Disability Law and Reasonable Accommodation

OPM Employment Law Roundtable
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Purpose of Antidiscrimination Disability Laws

• The purpose of the antidiscrimination disability laws is to surmount barriers in the workplace, to counteract the accumulated myths and fears associated with a medical condition, and to make decisions based on sound medical judgments. *School Bd. of Nassau County v. Arline* - 480 U.S. 273 (1987)

• [http://www.youtube.com/watch?v=LBP8QDI m6OA](http://www.youtube.com/watch?v=LBP8QDI m6OA)
What The ADAAA Does

- Retains Previous Express Definition of Individual with a Disability:
  - A Physical or Mental Impairment that Substantially Limits (SL) a Major Life Activity (MLA) (Actual Disability); A Record of Such an Impairment; or Being Regarded as Having Such an Impairment

- Changes Rules of Construction that Make it Easier for Individual to show Disability under the Act
  - Easier to Show Actual and Record of Disability
    - Definition of Disability must be “broadly construed”
    - Expands the Definition of “Major Life Activity” (MLA)
    - Easier to Prove “Substantial Limitation” (SL) (lowers degree of functional limitation and eliminates the “severely or significantly restricted” test and “central importance to daily living” test
    - Eliminates “Mitigating Measures” in assessing whether individual is disabled
    - Makes it easier to show SL in MLA of “working” as described in Appendix
    - Clarifies that Impairment that is Episodic or in Remission May Qualify as a Disability if it Substantially Limit a MLA
  - Easier to Show “Regarded As” Definition of Disability
    - Focus on adverse treatment because of actual or perceived impairment rather than on whether employee believed a SL of a MLA.
    - No RA for “Regarded As” only
    - Not “Regarded As” if Transitory [less than 6 months] or minor illness
A Different Perspective on Disability Discrimination

• http://www.youtube.com/watch?v=vSG6LGutkHo&feature=related
Definition of Disability

- Substantial Impairment of a Major Life Activity
- History of a Disability
- Regarded as Disabled
Physical or Mental Impairment

29 CFR 1630. 2(h) Physical or Mental Impairment Means:

Any physiological disorder, or condition, condition, cosmetic disfigurement or anatomical loss affecting one or more of the body systems...or any mental or psychological disorder, such as ...organic brain syndrome, emotional or mental illness, and specific learning disabilities.

E.g. Physical or mental weakness based on a medical condition
Major Life Activities (MLA)

• 1630.2(i) **MLA** basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty.

• 1630.2 (i)(1) **MLA** includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;

• 1630.2(i)1) **Broadens MLA**, to include walking, standing, sitting, reaching, lifting, bending, speaking, breathing, reading, thinking, concentrating, communicating, interacting with others.
Major Life Activities (MLA)

• 1630.2 (i)(2) Broadens MLA to include major bodily functions: immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.
  – E.g. kidney disease affects bladder function;
  – cancer affects normal cell growth;
  – diabetes affects functions of the endocrine system (e.g. production of insulin);
  – Epilepsy affects neurological functions or functions of the brain;
  – HIV and AIDS affect the immune system and reproduction functions;
  – Sickle Cell disease affects the hemic system;
  – Lymphedema affects lymphatic functions;
  – Rheumatoid arthritis affects the musculoskeletal functions;
  – Not an exhaustive list.
Substantially Limits (SL)

• 1630.2(j) An impairment is a disability if it “substantially limits” the ability of an individual to perform a MLA compared to most people in the general population.

• An impairment does not need to prevent, or significantly restrict, the individual from performing a MLA in order to be considered a disability.
Substantially Limited (Cont.)

- Comparison is to general population—not those similarly situated.
  - Ability of individual with amputated limb to lift is compared to most people in general population—not other amputees.
  - Individual with dyslexia SL in reading/learning by comparing to others of a certain age, school grade, level of education or aptitude.
Substantially Limits (SL) (cont.)

