

SKILLS BUILDING FOR EEO INVESTIGATORS

SESSIONS 3F and 4F

1:30 to 5:00 PM

Tuesday, July 28, 2009

Presented by EEO Works LLC

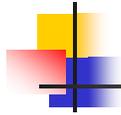
Contact: ed@eeoworks.com

Theories of Discrimination



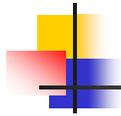
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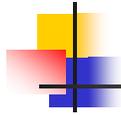
DISPARATE TREATMENT

- Most common form of charge
- "I was treated differently because of my _____."
- Retaliation is a form of disparate treatment.
- Alleges intentional discrimination so damages are in the picture.



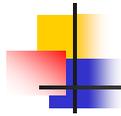
DISPARATE TREATMENT

- Proof of motive is essential.
- Only people have motives.
- "They" don't make employment decisions. "The company/agency" doesn't make employment decisions.
- Only people. Find the right person(s) to investigate.



DISPARATE TREATMENT

- To find the right person(s), you need to understand how the decision disputed in the charge was made.
- Seek only relevant evidence.
- Seek a reasonable sample of relevant evidence.



DISPARATE TREATMENT

- Relevant evidence is any testimony or writing that helps illuminate the motives of each decision maker.
- Of course, you might collect *material* evidence needed to document other aspects of the case (such as a CBA).
- If a piece of evidence does not illuminate motive, it is not relevant.

Proof of Motive

- Directly --- by credible testimony or document which shows directly (without the need to make an inference)
- What was in the mind of the decision maker at the time the decision was made.
- "I fired her because of her epilepsy."

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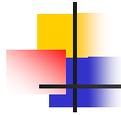
Proof of Motive

- Indirectly --- By reasonable inferences from circumstantial evidence.



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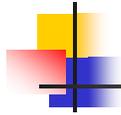
“Similarly Situated”

- To compare the complainant’s treatment to relevant others,
- You must first determine the complainant’s “situation”.
- You start by asking C to detail his/her situation.
- Then ask the decision maker to tell you how he/she defined C’s situation.
- Where there is conflict, determine how the DM resolves each conflict.



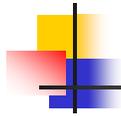
“Similarly Situated”

- Some factors will be objective, a matter of fact. Determine whether they are factually true.
- Even if factually true, have they been used consistently as factors by the DM?
- In other words, is this a “credible” factor --- is it believable that the factor was given weight by the DM in the assessment of C’s behavior or qualifications and so forth?



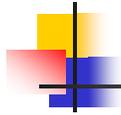
“Similarly Situated”

- Some factors will be subjective and involve judgment by the DM. Assume their credibility for the time being.
- Check with C to see what part of this testimony C concedes and what part C disputes.
- You will need to resolve each of the disputed items.



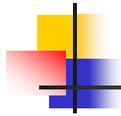
“Similarly Situated”

- What process did the DM use to decide that this was C's “situation”?
- [Process here means what data the DM gathered, what persons were spoken to, why some things were or were not done to gather information.]
- The process itself is part of C's situation and can be compared to the process used to assess relevant others.



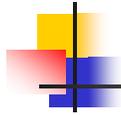
“Similarly Situated”

- Once you have a working definition of C’s situation, you are ready to find others who shared a similar situation.
- You will need to pick a group of persons to compare to C.
- Often, you will need to pick a reasonable period of time to sample decisions by the DM.



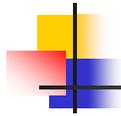
“Similarly Situated”

- When making inferences, the more similar two persons are in situation, the more you reasonably expect their treatment to have been the same.
- Every difference in treatment between persons of a different EEO status should be resolved by asking the DM to account for any difference and weighing his/her response.



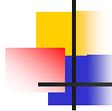
Disparate Treatment

- **Unexplained and incredible differences in treatment between C and a person in a different EEO status *by the DM* where the two are sufficiently similar in their situation are the foundation for a reasonable inference that illegal discrimination has occurred.**



Disparate Treatment Scenario #1: Similarly Situated

- Problem: Who is a proper comparator?
- How did you decide this?
- How similar does a person have to be before you are willing to compare C and that person?
- Who are the best comparators? (That is, the ***most similarly situated***)



The “nearly identical” standard

- Lyn Holbrook is an FBI agent in training.
- Her primary instructor (KC) suspects a sexual relationship between her and an instructor (P)
- He tells the staff counselor. She does nothing.



