

Disability Law and Reasonable Accommodation

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The views expressed in this presentation are those of Mr. Maxin
and do not necessarily represent the views of his employer.



Purpose of Antidiscrimination Disability Laws

- The purpose of the antidiscrimination disability laws is to surmount barriers in the workplace, to counteract the accumulated myths and fears associated with a medical condition, and to make decisions based on sound medical judgments. **School Bd. of Nassau County v. Arline - 480 U.S. 273 (1987)**
- http://www.youtube.com/watch?v=LBP8QDI_m60A

What The ADAAA Does

- Retains Previous Express Definition of Individual with a Disability:
 - A Physical or Mental Impairment that Substantially Limits (SL) a Major Life Activity (MLA)(Actual Disability); A Record of Such an Impairment; or Being Regarded as Having Such an Impairment
- Changes Rules of Construction that Make it Easier for Individual to show Disability under the Act
 - Easier to Show Actual and Record of Disability
 - Definition of Disability must be “broadly construed”
 - Expands the Definition of “Major Life Activity” (MLA)
 - Easier to Prove “Substantial Limitation” (SL)(lowers degree of functional limitation and eliminates the “severely or significantly restricted” test and “central importance to daily living” test
 - Eliminates “Mitigating Measures” in assessing whether individual is disabled
 - Makes it easier to show SL in MLA of “working” as described in Appendix
 - Clarifies that Impairment that is Episodic or in Remission May Qualify as a Disability if it Substantially Limit a MLA
 - Easier to Show “Regarded As” Definition of Disability
 - Focus on adverse treatment because of actual or perceived impairment rather than on whether employee believed a SL of a MLA.
 - No RA for “Regarded As” only
 - Not “Regarded As” if Transitory [less than 6 months] or minor illness

A Different Perspective on Disability Discrimination

- <http://www.youtube.com/watch?v=vSG6LGutkHo&feature=related>

Definition of Disability

- Substantial Impairment of a Major Life Activity
- History of a Disability
- Regarded as Disabled

Major Life Activities (MLA)

- 1630.2(i) **MLA** basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty.
- 1630.2 (i)(1) **MLA** includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;
- 1630.2(i)1) **Broadens MLA**, to include walking, standing, sitting, reaching, lifting, bending, speaking, breathing, reading, thinking concentrating, communicating, interacting with others.

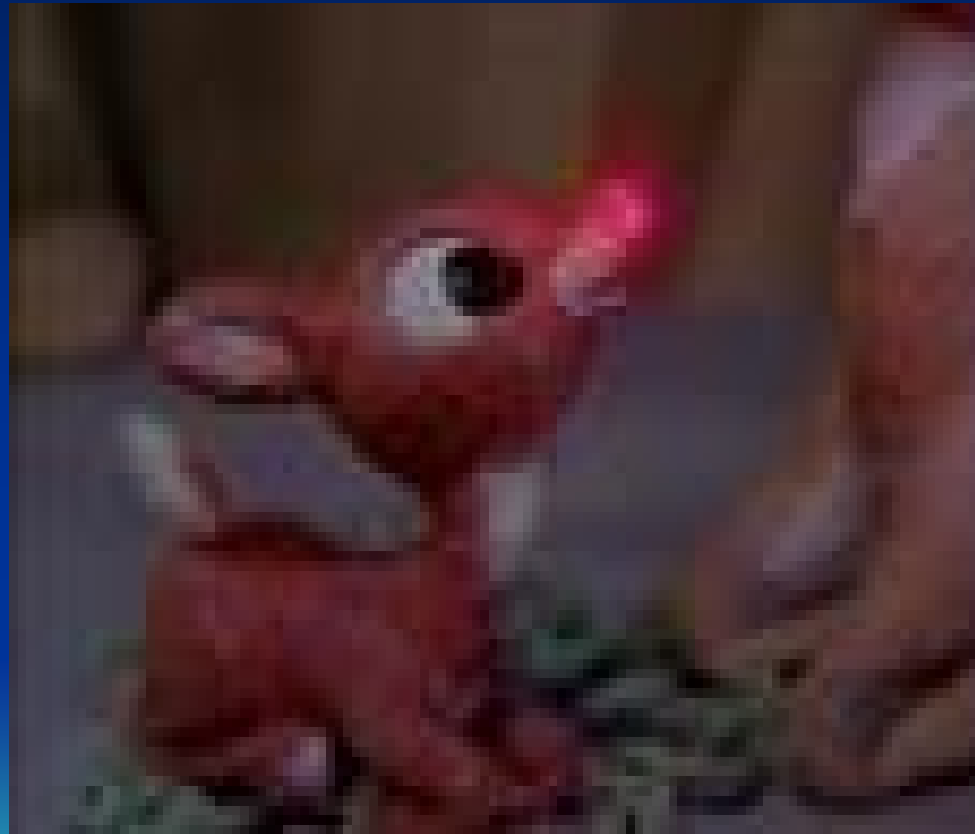
Major Life Activities (MLA)

