

Disability Law Update: Mental, Psychiatric, and Intellectual Disabilities

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Presentation Overview

- ADA and WLAD coverage and definitions
- Disclosure of mental disabilities and appropriate inquiries
- Reasonable accommodation requirements

ADA and WLAD Coverage

- ADA: Employers with **15** or more employees, including state and local governments.
- WLAD: Employers with **8** or more employees.
 - However, regardless of size, a discharged employee can allege a claim for wrongful discharge in violation of public policy where the underlying policy is the WLAD.

Definition of "Disability" Under the ADA

- "Disability," under the ADA, is defined as a mental or physical impairment that substantially limits a major life activity.

"Mental Impairment" Under the ADA

- "[A]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. §1630.2(h)(2)
- Examples:
 - Major depression
 - Bipolar disorder
 - Anxiety disorders
 - Schizophrenia
 - Personality disorders

What is NOT a "Mental Impairment" Under the ADA

The ADA specifically excludes:

- Compulsive gambling
- Kleptomania
- Specific sexual behavior disorders
- Pyromania
- Psychoactive substance use disorders resulting from current use of illegal drugs

Case Example: Current Addiction to Illegal Drugs

- Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001).

"Substantially Limited" Under the ADA

- Cannot perform a major life activity; or
- Is significantly restricted as to the
 - manner,
 - duration, or
 - condition under which the individual performs the activity compared to the average person in the general population.

"Substantially Limited" Under the ADA

- Mitigating measures must be taken into account.
- Short-term conditions are generally *not* substantially limiting.
- Chronic, episodic conditions *may be* substantially limiting
 - if substantially limiting when active or
 - have a high likelihood of recurrence in substantially limiting forms.

Case Examples: Substantial Limitation

- Humphrey v. Memorial Hosps. Ass'n, 239 F.3d 1128 (9th Cir. 2001).
- Doyal v. Oklahoma Heart, 213 F.3d 492 (10th Cir. 2000).
- Krocka v. City of Chicago, 203 F.3d 507 (7th Cir. 2000).

"Major Life Activity" Under the ADA

- Definition is flexible.
- May include:
 - Interacting with others
 - Working
 - Caring for oneself
 - Speaking
 - Sleeping
 - Learning
 - Thinking
 - Concentrating

Work As a Major Life Activity

- Employee must be limited in a broad class of jobs and not just one particular job.

Case Examples: Major Life Activity

- McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999)
- Sinkler v. Midwest Property Management, LTD, 209 F.3d 678 (7th Cir. 2000).

WLAD Protections and Definition of "Disability"

- The WLAD prohibits discrimination based on disability, including sensory, mental, and physical disabilities.
- Definition of "disability" contains the following elements:
 - A sensory, mental, or physical "abnormality"
 - That is medically cognizable or diagnosable or exists as a record or history, and
 - That substantially limits the individual's ability to perform his or her job.

Case Example: Ability to Perform Job

- Roeber v. Dowty Aerospace
Yakima, 116 Wn. App. 127 (2003).

Further Protections Under the ADA and WLAD

- "Regarded as"
- "Record of"
- Association with (ADA)

Disclosure and Appropriate Inquiries

- Different rules apply based on the stage of employment:
 - Application and interview
 - Job offer
 - During employment

Disclosure and Inquiries: Application and Interview

- **May not** require job applicant to take a medical examination or ask about a person's disability.
- **May** ask questions regarding applicant's ability to perform job-related functions.
- If applicant voluntarily discloses disability or if disability is obvious, employer **may only** ask questions regarding need for reasonable accommodation.

Disclosure and Inquiries: Job Offer

- **May** inquire as to whether the applicant will need reasonable accommodations, but **only if**:
- All entering employees in same job category are asked same question; or
- Applicant has voluntarily disclosed existence of disability and employer could reasonably believe applicant would need accommodation.

Disclosure and Inquiries: During Employment

- **May** make disability-related inquiry or request a medical examination of an employee if it is job-related and consistent with business necessity.
- Employer must show it had a reasonable belief that:
 - Essential job functions would be impaired by medical condition, or
 - Employee would pose a direct threat due to a medical condition.

Disclosure and Inquiries: Confidentiality

- All information concerning the medical condition or medical history of its employees.
- Includes voluntarily disclosed information.
- Limited exceptions:
 - Supervisors re work restrictions
 - First aid/safety personnel
 - Government investigations

Reasonable Accommodation Under the ADA and WLAD

- **Duty to Accommodate:** Qualified individuals who can perform the essential functions of a job with an accommodation
- **No duty:** individuals who cannot perform the essential functions of a job even with accommodation
- **No duty:** individuals who pose a direct threat to the health and safety of themselves or others in the workplace

Reasonable Accommodation for Applicants

- Employers must provide reasonable accommodation to applicants
- Even if employer believes it will be unable to provide accommodation on the job
- May request limited documentation

Reasonable Accommodation for Employees

- Required to provide reasonable accommodation to qualified individuals for all privileges and benefits of employment.
- This includes:
 - Training
 - Services (cafeterias, EAPs)
 - Parties or other social functions

"Qualified Individuals" Under the ADA and WLAD

A "qualified individual" is one who:

- Meets the definition of "disability" and
- Can perform the essential functions of the employment position
- With or without reasonable accommodation

Case Example: "Qualified Individual"

- Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 2000).