The “nearly identical” standard

- After a second incident, KC reports the matter to the Assistant Director (AD)
- AD investigates and suspends Lyn for lying and not staying apart from P during the investigation.
- She is returned to her former job at the FBI and files an EEO complaint alleging sex discrimination.

The “nearly identical” standard

- She alleges KC made numerous sexual and sexist remarks while interacting with her.
- She compares herself to two male agents-in-training whose indiscretions led to lesser discipline
- And to P who was stripped of his supervisory authority but remained an agent.

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The “nearly identical” standard

- What comparisons will you make?
- Ask any questions you wish in order to get more relevant information.



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Disparate Treatment Scenario #2: No Knowledge

- James Olson applies for a job he once held before being laid off 18 months ago.
- His application is processed by the H/R Director who knows nothing about his disability.
- She rejects Olson and he complains of disability discrimination.



Disparate Treatment Scenario #2: No Knowledge

- Assume Olson has a disability.
- Assume the H/R Director has no knowledge of this.
- Is the case closed?
- How do you proceed?
- Ask me any questions you want answered in order to get relevant information.



Disparate Treatment Scenario #3: More than 1 DM

- Nick Bragger applied for the job of Logistics Supervisor.
- He was interviewed by a three member panel
- Which chose another applicant.
- Dissatisfied, Bragger complains of EEO discrimination.



Disparate Treatment Scenario #3: More than 1 DM

- So, we have three possible sources of biased motive.
- How do you proceed?
- What if Nick was interviewed by three persons over a two day period, the last of whom made the selection decision?

D/T Scenario #4: DM Shares EEO Class of Complainant

- Taking scenario #3, what if the principal DM was of the same race as Nick and Nick alleges race discrimination?
- Is the case closed?
- How do you proceed?



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Disparate Treatment Scenario #5: Subjectivity

- Arnold Chapman (59) applied for an Inventory Control Supervisor job.
- He has ample supervisory experience at the company where he was employed 26 years but was laid off from two years ago.
- He supervised production planning and had positive performance ratings.

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Disparate Treatment Scenario #5: Subjectivity

- When interviewed by you, the sole DM said he rejected Chapman because:
- He was a “job hopper” (had 4 jobs in 2 years) and
- He didn’t interview well. His answers were not concise; he didn’t aggressively ask the DM probing questions about the job and he was vague about why he had 4 jobs.

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Disparate Treatment Scenario #5: Subjectivity

- Chapman alleges age discrimination.
- How do you assess the credibility of these asserted reasons?
- What is/are the legal standard(s) applicable to a subjective defense?



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Disparate Treatment Scenario #6: Same DM

- Using Chapman case again.
- This time, Chapman is selected but, 6 months later, the same DM decides to fire Chapman.
- In this case, Chapman is African American and alleges race discrimination.



Disparate Treatment Scenario #6: Same DM

- The DM defends by citing to his decision just 6 months earlier to hire Chapman.
- How can he have been free of race bias then and affected by race bias now?
- How soon can you submit this case?

HARASSMENT



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Illegal Harassment

- Remember must be motivated by an illegal motive
- Must involve actionable behavior
- And, if done by nonmanagers, employer must act negligently.

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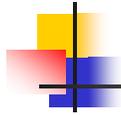
The Different Types of Harassment

- Supervisor demands a sexual relationship/does something actionable.
- Supervisor engages in actionable behavior but no tangible action occurs
- Coworkers engage in actionable behavior.



Supervisor makes a sexual demand

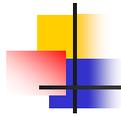
- Evidence proves (1) the demand was made.
- (2) C refused or accepted but unwillingly.
- (3) A tangible employment action was taken as a result of C's response to the demand.



If proved, the employer is liable.

Whether the tangible action is favorable or unfavorable

As long as it occurs because of the demand for a sexual relationship.



