

NATIONAL EMPLOYMENT LAW INSTITUTE
RESOLVING ADA WORKPLACE QUESTIONS

September 28, 2005

Dallas, Texas

Summary

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1. Over the past year, there have been 11,000 – 12,000 federal ADA court cases. Of these, 300 – 400 were in appellate courts.
2. There has been lots of unofficial guidance from EEOC contradictory to its official guidance.
3. Don't have medical personnel make legal decisions.
4. If one returns from work after taking FMLA leave AND is covered by the ADA, the employer must return them to the same job. If they were not covered by the ADA, the employer may return them to the same *or equivalent* job.
5. Compare the individual's abilities/limitations to those of an average person (see McCrary v. Aurora Public Schools, 2003 U.S. App. LEXIS 1449, 10th Cir. 2003; Schumacher v. General Security Services Corp., 2000 U.S. App LEXIS 22395, 9th Cir. 2000).
6. The employer is entitled to know why a reasonable accommodation is needed for a disability.
7. Relationship with someone with a disability – No reasonable accommodation required, but non-discrimination applies. FMLA may also apply.
8. Top disabilities
 - a. Back injury
 - b. Psychological disorder
 - c. Neurological (e.g., carpal tunnel syndrome)
9. Doesn't matter how or where impairment occurred.
10. Documentation doesn't have to be from a medical professional, but does need to come from a credible consultant or expert. Vinson v. Thomas, 2002 U.S. App. LEXIS 8586 (9th Cir. 2002): The court held that it could be sufficient to present an opinion from a learning disabilities expert to support the individual's claim of dyslexia.
11. Medical forms may not always be a good idea; they may ask more than is needed and may set the employer up for a harassment claim.
12. Communicating in writing as a major life activity – the employer must ask why can't the person do so. Are they not educated, or is there an underlying medical condition?

13. ADHD: Collins v. Prudential Investment and Retirement Services, 2005 U.S. App. LEXIS 148 (3d Cir. 2005) – The court found that the employee’s ADHD did not “substantially” limit her ability to think, learn, concentrate, and remember, where she sometimes became distracted from her tasks, had trouble placing tasks in priority order, and had trouble showing up for events on time. The court noted that “many people who are not suffering from ADHD/ADD must regularly ‘cope with’ such limitations.” Again, compare the individual’s limitations to those of the average person.
14. Obesity: EEOC has said that weight within the normal range is not an impairment. However, severe or morbid obesity – defined as twice the normal body weight – has been found to be a disability *in some instances*.
15. EEOC has stated that if someone is “extremely nauseous” or “constantly fatigued” while performing a major life activity, that person could be considered to be substantially limited compared to the average person. Similarly, if employee “suffers pain” while working, the employee might be considered substantially limited in working. Courts, however, have disagreed on this point.
16. EEOC has acknowledged that it is appropriate to look at what the individual is able to do when analyzing whether the person is substantially limited in a major life activity.
17. Hewitt v. Union Oil Company of California, Inc., 2002 U.S. App. LEXIS 17229, 9th Cir. 2002: The plaintiff may have been substantially limited in sleeping where, although he slept for 10 to 12 hours per day, he had mild sleep apnea which resulted in “sleep disruption or deprivation.”
18. “Percentage” limitations are generally not enough to show a “substantial” limitation (e.g., 20% leg disability). What does the impairment mean? What can the individual do/not do compared to an average person?
19. Don’t use “permanent” or “temporary;” use “short-term” or “long-term.”
20. How long is “long-term”? EEOC and courts hold that if an impairment lasts “at least several months,” it is not short-term. Fram recommends using three months as the dividing line; however, some courts have held that periods up to one year are not long enough to be a permanent or long-term condition.
21. If episodic disorders occur only rarely, they might not be disabilities.
22. EEOC has acknowledged that although an individual is not required to mitigate his condition, someone “whose uncontrolled symptoms prevent him from carrying out the essential functions of a job, with or without reasonable accommodation, would not be qualified for the position (5th Cir. Brief).
23. In examining substantial limitation in working, courts will examine jobs the individual can perform, not merely those jobs the individual cannot perform. It must be shown that the individual cannot perform a class or a broad range of jobs.
24. Some courts have held that if an individual continued to perform his/her job despite a medical condition s/he will not be considered substantially limited in working (e.g., Benoit v. Technical Manufacturing Corp., 331 F.3d 166, 1st Cir. 2003).
25. While courts have usually held that alcoholism is a covered disability, more and more seem to be taking a different position (e.g., Roberts v. Rayonier, Inc., 2005 U.S. App. LEXIS 11585, 11th Cir. 2005; Sullivan v. The Neiman Marcus Group,

