



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

EXCEL 2014

The Americans with Disabilities Act and Reasonable Accommodation

Presented by

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Today's Goals

- ❖ Provide an overview of the EEOC's laws which prohibit unlawful employment discrimination
- ❖ Discuss the Americans with Disabilities Act (ADA and ADA AA)
- ❖ Discuss selected employment actions under the ADA/ADA AA, including reasonable accommodation, using hypothetical situations

Laws Enforced by the EEOC



- **Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on sex, race, religion, national origin, and color**
- **The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination against persons 40+ and older**
- **The Equal Pay Act of 1963 (EPA) prohibits sex-based wage discrimination between women and men in the same establishment performing equal work under similar working conditions**
- **The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination against a qualified individual with a disability**
- **Genetic Information Non-Discrimination Act of 2008 (GINA) prohibits genetic information discrimination**
- **All laws prohibit retaliation.**

Covered Employment Actions

- Benefits
- Discharge
- Discipline
- Harassment
- Hiring
- Lay-off
- Promotion
- Reasonable/Religious Accommodation
- Recruitment
- References
- Training
- Wages
- Work Assignments





FY 2013 Enforcement & Litigation Statistics

- EEOC received 93,727 private sector charges in FY 2013 - 5,685 less than the number of charges received in FY 2012.
- EEOC obtained \$372.1 million in relief through enforcement and \$39 million in litigation (\$411.1).
- \$109 million in monetary benefits was obtained in enforcement for ADA charges and \$14 million in litigation.
- Nationally, **41.1%** of charges alleged retaliation, **35.3%** race, **29.5%** sex, **27.7%** disability, and 22.8% age.

The Americans with Disabilities Act (ADA)



- Prohibits discrimination on the basis of disability, including the requirement to provide a reasonable accommodation to persons with a physical or mental impairment
- Covers individuals who have a physical or mental impairment which substantially limits one or more major life activities and can perform the essential functions of the job with or without a reasonable accommodation
- Covers individuals with a record of a disability
- Covers individuals regarded as having a disability



The ADA also

- Prohibits employers, employment agencies, and labor unions from discriminating against qualified individuals in the application process, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment.
- Requires an employer to make an accommodation to the known disability of a qualified applicant or employee if it would not cause an “undue hardship” on the operation of the employer’s business.



The Americans with Disabilities Act Amendments Act (ADA AA)

**The ADA AA was signed into law by Pres. Bush
September 25, 2008 and became effective
January 1, 2009**

- Does not change the definition of disability**
- Instructs EEOC to construe the term “disability” broadly**
- Changes the meaning of “major life activities,” “substantially limits,” and “regarded as”**
- Includes two non-exhaustive lists:**
 - Major life activities**
 - Major bodily functions**

Episodic Conditions, Multiple Major Life Activities, and Mitigating Measures – ADA v ADA AA



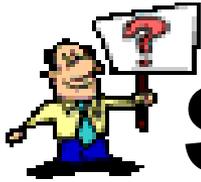
- **Some courts had ruled that an individual must be limited in more than one major life activity in order to have a disability under the ADA.**
- **Under the ADA AA, an impairment that substantially limits a major life activity does not need to limit other major life activities to be considered a disability.**
- **Some courts had ruled that episodic or intermittent impairments, such as epilepsy or post-traumatic stress disorder, are not covered under the ADA.**
- **Under the ADA AA, impairments that are episodic or in remission are disabilities if the impairment would substantially limit a major life activity when the condition is considered in its active state.**
- **Previously, mitigating measures (e.g., medication, assistive devices) used to reduce or eliminate the effects of an impairment were considered in determining whether an impairment substantially limits a major life activity.**
- **Under ADA AA, the determination of whether an impairment substantially limits a major life activity should be made without regard to ameliorative effects of mitigating measures.**



Major life activity means...