What is a TANGIBLE EMPLOYMENT ACTION?

An action which significantly changes a person's employment status



Supervisor does something actionable

- **For example, leads a pattern of severe racial harassment or at least condones and participates in such behavior.**
- **The target of the harassment complains.**
- **The supervisor takes a tangible action against him/her as a result.**

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Supervisory involvement; No tangible action

- Supervisor engages in actionable behavior but takes no tangible action.
- Employer can escape liability if:
- It can plead and prove that it takes reasonable care to prevent and remedy sexual harassment, *and*
- Recipient unreasonably failed to take advantage of internal complaint process.

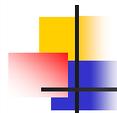
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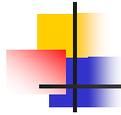
So, general rule for all types of harassment is:

Where a supervisor is involved in actionable harassment and a tangible action results from it, liability attaches.



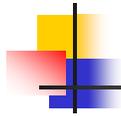
For all types of harassment:

Where no supervisor is involved.



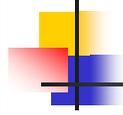
The evidence should show:

- Things were said or done,
- Which were motivated by EEO bias
- And which were unwelcome to one or more persons
- And which were “actionable” (unreasonably interfered with the person’s ability to do a job)

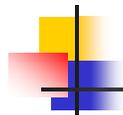


Nonsupervisory Harassment

When does liability attach in such a situation?



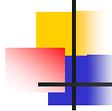
When the
employer was
negligent.



Negligence defined in this
context:

Which means that the employer
knew or should have known about
the harassing behavior but failed to
take *prompt and effective* action.

P and E action means action
reasonably likely to deter future
harassment of that sort.



Who is a “supervisor”?

Someone with the authority to take or to recommend a tangible employment action or someone with authority to direct the person’s daily work activities.



Harassment Scenario #1: Unwelcome?

- **Supervisor Jack B. Nimble places a picture from the agency’s Kumbiya picnic of Jill Wiley, his assistant, on the agency intranet.**
- **He makes comments about her appearance, dress and figure in front of others.**
- **Rumors start that the two are having an affair.**



Harassment Scenario #1: Unwelcome?

- Nimble responds to her harassment complaint by asserting that she loves the attention the picture generated.
- She has gone with him to ***Strippeez*** after work for a drink on two occasions
- And she tells off-color jokes with friends at work.

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Harassment Scenario #1: Unwelcome?

- How do you proceed to assess the idea that Jill welcomes Nimble's jokes and the attention the picture and rumors are generating?
- What kind of behavior by Jill might create the appearance she welcomes bawdy attention and undermine her complaint?

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Harassment Scenario #2: Assessing Performance

- Carl Muhammad, African-American, alleges he has been subjected to a pattern of racial harassment by his supervisor.
- He complained to his 2nd level manager.
- In addition, his supervisor has issued him an “unacceptable” performance rating in quantity and quality of work.



Harassment Scenario #2: Assessing Performance

- During the investigation, the supervisor provides several examples of work done by Muhammad which demonstrate inattention to detail, spelling errors, tardy completion dates and missing information.
- None of the supervisor’s other subordinates show such poor work.
- Does this dispose of the performance rating portion of the complaint?

Harassment Scenario #3: After Hours, Off Premises

- Jean Marlowe complains that a male coworker makes sexual boasts about her at his local bar, parks in front of her apartment for hours and leaves heavy breathing messages on her phone.
- The agency's counsel advised against taking any action on the matter because none of the alleged behavior was the agency's responsibility. It occurred elsewhere.

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Harassment Scenario #3: After Hours, Off Premises

- Is behavior off the agency's premises and on non-duty hours *ever* something the agency has a responsibility to address?



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Harassment Scenario #4: Workplace Culture

- Mary “Brawler” Smith works as a correctional officer in a medium security prison.
- One of the sergeants and some of her fellow officers make jokes associating her size with her sexual appetite and ability; brush up against her, and ape sexual gestures in her presence.

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Harassment Scenario #4: Workplace Culture

- During your investigation, several of the males assert that Smith should have known the work environment was a “blue collar” one.
- By agreeing to work in the prison, she was agreeing to accept the environment.
- How will you assess this defense?