- 1630.2(j)(2)(Rules of Construction)
- Focus on whether discrimination occurred, not on definition of disability
- Section 1630.2(j)(1)(iii): Substantial Limitation Should Not Be Primary Object of Attention; Extensive Analysis Not Needed
- Section 1630.2(j)(1)(iv): Individualized Assessment Required, But With Lower Standard Than Previously Applied [“Significantly or Severely Restricted” test eliminated]
- Section 1630.2(j)(1)(v): Scientific, Medical, or Statistical Analysis Not Required, But Permissible When Appropriate
- Need not demonstrate a limitation in the ability to perform activities of central importance to daily living
  - 20 lb lifting restriction that is not short term is SL in lifting, and need not show inability to perform activities of daily living that require lifting;
  - Monocular vision with limited depth perception or field of vision, need not examine inability to perform activities of central importance of daily life that require seeing in order to SL in seeing
Rudolph and Regarded as Disabled
“Regarded As” Disabled PRIOR To ADAAA

• Before the ADAAA an Employee was Regarded as Disabled if He/She Had:
  • No impairment, but employer erroneously treats person like he or she has an impairment that substantially limits a MLA
  • An impairment, but employer erroneously treats the person like his or her impairment substantially limits a MLA

• Sutton Analysis of “Regarded As” Overruled: Pilots argued that United Airlines mistakenly believed that their nearsightedness substantially limited them from flying. The Supreme Court found that the pilots were not disabled because United Airlines only perceived their sight impairment as stopping them from working at only one particular job - not a class of jobs.
“Regarded As” Disabled Under The ADAAA

- **Section 3(3)(A) of the ADAAA** An Individual Meets the Requirement of Being Regarded As Disabled if the “Individual Establishes that He or She Has Been Subjected to an Action Prohibited Under this Act Because of Actual or Perceived Physical or Mental Impairment *Whether or Not The Impairment Limits or is Perceived to Limit a Major Life Activity.*”

- Thus, any employee removed for medical inability to perform their job is, at a minimum, regarded as disabled.

- **Section 3(3)(B)** However, the “Regarded As” definition “shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.”

- **Section 6 (h)** No Obligation to Reasonably Accommodate an Individual Who Meets the Definition of Disability Solely on the Basis that they are “Regarded As” Disabled.
No Reverse Disability Discrimination

• 29 CFR 1630.4(b) *Claims of No Disability*. Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of his lack of disability, including a claim that an individual with a disability was granted an accommodation that was denied to an individual without a disability.
Qualified Individual With A Disability

42 U.S.C. 12102(8); 29 CFR 1630.2(m): individual with a disability who, with or w/o RA can perform essential functions.

“I’m O.K. with everything except the part about being up high....”
“Qualified Individual With a Disability?” – “Essential Functions”

• Reasons a function may be considered essential:
  – Reason position exists
  – Limited number of employees
  – Highly specialized

• Evidence function is essential may include:
  – Employer’s judgment
  – Written job descriptions
  – Amount of “on the job time” function consumes
  – Consequences if function not performed
  – Terms of collective bargaining agreements
  – Experience of past and current employees

• Interpretive Guidance introduces term “fundamentally alter”
Definition of Reasonable Accommodation

- 1630.2(o): A covered entity is required, absent undue hardship, to provide reasonable accommodation to a qualified individual with a disability with a substantially limiting impairment or a “record of” such an impairment. However, a covered entity is not required to provide an accommodation to an individual who meets the definition of disability solely under the “regarded as” prong.” App p. 34
Reasonable Accommodation

• EEOC’s Oct 2002 Guidance on Reasonable Accommodation: may include but is not limited to:
  – (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
  – (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.
Reasonable Accommodation

• Accommodations are not limited to adjustments to a physical work environment. They may involve changes to the way a job is done or structured, modified workplace policies and procedures, adjusted work schedules, swapping or eliminating marginal functions or perhaps even changes to corporate culture. Or, they may entail procuring assistive technology or services such as readers or interpreters. [http://www.dol.gov/odep/pubs/misc/job.htm](http://www.dol.gov/odep/pubs/misc/job.htm)
What’s Not a Reasonable Accommodation?

• Guidance to 2630.2(o); EEOC’s 2002 Guidance on Reasonable Accommodation: “An employer never has to reallocate essential functions as a reasonable accommodation, but can do so if it wishes.”

• EEOC’s RA Guidance Question 9: Employee entitled to reasonable effective accommodation, not accommodation of choice

• Consider the employee’s request, but agency can choose between 2 effective accommodations.
The Interactive Dialogue

- http://www.youtube.com/watch?v=6wtfNE4z6a8
- Engage in the interactive process with the employee
- LISTEN! RESPECTFULLY DISCUSS THE ACCOMMODATION
- Identify essential functions of job
- Identify functional limitations of employee
- Determine potential reasonable accommodations
- Determine those reasonable accommodations that are effective that meet the needs of the employer and the employee [not necessarily the perfect accommodation of choice]
- Determine whether additional medical information is needed to make an informed decision and get signed medical release [get an agency doctor/contract doctor involved if necessary]
- Make the Accommodation
- Monitor Effectiveness
Examples of Reasonable Accommodation

- Technology
- Teleworking
  - http://www.youtube.com/watch?v=7CRLVLMN7-Y

Q.7 May an employer withdraw a telework arrangement or a modified schedule provided as a reasonable accommodation because the employee is given an unsatisfactory performance rating?

