

Health Care Entities and the ADA

Complex Issues in the Reasonable Accommodation of Employees with Disabilities

Part 1

June 18, 2014

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ADA Employment Basics

Employer shall not discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, hiring, advancement, discharge, compensation, job training, and other terms, conditions, and privileges of employment

(42 U.S.C. §12112)

Employer

- A person “engaged in an industry affecting commerce” who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, **and** the agent of such a person
- Like Title VII, no individual liability for employees who are agents of company, but agent may be directly liable if it satisfies “employer” criteria of 15 or more employees in 20 or more calendar weeks
- May even include agent of a future employer – see *EEOC v. Grane Health Care Co.*, Civ. Action No. 3:10-250, 2014 U.S. Dist. LEXIS 28477 (W.D. Pa., Mar. 6, 2014) (owner of SNF/rehab center, which hired employees for center pursuant to management consulting agreement before the latter began operations, was agent of center and liable for ADA violations involving pre-hire medical exams; both companies had over 15 employees)

ADA Employment Basics

Who the ADA Protects

- Qualified individual with a disability,
 - Who can perform the essential functions of the job (not marginal ones),
 - with or without reasonable accommodation;
- Those with a disability: a physical or mental impairment that substantially limits a major life activity;
- Those who have a record of a disability;, and
- Those who are “regarded as” having a disability (post-ADAAA, whether or not it limits major life activity)

42 U.S.C. §12102(1), §12111(8))

- Note: no “association” or “reverse discrimination” claims (*Ingram v. Henry Ford Health Sys.*, No. 13-11567, 2014 U.S. Dist. LEXIS 54857 (E.D. Mich. April 21, 2014))

ADA Employment Basics

Physical or Mental Impairment

- Physical: any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems
- Not obesity, unless substantially limits major life activities – fact-specific inquiry
 - Powell v. Gentiva Health Servs. Inc.*, No. 13-0007, 2014 U.S. Dist. LEXIS 17709 (S.D. Ala. Feb. 12, 2014)
- Mental: any mental or psychological disorder
(29 C.F.R. §1630.2(n))

ADA Employment Basics

Major Life Activity

- Caring for oneself
- Performing manual tasks
- Walking
- Seeing
- Hearing
- Speaking
- Breathing
- Eating
- Learning
- Sexual Relations
- Standing
- Lifting
- Sitting
- Bending
- Reaching
- Sleeping
- Reading
- Concentrating
- Thinking
- Communicating
- Interacting with others
- Working
- Operation of major bodily functions

ADA Employment Basics

Reasonable Accommodations

Reasonable Accommodations: An employer cannot refuse to make a reasonable accommodation to the known physical or mental impairment of an applicant or employee with a disability unless the accommodation would pose an undue hardship

1. A "reasonable accommodation" is any change in the way things are customarily done that would allow an individual with a disability to enjoy equal employment opportunities
2. Balance: undue hardship

May ask for supporting medical information

(42 U.S.C. §12111(9) & (10); 29 C.F.R. §§1630(o)(1) & 1630.9)

ADA Employment Basics

Reasonable Accommodations

Examples of possible reasonable accommodations:

- Physically accessible facilities
- Job restructuring
- Altering when and how an essential function is performed
- Modifying examinations, training materials or policies
- Modifying work schedules
- Reassignment to vacant position
- Equipment or devices
- Permitting paid or unpaid leave for treatment
- Reserved parking for mobility impaired
- Readers or interpreters

(29 C.F.R. §1630.2(o)(2))

ADA Employment Basics

Undue Hardship

- An accommodation that requires significant difficulty or expense, or is unduly disruptive to the nature and operation of the business
- Factors considered include the cost of the accommodation, the employers' size and financial resources , and the nature and structure of its operation (must consider offset through funding from outside sources and tax credits or deductions)
- Also the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to do business
- NOT effect on feelings of other employees

(29 C.F.R. §§1630.2(p), 1630.15(d))

ADA Employment Basics

Interactive Process

- After ADAAA, assume person likely qualifies as disabled!
- Are present mitigating measures (e.g. medication, prosthesis) sufficient?
- What alternatives are available? No obligation to accept employee's preference if other approaches also accommodate and are reasonable
- What are costs?
- Free Resource:
 - Job Accommodation Network (JAN)
 - (800) 526 7234 (v) (877) 781-9403 (TTY)
 - <http://www.jan.wvu.edu>
 - <http://askjan.org/media/occind/htm>
 - (accommodations ideas by industry)