- Under the ADA and according to the Supreme Court
- Must be an activity that is “of central importance to most people’s daily lives.” *Toyota v Williams*

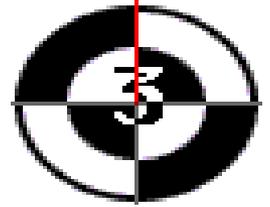
- Under the ADA AA
- The term major life activities is expanded to include not only types of major life activities but also major bodily functions:
- Major life activities include seeing, hearing, eating, sleeping, walking, breathing, reading, thinking, communicating, learning, concentrating, studying, lifting, bending, speaking, working, caring for oneself, and performing manual tasks.
- Major bodily functions include the immune, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, reproductive, and the endocrine systems.



Substantially limits means...

- Under the ADA, the Supreme Court ruled that an impairment “substantially limits” a “major life activity” if it “prevents or severely restricts the individual” from performing the activity. *Toyota Motor Mfg. of Kentucky v Williams*
- Under the ADA AA – “substantially limits” is to be construed broadly. The impairment need not rise to the level of severely or significantly restricting the ability to perform a major life activity.
- Impairments such as **diabetes, epilepsy, multiple sclerosis, deafness, paraplegia, blindness, bipolar disorder, Parkinson’s Disease, and monocular vision** will substantially limit a major life activity.

ADA Elements of Proof



1. CP has a disability;
2. CP is a qualified individual;
3. CP was unlawfully subjected to discrimination because of his or her disability.



Sam has seizures

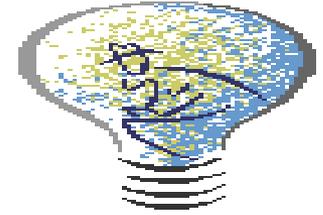
- Sam, a certified butcher, has been a poultry line cutter/slicer for ME Foods for 2 years. He uses a knife to cut/slice turkey parts into bites. Sam began having seizures when he was 8 and has been seizure-free for over 4 years. Sam had a seizure April 3 at work; he became dazed and disoriented for about 2 minutes. When the supervisor saw Sam walk into a wall, he took him to the nurse. Sam told the nurse his doctor had given him new medication which caused the seizure but the seizures would stop after he got used to the medicine. Sam had another seizure the next day and dropped his knife near his foot. Sam's supervisor tells Sam he is being put on leave until he can adjust to his medicine.
- Sam was fired the following Thursday.
- Sam files a charge with EEOC alleging he was fired and denied a reasonable accommodation because of his disability.



Is the person a qualified individual with a disability?

- Does the person have the skills, education, employment experience or licenses required for the job?
- Can the person perform the essential functions of the job with or without a reasonable accommodation?
- Person must be a qualified individual able to perform the essential functions of the job with or without a reasonable accommodation

Sam v ME Foods



- Does Sam have a disability?
- Yes: Sam has seizures which may be an impairment of a major bodily function, the neurological system or brain.
- Is Sam a qualified individual with a disability? Can Sam perform the essential functions of his job with or without a reasonable accommodation?
- If the employer contends Sam is a direct threat to himself or others, Sam may not be a qualified individual with a disability.



Direct Threat Standard

- Significant risk of substantial harm
- Specific risk identified
- Current or speculated risk
- Risk based on objective medical or factual evidence regarding Sam
- If significant risk of substantial harm, is there an accommodation that would eliminate or reduce the risk below the direct threat level



Is there a reasonable accommodation ?

- An accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities (in the application process, to perform essential job functions, to enjoy the same benefits and privileges of employment as other employees).
- A means of eliminating/alleviating barriers to equal employment opportunities.
- The process of determining the appropriate reasonable accommodation is an informal, interactive, problem solving technique involving both the employer and the qualified individual with a disability.

