

Employment Law for Business, 6th ed.
 Bennett-Alexander

Chapter 12

Disability Discrimination

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Statutory Basis

- **Americans with Disabilities Act of 1990, ¶602, §102**
 - No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
- **Vocational Rehabilitation Act of 1973, ¶504 §794**
 - No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.

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Removing Old Barriers

- Groups with disabilities continue to face the frustration of physical and attitudinal employment barriers
- Almost one in five Americans have one or more physical or mental disabilities
- Research has shown that the performance of a disabled worker, when properly placed, equals that of an able-bodied coworker
- Employers should be “disability-blind”

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Regulation

- Section 503
 - Requirement to employ and promote qualified disabled individuals
 - Only applies to government and federal contractors
- Americans with Disabilities Act (ADA)
 - Applied Rehabilitation Act standards to certain private employers
 - Increasing number of adults with disabilities working for the federal government
 - Increasing employment options for persons with psychiatric disabilities
 - Supporting legislation that allows adults with disabilities to retain Medicare coverage when they return to work

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Regulation (continued)

- State employees are not able to sue their state employers under the ADA
- ADA protects the disabled from:
 - Intentional discrimination for reasons of social bias against them
 - Neutral standards with disparate impact on the disabled
 - Discrimination as a result of barriers of job performance that can be fully overcome by accommodation

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Regulation (continued)

- Under the ADA and the Rehabilitation Acts, employers must take **proactive steps** to make their workplaces amenable to the impaired worker
- To make a claim an employee must prove:
 - That she or he is disabled
 - That she or he is otherwise qualified for the position
 - If an accommodation is required, that the accommodation is reasonable
 - That she or he suffered an adverse employment decision, such as a termination or demotion

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Disability

- Court determination is based on the effect of the impairment on her or his life
- Obesity as a disability
- “Correctable” disabilities

Disability

A physical or mental impairment that substantially limits one or more of the major life activities of an individual; a record of such impairment; or being regarded as having such an impairment.

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Mental Impairments

- Three key concepts:
 - Interacting with others
 - Requests for modified work schedules, individual office space, or changes in supervisory style
 - Uniformly applied standards for dress, grooming, and personal appearance
- Evaluating appropriate medical information

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Major Life Activity

- Defining:
 - Physical or mental impairment
 - Major life activities
- Episodic impairments
- “Bootstrap” theory of coverage
- Fear of contagion
- “Substantially limits”

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Perception of Impairment

- Example: disfiguring facial scar
 - Does not limit employment capabilities
- Perceived disability based on:
 - Appearance
 - Speech
 - Misread medical records

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Otherwise Qualified

- Able to perform the essential elements of his or her position
- An employer may not consider the possibility that an employee or applicant will **become** disabled or unqualified for the position in the future
- Was the applicant or employee qualified *at the time the adverse employment action was taken?*

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Direct Threat

- Considerations:
 - The nature of the risk
 - The duration of the risk
 - The severity of the risk
 - The probability that the disease will be transmitted and will cause varying degrees of harm
- AIDS, cancer, hepatitis C
- Environment

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Essential Functions

- Essential refers to those tasks that are fundamental, and not marginal or unnecessary, to fulfillment of the position objectives
 - Would removing the function fundamentally change the job?
- Frequency of the function
- Attendance
- ADA vs. Title VII
- Business necessity
- Requirements must be objectively determined

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Reasonable Accommodation

- The removal of unnecessary restrictions or barriers
 - Does not place an undue burden on the employer
- Example: adapting a workspace to the use of a wheelchair
- An accommodation does not have to be the best possible solution
- A disabled employee is entitle to reassignment if he or she is qualified to fill a vacant position, *even if he or she can no longer perform the essential functions of her or his own position*
 - Does not have to be the *most* qualified

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Reasonable Accommodation (continued)

- Conflict with other workplace rules and policies does not equal unreasonable
- An employer is not required to reassign or reallocate **essential** job functions
- An accommodation that constitutes a demotion would violate the ADA

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Undue Hardship

- Undue hardship
 - Financial difficulty
 - Unduly costly, extensive, substantial or disruptive
 - Fundamentally alters the nature or operation of the business
- *De minimis* cost
- Partial payment of accommodation by the employee or applicant

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Requests for Accommodation and Employer Responses Process

- Enforcement Guidance
- Employee must inform his employer of a disability and that an accommodation is needed
- Interactive process
- Employers should be promptly receptive and responsive

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Reasonable Accommodation and the Contingent Worker

- Both the staffing firm and the prospective employer may be responsible for reasonable accommodation
- Tax incentives to eligible small businesses
 - Providing workplace access
 - Removing architectural or transportation barriers
 - Hiring “vocational rehabilitation referrals”

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Employee's Responsibility for "Interactive Process": Identification and Request for Reasonable Accommodation

- Employee must make a request for reasonable accommodation
- Interaction:
 - Meet with the worker
 - Obtain as much information as possible about the condition
 - Discuss alternatives
 - Consider accommodations
 - Document the process
- Right to medical documentation

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Disability Harassment

- Workplace harassment prohibited when it creates a hostile environment against disabled workers
- Low incidence of cases
- Trend toward greater reporting and enforcement
- Recovery limited to the amount of actual damages incurred

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Intellectual Disabilities

- Formerly referred to as mental retardation
- Defined as anyone with an IQ of below 70-75 with significant limitations in adaptive skill areas, with a disability that originated before the age of 18
- The EEOC guidelines offer examples of reasonable accommodations that may be offered

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Effect of Regulation on the Actions of Employers

- Potential responsibility or liability of employer
 - “No fault” liability: worker’s compensation
 - A remedial history: purpose of worker’s compensation
 - General statutory scheme
- “Of or in the course of” employment
 - Protection of coworkers
 - Retaliatory discharge and remedies available
 - Disclosure
 - Genetic testing
 - Family and medical leave act

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Management Considerations

- Medical exams only **after** employment has been offered, and all employees in that position must have one
- Once hired and employed, employers are far more restricted
- Management educational programs
- Tax credits
- Substance use and abuse

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Summary

- Statutory protections against disability discrimination in employment strike a balance between the right of individuals with disabilities to have job opportunities and the need of employers to have an “able” workforce.
- Not every impairment will lead to protection as a disability. However, those who have a record of such an impairment or have been perceived as having such an impairment are also protected.
- The balance between employees’ rights and employers’ needs is further maintained by the concept of reasonable accommodation.
- Employers are well advised to ensure that they fairly and equitably analyze these issues in addressing all disability-related situations arising in the workplace.

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