ADA Employment Basics

Managing the Interactive Process

- Fully document interactive process
- Try to secure employee's signature on document memorializing any agreements reached in the interactive process
- If employee refuses to sign, employer's participants in process should:
 - Sign
 - Note, if true, that employee did not dispute content of memo, but simply refused to sign it
- Contemporaneously document all employment actions involving an employee who is an individual with a disability or has a record of a disability

ADA Employment Basics

Addressing Proposed Accommodations by an Applicant or Employee

- Do not immediately reject accommodation request, no matter how unreasonable it may appear
- Where appropriate, ask for details on how individual's proposal would work
- Try to respond with a reasonable alternative
- Try to get "buy-in" from individual

ADA Employment Basics

Direct Threat Defense

- Under the ADA an employer is allowed to require, as a qualification standard, that an employee not pose a significant risk of substantial harm to the health or safety of him/herself or others
- The determination of whether an individual poses a direct threat must be done on a case-by-case basis and cannot be solely because of a diagnosis or because of a medication that may diminish coordination or concentration for some people

(42 U.S.C. §12113(b); 29 C.F.R. §§1630.2(r) & 1630.15(b)(2))

ADA Employment Basics

Direct Threat Defense

- Factors to consider when determining if an employee poses a direct threat:
- The duration of the risk;
- The nature and severity of the potential harm;
- The likelihood that the potential harm will occur; and
- The imminence of the potential harm
- Even if the person is found to pose a significant risk of substantial harm, employer must analyze whether a reasonable accommodation would eliminate the direct threat or reduce it to an acceptable level

Scenario No. 1 – Facts

- Individual with intellectual disability (low IQ) applies for position in nursing home as a Certified Nursing Assistant
- Individual does not ask for specific accommodations, but her lower functioning is obvious to interviewer
- Interviewer is concerned that applicant may not be able to process instructions or communicate properly

Scenario No. 1 – Issues

- What steps can be taken to determine if applicant is qualified?
- Can employer ask if applicant needs accommodations?
- What types of accommodations are likely to be considered?

Scenario No. 1 – Resolution

- As with any applicant, may ask questions about how applicant would respond to particular situations or instructions – but take care to treat same as others
- Employer can ask if accommodation needed - normally employee must ask, but exception when the disability is “obvious” (e.g. displays low functioning, has Down syndrome)
 - Other exceptions: when employee does not understand that she is disabled, employee cannot articulate the need for an accommodation, or employer has enough information to determine that the problem is caused by a disability
- However, this runs the risk of claims of discrimination based on an actual disability or “regarded as disabled” if the applicant is not hired
- Gray area: employee does not request accommodation but asks for “help” or refers to illness or impairment? Do not ignore!
 - *Walters v. Mayo Clinic Health Sys. – Eau Claire Hospital, No. 12-cv-804, 2014 U.S. Dist. LEXIS 16906 (W.D. Wis. 2014)*

Scenario No. 1 – Resolution (*cont'd*)

- Possible accommodations: job coach, extra/repeated instructions, list of routine duties to check off, extra training time, other possibilities
- Trial period
- Explore possibility of third party assistance, e.g. rehabilitation/vocational services or similar non-profit that may be able to provide a job coach and training – particularly if limited staffing suggests some accommodations otherwise may present undue burden

Scenario No. 2 – Facts

- Physician complains she is allergic to co-worker's perfume and to other scents in a multi-specialty medical practice
- Physician requests employer to order coworkers not to wear perfume to work

Scenario No. 2 – Issues

- Is sensitivity to perfumes and scents a disability?
- Can medical evidence be required?
- What types of accommodations are reasonable?
- What about patients, visitors?
- Is physician sensitive to substances used to treat patients or for necessary cleaning and disinfecting?