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Harassment Scenario #5: The Equal Opportunity Harasser

- When accused, Undersecretary Major Contributor, replies to the complaint of sexual harassment by pointing out that he is indiscriminately vulgar and offensive to all his subordinates.
- What's more, the pervasive sexual jokes ridicule men as well as women so no-one is singled out for abuse.

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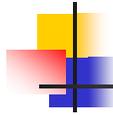


Harassment Scenario #5: The Equal Opportunity Harasser

- How will you assess the merits of this defense?
- "However, there may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers.... In such cases, the sexual harassment would not be based upon sex because men and women are accorded like treatment." *Henson v. City of Dundee* (11th Cir. 1982) 682 F.2d 897, 904.

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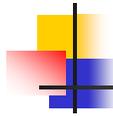


Harassment Scenario #6: Harassment Based on Religion

- Les Mercy believes he has a duty to bring as many people as possible to the fellowship of the Lord.
- As part of this belief, he leaves pamphlets and bible excerpts throughout the agency workplace.
- He is concerned about the lifestyle of his close coworker, Lola Palooza, which he considers sinful.

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Harassment Scenario #6: Harassment Based on Religion

- Mercy audibly prays over Palooza's soul, asking God's help in cleansing it.
- Palooza complains to management that Mercy is harassing her.
- Mercy cross complains that Palooza is not respectful of his religious beliefs and is harassing him when she invites him for a drink and whatever.... Knowing that will offend him.

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Harassment Scenario #6: Harassment Based on Religion

- The agency has a “zero tolerance” harassment policy and, supporting both claims, disciplines both employees.
- To avoid fragmentation, the agency assigns both cases to you.
- How will you proceed?
- Describe the constitutional framework for this issue.



Scenario #7: Reluctant Witnesses

- Admin Clerk Betsy Ross is called to H/R to discuss complaints about her conduct & attitude from the Director of the Division.
- During the discussion, she reveals that she has been sexually harassed by the Director and has adopted a more distant way of working for him.



Scenario #7: Reluctant Witnesses

- Fearing for her job, she files a complaint.
- During your investigation, you learn from various sources that five women have told the sources the Director behaved inappropriately toward them.
- When interviewed, none of the five report any harassing behavior by the Director.

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Scenario #7: Reluctant Witnesses

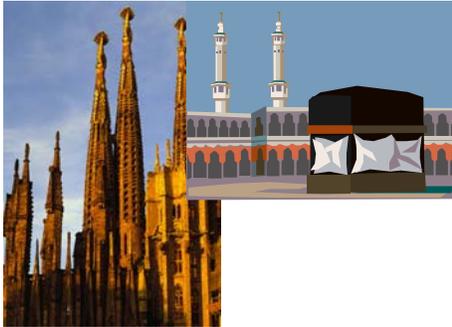
- Will the agency accept hearsay from the sources as to the Director's behavior?
- What are the strategic implications of this situation?
- How will you handle the strategic implications?

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FAILURE TO ACCOMMODATE

- We'll start with religious accommodation.



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Legal Foundation

- Title VII of the 1964 Civil Rights Act
- U.S. Constitution

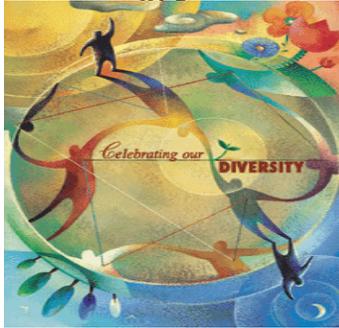


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Definition of "Religion"

- The term "religion" includes all aspects of religious observance and practice [Section 701(j)]



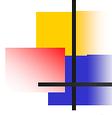
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701(j) Continued

- "...Unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

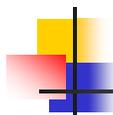
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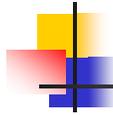
EEOC's Guidelines

- Religious nature of a practice or belief...
- "... the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." (29 C.F.R. Part 1605)



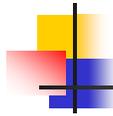
Religious Belief

Religious Practice



Aspects of Religious Practice

- Have to be formally part of a recognized religion?
- What if not required by a person's formal religion?
- How personal can practice be and still be protected?



