Navigating the Americans with Disabilities Act:

Who is Qualified and What Exactly is a Reasonable Accommodation?

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What is the Americans with Disabilities Act (ADA)?

- "Anti-discrimination statute"
- ADA was enacted in 1990 to prohibit employers from discriminating against "qualified individuals with disabilities" in regard to the terms and conditions of their employment
  - i.e., hiring, firing, promotion, discipline, compensation
- The ADA applies to employers with 15 or more employees

What is a disability under the ADA?

- The ADA defines ***Disability*** as a "physical or mental impairment that substantially limits one or more of the major life activities" of an individual.
- An impairment substantially limits a major life activity when a person is either unable to perform that activity, or is significantly restricted as to the condition, manner or duration under which they can perform the activity.
- Not every medical condition amounts to a disability under the ADA.
  - Merely having a medical condition, such as diabetes or high blood pressure, does not equate to a disability. Prince v. Ill. Dept. of Revenue (7th Cir. 1997)

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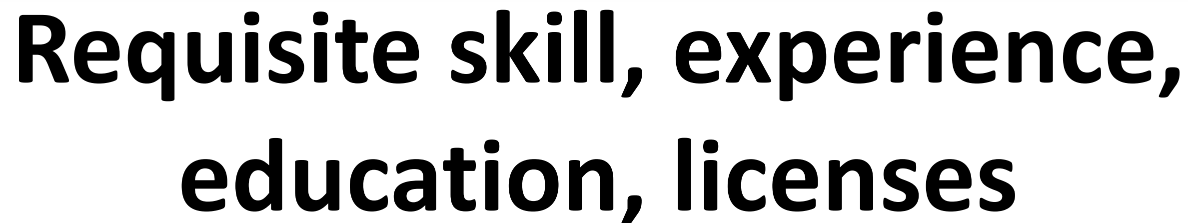
What is a disability under the ADA?

- An individual with a disability under the ADA may also include a person who:
  - Has a record of a physical or mental impairment that substantially limits one or more major life activities; or
  - Is regarded as having a physical or mental impairment that substantially limits one or more major life activities.

What is "qualified" under the ADA?

- The ADA only protects an individual who has a disability and who is "Qualified".
- To be "Qualified" under the ADA, an individual must:
  1. Have the requisite skills, experience, education, licenses, etc. for the job;
  2. Be able to perform the essential functions of the job, either with or without reasonable accommodation.
- Determination of whether an individual is qualified, must be made at the time of the employment decision and not at some point in the future.



Requisite skill, experience, education, licenses

- In general, if an individual does not have the skills/licenses/background required for the job, that person is not qualified.
- Examples:
  - Mechanic with back problems who does not have the required certificate from a trade school is not qualified
  - Teacher's assistant with anxiety issues who lacks state required teaching certificate is not qualified to be an elementary school teacher
  - Individual who lost FAA certification because of medical condition is not qualified to be a pilot/flight instructor

Requisite skill, experience, education, licenses

- Caution: Where the particular skills, requirements or qualification standards for a position act to screen out persons with disabilities, the burden is on the employer to show that the requirements/standards are "***job related and consistent with business necessity***"
- Examples:
  - Physical fitness standards upheld for firefighters and police officers;
  - Vision test to screen for ability to see colors (red and green) upheld as a standard for bus drivers;
- Employers must enforce any requirements/standards uniformly and consistently

Able to Perform the Essential Functions of the Job

- Courts have adopted the EEOC framework for analyzing when a function is essential:
  1. The position exists to perform the job function;
  2. There are a limited number of employees available who can perform the function;
  3. The function is highly specialized.
- The job function must be essential – not a marginal or nominal function
- Burden is on the employer to prove a function is essential to the job

Able to Perform the Essential Functions of the Job

In determining if a job function is essential courts will examine and consider:

- The employer's judgment;
- A written job description;
- Whether the function is actually performed and the amount of time spent performing the function;
- The consequences of not requiring someone in the job to perform the function.

