

Disability Disclosure

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American's with Disabilities Act (ADA)

- Disability determination (ADA), must meet at least one of the following three conditions:
 1. A physical or mental impairment that substantially limits one or more major life activities (such as walking, talking, seeing, reading, learning, working, etc.);
 2. A record of such impairment (for example, people with a history of cancer or mental illness); or
 3. A perception by others as having an impairment (such as a person with a disfiguring facial scar, or a person rumored to be HIV positive).

ADA Continued...

Title I – Employment

- Employers may not discriminate against an individual with a disability in hiring or promotion if the person is otherwise qualified for the job.
- Employers can ask about one's ability to perform a job, but prior to offering a job they cannot inquire if someone has a disability or requires medical examinations.
- Employers cannot use tests that tend to screen out people with disabilities unless the tests measure job-related skills.
- Employers need to provide "reasonable accommodation" to individuals with disabilities. This includes steps such as job restructuring and modification of equipment.
- Employers do not need to provide accommodations that impose an "undue hardship" on business operations.
- Who needs to comply:
 - Private employers with 15 or more employees.
 - State and local government employers, regardless of how many employees they have.

Entitlement vs. Eligibility

- Students in high school = entitled to support (IDEA)
 - Responsibility of the school to identify students in need, and develop appropriate accommodations.
- Adults - post high school = eligibility for support
 - Responsibility of the individual to identify programs for which they may qualify – apply – follow the process advocating on their own behalf for what they need to be successful.

A Personal Decision

- The individual must make this choice for themselves because it involves discussing sensitive information.

For Example

- An individual has a bowel problem that causes her to be unable to control bowel functions and completely empty her bowel. She has up to two minutes to find a bathroom or she will have an "accident". She had a pacemaker to assist with control and that did not work. Not only does she have to immediately find a bathroom, but she also has to return to the bathroom every 15 minutes until she is sure she has emptied her bowels. If she wears Depends, she becomes so sore that she bleeds and is in immense pain.
- She kept a journal on her bathroom needs for seven days. There were two days she could not work at all due to pain and her need to use Sitz baths throughout the day. Two days she could not work at all due to pain and her need to use Sitz baths throughout the day. Two days she was in and out of the bathroom all morning. One day she was in and out of the bathroom all afternoon. Two days she did not use the bathroom at all and could work four hours without interruptions.
- She is embarrassed about her disability and could possibly disclose if the manager was an older lady, but would not be able to ask for an accommodation if the manager was younger or a male.
- She does not want to disclose to her co-workers.
- She feels she would not disclose her disability, but just try and use the bathroom without anyone knowing.

Disclosure

- 1st Step – decide if reasonable accommodations are going to be needed
- Rule of thumb
 - Only share personal information about the disability for the specific purpose of being helpful to the particular individual – it is not necessary to share everything.
 - No set requirements of when, what, or how information needs to be shared
 - Only what impacts the requirements of their job (Essential Functions)
 - If disability is obvious, disclosing could help clear the air
 - Evaluate pro's and con's
 - Practice effective communication of disability, needs, skills and ABILITIES!

For Example

- A music teacher at a large high school was diagnosed with a rare disease that caused her to lose part of her sight. The school was willing to accommodate her disability but it was taking a long time to evaluate her needs and decide on appropriate accommodations. The school wanted her to research the assistive technology and tell them what she needed.
- Both the teacher and the school were getting discouraged. She then applied for DVR services and they paid for a thorough assistive technology assessment. Between the school system and DVR, equipment was purchased and she was able to keep her position. The employer is responsible for the cost of accommodation but because this was so expensive, DVR covered some equipment that she would use at home and during work.

Emphasize Skill and Ability

- How do you do this?
 - Compare what the job requires with what the student/individual is good at. Then make direct connections between what the job needs and what the person can offer to the company. Even positive personal attributes – Employers want to hire someone they like.
 - Before applying for a job take a serious look at what a person is good at and practice talking about these qualities.
- Example:
 - Employer: I see you use a wheel chair and I am concerned you will have trouble with this job. Applicant: Yes, I use a wheelchair, but I have also learned how to creatively problem solve in a variety of settings.

