threat because of a medical condition, you can request medical documentation. Once a reasonable accommodation is requested, you and the individual should discuss his/her needs and identify the appropriate reasonable accommodation. Where more than one accommodation would work, you may choose the one that is less costly or that is easier to provide.

*Issue: Your employee, who was first a police dispatcher and later became an Emergency Medical Technician at the university hospital (EMT), injured his back and was not able to resume active status as an EMT. He has made repeated requests for accommodations to work in a light duty position such as the police dispatcher position and has asked what type of training he should pursue. His supervisor tells him to fill out a job application. How do you proceed?*

### **Team Approach**

**Supervisor** re-considers requiring employee to fill out a new job application since he has requested an accommodation. **Director** sets in motion the process of engaging in interactive discussions with the employee. **Counsel** agrees, stating that employee is fully qualified to work as a police dispatcher and since they were in the process of hiring more dispatchers, this should be considered as a reasonable accommodation.<sup>48</sup>

### **B. Handling Direct Threats**

There are two primary situations when an employer may, within the ADA, terminate an employee (or fail to hire) who has a covered disability:

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<sup>48</sup>Based on Shapiro v. Lakewood, 2002 U.S. App. LEXIS 10302 (3<sup>rd</sup> Cir. 2002)

- When the employee cannot, with reasonable accommodations, perform the essential functions of the job and
- When the employee poses a direct threat to himself and/or others.

Refer to the section above regarding essential functions. Situations may arise where an individual with a disability is posing a **direct threat** to his/her co-workers and/or him/herself. In this situation, an employee may be terminated for safety reasons.<sup>49</sup> In some instances, the nature of a particular person's disability may cause an unacceptable risk of harm. "Direct threat" simply means "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." Factors to consider to determine if an individual poses a direct threat are (1) duration of the risk, (2) nature and severity of the potential harm, (3) likelihood that the potential harm will occur, and (4) imminence of the potential harm.<sup>50</sup>

In the Supreme Court decision in Chevron U.S.A. Inc. v. Echazabal, the Court upheld an EEOC regulation allowing an employer to include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. The Court stated that the EEOC had exceeded its authority in adopting language (threat to self) that was not specifically contained in the law. There is an affirmative defense for an employment action taken pursuant to a qualification standard that is job related or consistent with business necessity. The statute explicitly allows "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." The existence of a significant risk is determined from the standpoint of the health care professional and the risk is based on medical or other objective evidence available to the health care profession, and not simply on a good faith belief that a risk exists.<sup>51</sup>

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<sup>49</sup> 29 C.F.R. § 1630.2(r) (1996)

<sup>50</sup> 29 C.F.R. § 1630.2(r) (1996). 2002

<sup>51</sup> Bragdon v. Abbott, 524 U.S. 624 (1998)

*Issue: The supervisor of the university grounds' crew (a position which requires driving) is reviewing applications and wants to disqualify an applicant who discloses that he is insulin-dependent because of his diabetes. What do you suggest to him?*

### **Team Approach**

**Supervisor** identifies what “genuine substantial risk” would arise from hiring someone who is diabetic. **Director** reviews written job description to see if essential functions are job-related and not status-related. **Counsel** suggests that an individualized assessment should be conducted in order to determine if the applicant is qualified to perform essential functions of the job.

### **C. Administering Tests**

When evaluating the abilities of applicants or current employees, employers may only use the standards and tests that truly show the legitimate requirements for the job. Criteria that have a discriminatory impact and are not related to job requirements are prohibited. All questions related to physical and/or mental disabilities must be removed from job application forms. Employers may make a conditional job offer on the successful completion of a medical exam as long as it is administered to all new employees within the same job category, the results are kept in a confidential file, and the exam is not used to take an applicant out of consideration (unless it indicates that the applicant is not qualified for the job).

Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations of employees must be job related and consistent with the employer's business needs.

The Act sets forth special requirements for administering medical examinations to current employees. Once an individual is hired, the ADA prohibits the employer from the following: requiring a medical examination; inquiring whether the employee has a

disability; asking about the severity of the disability; unless the inquiry or examination is job-related and consistent with business-necessity.