- 1630.2 (i)(2) **Broadens MLA** to include major bodily functions: immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.
 - E.g. **kidney disease** affects bladder function;
 - **cancer** affects normal cell growth;
 - **diabetes** affects functions of the endocrine system (e.g. production of insulin);
 - **Epilepsy** affects neurological functions or functions of the brain;
 - **HIV and AIDS** affect the immune system and reproduction functions;
 - **Sickle Cell** disease affects the hemic system;
 - **Lymphedema** affects lymphatic functions;
 - **Rheumatoid** arthritis affects the musculoskeletal functions;
 - Not an exhaustive list.

Substantially Limits (SL)

- 1630.2(j) An impairment is a disability if it “substantially limits” the ability of an individual to perform a MLA compared to most people in the general population.
- An impairment does not need to prevent, or significantly restrict, the individual from performing a MLA in order to be considered a disability.

Rudolph and Regarded as Disabled



“Regarded As” Disabled Under The ADAAA

- **Section 3(3)(A) of the ADAAA** An Individual Meets the Requirement of Being Regarded As Disabled if the “Individual Establishes that He or She Has Been Subjected to an Action Prohibited Under this Act Because of Actual or Perceived Physical or Mental Impairment Whether or Not The Impairment Limits or is Perceived to Limit a Major Life Activity.”
- Thus, any employee removed for medical inability to perform their job is, at a minimum, regarded as disabled.
- **Section 3(3)(B)** However, the “Regarded As” definition “shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.”
- **Section 6 (h)** No Obligation to Reasonably Accommodate an Individual Who Meets the Definition of Disability Solely on the Basis that they are “Regarded As” Disabled.

No Reverse Disability Discrimination

- 29 CFR 1630.4(b) *Claims of No Disability.* Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of his lack of disability, including a claim that an individual with a disability was granted an accommodation that was denied to an individual without a disability.

Qualified Individual With A Disability

42 U.S.C. 12102(8); 29 CFR 1630.2(m): individual with a disability who, with or w/o RA can perform essential functions.



"I'm O.K. with everything except the part about being up high...."

“Qualified Individual With a Disability?” – “Essential Functions”

- Essential functions(EF) are **fundamental duties of a job**, that is the **outcomes that must be achieved** by someone in that position. EF and job performance are not the same thing. Work performance typically encompasses not only how well an employee performs the fundamental duties of a position, but also performs marginal duties. **Complainant v. Brennan, USPS, EEOC Doc. 0120111921, 2015 WL395538 (EEOC, June 19, 2015)**(Case remanded for additional investigation on what the EF for Auditor Evaluation Specialist position was when employee with epilepsy was denied continued telework due to poor performance by not providing status reports, failing to submit timesheets, not discussing what he was working on, and when work was inaccurate, e.g. turned in a timesheet showing he worked 18 hours on Christmas Day.)
- Reasons a function may be considered essential:
 - **Reason position exists**
 - **Limited number of employees**
 - **Highly specialized**
- **Evidence function is essential may include:**
 - **Employer’s judgment**
 - **Written job descriptions**
 - **Amount of “on the job time” function consumes**
 - **Consequences if function not performed**
 - **Terms of collective bargaining agreements**
 - **Experience of past and current employees**