Checks on Personal Practice

- Political Belief
- Personal Preference
- Appropriateness of Practice
- Sincerity



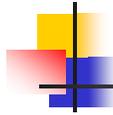
"It is no business of courts to say ..., what is a religious practice or activity...."

Fowler v. Rhode Island
(345 U.S. 67,70)(1953)



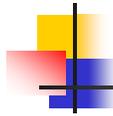
"The threshold question of sincerity ... must be resolved in every case."

United States v. Seeger (380 U.S. 163, 185)(1965)



Prima Facie Case

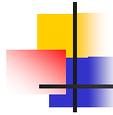
- Has a bona fide religious belief that that conflicts with a job requirement.
- Has informed the employer
- Was disciplined for failure to comply with the requirement



TWA v. Hardison (432 U.S. 63)(1977)

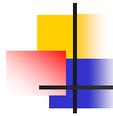
- Determined the scope of the *undue hardship* defense





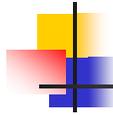
Tension in Reasonable Accommodation Theory

- 701(j) makes it “clear that Title VII requires religious accommodation even though unequal treatment would result.” Dissent at page 89.
- “[W]e will not construe the statute to require an employer to discriminate against some employees to enable others to observe their Sabbath.” Majority at page 85.



In the facts of the case, specific actions ***NOT*** required

- Denying the shift and job preference of any employees.
- Or the contractual rights of some employees.
- In order to accommodate or prefer the religious needs of others. (Majority at page 81)



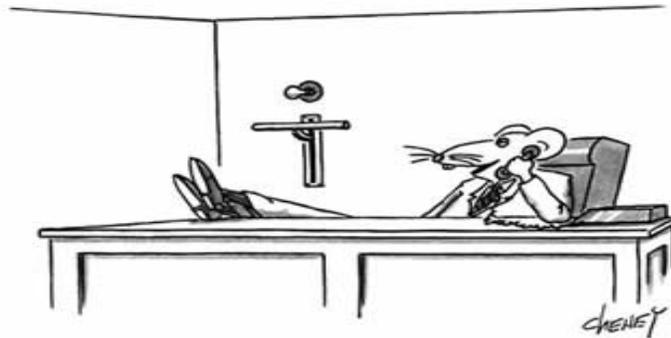
In the facts of the case, specific actions ***NOT*** required

- Replacing Hardison on the conflicting shifts with supervisory personnel or borrowing employees scheduled elsewhere.
- Paying premium pay to persons not already scheduled.
- Both would create a cost for TWA in terms of lost efficiency or higher wages.



"To require TWA to bear more than a *de minimis* cost ... is an undue hardship.... [T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion" P.84

Of course, there are other ways to show undue hardship.



"Oh, not bad. The light comes on, I press the bar, they write me a check. How about you?"

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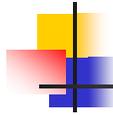
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Religious Accommodation Scenario #1: How Unusual?

- John Doe is a member of the World Church of the Creator, a religion with no pastors or churches "established for the Survival, Expansion and Advancement of the White Race exclusively."
- He is also a member of the Ku Klux Klan.

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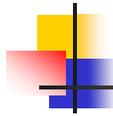
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Religious Accommodation Scenario

#1: How Unusual?

- He has a practice of displaying the Confederate battle flag in his work cubicle.
- When asked to remove the flag, he asserts the Cross of St. Andrew has religious significance for him.
- When forced to remove the flag, a complaint ensues.



Religious Accommodation Scenario

#1: How Unusual?

- How do you proceed to investigate whether Doe's practice of displaying the flag is properly considered a religious practice?
- Is his membership in the Klan (and the display of Klan regalia) another possible religious expression for him?



Religious Accommodation Scenario #2: Need or Preference?

- Anne Jones is a member of a church with a large ministry to those with AIDS. She serves as President of the group that carries out the program.
- She requests annual leave to prepare for a big fundraiser for the program during a period when the agency requires staff to be present.

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Religious Accommodation Scenario #2: Need or Preference?

