



The Americans with Disabilities Act: A Primer for Employee Management



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Who is Protected by the ADA?

The ADA applies to a **person who has** a physical or mental impairment that substantially limits one or more major life activities (like sitting, standing, or sleeping).

- ✓ The ADA covers more than just people who are deaf, people who are blind, or people who use wheelchairs.
- ✓ People who have physical conditions such as epilepsy, diabetes, HIV infection or severe forms of arthritis, hypertension, or carpal tunnel syndrome may be individuals with disabilities.
- ✓ People with mental impairments such as major depression, bipolar (manic-depressive) disorder, and mental retardation may also be covered.

The ADA also protects a **person with a record** of a substantially limiting impairment.

Example: A person with a history of cancer that is now in remission may be covered.

And the ADA protects a **person who is regarded** (or treated by an employer) as if s/he has a substantially limiting impairment.

- ✓ Sometimes, a person may be covered even if s/he has no impairment or has a minor impairment, particularly if the employer acts based on myths, fears, or stereotypes about a person's medical condition.

Example: An employer may not deny a job to someone who has a history of cancer because of a fear that the condition will recur and cause the employee to miss a lot of work.

The ADA only protects a **person who is qualified** for the job s/he has or wants.

- ✓ The individual with a disability must meet job-related requirements (for example, education, training, or skills requirements).
- ✓ S/he must be able to perform the job's essential functions (i.e., its fundamental duties) with or without a reasonable accommodation.

☞ **Practice tip:** Employers do not have to hire someone with a disability over a more qualified person without a disability. The goal of the ADA is to provide equal access and opportunities to individuals with disabilities, not to give them an unfair advantage.

What does the ADA require an employer to do?

Employers covered by the ADA have to make sure that people with disabilities:

- ✓ have an equal opportunity to apply for jobs and to work in jobs for which they are qualified;
- ✓ have an equal opportunity to be promoted once they are working;
- ✓ have equal access to benefits and privileges of employment that are offered to other employees, such as employer-provided health insurance or training; and
- ✓ are not harassed because of their disability.

☞ **Practice tip:** Harassing someone because of a disability is just as serious as harassing someone because of race, sex, religion, or national origin. If an employee complains to you that s/he is being harassed because of a disability, respond to the complaint right away by conducting an appropriate investigation and, if necessary, taking action to correct the situation.

As discussed in the sections that follow, the ADA also limits the kinds of medical information that you can get from a job applicant or employee and requires you to provide reasonable accommodations to the known limitations of qualified individuals with disabilities.

Hiring Do's and Don'ts – Pre-Job Offer

Basic rule: The ADA does not allow you to ask questions about disability or use medical examinations until after you make someone a conditional job offer.

☞ **Practice tip:** Focus application and interview questions on non-medical job qualifications. An employer may ask a wide range of questions designed to determine an applicant's qualifications for a job.

Examples of what you can ask:

- * Whether s/he has the right education, training, and skills for the position.
- * Whether s/he can satisfy the job's requirements or essential functions (describe them to the applicant).
- * How much time off the applicant took in a previous job (but not why), the reason s/he left a previous job, and any past discipline.

Examples of what you can't ask:

- * questions about an applicant's physical or mental impairment or how s/he became disabled (for example: questions about why the applicant uses a wheelchair);
- * questions about an applicant's use of medication;
- * questions about an applicant's prior workers' compensation history.

Where it seems likely that an applicant has a disability that will require a reasonable accommodation, you may ask whether s/he will need one. This is an exception to the usual rule that questions regarding disability and reasonable accommodation should come after making a conditional job offer.

Example: During a job interview, you may ask a blind applicant interviewing for a position that requires working with a computer whether s/he will need a reasonable accommodation, such as special software that will read information on the screen.

Hiring Do's & Don'ts – Post-Job Offer

Basic rule: After making a job offer, you may ask any disability-related questions and conduct medical examinations as long as you do this for everybody in the same job category.

☞ **Practice tip:** You may withdraw an offer from an applicant with a disability only if it becomes clear that s/he cannot do the essential functions of the job or would pose a direct threat (i.e., a significant risk of substantial harm) to the health or safety of him/herself or others. Be sure to consider whether any reasonable accommodation(s) would enable the individual to perform the job's essential functions and/or would reduce any safety risk the individual might pose.

Examples of what you can do:

- * If you want to give a medical examination to someone who has been offered a job that involves heavy labor, you must give the same exam to anyone who is offered the same kind of job.
- * You may withdraw an offer of a manufacturing job involving the use of dangerous machinery if you learn during a post-

offer medical exam that the applicant has frequent and unpredictable seizures.