Examples of reasonable accommodation



- Job restructuring
- Modified work schedule
- Flexible leave policy
- Reassignment to a vacant position
- Acquiring or modifying equipment or devices
- Modifying exams, training materials, etc.
- Qualified readers or interpreters
- Making facilities accessible and usable

Failure to Provide a Reasonable Accommodation Elements



- 1) Complaining Party has a disability (a physical or mental impairment that substantially limits one or more major life activities) or has a record of a disability;
- (2) CP notified the Employer of his/her disability and the need for an accommodation;
- (3) There is an accommodation that would allow CP to participate in the application process; to perform the essential functions of the job; or to enjoy equal benefits and privileges of employment;
- (4) The Employer failed to provide an effective accommodation;
- (5) The Employer's rebuttal: The requested accommodation (as well as alternative effective accommodations) would pose an undue hardship.



What is undue hardship?

- ❖ If an accommodation would be too difficult or too expensive to provide considering the employer's size, financial resources, and the needs of the business, it may be an undue hardship for the employer.
- ❖ An employer does not have to provide an accommodation if doing so would cause undue hardship to the employer.
- ❖ An employer may not refuse to provide an accommodation just because it involves some cost.
- ❖ An employer does not have to provide the accommodation the employee or applicant wants as long as it allows the person to participate in the application process; to perform the essential functions of the job; or to enjoy equal benefits and privileges of employment.

Is there a reasonable accommodation for Sam?



- What are the essential functions of Sam's job?
- Is there an accommodation that will allow Sam to perform the essential functions of his job and eliminate the risk of harm to himself or others?

How do you respond to Michael?



- Michael, a data clerk, has a permanent leg injury that substantially limits his ability to stand and walk. Michael performs most of his work on a computer. He also opens and sorts bills, enters data in the a/c data base, and prepares accounting reports.
- Occasionally, data clerks deliver the mail when all mail clerks are absent. Michael's supervisor tells the data clerks that they will have to deliver the mail the week of August 5 because all mail clerks will either be on vacation or in training. Each data clerk will be assigned a day. The employer occupies a 10-story building and the mail has to be delivered to each department which usually takes all day. Michael asks that he not be required to deliver the mail.



Michael asks for an accommodation

- Should you grant Michael's request?
- Is Michael a qualified individual with a disability?
- Is delivering the mail an essential function of Michael's job?
- Delivering the mail is not an essential function of Michael's job because it is an occasional duty. But Michael can perform the essential functions of his data entry job with the accommodation of removing the mail delivery function.



Making Production

- THE Company requires all packers to pack 30 pairs of gloves per hour and take the container to the dock. Joie has not been able to make production for the month. You meet with her to counsel her about not meeting production and tell her if her performance does not improve, she will receive additional discipline which could lead to her discharge. Joie then tells you she has deteriorating cartilage in her left wrist which makes it painful for her to pack 30 pairs of gloves per hour and she is trying as hard as she can to make production. Joie says if she does not have to take the container to the dock, she can make production. What do you do?
- An employee with a disability must meet the same production standards as employees who do not have a disability. However, Joie may need a reasonable accommodation to perform the essential functions of the job.

Donna does not ask for an accommodation



- You know that Donna has macular degeneration and her sight is failing. Although you have told Donna about numerous errors in her work, she does not acknowledge her vision problem. Donna has been a model employee for 20 years and is known for her quality work but you are not sure about what to do.
- Do you ask Donna if she needs an accommodation?
- You may ask Donna if there is anything you can do to help her. You know about her vision degeneration and you may ask Donna if she needs an accommodation such as a large print feature or other magnifying equipment. But you cannot force Donna to accept the accommodation. If her work performance continues to suffer, you may address the performance problem as with any other employee.



I want one, too.

- Suppose Donna tells you that she is relieved you asked her about an accommodation for her vision problem. She admits she did not know how to discuss it and did not want to lose her job. You, Donna and the human resources director discuss what can be done to help Donna perform the essential functions of her job. Because Donna is responsible for inputting codes in the database, it is agreed that the employer will upgrade her computer with a special magnifying screen.
- A co-worker questions you about Donna getting a new computer and why she cannot get a new computer.
- You may not tell a co-worker that Donna has a new computer because it is a reasonable accommodation.