Ability to handle stress/Get along with others

- A welder was found "not qualified" under the ADA where his major depressive disorder led him to threaten to kill his co-workers in chilling detail on multiple occasions. Mayo v. PCC Structurals, Inc. (9th Cir. 2015);
- Supervisor "not qualified" under the ADA when her return to work note indicated that she could not have contact with any of her former subordinates and should not have contact with co-workers or the public. Sapp v. Donohoe (5th Cir. 2013)
- Janitor with autism disorder "not qualified" where his disability caused him to leer at and engage in the sexual harassment of female staff members. McElwee v. County of Orange (2nd Cir. 2012)
- Court reversed a determination of the EEOC and found a grocery store bagger with autism was "not qualified" for the job where his autism led him to make loud, rude and inappropriate personal comments to customers. Taylor v. Food World, Inc. (11th Cir. 1998)

What functions have been found essential?

Attendance/Punctuality

- Where attendance at the job is an essential function has been subject to debate between the EEOC and courts.
- EEOC guidelines provide that attendance is not an essential function of the job.
- Courts disagree with the EEOC:
  - Economic support specialist job found to require regular attendance to answer calls, attend client and staff meetings, and use internal computers. Whitaker v. Wisconsin Dept. of Health (7th Cir. 2017)
  - Employee was not qualified under the ADA where his back problems precluded him from regular attendance at work even on shorter shifts. Starts v. Mars Chocolate (5th Cir. 2015)
  - Employee with MS not qualified for position of truck dispatcher where she was undergoing no treatment and had no anticipated date by which she could be expected to attend work regularly. Basden v. Professional Transportation, Inc. (7th Cir. 2013)

What functions have been found essential?

Ability to Stay Awake/Conscious

- The EEOC has taken the position that "consciousness" is not an essential function of a train dispatchers job.
  - Specifically, the EEOC stated that while consciousness may be necessary, it is not itself a job function because otherwise an individual who is unable to remain conscious based on a heart disorder would be disqualified from every job imaginable.
- Fortunately the courts disagreed with EEOC, and held that a train dispatcher must be conscious and alert because constant monitoring and communication was critical to avoid train accidents. Donahue v. Consolidated Rail Corp. (3rd Cir. 2000)
- Court also found that ability to stay awake was essential function of the job of a security officer, and officer was not qualified based upon her sleep apnea. Smith v. Sturgill (11th Cir. 2013)
- Court found correctional officer was unqualified for job due to narcolepsy which prevented him from performing his security duties of watching over prisoners while he was sleeping. Roetter v. Michigan Dept. of Corrections (6th Cir. 2012)

Ability to Work Overtime

- The EEOC has taken the position that mandatory overtime was not an essential function for a Border Patrol Officer because it was not an “outcome” of the job.
- The courts, however, have again disagreed with the EEOC on this point:
  - Overtime was an essential function for an apartment complex service technician responsible for responding to issues after hours. Gavurnik v. Home Properties LP (3rd Cir. 2017)
  - Overtime found to be an essential function of the job for a utilities service employee who was responsible for reconnecting service and fixing disruptions on the same day. Davis v. Florida Power & Light Co. (11th Cir. 2000)

Ability to Work a Specific Shift

- The EEOC has been inconsistent on this issue
- The EEOC held that the shift was not an essential function of a lab position, which was to analyze samples and not on any particular schedule. EEOC v. Union Carbide Chemicals (E.D. LA 1996)
- However, EEOC Enforcement Guidelines acknowledges that for certain positions the time during which an essential function is performed may be critical.
- Courts are also inconsistent as to whether specific shift work is essential:
  - The ability to work rotating shift hours and a consistent schedule was an essential function of the position of a deputy sheriff. Spears v. Creel (11 Cir. 2015)
  - Rotating shifts for nurses at a hospital was an essential function of the position in order to provide 24-hour coverage. Laurin v. Providence Hospital (1st Cir. 1998)
  - But: courts have also held that changing an employee's work schedule to alleviate her disability related difficulties in getting to work early in the morning is the type of accommodation that the ADA contemplates. Colwell v. Rite Aid Corp. (3rd Cir. 2010)

Standing/walking

- Both the courts and the EEOC have taken conflicting positions as to whether standing or walking is an essential function, based primarily over whether it truly is an essential function or is simply one way to perform a function.