Example of what you can't do:

- × You can't withdraw an offer to an HIV-positive applicant because you are concerned about customer and client reactions or because you assume that anyone with HIV infection will be unable to work long and stressful hours.

Getting Medical Information from Employees

Once a person with a disability has started working, actual performance, and not the employee's disability, is the best indication of the employee's ability to do the job.

Basic rule: The ADA strictly limits the circumstances under which you may ask questions about disability or require medical examinations of employees. Such questions and exams are only permitted where you have a reasonable belief, based on objective evidence, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition.

Sometimes you may have observed the employee's job performance or you may have received reports from others who have seen the employee's behavior. These observations or reports may give you a reasonable belief that the employee's ability to perform essential job functions is impaired by a medical condition or that the employee poses a direct threat because of a medical condition.

☞ Practice tip: If an employee with a disability is having trouble performing essential job functions, or doing so safely, do not immediately assume that the disability is the reason. Poor job performance is often unrelated to a medical condition and, when this is the case, it should be handled in accordance with your existing policies concerning performance

(e.g., informal discussions with the employee, verbal or written warnings, or termination where necessary). On the other hand, if you have information that reasonably causes you to conclude that the problem is related to the employee's disability, then medical questions, and perhaps even a medical examination, may be appropriate.

Example: A normally reliable employee who is making frequent mistakes tells you that the medication she has started taking for her lupus makes her lethargic and unable to concentrate. Under these circumstances, you may ask her some questions relating to her medical condition, such as how long the medication can be expected to affect job performance.

Inquiries or exams always allowed: Certain types of inquiries or examinations are always permitted, even if they disclose some medical information. For example, you may:

- * Ask all employees to provide a doctor's note to support a request for leave.
- * Ask about an employee's medical condition and conduct medical examinations that are required by another federal law.

Confidentiality

Basic rule: With limited exceptions, you must keep confidential any medical information you learn about an applicant or employee. Information can be confidential even if it contains no medical diagnosis or treatment course and even if it is not generated by a health care professional.

Example: An employee's request for a reasonable accommodation would be considered medical information subject to the ADA's confidentiality requirements.

☞ **Practice tip:** Do not place medical information in regular personnel files. Rather, keep medical information in a separate medical file that is accessible only to designated officials. Medical information stored electronically must be similarly protected (e.g., by storing it on a separate database).

Reasonable Accommodation and Undue Hardship

What is reasonable accommodation?

- ✓ Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities.
- ✓ Accommodations vary depending upon the needs of the individual applicant or employee. Not all people with disabilities (or even all people with the same disability) will require the same accommodation. For example:
 - * A deaf applicant may need a sign language interpreter during the job interview.
 - * An employee with diabetes may need regularly scheduled breaks during the workday to eat properly and monitor blood sugar and insulin levels.
 - * A blind employee may need someone to read information posted on a bulletin board.
 - * An employee with cancer may need leave to have radiation or chemotherapy treatments.

When do I have to provide an accommodation?

- ✓ You must provide a reasonable accommodation if a person with a disability needs one in order to apply for a job, perform a job, or enjoy benefits equal to those you offer other employees. You do not have to provide any accommodation that would pose an undue hardship.

What is undue hardship?

- ✓ Undue hardship means that providing the reasonable accommodation would result in significant difficulty or expense, based on your resources and the operation of your business.

☞ **Practice tip:** If providing a particular accommodation would result in undue hardship, consider whether another accommodation exists that would not.

Other Limitations on the Obligation to Provide Reasonable

Accommodation: In addition to actions that would result in undue hardship, you do not have to do any of the following:

- * provide an employee with an adjustment or modification that would assist the individual both on and off the job, such as a prosthetic limb, wheelchair, or eyeglasses;
- * remove or alter a job's essential functions;

Example: A grocery store bagger develops a disability that makes her unable to lift any item weighing more than five pounds. The store does not have to grant an accommodation removing its fifteen-pound lifting requirement if doing so would remove the main job duty of placing items into bags and handing filled bags to customers or placing them in grocery carts.

- * lower production or performance standards;

Example: A hotel that requires its housekeepers to clean 16 rooms per day does not have to lower this standard for an employee with a disability.

- * or excuse violations of conduct rules necessary for the operation of your business.

Example: You do not have to tolerate violence, threats of violence, theft, or destruction of property, even if the employee claims that a disability caused the misconduct.