Intermittent Leave as an accommodation

An events planner has exhausted her FMLA leave due to her disability and requests additional intermittent leave as a reasonable accommodation. The planner can never predict when she will need the leave or how much leave is needed. She has taken 2 to 3 days in previous episodes. You agree to the request but during the next two months, the planner takes 14 days of leave. You request and get a doctor's statement that states the planner will continue to need the leave for at least the next 6 months. Because of the planner's job duties and unpredictability of the planner's need for leave, it has been difficult finding a replacement for her on short notice. What should you do?

Is this an undue hardship for the employer?

The on-going, frequent, and unpredictable nature of the absences may make additional leave an undue hardship.



Indefinite leave as an accommodation

An employer's policy allows employees one year of medical leave and then requires the employee to either return to work with/without an accommodation or be terminated. An employee with a disability has been on medical leave for one year when he informs the employer that he will never be able to return to his old job due to his disability and he does not know when he can return to another job he could perform. What do you do?

The ADA does not require the employer to provide indefinite leave.

Unlawful Workplace Harassment



- Is any unwelcome verbal or physical conduct based on a person's sex, race, religion, national origin, color, age, disability, or genetic information **AND**
- The conduct can reasonably be considered to adversely affect the person's work environment
= Hostile Work Environment
- **OR**
- An employment action/decision affecting the employee is based on the employee's rejection or acceptance of the unwelcome conduct
= Tangible Employment Action



Harassment Elements

- Person is a member of a protected group
- Person is subjected to unwelcome conduct
- The harassment is based on sex, race, religion, national origin, color, age, disability or genetic information
- creates **Hostile Work Environment** or
- causes **Tangible Employment Action**
- Whether there is employer liability

Employer Liability



- **The employer is liable for harassment by a co-worker, customer, or supplier/vendor if it knew or should have known of the harassment and failed to take corrective action**
- **Employer knowledge is assumed if (1) a supervisor is present during the harassment, (2) an employee tells a supervisor of the harassment, or (3) harassment is widespread**
- **The employer is liable for hostile work environment harassment by a supervisor unless it can show that it has an effective complaint procedure of which the employee was aware but failed to use**
- **The employer is directly liable for hostile work environment harassment by an owner, a partner, or other “high-ranking official”**



Ed is teased.

- Ed has cerebral palsy and his coworkers frequently tease him about his speech impediment. Ed has told the coworkers he does not like the teasing. The coworkers continue to tease Ed but not when the supervisor is present. Ed finally tells you, the supervisor, about the harassment.
- What do you do?
- You must adhere to your anti-harassment policy.

Ray is insubordinate



- Ray, a blind employee, has had several disputes with his supervisor. He makes frequent personal telephone calls on company time and has been counseled about this. The supervisor has also counseled Ray about taking unscheduled smoke breaks.
- Can the supervisor discipline Ray for violating the company's conduct policy?
- If an employee's disability does not cause the misconduct, the employer may hold the employee to the same conduct standards that it applies to all other employees.

IT PIP



- An IT specialist has a known disability and has missed several project deadlines and other employees have finished his work. The IT specialist does not keep up with database changes which also causes him to make errors. You discuss his performance with him according to your performance policy and place him on a Performance Improvement Plan (PIP). Because his performance does not improve, you fire him.
- Should you have given him another chance to improve instead of firing him?
- An employee with a disability must meet the same production and performance standards as a non-disabled employee in the same job.



What if the person has an “invisible” disability?



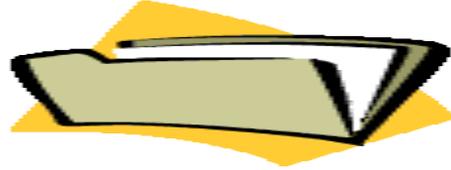
- Some disabilities are obvious such as a person’s use of a wheel chair or crutches because of the inability to walk.
- Invisible disabilities are disabilities that are not immediately apparent.
- Some examples of invisible disabilities include diabetes, inflammatory bowel disease, epilepsy, fibromyalgia, major depression, and bipolar disorder.
- The ADA does not restrict, require, or recommend to applicants/employees with disabilities when, if, or how to discuss their disabilities with employers.

