

AMERICANS WITH DISABILITIES ACT BASICS

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The Americans with Disabilities Act (the ADA) prohibits employers from discriminating on the basis of disability against a qualified individual with respect to job application procedures, the hiring, advancement and/or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.¹ The ADA may be the most complex of the federal anti-discrimination statutes in that it is the only statute that requires employers to take certain actions in addition to abstaining from other actions: the ADA requires employers to provide a reasonable accommodation to the known physical or mental limitations of applicants and employees, unless doing so would impose an undue hardship on the employer's operations. *The obligation to make reasonable accommodation is a form of non-discrimination.*² Each situation is based on an individual assessment of the applicant or employee's disability with respect to the position in question. The ADA also prohibits employers from asking any questions of job applicants that are likely to reveal the existence of a disability until it has extended a condition offer of employment. This prohibition effectively means that an employer cannot ask any questions about the applicant's medical history or conditions, nor may it require a medical examination, before offering the applicant a job.³

While Title VII protects everyone who might experience discrimination on the basis of race, color, gender, religion or national origin and the ADEA protects anyone age 40 or above,

¹The employment provisions of the ADA are codified at 42 U.S.C. §§12111-12213. The EEOC's ADA regulations may be found at 29 CFR Part 1630.

²See 29 CFR Part 1630, App. 1630.9.

³See 42 U.S.C. § 12112(d); 29 CFR § 1630.14(a) and (b).

whom the ADA protects is less clear. Analyzing whether an individual falls within the ADA-protected class requires applying a series of definitions. So to understand what it means to say that the ADA prohibits employers from discriminating on the basis of disability against a qualified individual, we must define the term “disability,” as well as the phrase “qualified individual.” The ADA defines *disability* as a physical or mental impairment that substantially limits a person in performing one or more major life activities. This definition, in turn, requires definition of another phrase, that of “major life activities.” Major life activities are defined by the statute and EEOC regulations through examples. Major life activities include:

- caring for oneself
- performing manual tasks
- walking
- seeing, hearing, speaking
- breathing
- learning
- eating
- bending
- reading
- working
- sitting
- standing
- sifting
- reaching
- thinking
- interacting with others
- sleeping
- speaking
- concentrating
- communicating.⁴

Major life activities also include major bodily functions, such as

- functions of the immune system
- normal cellular growth
- digestive and bowel functions
- endocrine functions.⁵
- neurological and brain functions
- respiratory and circulatory function
- reproductive functions, and

Persons who have a record of such an impairment or are regarded as having such an impairment are also covered by the ADA.⁶ The ADA provides that the definition of disability is to be construed in favor of broad coverage of individuals.⁷

⁴See 42 U.S.C. § 12102(2)(A); 29 CFR § 1630.2(i)(1)(i).

⁵See 42 U.S.C. § 12102(2)(B); 29 CFR § 1630.2(i)(1)(ii).

⁶See 42 U.S.C. § 12102(1)(B) and (C), (3)(A).

⁷See ADA Amendments Act (ADAAA), Pub. L. No. 110-325, § 3(4)(A)(2008).

Once it has been established that an individual has a disability within the meaning of the law, employers must consider the meaning of the phrase *qualified individual*. A qualified individual means one who has the prerequisite skills, experience, education and other job-related requirements of the position and who, *with or without reasonable accommodation*, can perform the *essential functions* of the job.⁸ The essential functions of the job, in turn, are the basic, fundamental duties that the employee must perform. The term “essential functions” does not include the marginal functions of the position.⁹ A job function may be considered essential for any of several reasons, including but not limited to the following:

- the reason the position exists is to perform that function;
- the limited number of employees available among whom the performance of that job function can be distributed;
- the function is highly specialized so that the person in the position is hired for his or her expertise or ability to perform the particular function.¹⁰

Evidence of whether a particular function is essential includes, but is not limited to the employer's own judgment as to which functions are essential, written job descriptions prepared before advertising or interviewing applicants, the amount of time spent on the job performing the function, the consequences of not requiring the person in the position to perform the function, the work experience of past incumbents in the job, the current work experience of persons in the same or similar positions.¹¹

The ADA applies to all state agencies and to educational institutions with 15 or more employees.¹²

⁸See 29 CFR § 1630.2(m).

⁹See 29 CFR § 1630.2(n).

¹⁰See 29 CFR § 1630.2(n)(2).

