



The Americans with Disabilities Act

Author(s): JOHN E. THIEL

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THE AMERICANS WITH DISABILITIES ACT

BY JOHN E. THIEL

The Americans with Disabilities Act (ADA) is designed to prevent employment discrimination against individuals with disabilities; and to prohibit discrimination so that qualified handicapped persons may receive certain public services, public accommodations, transportation, and telecommunications.

The law, which became effective on July 26, 1992, is divided into five sections. Title I applies to the employment relationship. The ADA's goal of prohibiting discrimination in the employment setting is not a great deal different than that of Title V of the Rehabilitation Act of 1973.

In addition, most states have statutes and regulations that prohibit employment discrimination on the basis of handicap. For practitioners who are familiar with handling general employment discrimination cases alleging discrimination on the basis of handicap, as well as

claims pursuant to the Rehabilitation Act of 1973, the skills known are transferable to handling cases involving the ADA.

Who Is Protected?

In order to be protected under the ADA, a person must be a qualified individual with a recognized disability. The person must be able to perform the essential functions of a job, with or without reasonable accommodation. The ADA covers all employers engaging in industry affecting commerce that employ 15 employees for each working day in at least 20 or more calendar weeks. Unlike some other federal legislation, the ADA applies to state and local governments, agencies, departments, and other government entities. The scope of coverage regarding employers is broad as long as employers meet the 15-employee threshold.

In order to be covered under the ADA, a person must have a disability that is recognized under the law. A disability is generally defined as something that is a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Major life activities are generally recognized as the ability to see, hear, speak, move about, and generally participate in the workplace.

The ADA also covers people who, while they may not currently have a disability affecting a major life activity, have a record of such disability. Lastly, as in other types of handicap pro-



John E. Thiel is a shareholder with Godfrey & Kahn, S.C., in its Appleton, Wisconsin, regional office. He provides legal advice and consultation to management concerning employment issues involving individual rights of employees.

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tections, a person is protected from an employer's perception that the employee has a disability, when in fact the employee does not.

The law generally has been applied to include the following chronic medical conditions as disabilities: cancer or a person having a history of cancer, inability to utilize various limbs of the body, any hearing or visual impairment, developmental disabilities, having the condition of AIDS, and various recognized mental conditions.

Conditions that are not categorized as disabilities under the ADA include various sexual disorders or behavior disorders such as compulsive gambling, kleptomania, and pyromania. As in state handicap laws or the Rehabilitation Act, alcoholism and drug addiction are considered to be handicaps, but the active use of illegal drugs is not covered, nor would the ADA protect an employee at work intoxicated.

However, the fact that an employee might be intoxicated on one occasion might be evidence of alcoholism that is in and of itself protected. The practitioner should proceed with caution, and should generally advise that the alcoholic employee be put on a last chance program. It is the status of being an alcoholic that creates the protective category under the ADA.

The case law has been evolving since 1992 regarding the application of the protective nature of the law. Initially, courts generally found that anyone with a disability would be entitled to protection under the ADA. But as federal courts take a more strict analysis of the law, they are tending to find that if a person has a chronic condition that is considered to be a disability, but the condition is under control by the use of legal medication, then the person is not disabled under the ADA. The rationale is that if the medication controls the disability so that it does not affect a major lifetime activity, then the person does not need protection under the ADA. The person is able to perform the work of the job under her own merits without further protection. However, the employee in such a situation would still be protected from illegal discrimination based on a perception of an impairment.

Accommodations

Even if a person is disabled, the duty of the employer is to provide reasonable accommodation for the condition. Reasonable accommodation is something that would not impose an undue hardship upon the employer's business and

would enable the qualified applicant to be considered for the job position and allow the applicant to perform the essential functions of the job.

The essential functions of a job can be controlled by the employer. They are best determined by a written job description for each job in the place of employment. The essential functions of the job are those tasks that must be performed under a job category for an efficient workplace setting. Nonessential functions of the job would include other items to be performed by the employee that are not essential to the specific job position.

Once an employer identifies the essential functions of the job, it is necessary to analyze whether the protected employee is unable to perform the essential functions without reasonable accommodation. The reasonable accommodation could be restructuring the performance process or providing specialized equipment so the employee can complete the work. The courts have held that it is not necessary to have another employee perform work for the protected one as a reasonable accommodation.

