



C R A N F I L L , S U M N E R & H A R T Z O G , L L P

RALEIGH • CHARLOTTE • WILMINGTON

**The Americans With
Disabilities Act:
A General Overview**

Rachel Esposito, Esquire
Cranfill, Sumner & Hartzog, LLP
Raleigh, North Carolina

BIZARRO



BIZARRO.COM
Dist. by King Features

© DAN
PIRARO
3.1.04

Areas of Greatest Dispute Between Employers and Employees

Percentage of EEOC Charges in 2003:

- Race 35.1%
- Sex/gender 30%
- Retaliation 27.9%
- Age 23.5%
- **Disability 18.9%**
- National Origin 10.4%
- Religion 3.1%
- Equal pay 1.4%

The Americans with Disabilities Act (ADA) – A General Overview



Who Is A Covered Entity?

- Private and Public Employers with 15 or more employees

Who is a Covered Employee?

A qualified individual with a disability.

Question 1: Does the employee have a “disability”?

“Disability” is:

- A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- A record of such an impairment; or
- Regarded as having such an impairment

Major Life Activities:

- Caring for self
- Manual tasks
- Walking
- Seeing
- Hearing
- Speaking
- Breathing
- Learning
- **Working**
- Reproduction
(Bragdon v. Abbott,
524 U.S. 624
(1998))

“Substantial limitation” of the “major life activity” - working

- EEOC says employee must be:
Significantly restricted in the ability to perform either a **class of jobs** or a **broad range of jobs** in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation on the major life activity of working.

Relevant Case Law

- Sutton v. United Airlines, Inc., 527 U.S. 471 (1999). Must be precluded from more than one type of job. Mitigating measures to be considered.
- Roszbach v. Miami, 371 F.3d 1354, 15 A.D. Cases 1064, (11th Cir. 2004). “Police officer” is too narrow a range of jobs to constitute a “class of jobs” under the ADA.

- Murphy v. United Parcel Service, 527 U.S. 516 (1999). Plaintiff not disabled because, when medicated, blood pressure did not substantially limit a major life activity.
- Toyota Motor Mfg., Ky, Inc. v. Williams, 534 U.S. 184 (2002). Inability to perform the manual tasks of current job is not enough...(carpal tunnel). Must substantially limit activities "of essential importance to most people's daily lives."

If the answer to **Question 1** is yes, **Question 2**:

Is the person with a disability a "qualified" individual? i.e. can they perform the essential functions of the job with or without a reasonable accommodation?

“Essential Function”

“The fundamental job duties of the employment position the individual with a disability holds or desires.” 29 CFR § 1630.2(h)(1)

Factors are:

- Employer's judgment as to what functions are essential
- Written job descriptions
- Amount of time spent on the function
- Consequences to other employees in not requiring that the employee perform the function

- Attendance/punctuality can be essential job function
- Overtime
- Set schedule? Probably not unless duties are time sensitive

What is a “Reasonable Accommodation”

- Case by case analysis based on factual circumstances
- Employee does not have sole prerogative to select or chose (employer can choose an accommodation that is not the employee's first choice – but it must be reasonable and effective)
- Employer is only required to accommodate a known disability – burden is on the employee to notify the employer

Defenses to Reasonable Accommodation

- “Undue hardship” 29 CFR § 1630.2(p)
- “Direct threat” – to self or others.
29 CFR § 1630.15(b)(2);
Chevron USA, Inc. v. Echazabal, 536 U.S. 73 (2002).
- Conflict with pre-existing seniority rules. U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

Interactive Process Between Employee and Employer

- Once employee notifies of disability/need for accommodation – employer must participate in interactive process to identify reasonable accommodation that would allow employee to perform essential functions of his/her job.

- In litigation, the burden to show that a reasonable accommodation exists rests with employee.
- But, if employer shows efforts to accommodate, courts will likely show deference to the employer.

Practice Tips . . .

- **Beware of retaliation claims**

Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183 (3d Cir. 2003).

"[T]he absence of a disability does not translate into an absence of protection under the ADA."

- Permanent disability adjudication under State Retirement System is not an absolute bar to an ADA claim. Murphey v. Minneapolis, 248 F.3d 1074 (8th Cir. 2004); Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999).

The Good News:

- Supreme Court declines to review 7th Circuit decision holding no compensatory or punitive damages for retaliation claims. Kramer v. Bank of America, Securities LLC, 355 F.3d 961, 15 AD Cases 1216 (7th Cir. 2004); *cert. denied*, 124 S.Ct. 2987 (2004).