¹¹See 29 CFR § 1630.2(n)(3) and 29 CFR Part 1630 App. § 1630.2(n).

¹²See 42 U.S.C. § 12111(5)(a).

Disparate Treatment or Intentional Discrimination under the ADA

Under the ADA, individual applicants who have been denied employment because they have a disability (or who believe they may have been fired because of a disability) may bring a claim of disparate treatment, or intentional discrimination, against the offending employer. As is the case with Title VII and ADEA disparate treatment claims, the burden-shifting framework of *McDonnell Douglas Corp. v. Green* applies where there is no direct evidence of discrimination and proof must be circumstantial. Take Marcus, for example, who believes that his application for the position of budget analyst has been rejected because he suffers from epilepsy but has no “smoking gun” or direct evidence of disability discrimination. To establish a *prima facie* case, Marcus would have to show that (1) he has epilepsy and that it is a disability within the meaning of the ADA; (2) he is qualified to perform the essential functions of position of budget analyst; and (3) the employer rejected his application because of his disability or was unreasonably unwilling to accommodate his needs for accommodation, namely, that another person drive to meetings outside of the office. Once Marcus has established his *prima facie* case of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for rejecting Marcus’s application. If the employer meets this burden, the presumption of intentional discrimination disappears, but Marcus can still prove disparate treatment by offering evidence demonstrating that employer's explanation is merely a pretext for discrimination.¹³

Disparate Impact or Unintentional Discrimination under the ADA

The disparate impact or unintentional discrimination theory of discrimination is available to ADA plaintiffs as it is under Title VII and the ADEA. The standard of proof that a rejected applicant must meet under the ADA, however, is lighter than that under Title VII and the ADEA.

¹³See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49, 124 S. Ct. 513, 517, 157 L. Ed. 2d 357 (2003) (presuming but not holding that the McDonnell Douglas burden of proof applies).

The general rule against discriminating on the basis of disability is set forth in 42 U.S. § 12112(a):

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.

The statute gives very specific definitions of what the phrase “discriminate against a qualified individual on the basis of disability” means in subsection (b). In subsections (b)(6) and (7), it addresses the use of qualification standards and testing, which are the areas in which disparate impact on the basis of disability is most likely to occur:

(b) As used in subsection (a) of this section, the term “discriminate against a qualified individual on the basis of disability” includes—

(6) using qualification standards, employment tests or other selection criteria that *screen out or tend to screen out an individual with a disability or a class of individuals with disabilities* unless the standard, test or other selection criteria, as used by the covered entity, is shown to be *job-related for the position in question and is consistent with business necessity*; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure) (emphases added).¹⁴

So, like Title VII and the ADEA, the ADA allows rejected applicants to show that a facially neutral employment practice – here, the use of qualifications or tests to screen and evaluate applicants – has had the effect of removing applicants with given disabilities from further

¹⁴See 42 U.S.C. §§ 12112(b)(6) and (7).

consideration for employment. Where the ADA differs from Title VII and the ADEA is in the fact that a plaintiff does not need to show that the qualification standard or test has had a disparate impact on a group or class of applicants with disabilities – the plaintiff need only show that the employer used a selection device that screened him or her out. Under the ADA, the plaintiff does not need to prove that others were similarly screened out or to make a statistical showing comparing the number of persons with the disability that one would find in the demographic pool compared to the number considered for the position. Another way of saying this is that under the ADA, an employment practice can have a disparate impact against a single person.

The ADA expressly says, however, that an employer may use a qualification standard, test or other selection device that screens out persons with particular disabilities if that selection device is “job-related and consistent with business necessity” and satisfaction of the standard or performance of the test or selection process cannot be accomplished through reasonable accommodation.¹⁵ The burden is on the employer to prove job-relatedness and business necessity. To determine whether a selection device is job-related involves analyzing the questions or subject matter contained in the test or criteria used by an employer in making hiring or promotional decisions. In other words, to show job-relatedness, an employer must demonstrate that the qualification standard or selection device fairly and accurately measures the individual's actual ability to perform the essential functions of the job. When every person excluded by the qualification standard is a member of a protected class -- that is, persons with particular disabilities -- an employer must demonstrate a predictive or significant correlation between the qualification and performance of the job's essential functions. The employer's

¹⁵See 42 U.S.C. § 12113(a).