- Her request is denied and a complaint ensues.
- Does Jones have a religious basis for her request for leave? Why/why not?

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Religious Accommodation Scenario

#3: "Ya Shoulda Told Me!"

- Ben Dare applies for a job for which he seems well qualified. He is hired.
- During his first week of employment, he tells his supervisor, Don Zat, that he is unable to work the evening shift this Friday because he is obliged to observe his Sabbath.
- Zat, upset that Dare didn't tell him about this when he was first interviewed and sure that accommodation would be a scheduling nightmare, fires Dare.

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Religious Accommodation Scenario

#3: "Ya Shoulda Told Me!"

- A complaint ensues.
- Surely Dare should have mentioned his need to observe a Friday sundown Sabbath when interviewed. Does this compromise his case?
- If you were Zat, how would you have proceeded?

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Religious Accommodation Scenario

#3: "Ya Shoulda Told Me!"

- What if Zat had described the scheduled hours of the job and the need to work evening shifts from time-to-time during the pre-employment interview and asked Dare whether he was able to work those hours and Dare said, "Yes," would that be a good defense for Zat --- lying during the interview?

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Religious Accommodation Scenario

#4: Employee Morale

- During your investigation, the DM asserts undue hardship on the grounds that other employees would object to having to work more weekends in order to accommodate a Sabbatarian employee.
- Is employee morale ever a part of a valid hardship defense?

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Religious Accommodation Scenario #4: Objectionable Assignments

- Ima Wright is a Counselor at a mental health facility.
- She requests that she not be assigned to counsel patients on matters in conflict with her religious beliefs. For example, extra-marital relationships and homosexuality.
- Her request is denied; a complaint ensues.

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Religious Accommodation Scenario #4: Objectionable Assignments

- Using your imagination, list some of the factors that might be considered when *weighing* hardship in this case.



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Religious Accommodation Scenario #5: Partial Accommodation

- Caroline Anderson has a voice mail message on her agency phone that ends with the phrase, "Have a blessed day!"
- She often includes the phrase in correspondence with agency vendors with whom she interacts.
- A major vendor complains.

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Religious Accommodation Scenario #5: Partial Accommodation

- The agency issues a policy telling all employees to avoid "additional religious, personal or political statements" in official correspondence, voice mail messages and employee communications.
- It offers Anderson a partial exemption from the policy when speaking with non-objecting coworkers.

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Religious Accommodation Scenario #5: Partial Accommodation

- Anderson refuses the offer and the complaint ensues.
- How do you assess cases where some accommodation has been offered?
- Define a standard for judging when an offer that is not all the person requests is, nevertheless, reasonable.

FAILURE TO ACCOMMODATE

- Next we turn to disability-based accommodation.





The ADA Amendments Act of 2008

Practical Implications For the Investigator

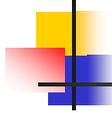


Key Changes

- Definition of DISABILITY should be construed in favor of broad coverage.
- The term “substantially limits” should be interpreted in accord with the Findings and Purposes of the 2008 Act.
- “[I]t is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations...”

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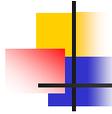


Key Changes

- "... and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis...."
- **Toyota** standard ("prevents or severely restricts") is void.
- Does this encourage superficial analysis? When is extensive analysis beneficial? [Hint: Jurisdiction and the merits are 2 different things.]

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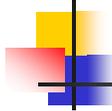


Key Changes

- Chronic or progressive conditions are now clearly covered:
- "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

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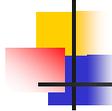
Key Changes

- The effects of mitigating measures --- including medication, prosthetics and similar medical devices, assistive technology, auxiliary aids or services and learned behavioral or adaptive neurological modifications --- should not be part of an assessment of the degree of limitation. (except for ordinary eyeglasses or contact lenses)



Key Changes

- Pure bias is covered.
- A person can qualify for coverage as someone regarded as having a disability where the person alleges an employment opportunity was lost “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”



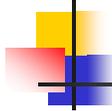
Key Changes

- “Indefinite” means six months or more.
- A transitory impairment (an impairment with an expected or actual duration of less than six months) is not a covered impairment.