- Inc., 358 F3d 110, 1st Cir. 2004). Of course, an individual must do more than just allege alcoholism to succeed with an ADA claim.
26. While the EEOC and most courts have stated that lifting is a major life activity, other courts have explicitly or implicitly held that “heavy lifting” is not a major life activity. Interestingly, in a number of cases, courts have held that the inability to lift even relatively little weight would not be a substantial limitation in lifting (e.g., 10-25 lbs.).
 27. The EEOC has stated that if the individual has a record of a condition that was not an impairment, or an impairment that was not substantially limiting, s/he is not covered under the “record of” prong. Courts appear to agree with this approach.
 28. The EEOC has written that an employer’s “knowledge of an impairment (or alleged impairment)” is a critical piece of evidence in regarded as cases. Therefore, it is very helpful to an employer’s defense if it has no knowledge of an alleged impairment (e.g., it did not ask disability-related questions about the impairment at the post-offer stage). In “record of” cases, the employer does not need to have knowledge of that record; however, in disparate treatment cases, it will be necessary to show “reasonable notice” of the individual’s medical history in proving that the employer discriminated against the individual “because of” that record.
 29. Courts have generally held that referring an individual to an employee assistance program is not evidence that the employer regarded the individual as having a disability.
 30. Regarding the essential functions of the job, a written job description prepared before advertising or interviewing for the job is evidence; however, the fact that something is not in the job description is not always fatal to an argument that it is an essential function.
 31. The EEOC has taken the position that “attendance” is not an essential function of a job; however, the Commission has decided cases in an arguably different manner. Most courts that have considered the issue have concluded that attendance is essential for most jobs.
 32. Regarding evidence that the employee is not qualified because of information in a doctor’s note, an employer may rely on the doctor’s note rather than believe an employee’s assertion that s/he *can* do the job.
 33. The Supreme Court has held that both Social Security benefits and ADA protection would be consistent where an employee could do a job with an ADA reasonable accommodation. In addition, an individual might be able to show that his/her condition has changed over time, “so that a statement about that disability at the time of an individual’s application for SSDI benefits may not reflect an individual’s capacities at the time of the relevant employment decision (Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 119 S.Ct. 1597, 1999).
 34. If the cost of a reasonable accommodation exceeds its benefits, it is not facially reasonable.
 35. EEOC has taken the position that reasonable accommodation is required in “record of” cases. Although the issue is controversial, it is possible that courts might agree with this position.

36. EEOC has publicly taken the position that an employer does not have a duty to provide a reasonable accommodation to someone who is only covered under the ADA because s/he is “regarded as” having a disability. However, some federal Courts of Appeals have agreed; others have not.
37. Employers should be aware that some courts have suggested that if the employer knows both about the disability and the need for accommodation, it may have an obligation to provide the accommodation – even without an express request that a modification is needed because of a disability. If the employer has knowledge of a disability or record of disability, and knew or should have known about the need for an accommodation, the interactive process must commence.
38. It appears the employee will be held responsible for the actions or inactions of his/her doctor (Serna v. Potter-USPS, 2005 EEOPUB LEXIS 1708, EEOC 2005; Vawser v. Fred Meyer Inc., 2001 U.S. App. LEXIS 21805, 9th Cir. 2001).
39. An employer’s obligation is to provide an effective accommodation – not necessarily the accommodation that the individual most wants. If two accommodations are equally effective, the employer gets to choose which to provide.
40. Preferences with regard to disabled employees:
 - i. Keep the employee in the workplace.
 - ii. Allow the employee to work at home.
 - iii. Provide leave.
 - iv. Reassign the employee.
41. The EEOC has been somewhat inconsistent on the issue of indefinite leave as a reasonable accommodation. On the one hand, it has stated that “the mere fact that an individual with a disability does not know exactly how long his recovery will take does not automatically render his leave request unreasonable.” However, it has also stated that “there may be some situations in which an employee’s chances of returning to work after a leave of absence are so remote or the amount or number of leaves needed is so extensive or open-ended that an individual cannot be said to be a qualified individual with a disability as a matter of law.”
42. Although courts have been inconsistent on whether an employer must reassign someone as a reasonable accommodation, it is important to remember that the statute specifically mentions it as a form of accommodation. Reassignment is available only to current employees, not to applicants or former employees. An employer does not have to bump any employee from a job in order to create a vacancy. An employer does not have to promote an employee as a reassignment. Finally, an individual must only be reassigned to a job for which s/he is qualified.
43. The EEOC has stated that “if an employee is being reassigned to a different geographical area, the employee must pay for any relocation expenses, unless the employer routinely pays such expenses when granting voluntary transfers to other employees.”
44. In enforcing its rules, the employer must show the business necessity of the rules.
45. Courts seem to be holding that an individual must have suffered some damage to succeed on a claim for disability-related issues, not simply that the individual has a disability.

46. In Adair v. Principi (VA), 2004 EEOPUB LEXIS 103, EEOC 2004, the EEOC held that it was illegal for the employer to ask, at the pre-offer stage, whether the applicant had “any mental or physical disabilities that would restrict” him from carrying out the duties of the position in question.
47. The EEOC seems to suggest that the employer cannot discipline an employee for insubordination for refusing the employer’s lawful request for medical information. However, if the request is related to performance problems, the employer’s only recourse is to “discipline the employee for past and future performance problems in accordance with a uniformly applied policy.”
48. Drug tests are not considered medical tests.