Additional Examples of Reasonable Accommodations

- **Job Restructuring**
  - Normally the reallocation or redistribution of nonessential, marginal job functions.
- **Leave**
  - Not entitled to indefinite leave
- **Altering the Way Things are Typically Done**
  - E.g. written instruction instead of oral instruction
- **Interpreters and Readers**
  - Qualified and effective
- **Reassignment**
  - Accommodation of last resort
  - Employee must be qualified for the position
  - Don’t have to create a job
  - Vacant funded position
  - Consider accommodations w/i job first unless the employee and agency agree otherwise [nationwide search/downgrade may be appropriate-Employee has the burden to prove such a position was available]

Benefits and privileges of the workplace
Timely Response To An Accommodation Request

• Shealy v. EEOC, 2011 WL 1621428 (E.E.O.C.) (delays of 4, 6 and 9 months in addressing a reasonable accommodation request have been found to violate the law.

• In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: (1) the reason(s) for delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide.
Timely Response to RA Request

- After careful review of the record, regarding (1), we find that Complainant failed to establish that the Agency unnecessarily delayed providing her reasonable accommodation. Complainant and S1 engaged in an informal process to clarify the nature and functional limitations of Complainant's impairment to identify an effective accommodation. Enforcement Guidance, at question 5. Although Complainant's initial medical documentation identified “work from home” as the physician's recommendation, the documentation did not identify “the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's ability to perform the activity or activities.” Enforcement Guidance, at question 6, examples A & B. Further, Complainant's initial documentation did not provide sufficient information regarding the workplace barrier that was impeding Complainant, such that the Agency could determine options for accommodating Complainant effectively. Enforcement Guidance, at question 9. Consequently, S1 requested additional information and moved forward to provide Complainant accommodation once he had documentation to satisfy the above-outlined criteria. It is noteworthy that an employer is not required to provide the precise accommodation the employee requests, so long as the accommodation offered is an effective one under the circumstances of the situation. See U.S. Airways v. Barnett, 535 U.S. 391, 400 (2002). Here, Complainant requested telework specifically, but the Agency had the right to choose among effective accommodations and it needed sufficient information to do so. Enforcement Guidance, at question 9. Complainant did not show that the information she provided for other matters in 2007 and 2008 was sufficient to determine accommodation for her March 26, 2009 request. The record reveals that Complainant provided sufficient medical documentation in June 2009 and then was permanently out of the workplace in August 2009.
Undue Hardship

“Undue hardship” means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act, No. 915.002 (revised October 17, 2002).
Medical Documentation and Reasonable Accommodation

• 2002 Enforcement Guidance on Reasonable Accommodation, Questions 6 and 8
• http://eeoc.gov/policy/docs/accommodation.html
• Kocher v. Social Security Administration, 2013 WL 3778046 (July 11, 2013, EEOC)
• (Inadequate medical documentation: Complainant's July 20, 2006 medical note, to support a request for extended leave, did not identify Complainant's prognosis or diagnosis. Similarly, in an August 9, 2006, note from Complainant's physician, it stated that Complainant had a potentially serious medical condition and for privacy reasons the physician would not discuss it in more detail. This vague medical documentation was not sufficient to support the request for a reasonable accommodation.)
  An agency may order a medical examination only in the following limited circumstances: (1) An individual has applied for or occupies a position which has medical standards or physical requirements or which is part of an established medical evaluation program, 5 C.F.R. § 339.301(b); (2) an employee has applied for or is receiving continuation of pay or compensation as a result of an on-the-job injury or disease, 5 C.F.R. § 339.301(c); or (3) an employee is released from his or her competitive level in a reduction in force and the position to which the employee has reassignment rights has medical standards or specific physical requirements which are different from those required in the employee's current position, 5 C.F.R. § 339.301(d).
• An agency may offer, rather than order, a medical examination (including a psychiatric evaluation) in any situation where the agency needs additional medical documentation to make an informed management decision, including situations where an individual has a performance or conduct problem which may require agency action. 5 C.F.R. § 339.302.
Confidentiality

- Information obtained regarding the medical condition or history of any employee shall be treated as a confidential medical record. See 29 C.F.R. § 1630.14; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the American with Disabilities Act (“Guidance”), Notice No. 915.002 (rev. Oct 17, 2002). Footnote 111 of the Guidance contains the following exceptions: “The limited exceptions to the ADA confidentiality requirements are: (1) supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; 2) first aid and safety personnel may be told if the disability might require emergency treatment; 3) government officials investigating compliance with the ADA must be given relevant information on request. See also 29 C.F.R. § 1630.14(c)(1); Hampton v. U.S. Postal Serv., EEOC Appeal No. 01A00132 (Apr. 13, 2000).

