

ADA Basics: When Does An Employee Have a Disability Discrimination Claim?

In 2008, Congress amended the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., (ADA) to broaden protections against disability discrimination. As a result many employees who may not consider themselves to be disabled or whose employers may not regard them as disabled may have disability discrimination claims under the ADA.

The ADA, as amended, defines disability discrimination to include: 1) discrimination on the basis of a current disability or 2) a record of disability, 3) the failure to reasonably accommodate an individual with a known disability or record of disability --or discrimination because of the need for accommodation, 4) discrimination because one is “regarded as” having a disability—which does not mean what you think (more below), 5) discrimination because of the disability of an individual with whom the employee has a relationship or association, 6) making an impermissible medical examination or inquiry or failing to maintain the confidentiality of permissible medical inquiries; and 7) participating in a contractual relationship that has the effect of discriminating on the basis of disability.

Discrimination on the basis of a current or actual “disability” means – taking adverse action against employees who have a mental or physical impairment that “substantially limits” them in a major life activity or major bodily function as compared to most people in the general population. Under the 2008 amendments to the ADA, which broadened the scope of the law, substantially limited is not meant to be a demanding standard. For example, a broken ankle that substantially limits someone in the major life activity of walking may be a disability under the ADA.

Whether an impairment substantially limits an employee is evaluated without the use of mitigating measures such as medication or physical therapy (, or crutches). This means, for example, that even if an employee is not substantially limited in a major life activity if she takes her medicine, if without her medicine she would be substantially limited, she has a disability under the ADA. In addition, substantial limitation for episodic conditions such as epilepsy, bipolar/depressive disorder, ulcerative colitis, multiple sclerosis, migraines and asthma—to name just a few, is evaluated as of when the condition flares up or is active, not when it is in remission or under control.

A “record of disability” under the ADA, simply means a history of having a disability.

An employer covered by the ADA (with 15 or more employees in 20 calendar weeks of the current or preceding calendar year) must reasonably accommodate otherwise qualified employees who have a known “disability” or a “record of disability” in a manner that would enable them to perform the essential functions of their position, unless to do so would pose an undue hardship on the employer or its operations. In most cases it is the employee’s responsibility to make known to an employer that they need help – though no magic words are required. An accommodation will be deemed “reasonable” if it is plausible on its face or seems reasonable in the run of cases.

Reasonable accommodations can include reallocating (or eliminating) the marginal or non-essential functions of a position, providing assistive devices or technology or alternative methods to enable an employee to complete essential functions, providing qualified readers or interpreters, or granting a reasonable period of leave to allow treatment, follow-up treatment, medication adjustment and/or recovery from an episodic flare-up or a new substantially limiting impairment. Reasonable accommodation may also include transfer to a vacant position at the same level or below for which an employee is qualified.

An employer violates the ADA not only when it fails to reasonably accommodate a disability or record of disability, but also when it takes adverse action against an employee because of his actual or suspected need for reasonable accommodation.

An employer may have a defense against a claim of damages due to a failure to reasonably accommodate if it engages in good faith in an interactive process with the employee in an attempt to identify a reasonable accommodation.

“Regarded as” disability was also redefined in 2008 to broaden the scope of this anti-discrimination provision. An employer does not have to actually regard an employee as having a disability, nor does an employee’s impairment need to actually be or be perceived as being substantially limiting, for the ADA to protect an employee from discrimination. Employees are “regarded as” having a disability if their employer takes an adverse action against them because of an actual or perceived physical or mental impairment, whether or not this condition is substantially limiting.

This means, for example, if an employee is fired because of a permanent limp that does not substantially limit their ability to do anything – but that the employer thinks reflects badly on the fitness of its employees, that employee will have been fired because of a “regarded as” disability – an impairment that resulted in an adverse action against him.

While employers must reasonably accommodate an employee with a substantially limiting impairment or a record of such impairment—that is a “disability” or “record of disability,” they do not have to accommodate an employee who meets only the “regarded as” definition of disability. An employer also has a defense against a “regarded as” claim if the employee’s impairment is both “transitory” (lasting 6 months or less) and “minor” (which is not defined by the statute.) Note, however, that according to EEOC regulations an actual “disability” may be substantially limiting and require reasonable accommodation, even if it lasts less than 6 months.

In addition to prohibiting discrimination on the basis of an employee’s own disability, the ADA also forbids discrimination against an employee because of their association with an individual with a disability. These issues frequently arise when an employer presumes that the disability of a relative or significant other will result in additional expenses for the employer, when the associate of the employee has a contagious disease or condition that results in fear of infection or stigma, or when the employer fears that the disability of a loved one will result in absence from work.

Note, that although an employer may not discriminate against an employee because of their association with a person with a disability, employers are not required to reasonably accommodate an employee because of the disability of a family member or close associate. So, employees are not entitled to medical leave under the ADA to care for a family member with a disability (although they may be entitled to such leave under the Family and Medical Leave Act.)

The ADA also provides protection for the privacy rights of employees. An employer is not allowed to make pre-offer medical inquiries of applicants for employment, whether or not the applicant has a disability. Once an offer is extended such inquiries may be made only if they are made of all employees in that type of position regardless of disability. An employer can use this information to disqualify an applicant with a disability only if the reason is job related and consistent with business necessity. Likewise, an employer cannot make medical inquiries of current employees unless the inquiry is job related and consistent with business necessity. These criteria may be met when such information is needed to evaluate a request for reasonable accommodation, or to determine the fitness for duty of an employee whose performance has declined in a manner that indicates that a medical evaluation is needed.

If an employee is required to provide the employer with confidential medical information in order to support their request for reasonable accommodation (or a request for medical leave under the Family and Medical Leave Act) or to submit to a fitness for duty exam, the employer must retain the employee's medical information in confidence and may disclose it only to managers (and first aid emergency personnel) with the need to know. If the employer discloses this confidential information to others the employee may recover for any damages that result, including damages for emotional distress.

An employer also may conduct "voluntary" medical examinations that are part of employee health programs. However, a recent decision brings into question whether an employer's payment of up to 30% of health insurance premiums for participation in such programs may make such participation involuntary.

Finally, employers may be held responsible for disability discrimination by those with whom they contract, for example, staffing agencies who impose impermissible qualification standards on applicants with disabilities, or third party administrators – who discriminate on the basis of disability in administering benefits, except on the basis of permissible underwriting criteria. Thus, if an employee is denied a reasonable accommodation by a third-party administrator, an employer may be held responsible for this violation of the ADA.

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