*Issue: A supervisor has noticed that an employee has not been able to do her work of following up on federal grants and contracts and has even observed behavior that indicates alcohol or substance abuse by that employee. What does she do?*

### **Team Approach**

**Supervisor** requests tests of the employees since such misconduct and current alcohol abuse is not protected by the ADA and assures employee that she will not place medical information in regular personnel file. **Director** suggests considering engaging in an interactive process to discuss reasonable accommodations such as a leave of absence to seek treatment but wants to be sure that they discuss it as ‘behavior’ rather than ‘status.’ Director knows that the university has the right to require adherence to its performance standards and its substance abuse policies. **Counsel** notes that even if employee is a current alcoholic and would otherwise be protected by the ADA, she is not qualified to perform the essential functions of the job and therefore not protected.

#### **D. When an Employee Asks to be able to Telework**

To mark the second anniversary of President George W. Bush's New Freedom Initiative (plan for the full integration of disabled people into the workforce), the EEOC has issued a fact sheet for employers regarding allowing a disabled worker to telework as a reasonable accommodation under the ADA.

The EEOC encourages employers and employees to engage in an interactive process to discuss such issues as **why** the employee needs to telecommute because of a disability, **whether** all or some of the job tasks can be performed from the employee's home, **how** to supervise in this situation; whether being in the office is an **essential function**, whether telephone, fax, and e-mail will ensure **timely communication** with all other work constituents; and whether the work requires immediate **access to**

**documents** or other information only available in the workplace, and whether the work at home must be **full time** or part-time basis.

Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework. However, an employer is not obligated to adopt an employee's preferred or requested accommodation and may instead offer alternate accommodations as long as they would be effective.<sup>52</sup>

*Issue: One of your assistant deans was supervising a student community service project in an urban neighborhood and witnessed the murder of a neighborhood resident as a result of a drive-by shooting. He was diagnosed with post-traumatic stress disorder. He stopped working in student life because it aggravated the symptoms of his disorder.<sup>53</sup> He asked for one of the following accommodation: relocate him to another campus, move him to a non-student life job, or allow him to work from home. How do you respond?*

### **Team Approach**

**Supervisor** does some research and determines that relocating was not an option because there were no similar jobs on the one other campus across the state; moving him to a non-student life job was not realistic because the student life skills were why they hired him; finally, allowing him to work from home would not meet the essential function of the job of interacting, counseling, and guiding student development. Plus, supervisor noted that she could not supervise employee and that telework would cause other student life employees to fill in and work even harder than they already do.

**Director** states that other employees have requested an at-home accommodation and that in certain fact situations it might be reasonable under the ADA. However, since

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<sup>52</sup> An employee failed to prove discrimination in violation of the ADA when her employer denied her request to work from home three days each week. Cruz v. Perry, SUPREME COURT OF THE UNITED STATES, 513 U.S. 1146; 115 S. Ct. 1093; 130 L. Ed. 2d 1062; 1995 U.S. LEXIS 1001 (Feb. 1995)

<sup>53</sup> Based on Mason v. Avaya Communications, Inc., UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, 357 F.3d 1114; 2004 U.S. App. LEXIS 422 No. 03-6035 ( Jan. 13, 2004).

the supervisor believes that this request involves being relieved of (or even modifying) an essential job function, it was not reasonable. **Counsel** advises that courts are reluctant to second-guess the employer's judgment when the decision is job-related (essential functions), uniformly enforced, and consistent with business necessity (hence telework would be an undue hardship and not a reasonable accommodation). Concludes that since employee cannot perform the essential functions of the position with or without a reasonable accommodation, he was not a qualified person with a disability.

### **E. What if an Employee Is Intellectually Disabled?**

“Intellectual disabilities” is the category of disabilities that was previously referred to as “mental retardation.” According to a recent EEOC publication<sup>54</sup> (the first ADA-related guidance in two years), an individual is considered to have an intellectual disability when (1) the person’s intellectual functioning level or IQ is below 70-75; (2) the person has significant limitations in basic skills needed for everyday life, such as communication, self-care, social skills, or work, and (3) the disability originated before the age of 18.