Learning About Yourself

- People need to learn about themselves in order to describe their attributes to an employer.
 - Included in this is learning about your disability and how it affects you (specific functions). This doesn't have to be negative. Clear and concise are key.
 - What does disability mean to you?
 - A person will also need to describe what types of support they will need to be successful.

Individual Decision

- Only the person you are working with can make the decision to disclose.
- Your job is to assist them with informed decision making.
 - Helping them to consider every aspect
 - Helping them to recognize differences in various situations

For Example

- An individual has a severe back injury and has had multiple surgeries. He is currently on Morphine, twice a day, for pain management. His physician stated that it is a legal requirement to disclose his morphine use every time he applies for a position.

Consider the Pro's

- Disclosing may
 - Facilitate Success
 - Strengthen Support Systems
 - Legal Protection
 - Self-image
 - Self-advocacy
 - Others?

Consider the Con's

- Disclosing also may be
 - Intimidating
 - Embarrassing
 - No assurance the other person will react positively
 - Exclusion
 - Poor self-image
 - Others?

For Example

- An individual has a TBI and although she does not have Tourette's syndrome, she will start to swear uncontrollably. She will also start mocking a person because of clothing or a comment they make and gets very nasty. There does not appear to be any triggers or situations that cause these behaviors. She would like to work in a retail business and would work in the back room pricing and preparing clothing for the floor. She will swear and mock co-workers as well as customers.

Ice Breaker

- Famous People Matching
– Activity form in “The 411 on Disability Disclosure”

Final Thoughts

- No technology/low technology (when possible) is always the best accommodation – easier for the person and the employer
- Disability + Work *Does not automatically* = Accommodation and Disclosure

For Example

- A 17 year old who has a short leg due to a growth plate injury at a younger age, who also experiences a learning disability impacting their writing (dysgraphia) and math (dyscalculia). Applies to work at a movie theater part-time as an usher. Duties include greet and direct customers, collect tickets at show start time, cleaning as necessary in entrance after shows have started, as well as cleaning the theaters at close.
- In this instance the individual’s disabilities – or functional limitations - do not prevent or inhibit their ability to complete the essential functions of the job. No disclosure necessary.

National Employment Law Cases

- **History of drug use vs. current drug use.** The ADA does not protect an employee from the consequences of current drug use. However, there is a "safe harbor" for those who have a "history" of use, have completed a treatment program and are no longer using. Where is the transition point? In *Shirley v. Precision Castparts Corp.* (S.D. Tex. 2012), an employee was abusing prescription painkillers at work. Instead of discharging him, as it could have, the company allowed a leave for treatment with the condition that he complete treatment. After two days, the employee checked out of the program, against the doctor's advice. He was fired. He sued under the ADA, claiming he had a protected disability as a "former user." The court disagreed, finding "current use" means "recent use." The employer could infer the use was current, especially since the person failed to complete treatment and checked out after only two days. There must be a "sufficient time" after the last use to qualify for the "safe harbor" protection

- **Safety evaluation is not a medical examination.** The ADA has strict guidelines on medical evaluations. A FedEx employee challenged a field evaluation safety assessment of hearing, which he failed. The court dismissed the case, finding it was not a medical exam under the ADA. There were no medical personnel involved. The hearing evaluation was done under actual workplace conditions, with a practical assessment of whether the person was able to be effectively safe. There was also a valid reason for the evaluation. The employee had several accidents, apparently due to failure to hear directions, including people yelling loudly that he was driving in the wrong lane. *Margarita v. FedEx Express* (E.D. NY, 2011).

- **Failure to confer with coach/guardian can violate interactive process.** Some disabilities render the person less capable of communicating without assistance. This may be true for visual and hearing conditions and is often the case with intellectual disabilities. A kitchen worker with an intellectual disability was capable of doing the job if his supervisor was reasonably sensitive to his understanding abilities and manner of direction. His accommodation plan included a request to consult with a third-party job coach or his guardian regarding accommodation requests and before any tangible employment decisions. The employee did make requests for accommodation, which seem to have been ignored. There was no communication to the designated third party. He was then fired, again with no consultation with the designated third party. This violated the established accommodation plan and the ADA required interactive process. The company agreed to settle the ensuing case for \$255,000 plus a series of compliance requirements. *EEOC v. Bannes Health* (Administrative Settlement, 2012).