Essential Functions

- **Alvara v. Department of Homeland Security**, 121 MSPR 613 (Special Panel 2014)(attendance is not an essential function and inability to perform graveyard shift due to sleep apnea of Customs and Border Patrol Agent (CBPA) was not an essential function and agency did not show it was an undue hardship.
- EF is to examine what essential duties an individual can perform while at work.
- Attendance may be a condition precedent to performing a function or a method by which an employee accomplishes a function—but it is not in and of itself an essential function.
- Employee could perform essential functions while at work
- RA to swap shifts subject to Undue Hardship analysis.
- Hundreds of CBPAs and agency history of permitting the swapping of shifts therefore no Undue Hardship.
- Agency discriminated when it denied employee RA request to avoid assignment to graveyard shift
- **Complainant v. Carter, DOD**, 2015 WL 1399447 (March 18, 2015)(Store Worker unable to perform essential functions because of inability to break down daily deliveries or lift boxes over 30 pounds.)

Leroy Columbo-Deaf Lifeguard Saved 907 Lives

Keith v. County of Oakland 703 F.3d 918
(6th Cir. 2013) deaf applicant for a lifeguard
position might, after a careful individualized
inquiry, be capable of performing the
essential functions of the position with
reasonable accommodations and therefore
the employer's MSJ was denied.



Definition of Reasonable Accommodation

- 1630.2(o): A covered entity is required, absent undue hardship, to provide reasonable accommodation to a qualified individual with a disability with a substantially limiting impairment or a “record of” such an impairment. However, a covered entity is not required to provide an accommodation to an individual who meets the definition of disability solely under the “regarded as” prong.” App p. 34

Reasonable Accommodation

- EEOC's Oct 2002 Guidance on Reasonable Accommodation: may include but is not limited to:
 - (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
 - (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.



What's Not a Reasonable Accommodation?

- Guidance to 2630.2(o); EEOC's 2002 Guidance on Reasonable Accommodation: "An employer never has to reallocate essential functions as a reasonable accommodation, but can do so if it wishes."
- EEOC's RA Guidance Question 9: Employee entitled to reasonable effective accommodation, not accommodation of choice
- Consider the employee's request, but agency can choose between 2 effective accommodations.

The Interactive Dialogue

- <http://www.youtube.com/watch?v=6wtfNE4z6a8>
- Engage in the interactive process with the employee
- LISTEN! RESPECTFULLY DISCUSS THE ACCOMMODATION
- Identify essential functions of job
- Identify functional limitations of employee
- Determine potential reasonable accommodations
- Determine those reasonable accommodations that are effective that meet the needs of the employer and the employee [not necessarily the perfect accommodation of choice]
- Determine whether additional medical information is needed to make an informed decision and get signed medical release [get an agency doctor/contract doctor involved if necessary]
- Make the Accommodation
- Monitor Effectiveness

Examples of Reasonable Accommodation

- Technology
- Teleworking

<https://www.youtube.com/watch?v=7CRLVLmN7-Y>

Complainant v. Jeh Johnson, department of Homeland Security (U.S. Coast Guard) 2015 WL 4537202 (July 15, 2015) (Telework was properly denied. Complainant's position required her to spend approximately 80% of her time working with special needs families who come directly to the office to meet with Complainant. If Complainant teleworked from home or worked from Sacramento, she would be unable to help individuals who come into the office in Alameda for assistance. Additionally, the staff in the office is very small, and a regular out-of-office schedule for Complainant could result in an understaffed office that is unable to meet the needs of the clients that come in for assistance. As a result, Complainant's requested accommodation of working alternate weeks between Sacramento and Alameda would not have allowed her to perform the essential functions of the position.)

Lavern B. Complainant v. Castro, Secretary of Housing and Urban Development, 2015 WL 780702 (February 12, 2015)(Financial Analyst with disability affecting his spine improperly denied 100% telework where mail could be scanned and not excessive, meetings and training via telephone or video conference, and could occasionally travel. "...the fact that Complainant received a 'fully successful' annual evaluation while telecommuting 100 percent of the time greatly undermines the Agency's contention that his inability to report to the Minneapolis office creates an undue burden on the Agency.")

