

THE ADA

Nils J.D. Eberhardt

John H. Tyler

ND Office of the Attorney General

500 North 9th Street, Bismarck ND 58501

Office: (701)-328-3640 | Fax: (701)-328-4300

October 28, 2015

*Presentation adapted from EEOC guidance as well as The ADA Handbook, Lehmann, 2013
and is not intended to provide legal advice or guidance.*

What is the ADA?

The Americans with Disabilities Act: (Quick Overview)

- Signed into law in 1990
- The Act applies to all employers with 15 or more employees
- U.S. Equal Employment Opportunity Commission (EEOC) enforces the ADA, but many states have similar laws that are enforced locally
- Protects individuals with disabilities from discrimination
- Requires a “reasonable accommodation” if needed in order to perform “essential functions” of a job

The ADA

- The scope of the ADA was expanded in 2008 with the passage of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA)
- The ADA contains four substantive titles
 - Title I (deals with employment) 42 U.S.C. §§12111-12117
 - Title II (deals with state and local governments) 42 U.S.C. §§ 12131-12165
 - Title III (deals with private entities offering commercial facilities and providing places of public accommodation) 42 U.S.C. §§ 12181-12189
 - Title IV (deals with telecommunications and common carriers)
47 U.S.C. § 225.711

ADA in General

- The ADA makes it unlawful to discriminate in employment practices such as:

- Recruiting
- Firing
- Hiring
- Training
- Promotions
- Job assignments
- Pay
- Benefits
- Layoffs
- Leave
- Other employment related activities

ADA Parameters:

- The ADA provides important rights for qualified individuals with a disability
 - Qualified individual:
 - An employee or applicant with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position
- What are essential functions? How are they defined?
 - Usually best defined by a written job description or explanation of essential job functions
 - EEOC considers these as evidence of essential functions

ADA Parameters cont.

- **Disability:**

- Under the ADA a person has a disability if the individual:

- Has a “physical or mental impairment that substantially limits one or more major life activities”

- Has a record of such an impairment

- Is “regarded as” having such an impairment

Disabilities and Substance Abuse

- **Most important thing to remember:**
 - Each situation is unique; very rarely will there ever be a “one size fits all” ruling or opinion
- **Generally speaking:**
 - Users of illegal drugs are not covered under the ADA, provided any employer action is based on the illegal drug use
 - A drug user may be considered disabled under the ADA if:
 - that individual has successfully completed a supervised drug rehab program
AND
 - is no longer using or has otherwise been rehabilitated
 - A person may be considered disabled under the ADA if they are:
 - Currently participating in a supervised rehab program AND
 - no longer using

Disabilities and Substance Abuse (continued)

- Employers may choose to adopt reasonable policies and procedures to ensure an individual is no longer using
 - Drug/alcohol testing (not prohibited under the ADA)
 - These tests must comport with requirements of state law as well as Fourth Amendment Standards for governmental employers
- Important to note employers still have authority to implement drug-free workplace policies
 - Prohibit the use of drugs and alcohol at workplace by all employees
 - Important: **The ADA may protect an employee's use of over-the-counter or prescription drugs to treat a disability:** John will discuss this more in regards to psychotropic medication later in the presentation
 - This use should not be prohibited by a drug testing policy
- Key: Once an employer has notification of an employee's medication status, the employer *must* engage in the interactive process and provide a reasonable accommodation

Disabilities and Substance Abuse (continued)

- Remember: Over-the-counter and prescription drug abuse is considered illegal drug use
 - Employees can be tested for such abuse based on reasonable suspicion
 - Remember Employees can face discipline
 - If the employer has a proper reasonable suspicion testing program, then they may test
 - State agencies must consult with legal before adopting a drug testing program
 - Most common way suspected impairment is dealt with for non-safety-sensitive positions is to explain the signs of impairment to the employee and offer them the voluntary opportunity to have a test and offer them the voluntary opportunity to have a test.

So What is this “Interactive Process”?

- Generally speaking:
 - Starts with an employee requesting an accommodation
 - OR
 - the potential need for an accommodation is apparent or obvious

Involves:

- a discussion between the employer and employee about the employee’s need for an accommodation
- It is a cooperative process where both sides discuss and navigate how to determine a “reasonable accommodation” for the disability at issue

So the Question Is.....

What Can You Do??

- When an employee is returning to work or is dealing with a disability that requires the use of strong prescription medication or opiate based medication while still complying with the ADA???

Maybe more importantly:

What can't You Do???

Let's Start with What You Can Do...

- An employer may ask about an individual's ability to perform job-related functions
 - may ask employee to describe or demonstrate how, with or without a reasonable accommodation, the individual will be able to perform the job-related functions
 - For current employees, employer may require the employee to undergo a medical exam and may inquire about the existence, nature, and severity of a disability so long as the exam or inquiry is job-related and consistent with a business necessity
 - Employer must rely on the medical professional's recommendations: we're not doctors and shouldn't diagnose
 - These are often referred to as "Fitness for Duty Exams"
 - these exams are specifically permitted when:
 - employer has reasonable belief the employee's present ability to perform the essential functions of a job will be impaired by the condition
 - OR-
 - employee will pose a direct threat

What Can You Do? (cont.)

- Employer can request an “independent medical exam” by a different doctor be done if:
 - Insufficient medical documentation is provided by employee’s doctor
 - These independent exams are generally paid for by the employer
 - It is a second opinion of sorts
 - Employer should get consent (written release) from employee to contact the medical professional doing the exam to discuss findings (both the independent professional and the employee’s regular doctor)
 - These consent forms generally also go to the doctor so he/she knows they are allowed to discuss the issues with you

What Can You Do? (cont.)