Scenario No. 2 – Resolution

- Likely a disability if sensitivity is greater than that of average person
- Can request medical documentation of nature, severity, duration and extent
- Reasonable to encourage employees to refrain from wearing fragrances and other scented personal products, especially particularly identified ones; provide fan/exhaust in work area; modify work station location; allow leave if reaction occurs
- Request for totally fragrance-free workplace may not be reasonable
- Query how to handle exposure to scents from items used to treat patients and chemicals used to disinfect
- Employer will not be able to control patients and their companions or visitors

Scenario No. 3 – Facts

- Experienced registered nurse develops MS and as result suffers mobility impairments and lifting restrictions
- Her job includes walking to patient rooms and other locations and occasionally lifting or assisting in lifting patients
- She seeks accommodation of her limitations
- She begins to take frequent FMLA leaves, one of 3 months' duration

Scenario No. 3 – Issues

- What are essential elements of her position?
- Can mobility impairment be accommodated?
- Can lifting restriction be accommodated?
- What accommodations does she propose?
- Can she be terminated if her leave is more than 3 months? More than 6 months?

Scenario No. 3 – Resolutions

- Mobility may be accommodated by use of an electric scooter, wheelchair, Segway, etc. with a basket to carry items
- Lifting may or may not be essential, e.g. if nursing assistants and orderlies are available, it is done in pairs, and RN's rarely do it
- Relatively inexpensive portable mechanical patient lifting devices are available and might suffice
- Possible alternative of reassignment to position that requires little travel – e.g., resource nurse
- If MS worsens, continuing duty to explore if any reasonable accommodations

Leave as Reasonable Accommodation

- Leave of absence is generally a reasonable accommodation, but employer not required to wait indefinitely for employee to return
 - *Bell v. Shinseki*, No. 1:12cv57, 2013 U.S. Dist. LEXIS 89896 (M.D. N.C. June 20, 2013) (court upheld decision to discharge employee after 4 months' absence)

Avoid predetermined leave periods (e.g., maximum 90-day leave permitted) or bright-line policies (e.g., requiring “full clearance” to return to work)

Scenario No. 4 – Facts

- Stock clerk in post-acute care facility has back and neck conditions that limit his ability to reach and lift
- As part of streamlining/cost reduction efforts, facility adds duty of delivering linens, which typically requires frequent bending over a cart with high sides
- Clerk asks to be relieved of this duty because he says it is aggravating his condition
- Facility denies, stating it is essential element

Scenario No. 4 – Issues

- Appropriate to request medical documentation?
- Is linen delivery truly an essential element?
- Is post-acute care center required to consider other alternatives as part of interactive process?

Scenario No. 4 – Resolution

- Unless the limitation is obvious, the center can request medical documentation of both a disability and the limitations the disability may cause
- Since linen delivery is newly assigned, it is worth considering if it is possible to trade this task with another task someone else does – but not required if it is an essential function
- Once it learns of problem, center needs to consider alternatives, such as a different type of cart or if no reasonable accommodation possible, job reassignment to a vacant position
- Different cart seems easy solution

Scenario 4 – Resolution

- Does employer waive right to insist on performance of all essential job functions if it temporarily relieves employee of performance of one such duty?
 - No – employer may temporarily relieve employee of an essential job function
 - *Hancock v. Washington Hosp. Ctr.*, No. 10-cv-487, 2014 U.S. Dist. LEXIS 1258 (D.D.C. Jan. 7, 2014) (medical assistant with polyradiculopathy and polyneuropathy temporarily relieved of triage duties)

Scenario No. 5 – Facts

- Hospital radiography tech suffers from epilepsy. Intermittent seizures are lengthy and cause her to lose orientation and muscle control and fall. Some result in injuries to the tech
- Placed on leave for treatment but after return unpredictable seizures continue
- Employer makes accommodations to try to eliminate environmental triggers, including reducing brightness of lights, eliminating mold, rerouting strongly perfumed patients to other technicians
- Seizures continue, more frequently, including twice in presence of patients, one of whom complains expressing concern for patient safety
- Tech argues that only accommodation needed is intermittent leave to rest and recuperate following a seizure

Scenario No. 5 – Issues

- Is tech disabled?
- Is tech a qualified person with a disability?
- Has employer fulfilled duty to try to accommodate?
- Does tech present a direct threat?