Key Changes

- Any visual acuity standard based on a person’s “uncorrected vision” violates the ADA unless the standard is shown by the user to be “job-related for the position in question and consistent with business necessity.”



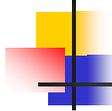
Key Changes

- The ADA does ***not*** provide a cause of action for persons who do not have a disability and who wish to allege loss of an employment opportunity for that reason.



Key Changes

- No covered entity need provide a reasonable accommodation to a person who is regarded as having a disability.
- Individuals who either have a present, substantially limiting impairment or a record of having had same are eligible for reasonable accommodation.



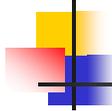
Key Changes

- EEOC will update its ADA regulations to incorporate these changes.



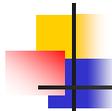
Definitions: Person with a Disability

- Person having one or more *impairments* that are *substantially limiting* with respect to one or more *major* life activity.
- Or a *record of* having had such an impairment.
- Or being *regarded as* having such an impairment though not so impaired.



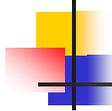
Definitions: Qualified

- **Otherwise qualified and**
- **Able to perform all the **essential functions** of a job**
- **With or without **reasonable accommodation**.**



Meaning of “substantial”

- Not the name of the impairment but its effects are at issue.
- Duration of impairment must be permanent or indefinite.
- Severity of impairment --- questions for Complainant.
- Impact on C --- daily activities.



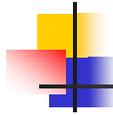
Meaning of “Major”

- Wide variety of activities accepted by courts as major.
- Does not have to have “public, economic or daily” character.
- Must involve “activities that are of central importance to most people’s daily lives.”



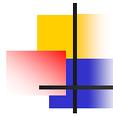
Meaning of “essential function”

- Not marginal.
- **Function** (the purpose or one purpose for which the job exists) distinguished from **task** (the way a function is accomplished normally).
- Functions are not accommodated; tasks may be.



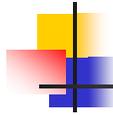
Meaning of “reasonable”

- Grounded in the limitations extending from C’s disability. (not personal preference)
- Actually in conflict with some job requirement(s) (not speculative)
- Does exist.
- Would be effective.



Meaning of “reasonable”

- Does not impose a significant cost (in light of the organization’s resources, associated tax benefits, number of people affected but not in light of C’s wage/salary).
- Does not impose significant difficulty (in light of the resources of the facility where the accommodation is needed).



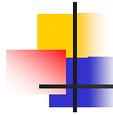
Other accommodation issues

- Sometimes accommodation does not have to be requested --- is done as part of direct threat assessment; is done when attempting to reduce the disability-based impact of a selection device; is initiated on behalf of person with impaired ability to articulate his/her needs.



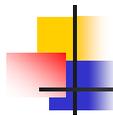
Other accommodation issues

- Can be requested by relative, caregiver, union official and others on C's behalf.
- Request is sufficient if contains two elements --- (1) request for help (2) for medical reasons.
- Interactive process normally required.
- C must cooperate in process.



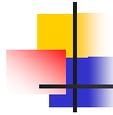
Other accommodation issues

- C has no burden to name accommodations and may be mistaken.
- Organization has burden to seek out information about assistive devices or changes in policy and their likely effectiveness.
- Accommodation can require tweaking not just one-time effort.



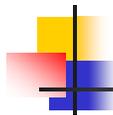
Other accommodation issues

- Accommodating “record of” and “regarded as” cases.
- C may take on part of cost where necessary.
- Information sought by organization should be job-related.
- Consider seeking a release when obtaining medical information from third party.



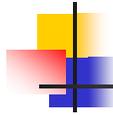
Other accommodation issues

- Effect of emergency situations on what is “essential” to job.
- Effect of generic job titles.
- Differences between formal job description and actual job duties.
- Reliance on physician’s assessment of threat where (s)he has limited job knowledge and ignores accommodation.



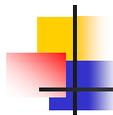
Other accommodation issues

- Sometimes a task operates as a function because it is the only effective way to accomplish a function.
- Attendance as a special case.
- Light duty and bridge positions.
- Proof of motive is irrelevant except in “regarded as” cases.