- Many cases have found it is not an essential function:

  – Reasonable to let a retail salespersons sit on a stool during the day because of a leg impairment. Gleed v. AT&T Mobility Services (6th Cir. 2015)

  – Allowing a cashier to use a stool during her shift instead of standing is a reasonable accommodation. Talley v. Family Dollar Stores (6th Cir. 2008)

  – Not an essential function for a machine assembler with a back impairment to stand while assembling cylinders on the factory line. Weber v. Titan Distribution (8th Circ. 2001)

- Other cases have found standing or walking to be an essential function:

  – Walking on uneven and wet surfaces and standing were essential function of a park groundskeeper's job. Bagwell v. Morgan (11th Cir. 2017)

  – A pharmacist was held unqualified for his position when he could not perform the task of standing and frequent walking around the pharmacy during an 8-hour shift. Williams v. Revco Discount Drug Centers (11th Cir. 2014)

What functions have been found essential?

Oral communication

- Held to be an essential function of the job
  - Elementary school teacher unqualified because of stroke which prevented her from communicating with students orally. Rabb v. School Board of Orange County (11th Cir. 2014)
  - Deaf employee who could not read lips or communicate orally was not qualified for job as a photographer which required him to communicate and respond to families with children. EEOC v. The Picture People (10th Cir. 2012)
- Held not to be an essential function of the job
  - Although finding that communication was necessary for a lifeguard, the court held that a deaf individual could be able to perform these functions through use of a whistle, visual cue cards and hand signals. Keith v. County of Oakland (6th Cir. 2013)

Lifting as an Essential Function

- Lifting has typically been found to be an essential function of a job:
  - Woman with shoulder injury was found not qualified to perform the essential functions of a nursing assistant job where she could not lift more than 50 pounds or raise her arm above shoulder level. Taylor v. Renown Health (9th Cir. 2017)
  - Lifting was an essential function of an auto parts sales manager job as the manager needed to lift and move items in the store 30 or 40 times a day. EEOC v. Autozone, Inc. (7th Cir. 2016)
  - Employee not qualified to be a boiler plant operator because of mobility issues caused by a disability which prevented him from performing heavy lifting in an emergency. Wilkerson v. Shinseki (10th Cir. 2010)
- Lifting has not been found to be an essential function of the job where:
  - An ambulance service employer did not routinely screen all of its prospective employees to confirm their ability to lift over 70 pounds. Gillen v. Fallon Ambulance Service (1st Cir. 2002)
  - Heavy lifting is not an essential function of the job where employee had been required to do heavy lifting only 4 to 5 times over an 18-year period and there were other devices available in the plant to help perform lifting. Duty v. Norton-Alcoa (8th Cir. 2012)

Duty to provide a reasonable accommodation under the ADA

- The duty to provide a reasonable accommodation to qualified individuals with disabilities is one of the most important requirements of the ADA.
- An accommodation typically involves removal of a "***workplace barrier***".
  - The barrier could be a physical obstacle; or
  - The barrier could be a procedure or rule hindering performance
- The U.S. Supreme Court has held that a reasonable accommodation is one that "seems reasonable on its face" and typically requires a cost/benefit analysis.
  - In determining whether an accommodation is reasonable, the employer should look at the cost of providing the accommodation weighed against the benefit of the accommodation

Duty to provide a reasonable accommodation under the ADA

- The ADA and EEOC regulations identify many types of "Reasonable Accommodations" that an employer may have to provide, including:
  - Job restructuring;
  - Part time or modified work schedules;
  - Reassignment to a vacant position;
  - Acquiring or modifying equipment;
  - Changing exams, materials or policies; and
  - Providing qualified readers or interpreters

- Generally an employee must request an accommodation – although no specific words are required
  - Employee need only put the employer on notice that they need help/assistance due to a medical condition

Documenting the request/need for accommodation

- If the employee asks for an accommodation, the employer may inquire about the disability.
- If the disability is not obvious, the employer may request documentation of the disability and the functional limitations from same.
- The employer may not ask for unrelated medical information or the employee's complete medical files or record.
- If an employee fails to provide the requested documentation, the employer may deny the request for the accommodation.

Duty to provide a reasonable accommodation under the ADA

Employers are obligated to provide an "***effective***" accommodation – not necessarily the one the employee most wants.