In order for a person to be protected, his impairment must currently substantially limit one or more major life activities, have a history of limited major life activities, or his employer must have treated him as if the impairment substantially limits one or more major life activities. In addition, the individual must be qualified and able to perform the job, with or without accommodation. The EEOC’s suggestions for possible accommodations included: providing "readers;" modifying training materials; providing job coaches; and allowing an applicant to demonstrate skills rather than taking a written test.

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<sup>54</sup> On October 20, 2004, the Equal Employment Opportunity Commission issued new enforcement guidelines titled: "Questions & Answers About Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act." See, [www.eeoc.gov](http://www.eeoc.gov).

### A word on Record Keeping

Pursuant to Title VII and the ADA, the EEOC has promulgated specific record keeping and retention procedures relating to the composition of a work force according to status, including disabilities, as defined under the law.<sup>55</sup> The Integrated Post Secondary Education Data System Survey (IPEDS) replaced the EEO-6 report formerly required by EEOC. Institutions must now submit the IPEDS on a biennial basis and retain them for three years.<sup>56</sup>

### **IV. Final Thoughts**

Work with your Team to utilize a checklist or decision tree in order to ensure thorough fact-finding and complete analysis, resulting in consistent, appropriate, and legal decision-making. Work on a preventative-law approach to your potential disability-related claims of employees, such as making sure that supervisors receive training in how to interview, work with, and properly discipline/terminate employees with disabilities. Training can help supervisors to understand that they should focus on the initial determination of whether a claimant is substantially limited in a major life activity, rather than merely assuming the existence of a disability and reasonable accommodation obligation. They should also avoid trying to be “helpful” by asking employees if they “might have a disability.” Your team should consider implementing mediation into your grievance process so that the complaining parties will have a neutral forum to discuss their suggestions for remedying their complaints; this would be a better time to have the matter resolved than to have it go to the EEOC, even with their mediation program. It also gives you a measure of control in deciding how to respond to a discrimination claim. Work with your team to ensure that you have updated Policies that include prohibitions on Disability-Based Harassment and Retaliation for filing disability-related requests or grievances. Harassment based on disability follows the same model as other forms of harassment, including the requirement that it be pervasive.<sup>57</sup>

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<sup>55</sup> See 29 C.F.R. §§ 1602.7 - 1602.27

<sup>56</sup> 29 C.F.R. § 1602.48

<sup>57</sup> See, Shaver v. Independent Stave Co., No. 03-1878, UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, 350 F.3d 716; 2003 U.S. App. LEXIS 24180 (Dec. 2003). Court held that

**Appendix A  
Form One**

UNIVERSITY REASONABLE ACCOMMODATION REQUEST FORM

POLICY: The University is committed to adhere to federal and local laws, including the Americans with Disabilities Act and will provide, upon request, reasonable accommodation to qualified employees or qualified applicants for employment with documented disabilities.

**Name**  
**Social Security #**

**Position Applied For (if applicable):**  
**Current Job Title/Position (if applicable):**

**Home Address/Phone Number**  
**Campus Address/Phone Number**  
**E-mail**

**Describe the disability (and provide documentation if necessary):**

**Describe the need for reasonable accommodation:**

**Can you perform the essential functions of the job?**

**How are the essential functions adversely impacted and why?**

**Provide your recommendations for reasonable accommodation(s):**

**Signature of Employee/Applicant**  
**Date**

**Supervisor Recommendation:**

Send completed request form and related copies to the University Human Resources.

**Signature of Supervisor and Title**  
**Date**

**Signature of University ADA Coordinator**  
**Date**

This form is available in alternative formats upon request.

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employee with metal plate in his head who was routinely called “platehead” did not have a claim because the repeated comment was neither severe nor extreme.

