ADA101 - You Have Rights: Reasonable Accommodations in the Workplace

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Learning Objectives

- Define the Americans with Disabilities Act including workplace protections and reasonable accommodations.
- Provide examples of what employers can and cannot ask in the interview process and pre-employment (interviewing) strategies that workers with psychiatric disabilities should consider.
- Give examples of when and how to disclose disabilities.
- Provide examples of workplace accommodations for workers with psychiatric disabilities and strategies workers should take to request such accommodations.
- Describe the steps one can take when they have experienced disability discrimination at work.
part I: Americans with Disabilities Act
Section 504 of the Rehabilitation Act of 1973 contains the first federal law prohibiting discrimination based on disability, including in employment, for entities receiving federal financial assistance.

- **Title I of the ADA** (1990) expanded prohibition of discrimination to private entities (with some exceptions).

- The powers, remedies, and procedures of **Title VII** of the *Civil Rights Act of 1964* are applicable to violations of Title I of the ADA.
Rights of Employees with Disabilities

- Title I of the Americans with Disabilities Act: 42 U.S.C. §§ 12111 – 12117
- Regulations: 29 CFR §§ 1630.1 – 1630.16
- ADA text available at: http://www.ada.gov/pubs/adastatute08.htm
What is the purpose of the ADA?

Reduce barriers to individuals with disabilities and provide equal opportunity in:

- employment
- public accommodations
- public services
- transportation
- telecommunication
ADA Employment Protections

People with disabilities are often restricted in employment opportunities by many different kinds of barriers, including:

- Physical barriers
- Communication barriers
- Scheduling barriers
- Barriers in other people’s minds
- A.K.A. prejudice (fear, stereotypes, presumptions and misconceptions)
When do the employment protections of the ADA apply?

- The **employer** is a covered employer
- The **employee** has a disability according to the ADA
- The **employee** or applicant is qualified to perform the job
ADA Definition of Disability:

When an individual has:

- A physical or mental impairment that substantially limits at least one major life activity
- A record of such an impairment
- Being regarded as having such an impairment
Whether or not a person has a disability should be determined without considering measures that reduce impairment, such as:

- Medication, medical equipment, prosthetics, hearing devices, mobility devices, low vision devices (does not include ordinary eyeglasses or contacts)
- Assistive technology
- Reasonable accommodations
- Behavior modification
What is a major life activity?

- caring for yourself
- performing manual tasks
- seeing
- hearing
- eating
- sleeping
- breathing
- Learning
- bodily functions
Title I of the ADA – Covers Private Employers

- Employers with 15 or more employees, working at least 20 calendar weeks a year
- Employment agencies
- Labor organizations
- Does NOT include the federal government (which is covered under Section 501 of the Rehabilitation Act) or Native American Tribes
No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
Qualified Persons Under Title I

If the person satisfies *job-related requirements* and can *perform the essential functions* of the job, with or without reasonable accommodation.
What is considered an essential function of a job under the ADA?

Look to the following to determine what the essential function of a job are:

<table>
<thead>
<tr>
<th>✓Written job descriptions</th>
<th>✓Employer’s opinion</th>
<th>✓The terms of a collective bargaining agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓Duties other people perform in the <strong>same</strong> position</td>
<td>✓Duties other people perform in <strong>similar</strong> positions</td>
<td></td>
</tr>
</tbody>
</table>
part II: interviews and pre-employment strategies
Disability-Related Questions & Medical Inquiries

The Phases of Employment are Critical!