- The Employer will usually know by now that there is a disability
- As discussed, when an otherwise qualified employee is suffering from a disability and the need for an accommodation is communicated to the employer or is apparent/obvious, the employer must engage in the interactive process to determine what reasonable accommodation is available
- **An accommodation is not required where the employer can demonstrate that the accommodation at issue will impose an undue hardship**
 - a very factual question
- **An accommodation may not be necessary if the employee poses a direct threat to the “health or safety of other individuals in the workplace.”**
 - Threshold for both these defenses is very high!!!

From the ADA:

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of **qualification standards**, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be **job-related** and **consistent with business necessity**, and **such performance cannot be accomplished by reasonable accommodation**, as required under this subchapter.

(b) Qualification standards

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.

The CFR explains “direct threat:”

(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. 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 a reasonable medical judgment** that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- 1) **The duration of the risk;**
- 2) **The nature and severity of the potential harm;**
- 3) **The likelihood that the potential harm will occur; and**
- 4) **The imminence of the potential harm.**

How have courts applied the “direct threat” to accommodation requests in the workplace, including psychotropic medication requests?

- “[C]ourts have unanimously held that an individual with a disability ‘cannot perform the essential functions of a job if his handicap poses a **significant risk** to those around him.’” Doe v. Salvation Army in U.S., 531 F.3d 355, 359 (6th Cir. 2008)
- Employees cannot be placed in a situation that could lead to harm to themselves or others
- State agencies have an obligation to ensure that employees are performing safely and therefore must inquire regarding safety, seek a fitness for duty exam, seek a second opinion, etc. when there are reasonable grounds to believe the employee may pose a direct threat. Including when he or she requests to work while on psychotropic medications.

- **BUT: you need to do a case-by-case analysis and engage in the interactive process to determine whether the person's disability will pose a significant threat.**
- **You can't just go on pre-conceived notions of what is too dangerous in the workplace, even with psychotropic medications.**

1. How would you handle this situation?

Employee, an accounts payable clerk, comes to you and says he's had a stroke and that his cognitive abilities aren't what they once were.

Employee's duties include:

- Matching invoices to receipts
- Researching problems with employer's distribution center

1. How would you handle this situation?

1. Call HR! If you are HR, call the AG's Office!
2. Enter into the **interactive process** to see if there's a reasonable accommodation that would allow him or her to perform essential job functions

Here's what the Court said:

From Hardenburg v. Dunham's Athleisure Corp., 963 F. Supp. 2d 693 (E.D. Mich. 2013):

Employer engaged with employee in **interactive process** to discover reasonable accommodations for employee who suffered a lack of cognitive function following a stroke, as required by the ADA's implementing regulations, **where employee's supervisor met with employee, an accounts payable clerk, to discuss potential accommodations which resulted in employee's working part time, as well as having his responsibilities reduced, and supervisor followed up with employee after he failed to meet his reduced goals.**

Americans with Disabilities Act of 1990, § 102(b)(5)(A), 42 U.S.C.A. § 12112(b)(5)(A); 29 C.F.R. § 1630.2(o)(3).

1. How would you handle this situation?

1. Call HR! If you are HR, call the AG's Office!
2. Enter into the **interactive process** to see if there's a reasonable accommodation that would allow him or her to perform essential job functions
3. If the employee is no longer qualified for the position and there's no reasonable accommodation available, the employee's employment should be terminated (optional: you can transfer to another position if one is available)

Employee ended up terminated in the Hardenburg case: the employer had fulfilled it's interactive process obligations and so was successful in the ADA litigation.

2. How would you handle this situation?

During an interview for a truck driving position, Applicant states that he needs to take psychotropic medication from time to time.

Here's what the Court said was wrong:

From *Doe v. Salvation Army in U.S.*, 531 F.3d 355, 356-57 (6th Cir. 2008):

When Doe, accompanied by DeGraw, arrived for the interview, Snider instructed Doe to fill out an application and explained that the part-time job that was available required three eight-hour days per week and paid \$7.00 per hour. Doe responded that he could not work on Fridays because, “[he] had to see [his] doctor, and ... pick up [his] medicine.” Snider asked Doe “what kind of medication” he took, and Doe responded, “psychotropic medicine.” According to Doe, at that point, Snider “stopped the interview and said that his insurance would not cover me.” Doe offered to obtain a letter from his doctor, but Snider refused to reconsider.

Snider testified that he ended the interview saying, “[w]hat I'll have to do is have this checked out,” meaning apparently, that he wanted to determine whether the ARC's insurance policy would cover a driver using psychotropic medication. However, ***Snider never pursued an investigation into the insurance coverage*** and later hired nine other drivers.

2. How would you handle this situation?

1. Call HR! If you are HR, call the AG's Office!
2. Enter into the **interactive process** with the applicant to see if there's a reasonable accommodation that would allow him or her to perform essential job functions

You can't rule out everyone without doing some sort of investigation or inquiry into the matter, even for drivers and psychotropic medication!

The ADA requires an individualized assessment for the interactive process: "one-size-fits-all" solutions are dangerous and probably violate the ADA.

Final tips:

- When engaging in the interactive process, the ADA does not require the removal of essential job functions
- The ADA only requires a reasonable accommodation that will allow the employee to fulfill the essential functions of their job
 - This does not mean you must provide the employee's preferred accommodation
 - Try and “think outside the box” to find solutions
- Good documentation reduces litigation risk
- Provide accommodations consistently to different employees to avoid successful discrimination claims

Question and Answer



IF YOU HAVE QUESTIONS ...

- Call your HRMS representative
- Call Nils Eberhardt
- Call John Tyler

Attorney General's Office:
701-328-3640