- **Q.7 May an employer withdraw a telework arrangement or a modified schedule provided as a reasonable accommodation because the employee is given an unsatisfactory performance rating?**

- <http://www.eeoc.gov/facts/performance-conduct.html>

- See **Complainant v. Brennan**, USPS, EEOC Doc. 0120111921, 2015 WL395538 (EEOC, June 19, 2015)

Additional Examples of Reasonable Accommodations

- **Job Restructuring**
 - Normally the reallocation or redistribution of nonessential, marginal job functions.
- **Kane v. U.S. Postal Service**, 2011 WL 5506200 (EEOC) (An employer can reasonably accommodate an employee with a disability-related occupational injury by restructuring a position through the reallocation or redistribution of marginal functions that the employee cannot perform because of the disability, but an employer cannot eliminate the essential functions of a position. EEOC Enforcement Guidance: Workers' Compensation and the ADA, EEOC Notice No. 915.002, at Question 20. Here, the Agency cannot accommodate Complainant's needs, suspicions, and phobias by restructuring a managerial or supervisory position by reallocating to him marginal administrative tasks while eliminating the essential function of managing and supervising employees. Therefore, we find that Complainant is not a "qualified" individual with a disability because he cannot perform the essential functions of a managerial or supervisory position, with or without a reasonable accommodation.)
- **Leave**
 - Not entitled to indefinite leave
- See **Complainant v. McDonald, Secretary Department of Veterans Affairs**, 2015 WL 5522284(EEOC September 11, 2015)(employee not entitled to provide recovery time of two years as a reasonable accommodation with no expected date of return and an employer does not have to provide paid leave beyond that which is provided to similarly-situated employees.)
- **Altering the Way Things are Typically Done**
 - E.g. written instruction instead of oral instruction
- **Interpreters and Readers**
 - Qualified and effective
 - **Complainant v. U.S. Postal Serv.**, 2015 WL 1636024 (EEOC) (reasonable accommodation, at a minimum, requires providing an interpreter for safety talks, discussions on work procedures, policies or assignments, and for every disciplinary action so that the employee can understand what is occurring at any and every crucial time in his or her employment career, whether or not he/she asks for an interpreter)
 - **Steele v. Pension Benefit Guaranty Corp.**, 2014 WL 4661872 (EEOC)(deaf employee entitled to effective accommodation not a perfect accommodation so they were entitled to qualified interpreters and agency reasonably accommodated employee by providing a pool of preferred interpreters even if they weren't available all of the time

Reassignment

- Reassignment
 - Accommodation of last resort
 - Employee must be qualified for the position
 - Don't have to create a job
 - Vacant funded position
 - Consider accommodations w/i job first unless the employee and agency agree otherwise
 - nationwide search/downgrade may be appropriate
 - Employee has the burden to prove such a position was available
 - **Thompson v. Department of the Air Force**, 2013 WL 2146762 (E.E.O.C.) Complainant worked as a Contract Negotiator in the Contracting Branch. He was diagnosed with major depression and panic anxiety disorder. A medical examination revealed he would have difficulty with certain aspects of his job, namely the complexity and scope of assignments as well as “personal contacts.” As a result, this physician recommended that management limit the number of contracts assigned to Complainant simultaneously or that Complainant be assigned lower priority/lower stress contracts. The agency attempted to reassign the Complainant a number of times but he was not receptive and he was terminated. While Complainant indicated that he would have been receptive to a reassignment he did not identify a vacant, funded position for which he could have performed the essential functions, with or without reasonable accommodation, and there is no evidence of one in the record. Complainant has an evidentiary burden to establish that it is more likely than not that there were vacancies during the relevant time period into which he could have been reassigned. Accordingly, the Commission found the agency was not denied reasonable accommodation in violation of the Rehabilitation Act.
 - **Gonzalez –Acosta v. Department of Veterans Affairs**, 113 MSPR 277 (2010) Housekeeping Aide who could not perform EF was entitled to be considered for reassignment to a vacant funded position for which he was qualified. The fact that he was assigned to perform clerical duties was not a reassignment; he was merely permitted for a time to perform light duty. The agency is not required to eliminate essential functions of the position. (E) has burden to show that there was a vacant funded position for which he was qualified. (E) proved there was a higher graded administrative position for which he was qualified but the agency has no duty to promote (E) as a RA. (A) produced evidence that it had done a search of actual vacancies but there were none that he was qualified for.