**Appendix A  
Form Two**

University's Disability Verification Form – **Health Provider Statement**

The employee indicated below has declared a disability and requested a reasonable accommodation in the workplace under the provisions of the Americans With Disabilities Act (ADA). The attached form is to be completed by the health care provider and should be submitted to the Department of Human Resources with the employee's Reasonable Accommodation Request form. The information sought is job-related and consistent with business necessity for the following reasons:

to determine if the individual meets the ADA definition of "individual with a disability";  
to determine if the individual is a qualified person under the ADA, meaning he or she can perform the essential functions of the job currently held, (or held before the injury or illness), with or without reasonable accommodation, and without posing a "direct threat" to health and safety of self or others that cannot be reduced or eliminated by reasonable accommodation; and  
to identify an effective reasonable accommodation that would enable the individual to perform essential job functions in the current (or previous) job, or in a currently vacant job for which the person is qualified (with or without accommodation).

The responsibility of making employment decisions or deciding whether or not it is possible to make a reasonable accommodation for a person with a disability lies with officials of the University, not the health care provider.

*MEDICAL AUTHORIZATION*

(To be completed by the employee)

I, \_\_\_\_\_, do hereby authorize my health care provider to furnish University, all medical records, reports, medical charts, laboratory records and reports, x-rays and x-ray readings and reports, and any and all records pertaining to my medical case, history, condition, treatment, diagnosis or expenses, including my psychological status to the extent that any such information has a bearing on my ability to perform the responsibilities and expectations of the essential functions of my position as a \_\_\_\_\_(title) at University.

I also authorize University, any of its employees, representatives, and agents, to release information to my health care provider, including records and statements, regarding related background information giving rise to the request for reasonable accommodation and/or medical leave related to this medical authorization. A facsimile or photocopy of this form will have the same force and effect as the original signed copy.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

(This Section to be completed by the Health Care Provider)

1) Employee Name \_\_\_\_\_ 2) Date \_\_\_\_\_

3) Job Title \_\_\_\_\_ 4) Department \_\_\_\_\_

5) Please describe the employee's current health condition/disability:

6) Date condition/disability commenced \_\_\_\_\_

7) Probable duration of condition/disability \_\_\_\_\_

8) Does the employee's medical condition result in a physical or mental impairment that substantially limits one or more "major life activities"? Yes \_\_\_\_\_ No \_\_\_\_\_

If "yes", please describe the functional limitations; indicating which "major life activity" is affected:

9) Attached is a job description or information about the essential functions of the employee's position. Please circle any items listed on the job description that the employee may not be able to perform based on the employee's medical history and physical exam. Please indicate your opinion by selecting one of the following options:

\_\_\_\_\_ Should be able to perform the essential job functions without accommodation; or

\_\_\_\_\_ May not be able to perform the essential job functions circled on the attached job description and a reasonable accommodation is not feasible; or

\_\_\_\_\_ May not be able to perform the essential job functions circled on the attached job description; however, the following reasonable accommodation(s) should be considered to help the individual perform the essential functions (please list your recommendation for reasonable accommodation):

10) (Optional) If necessary for the protection of the health and safety of this employee or others, please indicate special instructions for first-aid providers or supervisors:

\_\_\_\_\_  
(Signature of Health Care Provider)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Print Name of Health Care Provider)

\_\_\_\_\_  
(Type of Practice)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(Telephone Number)

*Used with permission of Western Kentucky University*

## Appendix B

### Professional Employment UNIVERSITY OF MAINE

UNIVERSITY OF MAINE

### JOB DESCRIPTION FORMAT

Title: \_\_\_\_\_ Date \_\_\_\_\_  
Dept: \_\_\_\_\_ Reports To: \_\_\_\_\_

**PURPOSE:** Summarize the general purpose or goal of this position. This statement should give a brief but concise overview of the basic function of the position.

**DUTIES/RESPONSIBILITIES:** The description of duties and responsibilities should be concise but clearly outline the basic components of the activity to be performed. An effective job description conveys the scope of the assigned responsibilities as well as the level of assigned authority, responsibility and autonomy.