Scenario No. 5 – Resolution

- Clearly disabled - seizures, while occurring, incapacitate her and prevent her from performing her job duties
- Not “qualified” - even with the attempted accommodations, tech suffers from numerous seizures and during seizures cannot fulfill essential function of job, including insuring patient safety during seizures.
- Significant accommodation efforts were made. Leave would not eliminate seizures or allow her to perform essential job duties
- Likely also a direct threat to her own safety as well as that of patients – as shown by injuries suffered

See Olsen v. Capitol Region Medical Center, 713 F.3d 1149 (8th Cir. 2013)

Scenario No. 6 - Facts

- Physician's Assistant (PA) has significant hearing loss. While she is able to speech read, she requires accommodation with respect to:
 - Monitoring vital signs
 - One-on-one Communications
 - Group Communication
 - Telephone Communication

Scenario No. 6 – Issues

- Stethoscopes/Monitoring Vital Signs
- Patient Rounds
- Sit-down conferences
- Using the telephone/compensating for inability to use it.
- Paging
- Interpreting Services

Scenario No. 6 – Resolution

- Ongoing interactive process; courts usually defer to health care provider on issue of what job functions are essential for patient safety
 - *See, Olivian v. Henry Ford Health Sys., Inc.*, No. 11-cv-13950 (E.D. Mich., Mar. 29, 2013)
- Some requests may be unduly burdensome, but see if alternatives
- Complaints of other employees do not make accommodation unduly burdensome – must have effect on safe provision of health care services
- Same principles apply to patients and families
- Close review of facts clearly required

See suggestions and discussion by Association of Medical Professionals with Hearing Losses at www.amphl.org/medicine.php

Scenario No. 7 – Facts

- An RN at a 24/7 Urgent Visit Clinic states that he has depression and anxiety and provides supporting medical documentation requesting he be exempt from shift rotation in order to provide him a regular sleep schedule
- He also asks for time off for counseling, breaks to use stress management techniques, the provision of to-do lists and written instructions, and provision of sensitivity training to co-workers

Scenario No. 7 – Issues

- Is it reasonable, to excuse nurse from normal shift rotation? Does the effect/reaction of other nurses matter?
- Is it reasonable to grant time off, require his supervisor to prepare written instructions and to-do lists, and provide sensitivity training, even if this imposes a burden on other employees?

Scenario No. 7 – Resolution

- Granting a fixed schedule could be a reasonable accommodation; however, if this violates a seniority system, it may not be, unless there have been exceptions in the past
- The burden of the other requested accommodations probably is not undue; but situation may be different if co-workers are not available to cover his absences or if nurses work, *e.g.*, in critical care

Scenario No. 8 – Facts

- Resident in family practice did well on medical knowledge exam but with patients shows weak communication and organization skills, skips standard procedures and performs procedures incorrectly, has difficulty communicating with others and makes errors in orders
- Director suspects cognitive disorder and refers resident for psychological evaluation that finds he has Asperger's. Before learning of diagnosis, director informs resident of termination for poor performance
- Attorney proposes accommodation through “knowledge and understanding” by having other medical professionals accompany resident on rounds and making other medical professionals aware of his conditions and symptoms. Resident insists he can improve patient communication skills on his own
- Parties meet to discuss proposed accommodation; director informs resident that hospital does not have sufficient resources to comply with the proposal, but offers help in finding an alternative residence in pathology, which requires little or no patient interaction

Scenario No. 8 – Issues

- Was resident otherwise qualified?
- Could his disability be accommodated?
- Did he propose a reasonable accommodation?
- Did the employer properly engage in the interactive process

Scenario No. 8 – Resolution

- Ability to communicate with professional colleagues and patients in ways that ensure patient safety is an essential function
- Proposed accommodation addressed some issues but did not address how it would improve his communication and interaction with patients, a key obstacle that prevented him from performing an necessary function
- Hospital not required to propose a counter-accommodation, but doing so is evidence of good faith and prevents employee from demanding a different one
- Meeting with resident and offering assistance in finding an alternative residency shows good faith

See Jakubowski v. Christ Hospital, Inc., 627 F. 3d 195 (6th Cir. 2010)

General EEOC Guidance

Questions and Answers about
Health Care Workers and
the Americans with Disabilities Act

http://www.eeoc.gov/facts/health_care_workers.html

Health Employment And Labor Blog



www.healthemploymentandlabor.com

Do You Have a Question?



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