The ADA and applicant and employee responsibilities



- If an applicant will need a reasonable accommodation to perform the essential functions of the job, s/he can inform the employer about the need and explain the nature of the needed accommodation and how it will enable the person to perform the essential functions of the job.
- If a disability is not obvious, has no bearing on the job, and will not impact the person's ability to perform the job, there may not be a need to tell the employer about the disability.
- A person with an invisible disability may choose to self-identify to put the employer on notice of the possibility of what may happen if the need arises (e.g., if the person has a seizure at work).

Record of and Regarded as



- Record of a substantially limiting condition means the person has a record or history of a past disability, such as a person with a history of cancer that is currently in remission.
- Regarded as covers anyone subjected to an action prohibited by the ADA/ADA AA because of an actual or perceived physical or mental impairment. No reasonable accommodation under regarded as prong.



More on Regarded As

- ✓ Does not require showing an employer believed the impairment substantially limited a major life activity
- ✓ Has only two elements: 1) employer took employment action 2) because of a person's actual/perceived impairment
- ✓ Employer can challenge claim by showing that the impairment is **both** transitory (lasting 6 months or less) and minor (**minor**)
- ✓ If employer's action is for lawful reason, no discrimination



For example,

- An employee alleges she has not been promoted because she has diabetes although she has not had an episode in five years. She says the employer refuses to promote her because it fears she will have a seizure.
- An employer reassigns an employee to a job which pays less because the employer fears the employee will have a heart attack. The employee has high blood pressure but it is not substantially limiting.
- An employee is discharged because of an unfounded rumor that he tested positive for the AIDS virus.

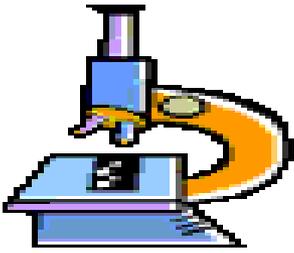
The Genetic Information Nondiscrimination Act (GINA)



- Signed into law by President Bush in September 2008 and became effective November 21, 2009
- Prohibits use of genetic information to discriminate in employment
 - Includes prohibition on harassment and retaliation
- Restricts employers and other entities covered by GINA from requesting, requiring, or purchasing genetic information
- Requires that covered entities keep genetic information confidential, subject to limited exceptions

What is Genetic information

- Genetic Information is information about:
 1. An individual's **genetic tests** (DNA, RNA)
 2. Genetic tests of **family members**
 3. The manifestation of a disease or disorder in family members (**family medical history**)
 4. Request for or receipt of genetic services by an individual or family member (e.g., genetic test, counseling, education)
 5. Genetic information of a fetus carried by an individual or family member or of an embryo legally held by the individual or family member using an assisted reproductive technology.



GINA and the ADA

- **GINA prohibits discrimination based on genetic information and family medical history related to an illness or a disease or disorder.**
- **ADA prohibits discrimination on the basis of manifested conditions that meet the definition of disability.**
- **Example: a woman who carries the BRCA1 or BRCA 2 gene which places her at a higher than normal risk of developing breast cancer but who does not have breast cancer is covered by GINA. If she develops breast cancer, she is probably covered by the ADA.**
- **Genetic information does not include information about a person's race, sex, ethnicity, or age.**

The ADA and the employer's responsibilities



- Do not discriminate against a person with a disability in the recruitment, application, hiring, promotion, discharge, compensation, training process or any term, condition or privilege of employment
- Focus on the person's ability not the disability
- Work with a person with a disability to determine if there is some assistance or reasonable accommodation that will allow the person to perform essential job functions



Key Takeaways

- Review hiring practices to ensure that disability information is not requested during hiring
- Train management to think broadly about disabilities
- Assume all employees can prove they have a disability covered under the ADA and are entitled to reasonable accommodation
- Assume an accommodation is possible



THE EEOC'S GOAL IS:

- **Equal Employment Opportunity**
 - **For All**