Each task description should address the following:

- Process -What **methods, procedures, tools** are used?
- Quantity -How **often** is the task performed? Daily? Weekly? As needed? (If infrequent, state why the responsibility is critical to the position.)
- Quality -What is the expected **outcome**? - Describe what is acceptable completion of the task.

One aspect of the Americans with Disabilities Act is to distinguish the essential functions of a position. Essential functions of the job are the fundamental duties that the employee **must** be able to perform with or without reasonable accommodation. A job function may be considered essential for reasons such as:

- The position exists to perform that function,
- There are a limited number of employees available among whom the job function can be distributed,
- The function is highly specialized, and the employee is hired for the expertise to perform the particular function, or
- Other employees in the same job are required to perform the function.

In addition to these general criteria, any task that is performed at least 10% of an employee's time would likely be considered essential.

If the essential functions require that an employee have particular physical abilities or communication abilities, these should be noted. For example, a job that requires frequent contact with other people requires communication verbally, in writing, or through other means. If an essential function of a position is to perform duties at various locations, an appropriate qualification is "frequent travel, normally requiring a driver's license." Statements describing the essential functions should begin with descriptive action verbs ("trains," "retrieves," "summarizes"). Avoid using the phrase "able to" or "ability to." This can confuse functions with required abilities.

Most positions include responsibilities which do not meet the criteria of an essential job function. Please designate with an asterisk (\*) only the functions which are considered essential.

Many job descriptions contain a statement that duties other than those enumerated may be assigned. Any such statement must make it clear that only duties reasonably related to the position will be assigned. For example, "other duties as assigned" is too broad, but "other reasonably related duties" or "other administrative duties," would be appropriate. The UMPSA agreement provides for an annual review with the employee of his/her job description. The unit member is entitled to have input in revising his/her job description and may attach a written addendum to the job description.

**QUALIFICATIONS:** What is the minimum educational level necessary to perform the essential functions of the job? Is a higher degree level preferred? Is a particular discipline or specific course work sought? Can experience be substituted for education? What kind of related job knowledge or experience is required to enable an employee to do this job? Descriptive statements that relate to the responsibilities may include 'familiarity with . . .,' 'basic working knowledge of . . .,' 'demonstrated success with . . .,' 'progressively more responsible work in the area of . . .,' 'significant experience with . . .'. Specifying a number of years of experience is not the most valid measure of an individual's level of qualifications. Must the employee hold a particular license or maintain certification? Is the employee expected to achieve the license/certificate within a stated period from the date of hire? Is travel an essential job function (as defined in the Duties/Responsibilities section)? If so, the 'ability to travel, normally requiring a driver's license,' would be a required qualification. What other special abilities are required to perform the essential functions? For instance 'ability to frequently lift 30 pounds' or 'ability to collect research samples in appropriate field conditions under sometimes adverse weather conditions.' Remember that the qualifications must directly relate to the position's duties and responsibilities.

**SUPERVISORY RESPONSIBILITIES:** Describe how many other employees (professional, classified, student) to be supervised. For what supervisory activities does the employee have informal, formal, subject to review, or final authority? For instance, the employee may schedule and oversee day-to-day work activities but not have responsibility for hiring and evaluating other employees.

**POSITION TYPE:** Is the position an ongoing base budgeted position, is its renewal contingent on the receipt of funding from outside the University, or is it for a fixed-length term?

**WORK ENVIRONMENT/DYNAMICS:** Please describe the environment and/or setting in which this job is performed. Is the employee required to be on call? If so, to what extent and for what kind of occurrences would the employee be called? Are there

stressors inherent to this particular job? What is the level of predictability in this job? What impact does change have on the job duties? How changeable are the methods, technology, services or other elements that affect the employee's job? How is this position expected to react to and/or manage change? How predictable are changes to work assignments? Over what kind of time frame is change normally incorporated into the job's duties? Describe any unpleasant factors of the work environment such as heat, noise, odors, bodily fluids, exposure to hazardous substances, etc. and the frequency/degree to which the employee would be subject to these.