burden is high, but it is generally lower when “the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great,” as in the case of public safety positions. For example, in one recent case from the Eleventh Circuit, the court found that a minimum hearing standard was job-related where U.S. Marshals Service officers needed to possess a certain level of unaided hearing to perform the jobs essential functions adequately at all times.¹⁶ In contrast, in a recent Ninth Circuit decision, the court held that an employer’s use of a U.S. Department of Transportation hearing standard applicable only to drivers of heavier weight truck for drivers of lighter-weight vehicles was not job-related.¹⁷

Business necessity, in contrast, analyzes whether there is a business reason that makes the employer’s use of a test or criteria in hiring or promotions necessary. Under the ADA, to show that a disputed qualification standard is “consistent with business necessity,” the employer must show that it “substantially promotes” the business’s needs. For a safety-based qualification standard, “[i]n evaluating whether the risks addressed by ... [the] qualification standard constitute a business necessity, the court should take into account the magnitude of possible harm as well as the probability of occurrence.” Finally, to show that “performance cannot be accomplished by reasonable accommodation,” the employer must demonstrate either that no reasonable accommodation currently available would cure the performance deficiency or that such reasonable accommodation poses an “undue hardship” on the employer.

Once an employer demonstrates that the pertinent qualification standard is job-related and consistent with business necessity, the burden shifts to the plaintiff to offer a reasonable accommodation that would seem to allow him to satisfy that standard. The employer would then have to show that performance of the job could not be accomplished through the proposed

¹⁶See *Allmond v. Akal Security, Inc.*, 558 F.3d 1312, 1316-17 (11th Cir. 2009).

¹⁷See *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 996-97 (9th Cir. 2007).

accommodation or that it would pose an undue hardship. But as noted in the section on disparate treatment under the ADA, reasonable accommodation may include acquiring or modifying equipment or devices, job restructuring, providing readers and/or interpreters, or making physical changes to the workplace.¹⁸

The Duty to Reasonably Accommodate a Disability

A reasonable accommodation may be needed by an applicant or a current employee. The definition of reasonable accommodation is the same in either situation: a reasonable accommodation is any change or adjustment to a job or work environment that allows a qualified applicant or employee with a disability to enjoy equal employment opportunities. There are three major kinds of reasonable accommodations:

1. changes to a job application process (for example, modifying examinations);
2. changes to the work environment, or to the way a job is usually done to enable a qualified person with a disability to perform a position's essential functions; or
3. changes that allow an employee with a disability to enjoy equal benefits and privileges of employment enjoyed by other similarly-situated employees (for example, access to training).¹⁹

Most accommodations fall into the second category and may include changes or modifications to training materials or policies, acquiring or modifying equipment or devices. In the case of both applicants who have been offered a position and current employees, reasonable accommodations may include job restructuring, modified work schedules, reassignment to a vacant position, providing readers and/or interpreters, offering leave without pay, or making physical changes that make the workplace more readily accessible to persons with disabilities.²⁰

¹⁸See 42 U.S.C. § 12111(A); 29 CFR § 1630.2(a).

¹⁹See 29 CFR § 1630.2(o).

²⁰See 42 U.S.C. § 12111(9); 29 CFR § 1630.2(o)(2).

The ADA requires the employer and the applicant or employee to work together to identify appropriate accommodations by using an **informal, interactive process**. In other words, the burden of finding a reasonable accommodation, if one exists, is on neither the individual with the disability nor the employer. The burden is on both. A reasonable accommodation is an effective accommodation – one that removes the workplace barrier at issue. But if there are two possible reasonable accommodations, the employer may choose which one to implement; it does not have to choose the accommodation that the applicant or employee prefers.²¹

How does an employer know an employee needs a reasonable accommodation?

Unless the disability and the resulting need for accommodation is obvious, it is the employee's responsibility to let his or her supervisor or management know that s/he needs a reasonable accommodation.

Note: An employee does not need to use the words "reasonable accommodation" or refer to the Americans with Disabilities Act in order to request an accommodation; all s/he needs to do is let the employer know that s/he needs an adjustment or change at work for reasons related to a medical condition.

Does an employer have a right to medical documentation?

An employer may ask an applicant or employee for medical documentation that establishes the existence of a disability entitling that person to a reasonable accommodation. Nevertheless, an employer cannot ask for more information than is necessary to establish the existence of a disability. For example, an employer is not entitled to the complete psychiatric history of an applicant suffering from post-traumatic stress disorder, only to documentation of the disorder, its current effects and the long-term outlook for the applicant's recovery.²²

²¹See 29 CFR Part 1630, App. 1630.9.