- The EEOC states that while an employer should give consideration to the individual's preferred accommodation, an employer is free to choose any effective accommodation that is less expensive or easier to provide.
- Examples:
  - When hospital employee with respiratory impairment requested her work area be cooled to 68 degrees as an accommodation, EEOC approved hospital's accommodation of air purifier with a fan in work area;
  - Accommodation of train travel with sleeper car upgrade approved even though employee with leg injury requested first class air travel which would allow him to stretch.

What is a reasonable accommodation?

Unpaid Leave of Absence

- The EEOC has consistently taken the position that a leave of absence is a reasonable accommodation.
- The courts have held that a leave of absence can be a reasonable accommodation under certain circumstances:
  - Most courts, however, say a 6-month leave is too long and not reasonable
  - The courts also hold that an indefinite leave is unreasonable (EEOC agrees)
- Severson v. Heartland Woodcraft, Inc. (7th Cir. 2017)
  - After employee exhausted FMLA leave for back surgery, requested additional unpaid leave of 2 to 3 months to continue recovery
  - Court denied the request under ADA, finding 2 to 3 month leave was not reasonable and that the ADA is not a leave of absence statute
  - Court found that a leave of absence does not assist an employee in performing the essential functions of the job, but rather excuses performance thereby making any long-term request for leave unreasonable

What is a reasonable accommodation?

Job Restructuring

- ADA regulations make clear that an employer must restructure an employee's job as a reasonable accommodation.
  - Miller v. IDOT (7th Cir. 2011): The court held that IDOT would have to allow a bridge repairman with acrophobia the ability to avoid working at heights where the employer routinely allowed members of the crew to swap tasks.
- Employer does not have to reallocate essential functions of a job as a reasonable accommodation.
  - Thaddeus v. Vilsack (EEOC 2016): The EEOC held that employer was not required to restructure the functions of a meat inspector who was color blind and could not differentiate between red and green – and thus could not detect the differences between contaminated meat and non-contaminated meat.
  - Stern v. St. Anthony's Health Center (7th Cir. 2015): Where chief psychologist at hospital could not perform duties because of his memory loss, employer not required to reassign those duties to another employee as a reasonable accommodation.
- An employer is not required to lower quality or productivity standards as a reasonable accommodation.

What is a reasonable accommodation?

- Light duty
- An employer is never required to create a new job or a position as a reasonable accommodation.
  - However, if an employer has light duty positions, the employer may be required to reassign an employee with a disability to one of those positions.
  - A more difficult question is whether an employer can reserve light duty jobs for employees who suffer on-the-job/work comp injuries.
    - The EEOC takes the position that an employer cannot reserve existing light duty jobs for on-job injuries only and must reassign any disabled employee.
    - Dalton v. Subaru–Isuzu (7th Cir. 1998): court held that employer could reserve light duty positions for those injured on the job, noting that nothing in the ADA requires an employer to abandon a legitimate, non-discriminatory policy or practice.

What is a reasonable accommodation?

Changing an Employee's Supervisor

- The EEOC has consistently taken the position that an employer is **not required** to change an employee's supervisor as a reasonable accommodation.
  - Specifically, the EEOC held that an employer was not required to reassign an employee suffering from depression and stress disorders to a new supervisor, even where the employee alleged that the supervisor exacerbated the condition.
- Similarly, a court denied a request by an employee that he have "restricted/limited visual and verbal contact" with his direct supervisor as a reasonable accommodation, because the court found this was effectively a request for a new supervisor which was per se unreasonable. Roberts v. Permanente Medical Group, (9th Cir. 2017).

What is a reasonable accommodation?

Rescinding discipline

- Both the court and the EEOC are in agreement that rescinding discipline is not a reasonable accommodation under the ADA.
  – The EEOC has stated that an employer is not required to rescind the termination of an employee who engaged in a profane outburst against the supervisor as a result of the employee's bipolar disorder.
    - In Alamillo v. BNSF Railway (9th Cir. 2017), the court held that an employee's request that the employer not terminate him for misconduct was not a reasonable accommodation.
    - Similarly in **Yarberry v. Greg Appliances** (6th Cir. 2015) the court upheld the termination of an employee for his bizarre misconduct in entering store after hours, roaming around, opening safe and leaving without turning on the alarm even though conduct caused by disability.

  – NOTE: While an employer does not need to forgive an employee for past misconduct or rule violations, the employer may have to provide a reasonable accommodation so the employee does not break rules in the future.