- **Pre-Offer:** Application and interview

- **Post-Offer:** After the employer extends a conditional job offer, but before a person starts work

- **During Employment:** After employment begins
Pre-Offer
(application and interview process)

Permissible:

- State the physical requirements of a job and ask if an applicant can satisfy these requirements (with or without a reasonable accommodation)

- Ask about performance of specific job functions

- Ask someone to describe or demonstrate how they would do a job

- Ask about the ability to meet attendance requirements of previous jobs or the job being discussed
Pre-Offer
(application and interview process)

An employer:

- cannot ask a disability related question (likely to “elicit information” about a disability)
- may not request any disability-related information or give any medical examinations prior to making a job offer to the applicant
- cannot ask a disability related question (likely to “elicit information” about a disability)
- may not request any disability-related information or give any medical examinations prior to making a job offer to the applicant
- may not ask any disability-related questions or require any medical examinations, even if they are related to the job
- cannot ask for information about: worker’s compensation claims, medical treatment, health conditions or medications
Post-Offer

Disability-Related Information and Medical Exams

• Employers can elicit medical information
• Employers can condition the offer of employment on the results of a medical examination
• Only if all entering employees are required to undergo a medical examination without regard to disability
• Examinations may not screen out or tend to screen out applicants with disabilities
• Medical inquiries must be Job-Related and Consistent with Business Necessity
A disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence," that:

- An employee's ability to perform essential job functions will be impaired by a medical condition
- An employee will pose a direct threat due to a medical condition
Criteria

According to the EEOC, the following seven factors are relevant in determining whether a test is a medical examination:

1) administered by a health care professional
2) interpreted by a health care professional
3) designed to reveal an impairment of physical or mental health
4) is invasive
5) measures an employee's performance of a task or measures their physiological responses to performing the task
6) normally given in a medical setting
7) medical equipment is used
The following are generally **NOT** Medical Exams:

- Tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions

- Polygraph examinations (although state law may prohibit their use)

- Physical agility tests, which measure an employee's ability to perform actual or simulated job tasks

- Physical fitness tests, which measure an employee's performance of physical tasks, such as running or lifting, as long as these tests do not include examinations that could be considered medical (e.g., measuring heart rate or blood pressure)
Confidentiality

- All information about disability and accommodations must be kept confidential
- Information can be available to supervisors and medical emergency personnel
- Keep separate medical and personnel files
- “Need to Know Basis”
Discipline and Termination

Rules and Their Enforcement Must Be:

- Evenly and Consistently Applied
- Job-related
- Consistent with business necessity
- Non-Discriminatory
- There must not be an unequal impact on employees with disabilities
part III: disclosing a disability
When should I disclose my disability?

- The best time to disclose your disability is as soon as you know that you will need a reasonable accommodation.

- You are not required to disclose your disability or your need for reasonable accommodations at the time of application.

- You should disclose your need for reasonable accommodations before your work starts to suffer.
How should I disclose my disability?

- You can inform your employer that you need reasonable accommodations because of a disability verbally or in writing.

- If you disclose your disability and request reasonable accommodations verbally, it is a good idea to follow up with a written request for reasonable accommodations based on disability.
part IV: requesting reasonable accommodations
What is reasonable accommodation?

A reasonable accommodation is any change in the work environment or the way things are usually done that gives an individual with a disability an equal employment opportunity.
A reasonable accommodation need not be the “best” or “ideal” accommodation available, but it must be an “effective” accommodation.

The accommodation must offer an equal opportunity for the person with the disability to be considered for a job, to perform the essential job functions, or to enjoy equal benefits and privileges of the job.
What are some examples of accommodations employers may need to offer an employee?

- Changes to a building or work location to make the area accessible and usable
- Job restructuring (i.e. Exchanging unimportant duties between co-workers)
- Part-time or modified work schedules
- Flexible leave policies
- Acquiring or modifying equipment or devices
- Adjusting or modifying examinations, training materials, or policies
- Providing qualified readers and interpreters
- Altering when or how an important job function is performed
- Changes in supervisory style
- Employer assistance getting to and from an accessible job site
- Permitting use of accrued paid leave or unpaid leave for necessary treatment
- Working at home
- Reassignment to a vacant position
Examples of accommodations employers may need to offer to employees:

- changes to a building or work location to make the area accessible and usable by an individual because of a physical or mental disability
- job restructuring: exchanging unimportant duties between co-workers
- part-time or modified work schedule
- flexible leave policies
- acquiring or modifying equipment or devices
- adjusting or modifying examinations, training materials, or policies
Reasonable Accommodations

- Employers cannot refuse to make reasonable accommodations for an otherwise qualified applicant or employee with a disability.