PARTIAL LIST OF LITIGATED CASES **WHERE STATE OF MISSISSIPPI WAS DEFENDANT**

CASE 1:

U. S. v. Mississippi Department of Public Safety, 321 F.3d 495 (5th Cir. 2003)

The Department of Justice sued the Mississippi Department of Public Safety alleging violation of the ADA when DPS dismissed Ronnie Collins from the training academy on account of his disability, Type II diabetes. DOJ contended that DPS had refused to make reasonable accommodations for Collins' disability. DPS contended that the suit was barred by the Eleventh Amendment. The Circuit Court reversed the district court's decision and remanded for further proceedings.

After Remand, Considered on Summary Judgment – 309 F.Supp.2d 837 (SD Miss. 2004)

DPS argues that DOJ had not identified a “major life activity” that had been substantially limited by Collins' diabetes. The Court observed that the Fifth Circuit has identified eating as a “major life activity.” DPS denied that there was proof of a request for reasonable accommodation. The Court held that once the request is made, the burden shifts to the employer to engage in the interactive process. Finally, DPS contended that Collins was fired for being uncooperative and aggressive. The Court found there was a material dispute about the reason Collins was terminated.

CASE 2:

Emma Cox v. Mississippi Department of Corrections, 2008 WL 2563356 (ND Miss. 2008)

Emma Cox sued the DOC and DOC sought dismissal of her complaint, contending that the suit was barred by the Eleventh Amendment and that a previous claim was dispositive of the issues. The District Court dismissed the Complaint and held that

Generally, the Eleventh Amendment bars an individual from bringing suit in

federal court against a state unless the state consents, or Congress has clearly abrogated immunity pursuant to a validly exercised power. **Perez**, 307 F.3d at 326. In **Board of Trustees v. Garrett**, the Supreme Court held that the Eleventh Amendment bars federal employment discrimination suits against a state based on disability, as authorized by Title I of the Americans with Disabilities Act. 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). More specifically, the Court held that Section 5 of the Fourteenth Amendment does not give Congress the power to enforce the Equal Protection Clause by authorizing federal employment discrimination suits against states based purely on disability. *Id.* at 369, 121 S.Ct. 955. The Court concluded that Congress had exceeded its powers under Section 5 of the Fourteenth Amendment in attempting to abrogate the states' Eleventh Amendment immunity under the ADA. *Id.* at 374, 121 S.Ct. 955. Therefore, the states' sovereign immunity to claims under the ADA was preserved. *Id.*, 121 S.Ct. 955.

CASE 3:

Cecil Ahl v. University of Mississippi, 1999 WL 1068597 (NDMiss. 1999)
Ahl, a campus security officer, had his larynx removed and spoke with the use of a tracheotomy. He complained that because of his disability, he was not selected for continued employment in a safety officer position. On motion for summary judgment, Court found that Ahl's condition was disabling and that the question of whether he could perform the essential functions of the job was a question for the jury.

CASE 4:

Thomas v. Mississippi State Dept. of Health, 934 F.Supp. 768 (SDMiss.1996)
Thomas applied for re-employment by the Department of Health and claims that DOH violated the ADA by refusing to rehire him because of his prior history of drug addiction. The District Court held that: (1) employer did not violate ADA when, in deciding whether to rehire applicant after having earlier terminated him for excessive absenteeism and negligence caused primarily by his drug addiction, it took into account his poor job performance prior to termination, and (2) assuming that employer asked applicant about his prior drug abuse and treatment during interview, such questions did not violate ADA.

CASE 5:

Jones v. Mississippi State University, 1994 WL 1890928 N.D.Miss.1994)
Farrah Jones, resigned her employment as a secretary with the University's

Financial Aid Department. Jones had informed her supervisor when hired of her diabetes, but claims that when her condition got worse her supervisor engaged in a campaign to force her to quit her job. The Court concluded that Jones failed to show that she was “otherwise qualified” and that she was adversely treated solely because of her handicap. Judgment was granted for the University.