**WORK YEAR:** Describe the employee's work year (full-time, part-time, fiscal, student calendar year, other). If the employee works less than twelve months, when does the work year begin and end?

**SCHEDULE FOR EVALUATION:** Evaluations for UMPSA unit employees should be conducted every six months during the probationary period and annually thereafter. Board of Trustee policy states that all employees shall be evaluated annually. The current UMPSA agreement requires that the annual evaluation be conducted within the thirty day period preceding the unit member's anniversary of employment. The department may also establish an alternate schedule for evaluations. Supervisors should take note that if the evaluation is not conducted within 30 days of when it should have been conducted, the unit member may request in writing that an evaluation be conducted. If the evaluation is then not conducted within three weeks of the written request, the evaluation shall be considered **SATISFACTORY** for that year.

You may want to have the unit member sign the job description, although this is not required. The signature might be accompanied by a statement such as:

My signature below indicates that I have reviewed this job description, have received a copy of it, and have had an opportunity to prepare an addendum.

\_\_\_\_\_  
Employee Signature      \_\_\_\_\_  
Date

**NOTE:** The UMPSA agreement provides that the unit member may be involved in revising his/her job description.

***PROFESSIONAL UNIT JOB DESCRIPTIONS SHOULD BE REVIEWED ANNUALLY.***

When a vacancy occurs . . .

Fax the job description and position vacancy announcements to the Office of Equal Opportunity who will coordinate a review with the Office of Human Resources. The position vacancy announcement and the Recruitment Strategy is subject to final approval from Equal Opportunity. **No** advertising should take place without this approval. More information at [www.ume.maine.edu/STEPS/](http://www.ume.maine.edu/STEPS/) or call 581-1226.

*Used with permission of the University of Maine*

**Appendix C**  
**Example 1**  
**Disability Discrimination/ Harassment Policy**

Part 4. Definitions

Subpart A.

Disability discrimination is prohibited by the state and federal law. Disability discrimination as defined by law is conduct that is directed at an individual because of his/her mental/physical disability or that of his/her spouse and that subjects the individual to different treatment by agents or employees without legitimate non-discriminatory reason so as to interfere with or limit the ability of the individual to participate in, or benefit from, the services, activities, or privileges provided by the system or colleges and universities or otherwise adversely affects the individual's employment or education.

Subpart B.

Disability harassment is a form of discrimination which is prohibited by state and federal law. Disability harassment is defined as verbal or physical conduct that is directed at an individual because of his/her mental/physical disability or that of his/her spouse and that is sufficiently severe, pervasive, or persistent so as to have the purpose or effect of creating a hostile work or educational environment. Disability harassment may occur in a variety of relationships, including faculty and student, supervisor and employee, student and student, staff and student, employee and employee, and other relationships with other persons having business at or visiting the educational environment. For more information, contact the Office of Affirmative Action.

*Used with permission of Minnesota State University*

## **Appendix C Example 2**

### **ANTI-HARASSMENT POLICY (including Sexual Harassment)**

Wake Forest University School of Medicine is committed to maintaining an educational and working environment free from discrimination. Discrimination or harassment of any employee or student based on sex, race, color, religion, national origin, sexual orientation, age or disability will not be tolerated. Individuals found to be in violation of this policy will be subject to disciplinary action which may include written warning, demotion, transfer, suspension, expulsion or dismissal.

Individuals who, in good faith, report harassment or present evidence in a harassment investigation are protected from retaliatory personnel or academic action. Acts of retaliation are a violation of this policy and are prohibited by law, even if a claim of discrimination later proves unfounded.

#### **DEFINITIONS**

##### *A. Sexual/Gender Harassment*

Sexual and gender harassment are forms of sex discrimination. They are illegal under state and federal law and a violation of School policy.

For purposes of this policy, sexual harassment is defined as unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature (whether between members of the same or opposite genders) when:

- submission to the conduct is made either directly or indirectly a term or condition of an individual's employment or academic success,
- submission to or rejection of the conduct by an individual is used as a basis for employment or academic decisions affecting the individual, or
- the conduct has the purpose or effect of interfering with an individual's work or academic performance or creating an intimidating, hostile or offensive work or academic environment.