- Employers cannot deny employment opportunities to people with disabilities based on the need to make reasonable accommodations.

- Reasonable accommodations are only required for people who have an impairment or have a record of an impairment.
Job Coaching

- An employer is typically not required to provide a job coach throughout the employment process but would need to consider as part of learning the job.

- Policies may need to be modified (i.e. allowing non-employee in restricted areas with a background check, etc.).

- Use of internal supports for employee (assign staff to work one-on-one when learning new tasks and to serve as support to the staff person).
A reasonable accommodation must be provided unless:

- It results in an undue hardship to the employer
- It poses a direct threat to the health or safety of the employee or others
- It results in a fundamental alteration of the position
Examples of accommodations that courts often find "unreasonable":

- Approving leave for an indefinite period
- Hiring an additional employee to handle the workload of the individual with the disability
- Permitting an employee with alcoholism to show up for work under the influence of alcohol or drugs, to drink alcohol or use drugs, or to engage in alcohol or drug-related misconduct
- Turning a temporary light-duty position into a permanent light-duty position
Reasonable Accommodations... The Interactive Process
Request For Accommodation

“The employer should “initiate an informal, interactive process with the individual with a disability in need of the accommodation.”

“The process should identify the precise limitation resulting from the disability and the potential reasonable accommodations that could overcome those limitations.”

29 C.F.R § 1630.2(O)(3)
The Process:

- **Step 1:** Employee or someone on behalf of the employee requests a reasonable accommodation.

- **Step 2:** The employer may seek limited medical information if the need for the accommodation and/or the disability are not apparent.

- **Step 3:** Discuss the accommodation request with the employee and other relevant individuals.

- **Step 4:** Determine an effective accommodation utilizing available resources.

- **Step 5:** If an effective, reasonable accommodation is found, it should be implemented and there should be follow-up to ensure its effectiveness.
Courts Generally Analyze Reasonable Accommodation Cases as Follows:

- The plaintiff needs to show the existence and that the accommodation is “reasonable on its face.” e.g.: voice recognition software exists and would cost the employer only $200 to purchase and install.

- Burden then shifts to the employer to prove the accommodation is an undue hardship.
Reasonable Accommodations...

...The Employer Defenses
Limitations – Undue Hardship

Undue Hardship:

“An action requiring significant difficulty or expense” by the covered entity when considering five general factors.

42 U.S.C. §12111(10)(A)
Factors Considered

1. The nature and net cost of the accommodation considering tax credits, deductions and outside funding

2. The overall financial resources of the facility or facilities, the effect on expenses and resources, and the number of persons employed at such facility

3. The overall financial resources of the employer, employment agency, or labor organization, the number, type and location of its facilities, and the overall size of the business with respect to the number of employees

4. The type of operation(s), including the composition, structure, and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility or facilities

5. The impact that the accommodation would have on the operation of the facility, including its impact on the ability of other workers to perform their duties and its impact on the facility's ability to do business
Limitations – Direct Threat

Direct Threat:

“A significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

42 U.S.C. §12111(3)
Direct Threat

Employers must investigate whether a direct threat can be reduced or eliminated through a reasonable accommodation – requiring use of the "interactive process"
Tax Incentives

1. Work Opportunity Tax Credit
2. Small Business Tax Credit
3. Architectural/Transportation Tax Deduction
Resources

- Job Accommodation Network (JAN)
- EEOC
- State Vocational Rehabilitation Agency and/or Blind Agency
- Computer Assistance Program (Department of Defense)
- Disability and Business Technical Assistance Center (DBTAC)
If your employer refuses to provide reasonable accommodations

- If your employer refuses a request for reasonable accommodation, you can also file a complaint with the Arizona Attorney General, Civil Rights Division. [https://www.azag.gov/complaints/civil-rights](https://www.azag.gov/complaints/civil-rights)
- Call ACDL if you need help
part VI: protections from discrimination
Next Steps:

If you think your rights have been violated:

- Try to resolve the matter informally with your employer
- Call the Arizona Center for Disability Law for further information on self-advocacy
- File a complaint
- A complaint with EEOC must be filed prior to suing an employer under the ADA.
Equitable Relief – Injunctions

Court orders to do or not do something
- Give plaintiff job or promotion
- Reinstatement after firing
- Provide Reasonable Accommodation
- Provide benefit or privilege denied
- Stop asking improper questions
Equitable Monetary Relief

- Back pay
  - Amount of salary/wages plaintiff would have received had s/he been hired/promoted

- Front-pay
  - In lieu of, or until reinstatement
  - Job no longer exists
  - Not feasible to have good working relationship (animosity of the parties)

- Lost benefits

- Interest
Compensatory Damages

- Out-of-pocket expenses
- New job commuting costs
- Emotional distress
  - humiliation
  - depression
  - anxiety
  - mental anguish
Punitive Damages

- Malice or reckless indifference to federally protected right

- Purpose:
  - Punish wrongdoer
  - Deter future bad acts
  - Deter other bad actors
  - Not to make victim whole

- Takes into account Defendant’s wealth
Damages – Reasonable Accommodation Cases

No compensatory or punitive damages if defendant can prove:

- Acted in good faith
- Engaged in the interactive process
### CAPS ON DAMAGES Only

Cap on total (compensatory + punitive)

**Varies by Size of Employer:**

<table>
<thead>
<tr>
<th># of Employees</th>
<th>Max Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>15-100</td>
<td>$50,000</td>
</tr>
<tr>
<td>101-200</td>
<td>$100,000</td>
</tr>
<tr>
<td>201-500</td>
<td>$200,000</td>
</tr>
<tr>
<td>501 or more</td>
<td>$300,000</td>
</tr>
</tbody>
</table>

Caps – only for compensatory & punitive damages

NO CAP on equitable monetary relief
- back pay
- front pay
- benefits
- interest
After Acquired Evidence

Defendant can use **ONLY** information it had when employment decision was made to defeat liability…

**BUT…**

…After acquired evidence **CAN** be used to limit remedy – reinstatement, back pay, front pay, etc.
Filing a Complaint

You may file a complaint of discrimination with:

- Arizona Civil Rights Division (ACRD) of the Arizona Attorney General’s Office
  
  https://www.azag.gov/complaints/civil-rights
  (602) 542-5263 (Phoenix office - voice)
  (602) 542-5002 (Phoenix office - TTY)

- Equal Employment Opportunity Commission (EEOC)
  
  http://www.eeoc.gov/employees/howtofile.cfm
  (602) 640-5000 (voice)
  (602) 640-5072 (TTY)
What ACDL Can Help You With

- Abuse and neglect
- Access to health care
- Access to mental health care
- Assistive technology
- Employment

- Voting rights
- Transportation
- Fair housing
- Accessibility
- Education
- Emergency preparedness
What is a Protection and Advocacy System?

A federally funded organization that works to protect people with disabilities from abuse and neglect and advocates for the rights of people with disabilities in the following areas: Employment, Education, Housing, Public accommodations, Health care services, Mental health care services and Assistive Technology.

Arizona Center for Disability Law (ACDL) is the protection and advocacy system for Arizona.
Accessing ACDL’s Services

- Call the intake line on Monday, Tuesday, Thursday or Friday.
- Intake lines are open on these days from 9:00 AM to 1:00 PM.
- Intake phone number is **602 274–6287** or toll free, **1-800-927-2260**.
- Getting Help – Intake Worksheet on www.azdisabilitylaw.org
Resources

- http://www.eeoc.gov/
- https://www.azag.gov/civil-rights
- http://www.ada.gov/
- http://azdisabilitylaw.org

Regulations

- http://www.ada.gov/pubs/adastatute08.htm
Questions