Timely Response To An Accommodation Request

- **Shealy v. EEOC** , 2011 WL 1621428 (E.E.O.C.) (delays of 4, 6 and 9 months in addressing a reasonable accommodation request have been found to violate the law.
- In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: **(1) the reason(s) for delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay , (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide.**

Undue Hardship

- “Undue hardship” means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act, No. 915.002 (revised October 17, 2002).

Undue Hardship (Con't)

- **Complainant v. Johnson, Department of Homeland Security**, 2014 WL 3571431 (EEOC). A determination of undue hardship should be based on several factors, including:
 - the nature and cost of the accommodation needed;
 - the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
 - the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
 - the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
 - the impact of the accommodation on the operation of the facility.
- Here, the facility employed about 700 Customs and Border Protection Officers to monitor, at all times, four bridges connecting the United States and Mexico. It is undisputed that the Agency permitted officers at this facility to swap shifts with each other, and exempted female officers, who were pregnant or breastfeeding, from working the graveyard shift for up to two years per child. Thus, there was insufficient evidence to show that the inability to perform the graveyard shift would cause an undue hardship.

Obtaining Medical Documentation and Assessing the Probative Weight of the Documentation

- 2002 Enforcement Guidance on Reasonable Accommodation, Questions 6 and 8: Agency can deny reasonable accommodation request if employee does not provide medical information needed to determine if the employee has a disability or evaluate a reasonable accommodation request. However, the agency may not ask for medical evidence where the need for the accommodation is obvious.
- <http://eeoc.gov/policy/docs/accommodation.html>
- **Brown v Department of the Interior**, 121 MSPR 205 (2014) the factors for assessing the “probative weight” of the medical evidence are: reasoned explanation vs. conclusory assertions; qualifications of expert; extent and familiarity with treatment of (E); knowledge of employee’s job/PD. In Brown, a GS-12 Criminal Investigator with history of back injury, subject to annual FFD exam, did not meet certain medical standards for her position, e.g. couldn’t engage in maximum exertion without warning, pursue perpetrators on foot, and respond to emergencies. More “probative weight” given to the agency doctor. (Who gave a FFD exam) over the employee’s doctor Dr. (who said he could perform the job) because the agency doctor considered actual duties in the PD whereas the employee’s Dr. merely relied on the employee’s characterization of what he did.
- **Kocher v. Social Security Administration**, 2013 WL 3778046 (EEOC, 2013)
- (Inadequate medical documentation: Complainant's July 20, 2006 medical note, to support a request for extended leave, did not identify Complainant's prognosis or diagnosis. Similarly, in an August 9, 2006, note from Complainant's physician, it stated that Complainant had a potentially serious medical condition and for privacy reasons the physician would not discuss it in more detail. This vague medical documentation was not sufficient to support the request for a reasonable accommodation.)

Fitness for Duty Must Be Job Related and Consistent With Business Necessity and Only Can Be Ordered in Very Narrow Circumstances