Another developing trend is that it might be a reasonable accommodation for the employer to provide greater leave to a disabled employee than she might otherwise be entitled to. If an employee is covered under a state or federal Family Medical Leave Act, it is still necessary to analyze whether an additional leave would be reasonable under the ADA.

The ADA does not require an employer to create light duty for an employee who is unable to return to his job. A distinction arises regarding an employee who is injured away from work and returns to work protected under the ADA. Under the ADA, it is necessary to determine whether the employee can return to the job she left at the time of the injury that resulted in the protected disability.

Contrast this scene with some state law workers' compensation requirements that grant a greater right to the injured employee to return to the workplace. In certain states the injured employee is allowed to return to any available job within the place of employment for which the employee is qualified. While both an employee that received a disabling injury away from work and one who received a disability at work are both protected under the ADA, it is necessary to make an analysis as to where the injury occurred to determine the scope of available jobs that must be reviewed before returning

the employee to the workplace.

If the employer determines that an employee is unable to perform the essential functions of the job with or without reasonable accommodation, then the employment is terminated. If the employee believes she has been wrongfully terminated and a determination is made that the employee is substantially impaired in her lifetime activities, the person may have a claim against the employer.

Filing a Claim

A claim is brought to the Equal Employment Opportunity Commission (EEOC). The general statute of limitations is 180 days from the date of the alleged discriminatory act. In states that have a comparable anti-discrimination law with a longer state statute of limitations, the law applies the longer statute of limitations.

An administrative complaint is filed at the EEOC and mailed to the employer. The employer is generally given a length of time in which to file a position statement. Depending on the circumstances, it is generally helpful to provide as much information as possible to the investigating officer. The first step is to determine whether the person is actually disabled. If the person is actually disabled, then it is necessary to determine whether the disability prevents the person from performing the essential functions of the job. If the disability prevents the person from performing the essential functions of the job, then it is necessary to show that there are no reasonable accommodations available to the person.

As in any kind of employment discrimination case, it is helpful if the employer can provide the lawyer with good documentation concerning the employee and any steps the employer took to provide reasonable accommodation.

As with other claims brought under federal laws, the EEOC can issue a right to sue letter to the employee. Once the right to sue letter is issued, the employee has 90 days in which to bring a lawsuit in state or federal court against the employer. More often than not, the EEOC has been finding no probable cause to believe that employment discrimination occurred under the ADA. If the EEOC does find a meritorious claim it has the ability to bring a lawsuit on behalf of the employee. If a lawsuit is brought the potential remedies available to the employee include reinstatement, back pay, reasonable accommodation, injunctive relief, and attorney fees and costs. In addition, pursuant to

the implementation of the Civil Rights Act of 1991, the complainant may seek compensatory damages as well as punitive damages.

Other Titles

Most of the interaction that a lawyer will have with the ADA is under Title I, which considers employment provisions. Title II concerns public services and transportation services. The public services portion deals with preventing discrimination by public entities regarding qualified individuals with disabilities and regulates the removal of architectural barriers, communication problems, and the removal of barriers for transportation systems.

Title III involves preventing discrimination regarding public accommodations and applies to private entities that hold themselves out to serve the public. This covers everything from inns and motels, restaurants, movie houses, auditoriums, museums, parks, schools, day care centers, gymnasiums, and other recreational facilities. The law prevents discrimination against qualified individuals with disabilities in their enjoyment of using the facilities. CL

CONDITIONAL OFFERS OF EMPLOYMENT

BY FLORENCIO "LARRY" RAMIREZ

Before being entitled to ADA protection, a person must be found otherwise qualified for the position sought. These initial questions must be initially determined by the employer at the time of hiring, promotion, or other job action (29 C.F.R. § 1630.2(m) (1997)). However, the ADA specifically prohibits any pre-offer of employment inquiry into any pre-existing physical condition or pre-employment physical examination (42 U.S.C. § 12,112 (1990)).

Once the employee has been determined to be otherwise qualified for the position sought, the employer may make a conditional offer of employment based upon the successful completion of a physical examination to determine the prospective employee's ability to perform the "essential functions" of the job. The physical examination need not be job-related and consistent with business necessity. However, all employees must be subjected to the same examination, and the results of such examinations must be kept confidential (29 C.F.R. § 1630.14(b) (1997)).

Florencio "Larry" Ramirez is a small firm practitioner in Las Cruces, New Mexico. He is the incoming chair of the ABA General Practice, Solo and Small Firm Section.