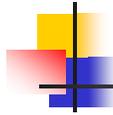
Other accommodation issues

- For employee only (i.e., not applicant), the attempt to accommodate includes an attempt to reassign to a vacant or soon-to-be-vacant job.
- Reassignment does not require creation of a new job; promotion; bumping of an incumbent from a given job; wage grandfathering.



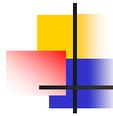
Other accommodation issues

- In cases where employees have settled seniority or length-of-service based expectations, it does not require abridging the seniority provisions of a negotiated or unilaterally imposed job allocation plan.
- [though a labor organization and an employer could agree to do so voluntarily]



Other accommodation issues

- To be reassigned C does not have to meet civil-service qualifications such as waiting for a test to be administered according to the normal schedule or competing for the assignment by being certified as eligible.
- If C is otherwise qualified for the vacant job (with the normal period of training), the job is assigned to C.



Establishing Whether a QID

- Robin Williams has a filed a failure to accommodate complaint and claims that she has arthritis and some degenerative neuropathy that limits her ability to lift and operate power tools, especially above the plane of her shoulder, and to perform the circular wiping motions required on her job.

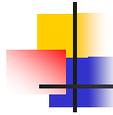
Establishing Whether a QID

- You are about to interview her.
- Give examples of questions you might ask her to determine whether she is *likely* an individual with a disability.



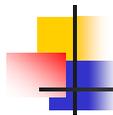
Gathering Medical Information

- Using the same scenario, discuss the process you would use to gather info to corroborate her medical condition and its limitations.
- List some of the documents you would seek.
- What if the agency DM got few (if any) of these documents?



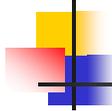
Assessing Essential Functions

- Describe the process you would use to determine the essential functions of Ms. Williams' job.
- Give examples of questions you might ask and to whom you would address the questions.



Psychiatric Disorders

- Jack Nicholson informs his agency that he has bi-polar affective disorder. He requests a transfer to a job with no stress as stress damages his health.
- He is a repair technician at a nuclear processing plant and his job includes responding to radiation emergencies.



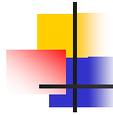
Psychiatric Disorders

- The DM who decided not to offer any accommodation is on record as saying that people with psychiatric issues are unstable and unsuited for many jobs.
- Discuss the difficulty of finding any job with no stress.
- Explain how you will investigate the implied direct threat defense embedded in the DM's attitude.



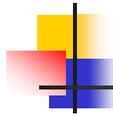
Psychiatric Disorders

- Is a request for transfer the same thing as a request for accommodation?
- If you were the DM how would you have processed the transfer request?
- Is a transfer and a reassignment to a vacant position the same thing?



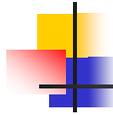
The Interactive Process

- Dolly Martin works in the office area of a Naval shipyard. She is a heavy smoker and developed emphysema.
- She requested accommodation for those times she had to enter the repair areas of the shipyard as part of her job.
- She suggests air-conditioning the buildings and installing filters on the repair equipment.



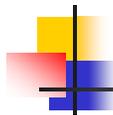
The Interactive Process

- The agency investigated these suggestions and found them all too costly and probably ineffective.
- The H/R also told Dolly he expected her to stop smoking before the agency would consider any request for help from her.
- How do you assess this interactive process? Why?



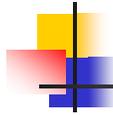
Assessing Significant Difficulty

- Smedley Knieval suffered a serious brain injury as a result of a snowboarding accident.
- He works at a remote location of the agency which is near his home.
- As part of a continuing recertification process, he has to journey to a training center for training.



Assessing Significant Difficulty

- Because he is unable to withstand the four hour journey to the training center, he requested training by computer or other means which would enable him to be trained at his location.
- The DM denied the request, saying it was an undue hardship to provide the requested accommodations.



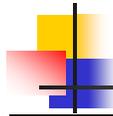
Assessing Significant Difficulty

- Describe how you would assess difficulty in this case.
- What attempts would you make to explore alternatives to the paths pursued by the DM?



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The End



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