- **Doe v. Pension Ben. Guar. Corp., 117 M.S.P.R. 579 (March 27, 2012)**
An agency may order a medical examination only in the following limited circumstances: (1) An individual has applied for or occupies a position which has medical standards or physical requirements or which is part of an established medical evaluation program, [5 C.F.R. § 339.301\(b\)](#); (2) an employee has applied for or is receiving continuation of pay or compensation as a result of an on-the-job injury or disease, [5 C.F.R. § 339.301\(c\)](#); or (3) an employee is released from his or her competitive level in a reduction in force and the position to which the employee has reassignment rights has medical standards or specific physical requirements which are different from those required in the employee's current position, [5 C.F.R. § 339.301\(d\)](#).
- An agency may *offer*, rather than order, a medical examination (including a psychiatric evaluation) in any situation where the agency needs additional medical documentation to make an informed management decision, including situations where an individual has a performance or conduct problem which may require agency action. [5 C.F.R. § 339.302](#).
- Family and Medical Leave Act 5 CFR 630.1208 (d) –(f) permits the agency to order a second medical opinion at agency expense a medical exam where the medical evidence to support the FMLA request is insufficient
- See **Sullivan v. USPS**, 464 Fed. Appx. 895 (Fed Cir. 2102 nonprecedential)

Confidentiality

- Information obtained regarding the medical condition or history of any employee shall be treated as a confidential medical record. See [29 C.F.R. § 1630.14](#); [EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the American with Disabilities Act](#) (“Guidance”), Notice No. 915.002 (rev. Oct 17, 2002). Footnote 111 of the Guidance contains the following exceptions: “The limited exceptions to the ADA confidentiality requirements are: (1) supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; 2) first aid and safety personnel may be told if the disability might require emergency treatment; 3) government officials investigating compliance with the ADA must be given relevant information on request. See also [29 C.F.R. § 1630.14\(c\)\(1\)](#); [Hampton v. U.S. Postal Serv., EEOC Appeal No. 01A00132](#) (Apr. 13, 2000).
- By its terms, the requirement applies to confidential medical information obtained from any employee and is not limited to individuals with disabilities. See [Hampton, EEOC Appeal No. 01A00132](#). If an agency discloses medical information pertaining to complainant in a manner that did not conform to this regulation, then its act of dissemination would constitute a violation of the Rehabilitation Act. See [Hampton, EEOC Appeal No. 01A00132](#). There is no requirement of a showing of harm beyond the violation.; see [Mayo v. Department of Justice, Federal Bureau of Prisons](#), 2012 WL 5426913 (E.E.O.C.)(Improper storage of medical records is a per se violation.

MISCONDUCT AND POOR PERFORMANCE

- http://www.youtube.com/watch?v=QMz_RQuTBII
- **Complainant v. Holder, Attorney General, Department of Justice**, 2014 WL 586587 (EEOC) Complainant, an AUSA, with various psychiatric disabilities slammed a case file down on the desk of a secretary and stated in a loud, angry agitated voice “If I can’t work on my cases, I’m not going to work his.” Later in the day pointed his finger at his supervisor’s face and was effectively “striking out at his supervisor” among other things. The employee requested as a reasonable accommodation “**Cut me some slack**, recognize this (treatment) is along drawn out process.
- **Hailey v. Postal Service** 2011 WL 2956814 (E.E.O.C.) Complainant did not notify the relevant, responsible Agency officials about his depression until after the absences had already occurred. An employer does not have to withhold discipline or termination of an employee who, because of a disability, violated a conduct rule that is job-related for the position in question and consistent with business necessity. “Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.” Id. Therefore, even if Complainant's depression caused him to be absent on numerous occasions, his failure to request a reasonable accommodation for his depression before or immediately after the absences occurred (such as during the interviews with management) means that the Agency did not have to withhold discipline or termination. <http://www.eeoc.gov/facts/performance-conduct.html>

Poor Performance

- **If an employer gives a lower performance rating to an employee and the employee responds by revealing she has a disability that is causing the performance problem, may the employer still give the lower rating?**
- Yes. The rating reflects the employee's performance regardless of what role, if any, disability may have played.
- Example 10: Odessa does not disclose her learning disability, even when she begins having performance problems that she believes are disability-related. Her supervisor notices the performance problems and counsels Odessa about them. At this point, Odessa discloses her disability and asks for a reasonable accommodation. The supervisor denies the request immediately, explaining, "You should not have waited until problems developed to tell me about your disability." Odessa's delay in requesting an accommodation does not justify the employer's refusal to provide one. If a reasonable accommodation will help improve the employee's performance (without posing an undue hardship), the accommodation must be provided.
- <http://www.eeoc.gov/facts/performance-conduct.html>
- **Petitioner v. Pritzker, Secretary, Department of Commerce (International Trade Commission)** 2015 WL 754755 (EEOC February 4, 2015) International Trade Specialist with obsessive compulsive disorder properly removed for unacceptable performance caused by his disability when, despite efforts to reasonably accommodate him, he could not perform the major duties of his job such as planning and coordinating trade programs, analyzing and recommending positions on complex trade issues.