²²See Equal Employment Opportunity Commission, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, No. 915.002, 7/27/00, p. 12.

What if an employer cannot accommodate an employee?

An employer is not required to provide a particular reasonable accommodation if doing so would cause the employer **undue hardship**. Undue hardship means that the accommodation would be unduly costly, extensive, substantial or disruptive, or would alter the nature or operation of the employer's business. Factors to be considered in determining undue hardship include the cost of an accommodation, the employer's size and financial resources and the nature and structure of the employer's operation.

Not all proposed accommodations are reasonable and disabilities cannot always be accommodated. Some accommodations that the courts have found to be inherently unreasonable include eliminating essential functions, indefinite, extended leaves of absence, lowering performance or production standards that are applied uniformly to employees with and without disabilities, and working at home, unless the employee can effectively perform all work-related duties at home.

Medical Information and Examinations under the ADA

The ADA makes the solicitation of medical information and the requirement of medical examinations unlawful except under very carefully delineated circumstances. There are different rules for pre-employment medical inquiries and examinations and for medical questions and examinations of current employees. Before looking at the two sets of rules, we should first make clear what would count as a medical inquiry prohibited by the ADA and what would constitute a medical examination prohibited by the statute.

Medical Inquiries

For ADA purposes, a disability-related or medical inquiry is one that is likely to elicit information about a disability. The same standards for determining whether a question is

disability-related in the pre- and post-offer stages apply once an employee has been hired. In its Preemployment Guidance and in the Guidance of Current Employees, the EEOC gives the following examples of questions that are disability-related inquiries under the ADA:

asking an applicant or employee a broad question about impairments (for example, “What impairments do you have?”)

- asking an applicant or employee whether they have (or ever had) a disability, how they became disabled or inquiring about the nature or severity of an employee's disability;
- asking an applicant or employee to provide medical documentation regarding their disability in the absence of a request for reasonable accommodation;
- asking about an applicant or employee's prior workers' compensation history;
- asking an applicant or employee whether they are currently taking any prescription drugs or medications, whether they have taken any prescription drugs or medications in the past, or monitoring an employee's taking of prescription drugs; and,
- asking an employee's co-worker, family member, doctor, or another person any of these questions about an employee or applicant.

Medical Examinations

The EEOC defines "medical examination" as a **“procedure or test that seeks information about an individual's physical or mental impairments or health.”** Its *Preemployment Guidance* says the following factors should be considered in evaluating whether a test (or procedure) is a medical examination:

- whether the test is administered by a health care professional;
- whether the test is interpreted by a health care professional;
- whether the test is designed to reveal an impairment or physical or mental health;

- whether the test is invasive;
- whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task;
- whether the test normally is given in a medical setting; and,
- whether medical equipment is used.

In many cases, several of these factors will be relevant in determining whether a test or procedure is a medical examination. In other cases, one factor may be enough to determine that a test or procedure is medical.

Here are some common tests that will qualify as medical examination under the ADA:
vision tests performed by an ophthalmologist or optometrist;

- blood, urine, and breath analyses to check for *alcohol use*;
- blood pressure screening;
- range-of-motion tests that measure muscle strength and motor function;
- pulmonary function tests (i.e., tests that measure the capacity of the lungs to hold air and to move air in and out);
- psychological tests that are designed to identify a mental disorder or impairment; and,
- diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI).

A test to determine the **current illegal use of drugs** is not considered a medical test, nor is a physical agility test to measure an employee's ability to perform actual or simulated job tasks, or physical fitness tests to 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).*

Pre-employment Medical Questions and Examinations

Under Title VII and the ADEA, application questions such as “what is your race?” or “date of birth” or “age,” are not unlawful on their face. But the fact that an employer has asked those questions will certainly be used as evidence of discriminatory intent in a failure to hire case. The ADA is different in that it expressly prohibits employers from directly asking a job applicant about a disability or asking any other questions that are likely to reveal the existence of a disability.²³

An employer may not, therefore, use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may have. An employer may not ask, “Do you need a reasonable accommodation to perform this job?” or “Do you have any medical conditions that would prevent you from performing this job?” or even “Have you ever filed a workers’ comp claim?”²⁴ An employer may ask, however, about the applicant’s ability to perform specific job functions, such as his or her ability to lift a certain amount of weight, about the applicant’s non-medical qualifications and skills, such as work history, education, required licenses and certifications, and for applicants to describe or demonstrate how they perform job tasks.²⁵

Once an offer has been extended, the employer may require the successful applicant to take a medical examination -- provided that it requires medical exams of all new employees in the same job category. Once an offer has been extended, the employer may also ask disability related questions, including questions about an applicant’s workers’ compensation history, attendance record at previous jobs, and health.²⁶ If a conditional offer is withdrawn after a post-

²³See 42 USC 12112(d).