Notice

- ADA: Employers must accommodate known limitations.
 - Employee must advise of disability and need for accommodation
- WLAD: Knowledge that disability is or may be interfering with ability to perform job.
 - Employee need not request accommodation

The Interactive Process

- Discuss essential job functions
- Discuss limitations with employee
- Discuss workplace barriers
- Discuss possible accommodations
- Obtain medical opinion
- Employee has duty to cooperate

Interactive Process: "Essential Functions"

- Critical to identify "essential" and "marginal" functions.
- EEOC – job may be essential if:
 - Position exists to perform function
 - Limited number of employees available to perform function
 - Function is highly specialized

Interactive Process: "Essential Functions"

Relevant to the decision of what is an "essential function" are:

- Employer's judgment
- Written job description
- Amount of time spent performing function
- Consequences of not requiring someone to perform the function
- Work experience of people who are performing the job.

Case Example: Essential Functions

- Earl v. Mervyns, Inc., 207 F.3d 1361 (11th Cir. 2000).

Interactive Process: Obtaining Medical Information

- Request only if need for accommodation is not obvious
- Limited to how medical condition affects job performance
- Provide employee's provider with written job description
- Follow up if necessary
- Obtain only necessary documentation

What is "Reasonable"?

- Effective
- Allows employee to meet "average productivity or performance standards"
- Not necessarily the employee's preferred accommodation
- Medically necessary – WLAD

Case Example: Medically Necessary

- Riehl v. Foodmaker, Inc., 152 Wn.2d 138 (2004).

"Undue Hardship"

- Not required to grant an accommodation that would be an undue hardship.
- Factors include:
 - Nature of the accommodation
 - Net cost
 - Financial resources
 - Operational impact
 - Violation of seniority rights under CBA

Case Example: Undue Hardship

- Baumgart v. State of Washington,
189 F.3d 472 (9th Cir. 1999)
(unpublished).

"Direct Threat"

- No duty to employ individuals who present a direct threat.
- Not "direct threat" simply by having psychiatric disability.
- Factors:
 - Duration of the risk
 - Nature and severity of potential harm
 - Likelihood that the potential harm will occur
 - Imminence of potential harm
 - Availability of reasonable accommodations to minimize or eliminate the risk.

Case Example: Direct Threat

- Emerson v. Northern States Power Co., 256 F.3d 506 (7th Cir. 2001).



Overview of Possible Reasonable Accommodations

- Job restructuring
- Reassignment to open positions
- Leave
- Light duty
- Modified or flexible work schedule
- Equipment or devices
- Work station placement
- Shift changes
- Supervisory methods
- Modified policies

Job Restructuring

- Not required to reassign or eliminate essential functions of a position.
- May consider redistributing, trading, or eliminating nonessential, marginal functions of a position.

Reassignment

- Last resort
 - Equivalent pay and status or
 - Lower paying position if no equivalent jobs available.
- Employee must be qualified.
- Employer must affirmatively assist in search for new position.

Case Example: Reassignment

- Skerski v. Time Warner Cable Co.,
257 F.3d 273 (3rd Cir. 2001).

Leave Options

- FMLA if "serious health condition"
- Paid or unpaid
- Short- or long-term disability programs
- Lengthy or indefinite leave
- Intermittent or sporadic leave
- Must be returned to same position unless:
 - undue hardship or
 - medically unable to return to former position even with reasonable accommodation

Possible Reasons for Denying Leave

- Undue hardship
- Another reasonable accommodation offered;
- Granting leave would not render employee qualified for the position

Light Duty

- Employers are not required to create a light duty job where no such position currently exists.
- If a vacant light duty job exists for which the employee is qualified, the individual should be offered the position.

Work Schedule and Shift Changes

- Generally not required to provide open-ended work schedule.
- Generally not required to provide shift change where the particular shift is an integral party of the job.
- Employers may consider:
 - Altering arrival/departure times
 - Providing additional unpaid breaks during the day
 - Changing time of day that particular functions are performed

Workplace Policies and Misconduct Issues

- Employers are generally not required to modify a workplace policy as a reasonable accommodation.
- Employers are generally not required to excuse misconduct, even by an employee with a disability.

Reasonable Accommodation Does Not Require:

- Eliminating essential job functions
- Creating a new job
- Bumping other employees
- Promoting an employee
- Violating collective bargaining agreement
- Providing or transferring to a new supervisor

Case Example: Accommodations Not Required

- Wilson v. Wenatchee School District, 110 Wn. App. 265 (2002).

Continuing Duty to Accommodate

- If accommodation is unsuccessful, consider whether a more effective alternative is available.
- Interactive process must begin again when employer aware that first accommodation not working.
- BUT, employer's duty ends when employee rejects reasonable accommodation offer.