- By its terms, the requirement applies to confidential medical information obtained from any employee and is not limited to individuals with disabilities. See Hampton, EEOC Appeal No. 01A00132. If an agency discloses medical information pertaining to complainant in a manner that did not conform to this regulation, then its act of dissemination would constitute a violation of the Rehabilitation Act. See Hampton, EEOC Appeal No. 01A00132. There is no requirement of a showing of harm beyond the violation.
MISCONDUCT AND POOR PERFORMANCE

• [Video Link]

Complainant did not notify the relevant, responsible Agency officials about his depression until after the absences had already occurred. An employer does not have to withhold discipline or termination of an employee who, because of a disability, violated a conduct rule that is job-related for the position in question and consistent with business necessity. “Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.” Id. Therefore, even if Complainant's depression caused him to be absent on numerous occasions, his failure to request a reasonable accommodation for his depression before or immediately after the absences occurred (such as during the interviews with management) means that the Agency did not have to withhold discipline or termination. Hailey v. Postal Service 2011 WL 2956814 (E.E.O.C.)

• [EEOC Website Link]

Poor Performance

• If an employer gives a lower performance rating to an employee and the employee responds by revealing she has a disability that is causing the performance problem, may the employer still give the lower rating?

• Yes. The rating reflects the employee’s performance regardless of what role, if any, disability may have played.

• Example 10: Odessa does not disclose her learning disability, even when she begins having performance problems that she believes are disability-related. Her supervisor notices the performance problems and counsels Odessa about them. At this point, Odessa discloses her disability and asks for a reasonable accommodation. The supervisor denies the request immediately, explaining, “You should not have waited until problems developed to tell me about your disability.” Odessa’s delay in requesting an accommodation does not justify the employer’s refusal to provide one. If a reasonable accommodation will help improve the employee’s performance (without posing an undue hardship), the accommodation must be provided.

• http://www.eeoc.gov/facts/performance-conduct.html
Poor Performance Continued

• **Example 11:** A federal employee is put on a 60-day Performance Improvement Plan (PIP). In response, the employee requests a reasonable accommodation. The supervisor postpones the start of the PIP and immediately discusses the request with the employee, enlisting the agency’s Disability Program Manager (DPM) in the interactive process. The supervisor and DPM determine that a reasonable accommodation might help address the employee’s performance problems. The supervisor arranges for the reasonable accommodation and the 60-day PIP commences.

The employer did not have to cancel the PIP because reasonable accommodation never requires excusing poor performance or its consequences. However, the fact that the employee did not ask for an accommodation until being placed on a PIP does not relieve the agency of its obligation to provide reasonable accommodation if the employee has a disability and an accommodation will help improve her performance.

The temporary postponement of the PIP to process the request for a reasonable accommodation ensures that, if a reasonable accommodation is needed, the employee will have an equal opportunity to improve her performance. If the employer determines that the employee is not entitled to a reasonable accommodation (e.g., the employee does not have a “disability”), the employee should be so informed and the PIP should begin.

http://www.eeoc.gov/facts/Performance-Conduct.html
Mixed Motive

• A mixed motive analysis applies to disability discrimination cases. An employee must show that the employee’s disability was a “motivating factor” even though other factors also motivated the practice. An agency may limit the remedy if it demonstrates, by clear and convincing evidence, that it would have taken the same action in the absence of the impermissible motivating factor. If the agency meets this burden the employee may still be awarded declaratory relief, injunctive relief and attorney’s fees and costs demonstrated to be directly attributable to the claim. Southerland v. Department of Defense, 2013 MSPB 46 (June 18, 2013); Feder v. Eric Holder, Department of Justice, 2012 WL 3059995 (EEOC, 2012).
Recommendations

• Reevaluate Employer RA Procedures and Policies
• Carefully Train All Managers on Employer RA Procedures and RA Obligations
• Carefully Evaluate Your Medical Qualification Standards
• Carefully Assess Any Decisions Based on Medical Evidence, e.g. Medical Inability to Perform
• http://www.youtube.com/watch?v=8hU6gR4zHnM