Integration Of The ADA & FMLA with Worker's Compensation Laws

- Concurrent running of FMLA and Worker's Compensation is permitted.
- Serious health condition under FMLA is not always a record of disability but may rise to this level.

■ Light Duty

- ADA requires consideration of light duty as a reasonable accommodation
- WC – must take available light duty or forfeit Comp benefits
- FMLA – can't force employee to take light duty if employee prefers FMLA leave and has it available

Return to Work

- Transfer to an alternate position may be a reasonable accommodation under ADA but under the FMLA must restore employee to original or equivalent position

Absolute Absenteeism Policies

- OK under REDA
- OK under FMLA (after 12 weeks)
- ADA may require additional unpaid leave (above FMLA as a reasonable accommodation) – requires a “case by case analysis”.

Treatment of Drug Users

- ADA does not protect current users but does protect individuals who have successfully completed a drug rehabilitation program and are no longer engaging in drug use. 29 CFR § 1630.3(b).
- ADA also protects individuals who are “erroneously” regarded as using drugs when they are not. Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995); 42 USC § 12102(2)(B)–(C); 29 CFR § 1630.2(g)(2)-(3).

- Hernandez v. Hughes Missile Systems Company, 298 F.3d 1030 (9th Cir. 2002), “absolute NO rehire” policy for drug users challenged by EEOC.
- Supreme Court takes case (Raytheon Co. v. Hernandez, 540 U.S. 44 (2003))
 - then remands without answering question.

- On remand – 9th Circuit avoids the question – but sends case to jury on the issue of whether or not the employer's proffered reason for no-rehire is pretextual. Hernandez, 362 F.3d 564 (2004).

Recent U.S. Supreme Court Case (Title II)

- Tennessee v. Lane, 124 S.Ct. 1978 (2004).
 - Paraplegics found access to TN courthouses nearly impossible and being assisted/carried up and down stairs demeaning.
 - A plaintiff in federal court can seek money damages from a State under Title II of the ADA where the alleged unconstitutional action is denial of access to the judicial system.

Recent NC Case (Title II of ADA)

- Melton v. Orange County _____ ?
Party, 304 F.Supp.2d 785 (M.D.N.C. 2004).
 - Plaintiff had difficulty using stairs in building rented by local political party for a rally.
 - District court granted summary judgment motion because a local political party is not a public entity under Title II of the ADA.

Recent NC Cases Under Title I of ADA (re: Employment)

- Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001).
 - Employee was under light duty work restrictions after a back injury. Employee alleged that coworker ostracized him, supervisors harassed him because of his disability.
 - The Fourth Circuit recognized a hostile work environment claim in an ADA disability discrimination context.

- Rohan v. Networks Presentations LLC, 375 F.3d 266, 15 A.D. Cases 1313 (4th Cir. 2004).
 - Employee, a singer/actress in a traveling theatre group, suffered from post-traumatic stress disorder (PTSD) as a result of allegedly having been sexually abused by her father. She claimed that her PTSD was a disability that substantially limited her ability to interact with others, an essential function of her employment.

- Employer fired employee after several of employee's episodes and a suicide attempt had disrupted the group.
- 4th Circuit (opinion by Allyson Duncan) held that because employee failed to show substantial limitation in a major life activity or that employer regarded her as substantially limited, she was not "disabled" and could not state a claim under the ADA.

■ Heston v. Underwriters Laboratories, Inc., 297 F.Supp.2d 840 (M.D.N.C. 2003).

- After returning to work from medical leave for a disabling back injury, employee was placed in a lower-level position and subsequently resigned.
- After failing to secure full-time employment elsewhere, employee discovered that her former employer (Δ) was giving negative references based on her disability.

- U.S. District Court held that former employee could sue under subsection (d) of the ADA for the release of confidential medical information even though she was not a “qualified individual with a disability.”

- Faircloth v. Duke University, 267 F.Supp.2d 470 (M.D.N.C. 2003).

- Long-time employee developed asthma that was aggravated by smoke, including second-hand cigarette smoke. Despite employer's smoke-free workplace policy, coworkers continued to smoke in employee's presence and both coworkers and supervisors harassed employee about his requests that they not smoke around him.

- District court held that the determination of whether asthma is a disability under the ADA is factually intensive and should be done on a case-by-case basis.



CRANFILL, SUMNER & HARTZOG, LLP

RALEIGH • CHARLOTTE • WILMINGTON