

PEOPLE WITH DISABILITIES AND THE HEALTHCARE WORKFORCE

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DISCLOSURES

- No conflicts of interest
- No products will be discussed.
- Employed by University of Utah

OBJECTIVES

- To discuss requirements of the ADA
- To discuss the significant changes in the ADAAA
- To discuss the idea of reasonable accommodations
- To present case law about healthcare workers with disabilities
- To consider privacy issues when healthcare workers with disabilities are treated at the facilities that employ them

ADA

- Signed into law July 26, 1990
- Followed other laws proscribing discrimination against people with disabilities:
 - Architectural Barriers Act (1968)
 - Rehabilitation Act (1973)
 - Education for All Handicapped Children Act (now IDEA) (1975)
 - Fair Housing Amendments Act (1988)
- Purpose: to remedy discrimination against people with disabilities; end segregation of people with disabilities; to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency” for people with disabilities

DISABILITY LAW: WELFARE OR CIVIL RIGHTS?

- Welfare:
 - Compensation for disadvantage
 - Special benefits
- Civil rights:
 - Inclusive equality
 - Removing barriers—physical design, workplace structures
 - Accommodations required for successful albeit non-traditional forms of job performance

ADA DEFINITION OF DISABILITY

- Physical or mental impairment that substantially limits one or more major life activities
- Record of such an impairment
- Being regarded as having such an impairment

- Original ADA
 - 43 million people with disabilities
 - A “discrete and insular minority”

PROHIBITS DISABILITY DISCRIMINATION

- In employment (15+ employees), public services, public accommodations
- Employment: job application procedures, hiring, advancement, discharge, compensation, job training, other terms, conditions, privileges of employment
- Discrimination includes
 - Limiting, segregating, classifying
 - Using standards that have the effect of discrimination on the basis of disability
 - Not making reasonable accommodations to know physical or mental limitations of an otherwise qualified individual with a disability
 - Using qualification standards or other selection criteria that tend to screen out

BUT...

- To claim the protections of the statute, must first show that one is a person with a disability—i.e., within the protected class
- Other elements of the prima facie case: otherwise qualified, experienced differential treatment "because of" disability
- And defenses:
 - Qualification standards are job related and consistent with business necessity
 - Performance cannot be accomplished by reasonable accommodation
 - Individual shall not pose a "direct threat to the health or safety of other individuals in the workplace" (interpreted by the Court to include threats to self)
 - Proposed accommodation would present an "undue hardship" an action "requiring significant difficulty or expense" in light of the overall resources of the facility, the business, and the business' operations.

SUPREME COURT LIMITS DEFINITION OF DISABILITY

- *Sutton* trilogy (1999): in assessing substantial limitation, evaluate the individual in his/her corrected state. Ironies:
 - *Individuals are rejected because of their conditions in their uncorrected state, but cannot claim the protections of the statute because of what they can do in their corrected state*
 - *Individuals lose if they get proper treatment*
 - *Murphy v. United Parcel* (1999): for “regarded as” must show that the employer believed that the person’s employment substantially limited his/her major life activities
- *Toyota v. Williams* (2002): “substantial limit to major life activity” means restriction in performing tasks of central importance in most people’s daily lives

ADAAA (2008)

- Removed language in statutory preamble suggesting people with disabilities a limited group: 43 million, “discrete and insular minority”
- ADA provides “a clear and comprehensive national mandate for the elimination of discrimination against people with disabilities”
- Repudiates *Sutton* trilogy, *Williams*
- Rules of construction:
 - Definition of disability must be “construed in favor of broad coverage . . . To the maximum extent permitted...”
 - Substantially limited interpreted in accord with restatement of statutory findings and purpose
 - Disability determination made without considering ameliorative measures (except ordinary eyeglasses)
 - If impairment episodic, assessment when active
- Changed “because of the disability of” to “on the basis of disability” (perhaps moving away from “but for” causation?)
- Removes right to request reasonable accommodations for “regarded as” plaintiffs; also states that impairments that are “transitory and minor” will not trigger classification as “regarded as”

BUT DID NOT CHANGE

- Definition of discrimination
- Account of reasonable accommodations
- Role of qualification standards
- Defenses: direct threat, undue hardship

REASONABLE ACCOMMODATIONS?