Poor Performance Continued

- Example 11: A federal employee is put on a 60-day Performance Improvement Plan (PIP). In response, the employee requests a reasonable accommodation. The supervisor postpones the start of the PIP and immediately discusses the request with the employee, enlisting the agency's Disability Program Manager (DPM) in the interactive process. The supervisor and DPM determine that a reasonable accommodation might help address the employee's performance problems. The supervisor arranges for the reasonable accommodation and the 60-day PIP commences.

The employer did not have to cancel the PIP because reasonable accommodation never requires excusing poor performance or its consequences. However, the fact that the employee did not ask for an accommodation until being placed on a PIP does not relieve the agency of its obligation to provide reasonable accommodation if the employee has a disability and an accommodation will help improve her performance.

The temporary postponement of the PIP to process the request for a reasonable accommodation ensures that, if a reasonable accommodation is needed, the employee will have an equal opportunity to improve her performance. If the employer determines that the employee is not entitled to a reasonable accommodation (e.g., the employee does not have a "disability"), the employee should be so informed and the PIP should begin.

<http://www.eeoc.gov/facts/performance-conduct.html>

Direct Threat

- 42 U.S.C. 12112(3): Direct threat: The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.
- 42 U.S.C. 12113(b): The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.
- 29 CFR 1630.2(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.
- 29 CFR 1630.15(B)(2) Direct threat as a qualification standard. The term "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace
- **Echazabal v. Chevron**, 532 U.S. 925 (2002) (Contract employee at a Chevron oil refinery wanted to work for Chevron. He twice failed company physical – suffered from Hepatitis C. Following second failure, Chevron directed contractor to move him to area without exposure to dangerous fumes or remove him from the refinery; the contractor laid him off. Echazabal argued ADA says "threat to others" not "threat to self." Supreme Court held Direct threat may be threat to self or others.
- **Nathan v. Holder, DOJ** (FBI), 2013 WL 3965241 (EEOC)(Special Agent applicant with monocular vision was improperly denied employment and did not show reasonable probability of substantial harm when medical exam did not take into consideration individualized assessment of applicant such as learned behaviors, practical experience which would allow him to perform the position safely.)



Direct Threat Factors

- 29 CFR 1630(r): the determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job. This assessment shall be based on:
 - Duration of the risk
 - Nature and severity of potential harm
 - Likelihood potential harm will occur
 - Imminence of the potential harm
- Interpretive Guidance:
 - Employer must consider reasonable accommodation would eliminate risk or reduce risk to an acceptable level
 - Risk only considered when “significant”, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient

Qualification Standards

- § 1630.10 Qualification standards, tests, and other selection criteria. (a) *In general*. It is unlawful for a covered entity to use 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, on the basis of disability, 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**.
- (b) *Qualification standards and tests related to uncorrected vision*. Notwithstanding § 1630.2(j)(1)(vi) of this part, a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criterion, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity. An individual challenging a covered entity's application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a disability, but must be adversely affected by the application of the standard, test, or other criterion.
- See **Nathan v. Holder**, DOJ (FBI) *supra*, (medical exam that screens out applicants with monocular vision must still do an individualized assessment of the applicants medical condition).

Recommendations

- Reevaluate Employer RA Procedures and Policies
- Carefully Train All Managers on Employer RA Procedures and RA Obligations
- Carefully Evaluate Your Medical Qualification Standards
- Carefully Assess Any Decisions Based on Medical Evidence, e.g. Medical Inability to Perform
- <http://www.youtube.com/watch?v=8hU6gR4zHnM>

M

Y'all Come Back...