- Long-term light duty should not have been changed.** A Walgreen's beauty department employee's spinal stenosis musculoskeletal disorder limited her ability to lift over five pounds, and limited pulling, bending or stooping. Other employees chipped in to help when this work was necessary. For over seven years the employee received excellent evaluations for her overall performance. Then a new manager arrived. Upon learning of her limitations, he stated that she was "obviously disabled" and would be a liability. He took her off the schedule for not being able to do the essential physical duties of the job, thus forcing her into retirement. In the ensuing ADA case, Walgreen's presented evidence that lifting, bending, stooping, etc., were essential job functions. However, in this particular situation, the evidence showed that years of accommodation had enabled excellent function without hardship on others or on the overall operation. So, Walgreen's "essential functions" arguments were not compelling when measured against a long-term successful accommodation. *Barlow v. Walgreen's* (MD, Fla., 2012).

- Race discrimination leads to disability case.** An African American Electronic Tech was allegedly subjected to a period of racial harassment, discriminatory treatment and then retaliation after he complained. As a result, he developed a stress and anxiety disorder. His doctor advised that he could not return to work in the environment which produced the disorder. The Technician requested a transfer to an open position in another location but was denied. He sued under the ADA for failure to accommodate. The court found sufficient evidence for a disability discrimination case. Transfer to an open position is a well recognized form of reasonable accommodation, and the employee could have accomplished the functions of his position at another location "where he could escape the racially offensive environment" and not exacerbate his stress and anxiety disorder. *Lucas v. City of Philadelphia* (E.D. Pa., 2012). This case is a good illustration of how bullying or discriminatory harassment can create additional areas of liability. This case was not about the original racial discrimination; instead it was about the resulting disability. In fact, the bullying or harassment constructive discharge case may be harder to prove, while an ADA case has a lower standard required for the plaintiff.

- Employers have the right to change duties with changing times and technology.** No job is static and employees have no right to hold on to the job description or duties of their original hire. Due to incidents of fraud, Walmart changed its return process from a manual check-off by the greeter to a more complex hand-held scanning device. A greeter, due to a neurological disorder, was unable to effectively use the new device, which was now an essential function of the job. He requested and was denied the accommodation of going back to the old manual system. He then sued, claiming that he should be entitled to continue the duties he was hired to do and performed well. The court ruled that this argument was "a nonstarter." The new technology significantly reduced fraud, and any employer may change duties and technology if it can show a valid business reason, in spite of the consequences this may have for some employees unable to make the transition. *Walter v. Walmart Stores, Inc.* (N.D. Ind., 2011).

• **100% requirement is an automatic violation of the ADA.** This case is in the "should have known" category. An employee took leave due to prostate surgery. He was cleared to return with restrictions on lifting and standing too long without the opportunity to sit. The company terminated him for being unable to perform 100% of the job. The employer should have known better. The ADA regulations and a long line of cases hold that a 100% return requirement is a "per se violation" of the law. The whole reasonable accommodation concept is based on modifications because an employee may not be able to do 100% of the duties but can perform the essential functions. The employer should have engaged in the required interactive process to explore accommodations before making any decision. *Nolan v. Arkansas* (E.D. Pa., 2011).

• **Essential function can depend on number of other employees to bear the burden.** A nurse suffered a stroke. She rehabilitated enough to return to work, but not full time. She could work limited hours with no on-call duties. This meant the other nurses had to put in extra duty hours and pull more frequent on-call nights, weekends and holidays. The nurse could not provide a return to full time estimate and was ultimately terminated for inability to meet the essential scheduling requirements. She filed an ADA case and lost. There was no duty to convert a full time job to part time. The court ruled that "A job function may be considered essential by virtue of the limited number of employees available to perform the work." The ADA does not require accommodation by shifting essential functions and extra burden onto others. *Azzam v. Baptist Healthcare Affiliates, Inc.* (W.D. KY, 2012).