Mississippi Law Journal Articles Discussing the Americans with Disabilities Act (ADA)

75 Miss. L.J. 1

Mississippi Law Journal Spring, 2006 FOREWORD: THE AMERICANS WITH DISABILITIES ACT AT 15--PAST, PRESENT, & FUTURE Michael Waterstone [FNa1]

75 Miss. L.J. 945

Mississippi Law Journal Spring, 2006 DISABILITY AND EMPLOYMENT DISCRIMINATION AT THE REHNQUIST COURT Anita Silvers [FNa1] Michael E. Waterstone [FNaa1] Michael Ashley Stein [FNaaa1]

75 Miss. L.J. 975

Mississippi Law Journal Spring, 2006 A MILITARY-CIVILIAN COALITION FOR DISABILITY RIGHTS Ann Hubbard [FNa1]

75 Miss. L.J. 1007

Mississippi Law Journal Spring, 2006 DISABILITY, FLUIDITY, AND MEASURING WITHOUT BASELINES Kaaryn Gustafson [FNa1]

75 Miss. L.J. 1039

Mississippi Law Journal Spring, 2006 STARTING ANEW: THE ADA'S DISABILITY WITH RESPECT TO EPISODIC MENTAL ILLNESS Camille A. Nelson [FNa1]

75 Miss. L.J. 1063

Mississippi Law Journal Spring, 2006 HOW BIZARRE? THE APPLICATION OF REASONABLE ACCOMMODATION TO EMPLOYEES “REGARDED AS” DISABLED UNDER THE ADA DOES NOT NECESSARILY LEAD TO BIZARRE RESULTS Elizabeth Mills [FN115]

75 Miss. L.J. 1085

Mississippi Law Journal Spring, 2006 DISABILITY CIVIL RIGHTS LAW & POLICY Elizabeth Penn [FNa1]

74 Miss. L.J. 253

Mississippi Law Journal Fall 2004 CONSTITUTIONAL LAW--ELEVENTH AMENDMENT--ABROGATION OF STATES' SOVEREIGN IMMUNITY IN TITLE II OF THE AMERICANS WITH DISABILITIES ACT HELD A VALID EXERCISE OF CONGRESS'S FOURTEENTH AMENDMENT SECTION FIVE POWER Edward J. Everitt

22 Miss. C. L. Rev. 71

Mississippi College Law Review Fall, 2002 FATAL FLAW: FAILURE TO CONSIDER THE PERSONAL CIRCUMSTANCES OF A PERSON WITH A DISABILITY Annette Bulger Mathis [FNa1]

21 Miss. C. L. Rev. 153

Mississippi College Law Review Fall, 2001 SUPREME COURT'S CLARIFICATION OF THE EFFECT OF "MITIGATING MEASURES" IN DISABILITY DETERMINATIONS MUDDIES DISABILITIES WATERS: SUTTON v. UNITED AIRLINES, INC. William B. Lovett, Jr. [FNa1]

69 Miss. L.J. 561

Mississippi Law Journal Fall, 1999 EMPLOYMENT LAW--AMERICANS WITH DISABILITIES ACT--CORRECTIVE AND MITIGATING MEASURES SHALL BE CONSIDERED IN DETERMINING WHETHER INDIVIDUAL IS DISABLED UNDER ADA Erin Argo

69 Miss. L.J. 945

Mississippi Law Journal Winter, 1999 STATUTORY INTERPRETATION--THE AMERICANS WITH DISABILITIES ACT OF 1990-- QUALIFIED MENTALLY DISABLED PERSONS HAVE A RIGHT TO TREATMENT IN COMMUNITY-BASED SETTINGS Emily Hogue

62 Miss. L.J. 631

Mississippi Law Journal Spring, 1993 THE AMERICANS WITH DISABILITIES ACT OF 1990 AND WORKERS' COMPENSATION: THE EMPLOYEES' PERSPECTIVE Alison Steiner, Esq. [FN1]

62 Miss. L.J. 665

Mississippi Law Journal Spring, 1993 DISABILITY LAW AND EMPLOYER POLICIES IN MISSISSIPPI R. Pepper Crutcher, Jr. [FN1]

62 Miss. L.J. 719

Mississippi Law Journal Spring, 1993 THE "DIRECT THREAT" APPROACH TO THE HIV-POSITIVE HEALTH CARE EMPLOYEE UNDER THE ADA R.

Bradley Prewitt

11 Miss. C. L. Rev. 233

Mississippi College Law Review Spring, 1991 HANDICAPPED DISCRIMINATION LAW AND THE AMERICANS WITH DISABILITIES ACT Herbert E. Gerson [FNa1]. Gregory Addison [FNaa1]

11 Miss. C. L. Rev. 255

Mississippi College Law Review Spring, 1991 EMPLOYMENT DISCRIMINATION AGAINST AMERICANS WITH DISABILITIES Stephen L. Mikochik [FNa1]

11 Miss. C. L. Rev. 271

Mississippi College Law Review Spring, 1991 FLIMSY PRECEDENT AND NARROW VISION: A CALL FOR CONGRESSIONAL AMENDMENT OF TITLE VII AND THE ADA IN RESPONSE TO BOURESLAN Monique C. Lillard [FNa1]