

Disability Issues in Employment

It is unlawful to discriminate against a qualified individual on the basis of disability.

Nebraska Equal Opportunity Commission
Presenter: Gretchen Eure

Americans with Disabilities Act (ADA)

- **Title I** **Employment**
- **Title II** **Public services and transportation**
- **Title III** **Public accommodations**
- **Title IV** **Telecommunications services**
- **Title V** **Miscellaneous : exemptions,
attorney's fees, etc.**

WHO IS PROTECTED BY TITLE I of the ADA?

A qualified person
with a disability
who can perform the
essential functions of a job
with or without
a reasonable accommodation.

Americans With Disabilities Act Amendments Act of 2008

Signed into law

September 25, 2008,

effective January 1, 2009.

**Includes important changes to the
definition of the term “disability”**

What is rejected

Sutton v. United Air Lines, Inc. 527 U.S. 471 (1999)

This case stated that to determine whether a major life activity is substantially limited, reference has to be made to the ameliorative effects of mitigating measures

This case also narrowed the scope of “regarded as”.

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams 534 U.S. 184 (2002)

This case stated that terms “substantially” and “major” needed to be interpreted strictly: “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”

A common allegation in
discrimination complaints filed
with NEOC is

**Failure to Make
Reasonable Accommodation**



WHO MUST COMPLY

Employers, governments, employment agencies, labor unions, and joint labor-management committees

Who is covered:

- *Employees : full, part-time, temporary, seasonal.
- *Employers : agents, managers, supervisors, foremen, and others who act for the employer

Definition of Disability

Physical or Mental

impairment

which

“substantially limits” (broad coverage)

one (or more)

major life activities of such individual

ADAAA Covers person who has...

- An actual impairment
- A record of such impairment
- Is regarded as **(perceived)** having such an impairment

Note: This is decided on a case by case basis.

An impairment that is **episodic**
or in remission *is* a disability if
it would substantially limit a
major life activity when active.

“Regarded as”

Individual may establish s/he has been subjected to an ADA prohibited action because of an actual or perceived impairment whether or not the impairment limits or is perceived to limit a major life activity.

“Regarded as”

- (1)** shall not apply to impairments that are transitory and minor. Transitory means an impairment with an actual or expected duration of 6 months or less.

- (2)** not entitled to consideration for reasonable accommodation.

“Regarded as”

An individual may allege that he or she has been subjected to an ADAAA adverse action because of an actual or perceived impairment

...but the ADAAA does not require a showing that the employer *believed* the impairment substantially limited a major life activity. It is employment discrimination when there is an:

1. Adverse action
2. Because of a person’s actual, record of, or perceived impairment.

Other persons covered under the ADA

- Any **person with a disability associated** with the employee who has a disability
- Any **person associated with** a person with a disability

Exclusions not changed under ADAAA:

- **Current illegal use of drugs**
- **Psychoactive substance use disorders from current illegal use of drugs**
- **Sexual Impairments**
- **Compulsive Behaviors**

Major Life Activities include:

- Walking
- Speaking
- Breathing
- Seeing
- Hearing
- Learning
- Performing manual tasks
- Standing
- Thinking
- Caring for oneself
- Working
- Eating
- Sleeping
- Sitting
- Lifting
- **Bending***
- **Reading***
- Concentrating
- **Communicating***

Major Bodily Functions include:

1. Functions of the immune system
2. Normal cell growth
3. Digestive, bowel, bladder
4. Neurological, brain
5. Respiratory
6. Circulatory
7. Endocrine
8. Reproductive functions

Other than ordinary eyeglasses or contact lenses whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures

- Medical supplies
- Equipment
- Appliances
- Prosthetics
- Oxygen therapy equipment and supplies
- Hearing aids and cochlear implants; other implantable hearing devices
- Mobility devices

- **Use of assistive technology**

- **Reasonable accommodations or auxiliary aids or services**

- **Learned behavioral or adaptive neurological modifications**

A determination of whether the person is in the protected class of disability **will not** take into consideration the ameliorative effects of any of the above.

Medical Evidence

The employer decides whether a person is qualified
based upon the
best and objective medical evidence available.

- **Treating physician familiar with impairments**
- **Physician aware of the essential functions**
- **Vocational Rehabilitation Therapist**

Employment Practices Covered

- **application**
- **testing**
- **hiring**
- **assignments**
- **evaluation**
- **discipline**
- **promotion**
- **medical exams**
- **layoff/recall**
- **termination**
- **compensation**
- **leave**

Permissible Pre-offer questions

Ability to perform the essential functions of the position

The non-medical qualifications for the position

How an applicant would perform the job tasks

At the pre-offer stage, if an applicant requests a reasonable accommodation to complete the hiring process, the prospective employer may ask for documentation regarding this need.

The documentation sought is limited to verification that the accommodation is needed to complete the hiring process.