What is a reasonable accommodation?

Working from Home

- In finding that working from home is a reasonable accommodation, the EEOC takes the position that ***"where"*** the work is performed is just another policy that may have to be modified.
  - The EEOC found an employee was allowed to work from home during loud construction periods when the exposure to the loud noises precipitated her migraine headaches.
- Courts are more split on the issue:
  - Humphry v. Memorial Hospital (9th Cir. 2001): The court concluded that a medical transcriptionist could perform the essential functions of her job from home where she could not reliably attend work due to her obsessive-compulsive disorder.
- Courts do tend to focus on the essential functions of the position and whether those functions can be performed from home.
  - Lalla v. ConEd Co. (2nd Cir. 2002) The essential functions of plaintiff's job, including conducting on-site inspections and working on electric lines, could not be performed at home and thus it was not a reasonable accommodation.
  - Valdez v. McGill and Mueller Supply Co. (10th Cir. 2012), warehouse manager's essential job functions of inventory counts, customer interaction, and supervision of staff could not be performed from home.
- Most important factor in determining whether working at home is a reasonable accommodation is whether the person can in fact perform those functions from home.

What is a reasonable accommodation?

Irritant-Free Environment

- The courts generally have held employers have no obligation to provide an irritant or odor-free environment.
  - Horn v. Knight Management (6th Cir. 2014), janitor with respiratory issues could not be accommodated where exposure to chemicals was inevitable in performance of her job.
  - Dickerson v. Dept. of Veteran Affairs (11th Cir. 2012), employer was not responsible for providing a chemical free environment to nursing employee who worked around chemicals and medications.
- The EEOC appears more split on this issue:
  - Held that it was reasonable for employer to prohibit employees from making popcorn in the workplace in response to an employee with an allergy to corn products. Habluetzel v. Potter (EEOC 2006)
  - Complainant v. Bay (EEOC 2016): The EEOC found an employee's request that the employer insulate her entirely from imperfect air quality, imperfect office temperatures, crowded refrigerates, bad food quality, food odors and window cleaning supplies to be simply unreasonable.

What is a reasonable accommodation?

Reassignment to a new position

- Based upon the language of the ADA statute, courts have consistently held that an employer must reassign an employee to an available position as a reasonable accommodation.
- Courts are in agreement as to certain principles regarding reassignment:
  - Reassignment is available only to current employees and not to job applicants or former employees.
  - An employer does not have bump any employee from a job in order to create a vacancy.
  - An employer does not have to promote an employee as a form of reassignment.
  - An individual may only be reassigned to a job for which he or she is qualified.

Undue hardship

The ADA and EEOC regulations identify a number of factors used to determine whether an accommodation imposes an undue hardship on the employer.

- The nature and net cost of the accommodation;
- The financial resources of the employer, the number of employees at the facility, the effect on expenses and resources, and other impacts on the operation of the employer's facility.
- The overall financial resources of the entity, the size of the business, the number, type and location of its facilities; and
- The type of operation of the employer, including the composition, structure and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility in question to the employer.

Undue hardship

- The EEOC and some courts have stated that an accommodation might pose an undue hardship based upon the adverse effect it has on other employees.
  - For instance, if modifying one employee's schedule would so overburden another employee that he would not be able to handle his own duties, the employer could establish undue hardship
- Where an employer has done certain things for other employees, it will be difficult for the employer to argue that it would cause an undue hardship to do the same thing for an individual with an ADA covered disability.

Undue hardship

- Many employers have tried to argue that an accommodation was simply too expensive, but as a practical matter most courts do not seem receptive to the argument.
  - In Reyazuddin v. Montgomery County (4th Cir. 2015), the court stated that a $129,000 workplace modification to allow a blind employee to work in a call center did not pose an undue hardship.
- When arguing that an accommodation imposes an undue hardship, employers are typically required to open up their financial books to the courts or the EEOC.
  - In doing so, employers often have a tough time justifying expenses such as company cars and country club memberships when they claim they cannot afford reasonable accommodations.
- The EEOC and courts have also rejected any claim that the cost of an accommodation is too high relative to the accommodated employee's low salary.
  - The EEOC takes the position that the cost spent on an accommodation depends on the employer's total resources, and not an employee's salary, position or status in the company.