Examples of acts which may constitute sexual harassment include: unwelcome sexual flirtations, advances, propositions, sexually explicit statements, questions or jokes, offensive e-mails, displays of sexually explicit printed or visual material or electronic pornography, physical contact or touching or other conduct of a sexual nature that is unwelcome and makes a reasonable person feel uncomfortable.

In addition, harassment based on an individual's gender which would make a reasonable person experiencing such harassment uncomfortable in the work or academic environment or which interferes with an individual's work or academic performance also constitutes unlawful discrimination. Examples of acts which may constitute gender harassment include: verbal, graphic or physical conduct which threatens, ridicules or demeans an individual because of gender.

##### *B. Other Harassment in the Work or Academic Environment*

Harassment on the basis of race, color, religion or national origin is a form of unlawful discrimination and is prohibited under Title VII of the Civil Rights Act of 1964. When harassment based on race, color, religion, or national origin has the

“purpose or effect of substantially interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment”, it rises to the level of unlawful discrimination. In addition, these principles apply to harassment on the basis of age and disability under the Age Discrimination in Employment Act and the Americans with Disabilities Act, respectively. Finally, the University, through its policy entitled “Supplemental Anti-Discrimination Statement” applies these principles to harassment on the basis of sexual orientation.

Examples of conduct which may rise to the level of discrimination include: Jokes which refer to race, religion, national origin or disability or which portray age in a negative light; the posting or distribution of cartoons, drawings, or any other material which adversely reflects on a person’s race, religion, national origin, disability, or age; the use of “slurs” or other offensive language; practical jokes, horseplay, or teasing which tends to demean or ridicule a person’s race, religion, national origin or disability or which reflects negatively on a person’s age.

#### COMPLAINT PROCEDURE

Any staff member who believes that he or she has been harassed or has observed or been subject to a violation of this policy should promptly bring the matter to the attention of a supervisor, the Assistant Dean of Human Resources or the Director of Employee Relations. Faculty members should report harassment to their Chairs, the Associate Dean for Faculty Services or the Dean of the School; students should report harassment to the Associate Dean for Student Affairs, or the Dean of the School. Any member of management who receives a complaint or observes conduct which may constitute a violation of this harassment policy is obligated to notify the Assistant Dean of Human Resources or the Director of Employee Relations or, if students are involved, their faculty advisor, the Associate Dean for Student Affairs or the Dean of the School.

Complaints of harassment will be treated seriously and will be promptly investigated with reasonable steps being taken to protect the confidentiality of all parties. Information regarding the complaint procedure and supervisory responsibilities may be obtained from the office of the Director of Employee Relations, who is available to provide guidance and assistance in the proper handling of any allegation. In determining whether conduct constitutes a violation of this harassment policy, those entrusted with carrying out this policy will look at the record as a whole and at the totality of the circumstances, such as the nature of the offensive conduct and the context in which the alleged incidents occurred. The determination of the suitability of a particular action will be made from the facts, on a case-by-case basis. Following an objective evaluation of the information gathered, the parties will be notified of the outcome of the investigation. Employees and students utilizing this process will be protected from retaliation.

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This policy is intended as a guideline to assist in the consistent application of School policies and programs. The policy does not create an express or implied contract and the School may modify this policy as it deems necessary.

*Used with permission of Wake Forest University School of Medicine*

## **Appendix D Anti-Retaliation Provisions**

### Example One:

This policy prohibits retaliation for reporting concerns regarding discrimination, cooperating with any investigation of discrimination, or participating in the complaint process. Such retaliation against any person is a serious violation of this policy and may result in disciplinary action.

### Example Two:

The University seeks to create an environment where its students and employees are free, without fear of negative consequence, to use these procedures to determine if there has been a violation of their rights. Any act of retaliation will result in appropriate disciplinary action. Similarly, persons who use this process to bring frivolous or otherwise bad faith allegations against an employee shall be subject to disciplinary action.