Some Prohibited ADA Questions

1. Can you work on weekends?
2. Questions about height/weight
3. Questions about spouse
4. Questions about child-bearing
5. Do you have a disability (or description of physical or mental impairments)? (Pre-offer)
6. Have you been hospitalized? (Pre-offer)
7. Have you ever filed a worker's compensation claim? (Pre-offer)
8. Will you need sick leave for medical treatments? (Pre-offer)

Post Employment Inquiries

After the making a conditional job offer and before the individual starts work:

Employer may conduct a medical exam or ask health-related questions, providing that all candidates who receive a conditional job offer in the same job category are required to take the same exam and/or respond to the same inquiries.

Employer may offer a job conditioned on satisfactory results of a post-offer medical examination or inquiry

Questions an employer *might* ask to accommodate a disability

- **What is the impairment?**
- **What mitigating measure controls symptoms or limitations of the impairment?**
- **Is the mitigating measure fully or partially controlling the symptoms?**
- **Does the mitigating measure itself cause any limitations?**

Of course, these questions are prohibited at the pre-offer stage.

Remember...



- **Not all disabilities are visible**
- **The nature of a person's disability is a private manner**
- **An employer *is not* entitled to inquire for details**

Remember...

People with learning disabilities may have trouble with understanding the rules and policies, or the application and procedures.

People of extreme size or weight may need special accommodations

People with hearing difficulties may not receive all oral communications.

REASONABLE **ACCOMMODATION**

modification or adjustment

**to a job, practice or policy, procedure,
academic requirements in postsecondary
education, or the work environment**

Effects the terms and conditions of employment



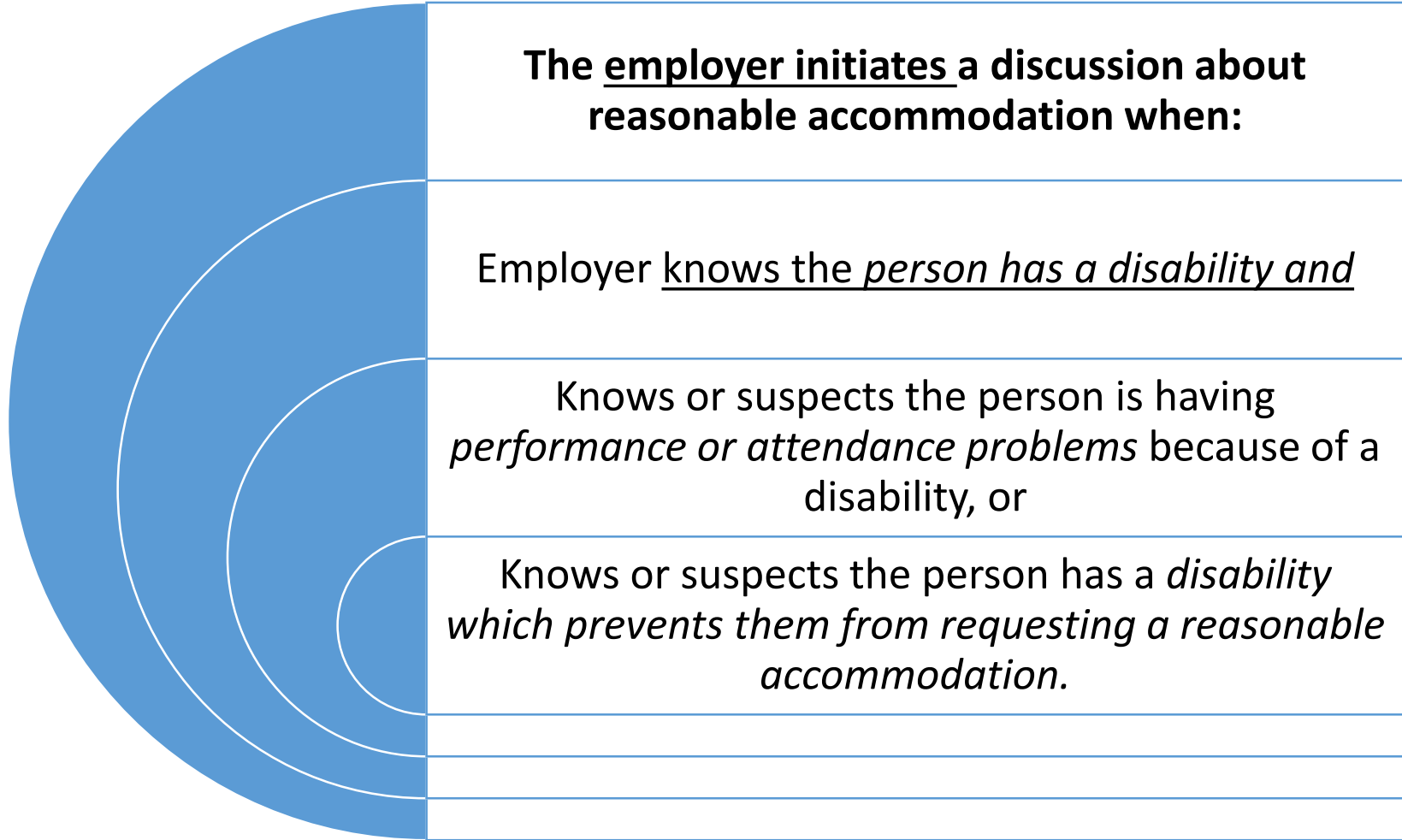
Equality in the application
process



Enables the person to perform
the essential functions of a job



Enjoy the benefits and privileges
of employment



The employer initiates a discussion about reasonable accommodation when:

Employer knows the *person has a disability and*

Knows or suspects the person is having *performance or attendance problems* because of a disability, or

Knows or suspects the person has a *disability which prevents them from requesting a reasonable accommodation.*

Identify
a Reasonable Accommodation

1. **What are the essential functions of the job?**
2. **What are the employee's specific abilities and limitations? (Interactive Process)**
3. **Identify accommodations and assess how effective each would be (Interactive Process)**

Employee's preference may be considered

What's an Essential Function?

1. Employees actually required to perform the function?
2. If removing that function fundamentally change the job?

It's essential if...

- **The position exists to perform the function**
- **There are a limited number of employees performing the function**
- **The function is highly specialized**

Factors to consider whether a Job Task is an essential Function:

- **Employer's judgment**
- **Job descriptions**
- **Amount of time spent performing function**
- **Consequences of not performing the work**
- **Work experience of past employees in the job**
- **Current work experience of other persons performing the job**

More Reasonable Accommodations

- **Facilities accessible and usable**
- **Restructure a job by reallocating or redistributing a marginal job function**
- **Changing when or how an essential job function is performed**
- **Adopting modified work schedules**
- **Obtaining or modifying equipment or devices**
- **Changing how or where examinations are taken**

What is Reasonable?

- Does not pose a ***financial hardship**
- Does not create a ***safety/health threat** to the employee or other persons
- Is ***not disruptive** to the workplace
- Does not pose substantial ***physical damage**
- **Does not impose a fundamental alteration in the nature of the business.**

What is

UNDUE HARDSHIP
Excessively costly,

**extensive, substantial, or
disruptive, or that would
fundamentally alter the
nature or operation of
the program/services**



Other Considerations

- Jobs with Multiple Functions

- Essential Functions of a Changing Job

- Attendance as an Essential Function: Regular attendance can be an essential function of a job, and the employer may ask if the individual can meet the attendance requirements at the pre-offer stage.

“Direct Threat”

What is it?

An individual with a covered disability poses a health or safety issue to his/herself or others, and such threat cannot be removed (from the workplace) by reasonable accommodation.

1. Duration of the risk
2. Nature and severity of the potential harm
3. Likelihood that the potential harm will occur
4. Imminence of the potential harm

Qualification Selection Criteria

Job-related

Consistent with business necessity

Employer is not required to lower quality or quantity of work unless applied to all applicants/employees in the same job

Hiring decision is based only on the individual's ability to perform the essential function of the job, with or without a reasonable accommodation

BUSINESS NECESSITY

The ADA does not exclude the use of factors such as judgment, ability to work under pressure, and interpersonal skills.

Other frequently asked questions related to the ADA

- What is disability by Association?
- What about a business “wellness” program?
- What are the rules for confidentiality of medical information?
- What is considered a job offer?

How and When should a person request an accommodation?

1. An employee or associate tells business that the person is having difficulty
2. An employee or associate states he or she will need assistance in performing the job
3. An employee submits a medical prescription which demonstrates there is a connection between the disability and the request for the accommodation

If the need for the accommodation is obvious, no request is needed

If a person was convicted of the illegal use of legal or illegal drugs and has been or is in a drug rehabilitation program, the person is regarded as having a medical condition requiring consideration of a reasonable accommodation.

The same is true for convictions related to alcoholism: convictions related to alcohol abuse of a person who currently is under medical treatment, or successfully completed medical treatment, is regarded as having a medical condition requiring consideration of a reasonable accommodation.

Case Study

The applicant's references show she was convicted for a violent crime (assault and battery) which under your policy disqualifies the applicant.

The applicant states the incident occurred before the applicant was diagnosed as being schizophrenic-bipolar, and following treatment which included medication, the applicant has not engaged in violent behavior for over 3 years, which is affirmed by the criminal records reviewed.

What do you do?



Criminal History & ADAAA

Intersection of Criminal History
and Disability

Verify and Decide (Interactive Process)



Seek confirmation of the person's statement related to current participation or past successful medical treatment for the medical condition leading to the conviction or reference.

1. Hold the person to **the same performance and attendance requirements** as others.
2. Once confirmation is obtained through competent and independent source(s), avoid taking any review or action which suggests harsher treatment, or more scrutiny of the employee.
4. Or: inform the applicant of the reason for the final decision.

Questions?