- May include accessible facilities, equipment design, altered ways of performance, adjustment of non-essential responsibilities, workplace rules—modifications that are needed for an employee to perform job successfully
- **Not** special benefits: eliminating essential job requirements, creating new positions, reassignment to position for which not qualified
- Test for “undue hardship” is more than *de minimus*: significant costs in light of the facility, overall employer resources, type of operations
- Defense: burdens of production and persuasion are on employer, not employee (that is, the employer has to show hardship by a preponderance of the evidence; it’s not up to the employee to disprove hardship)
- Defense: direct threat requires individualized assessment

CONTINUING PROBLEMS

- Plaintiffs are losing on whether they are “qualified”--that is, whether they can perform essential job functions with or without accommodations
- Courts are deferring to employers’ judgments about essential job functions, other workplace rules
- Courts sometimes change “direct threat” from a defense to part of what the plaintiff needs to show in establishing qualifications
- Employees in a “double bind” about whether to reveal disability
 - If reveal, risk discrimination
 - If don’t reveal, risk substandard job performance

HEALTH CARE WORKERS WITH DISABILITIES

- Health care an important area for addressing disability discrimination
 - Approaching 20% of GDP—many jobs with a variety of skills and pay
 - Third party payers—possibility of sharing costs of accommodation
 - Employer understanding of illness or injury
- BUT
 - Patient best interest: importance of qualifications, direct threat defense
 - Complexity and time-sensitivity of tasks
 - Need to rely on expert (employer?) judgment

ILLUSTRATIVE CASE: QUALIFIED?

- Employee with intellectual disabilities from cerebral abscess, stroke
- Job in hospital environmental services: cleaning operating rooms, performed successfully; reassigned to emptying trash from many floors, unsuccessful
- Accommodation requested: transfer back to cleaning ORs
- Employer: written job description that must rotate through all environmental services tasks
- Court: evidence of how jobs actually function could rebut written job description
- *Mobley v. Miami Valley Hosp.*, 603 F.App'x 405 (6th Cir, 2015)

ANOTHER EXAMPLE

- Stanley F. Wainapel, M.D. (Boston University)
- Slowly progressing retinal disorder
- Chief, Department of Physical Medicine & Rehabilitation, Albert Einstein College of Medicine
- Interests: complementary/alternative medicine, physical disability among physicians & medical students, ethical aspects of rehabilitation research, medical problems in musicians, disability in the novels of Dickens

ILLUSTRATIVE CASE: EMPLOYER JUDGMENTS ABOUT ESSENTIAL FUNCTIONS OF JOB

- Home health care field nurse, traveling to see 6/8 patients per day, training to be a team leader
- Epileptic seizure
 - Medication that caused fatigue, memory issues during adjustment
 - One-year driving restrictions
- Accommodations requested
 - Mother drives to appointments or uses public transit
 - Adjusted time line in training for team leader position
- Employer: can't do essential job function of driving to patients' homes
- Court: question of fact regarding responsibilities of a team leader and whether employee could meet them given travel restrictions
- Complications: employee fired allegedly because she missed work without approval to take her child to the doctor and because one patient requested that she be reassigned
- *EEOC v. LHC Group, Inc.*, 773 F.3d 688 (5th Cir. 2014)

ILLUSTRATIVE CASE: PERFORMING JOB DIFFERENTLY

- Deaf applicant for job as plasma center technician
- Denied job on the basis that she would not be able to hear alarms on plasmapheresis machines
- Proposed accommodation: enhanced alerts on the machines, call buttons for donor alerts, hearing interpreter
- Court: employee must show accommodation reasonable in run of cases, employer must produce evidence of hardship, employee burden of persuasion
- Complication: direct threat defense, requires evidence of substantial risk, burden of persuasion still on employee
- *Osborne v. Baxter Healthcare Corp.*, 798 F.2d 1260 (10th Cir. 2015).

ANOTHER ILLUSTRATION OF DIFFERENT METHODS OF PERFORMANCE

- Tim Cordes, blind physician
- M.D., Ph.D. (medical scientist training program), University of Wisconsin
- Accommodations:
 - touch and computer programs converting images into structures that could be felt
 - Books on tape, text-to-speech conversion technology
- Board certified psychiatrist at Madison, WI, VA, specializing in tx of PTSD, addiction disorders

ILLUSTRATIVE CASE: DIRECT THREAT

- Nurse in behavioral health unit, needed cane after hip surgery
- Accommodation requested: use of cane
- Hospital: direct threat because risk of harm from patients grabbing cane; ability to subdue patients an essential job function
- Employee: in over three years had never had to subdue a patient; other equipment similar to canes regularly in unit without problems (e.g. broom)
- Court: “safety risk analysis” part of *employee* burden of showing she is qualified to perform job functions; all employer needs to do is show plausible risk
- *EEOC v. St. Joseph’s Hospital*, 2015 WL 685766 (M.D. Fla. 2015)

TO REVEAL?

- Medical resident with hidden disability: dyslexia
- Decision not to request accommodations
- Does not pass Step 3 exam within required time frame—later passes with accommodations but too late
- Medical school says no resources to accommodate delay; resident can't be reinstated in program
- Court: resident at fault for not passing examination within the requisite time frame

PRIVACY CONSIDERATIONS

- Employee concerns about who knows information, possible adverse consequences
- ADA: employers must keep employee medical information in separate, confidential files, releasing information about any necessary restrictions and reasonable accommodations only to supervisors or managers or any appropriate first aid and safety personnel
- HCP as employer: employment records are outside of HIPAA
- EHR problem: must have separate HIPAA EHR for employee as patient, records for employee as employee