²⁴See 29 CFR Part 1630 App. § 1630.13(a).

²⁵See 29 C.F.R. §§ 1630.13 and 1630.14 and 29 CFR Part 1630 App. §§ 1630.13(a) and 1630.14(a),

²⁶See 29 CFR § 1630.14(b).

offer medical examination or discussion of the applicant's medical history, the reasons for withdrawal of the offer must be job-related and consistent with business necessity.²⁷

Medical Questions and Examinations of Current Employees

Once an applicant becomes an employee, an employer is prohibited from requiring a medical examination or making inquiries of an employee as to whether the employee is disabled and about the nature or severity of the disability unless the examination or inquiry is shown to be job-related and consistent with business necessity.²⁸

The ADA prohibits employers from asking current employees questions not only about the existence of a disability, but also about their health and medical condition generally. The only exception to this rule is if questions about an employee's health or disability are **“job-related and consistent with business necessity.”** This means that employers may make inquiries when there is a need to determine whether an employee is still able to perform the essential functions of his or her job.”²⁹

In the interpretive appendix to its ADA regulations, the EEOC says that periodic physicals of current employees to determine fitness for duty or other medical monitoring if such physicals or monitoring are required by medical standards or requirements established by federal, state, or local law are permissible in that they are job-related and consistent with business necessity. These standards may include federal safety regulations that regulate bus and truck driver qualifications, as well as health standards issued under the Occupational Safety and Health Act (OSHA).³⁰

²⁷See 29 CFR § 1630.14(b)(3).

²⁸See 42 USC 12112(d)(4).

²⁹See 29 C.F.R. Part 1630, App. § 1630.14(c).

³⁰See 29 C.F.R. Part 1630, App. § 1630.14(c).

Confidentiality of Medical Information

Any medical information about either an applicant or a current employee that an employer acquires must be maintained on separate forms and in medical files separate from the general personnel file. Such information must be treated as a confidential medical record.

Notwithstanding any provisions of new General Statutes Chapter 126A or any other section relating to the personnel information of North Carolina public employees, medical information may not be disclosed to supervisors and managers unless it has to do with necessary restrictions on the work or duties of the employee and necessary accommodations. In addition, information may be disclosed to first aid and safety personnel if the disability might require emergency treatment. Finally, EEOC personnel looking into a local government's compliance with the ADA are entitled to any information relevant to their investigation.³¹

Resources

The Statute: The ADA is codified at 42 U.S.C. § 12102 – 12211.

The EEOC's ADA Regulations: 29 C.F.R. Part 1630..

Resources for interpreting the EEOC's regulations:

- Equal Employment Opportunity Commission, *Interpretive Guidance on Title I of the Americans with Disabilities Act*, a section-by-section interpretive appendix of the EEOC's ADA regulations found at 29 C.F.R. Pt. 1630, Appendix.
- Equal Employment Opportunity Commission, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, No. 915.002 (2002), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> .

³¹See 42 USC § 12112(d)(3)(B).

- Equal Employment Opportunity Commission, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act*, available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> .
- Equal Employment Opportunity Commission, *ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, 10/10/95; available at <http://www.eeoc.gov/policy/docs/preemp.html> .

Resources to help identify reasonable accommodations:

Job Accommodation Network (JAN)

Free consultant service that helps employers make individualized accommodations.
(800) 526-7234 <http://janweb.icdi.wvu.edu>

ADA Disability and Business Technical Assistance Centers (DBTACs)

Federally funded regional centers providing information, training and technical assistance on the ADA. Can make referrals to local sources of expertise in reasonable accommodations. (800) 949-4232

<http://adata.org/> For the southeast region: <http://www.adasoutheast.org/>

Rehabilitation Engineering and Assistive Technology Society of North America (RESNA)

(703) 524-6686 <http://www.resna.org>

Registry of Interpreters for the Deaf (703) 838-0030 <http://www.rid.org>