

CHAPTER 16

DISABILITY DISCRIMINATION AND REASONABLE ACCOMMODATION

I. INTRODUCTION

The rapidly changing workplace presents numerous challenges to individuals with disabilities that are not encountered by employees without such disabilities. For this reason, Congress created additional protections for individuals with disabilities. These protections prohibit discrimination on the basis of a disability and also require employers to alter certain workplace practices in order to accommodate the special needs of disabled employees. This chapter is designed to provide an overview of nondiscrimination requirements in the federal government under the authority of the various laws and regulations concerning disabilities, including the Rehabilitation Act of 1973. Chapter leaders will be able to use this chapter to evaluate situations involving disabilities. More specifically, leaders will be able to use the information provided in order to:

- (1) Recognize when a person would be able to claim the protection of the various laws and regulations concerning disabilities;
- (2) Describe the fundamental legal criteria and concepts for determining one's rights; and
- (3) Plan a representational effort around issues of disabilities and reasonable accommodation.

With these goals in mind, the chapter is divided into the following sections:

- Section II: Overview of statutes that create protections for individuals with disabilities.
- Section III: Definitions for terms encountered in the disability discrimination field.
- Section IV: Duty to provide reasonable accommodations to individuals with disabilities.
- Section V: A step by step approach to handling medical issues in the workplace.
- Section VI: Alcohol and drugs as medical problems.
- Section VII: Explains how to process a disability discrimination complaint.
- Section VIII: Indicates the kind of remedies available in such cases.
- Section IX: A checklist for evaluating a disability discrimination allegation.
- Section X: A model form to request a reasonable accommodation.

II. SOURCES OF RIGHTS FOR EMPLOYEES WITH DISABILITIES

The following are laws and authorities that a chapter leader can use to enforce nondiscrimination in the workplace. This source information will assist chapter leaders by providing various statutory and regulatory sections that they will need to cite when filing a grievance or similar action. Also, these citations will assist the leaders if they want to do more research in the area of discrimination.

Rehabilitation Act of 1973 (29 USC 791(b)) - Federal Agencies must not discriminate against their employees or applicants based on disability under Section 501 of the Rehabilitation Act of 1973. Under Title I of the Americans with Disabilities Act of 1990 (ADA), private employers are prohibited from discriminating based on disability. When Title I was enacted, some of the legal requirements of the ADA differed from the Rehabilitation Act, even though the two laws shared the same purpose: ending employment discrimination based on disability. In 1992, Congress made the laws the same by amending the Rehabilitation Act to apply the ADA standards to federal employment. In order to prevent agencies from discriminating against applicants and employees with disabilities, the Act requires federal agencies to develop affirmative action plans for the hiring, placement, advancement, and retention of persons with disabilities. Section 501 of the Rehabilitation Act prohibits federal agencies from discriminating against qualified people with disabilities in employment. This includes hiring, promotion, assignments, pay, and other terms and conditions of employment. Under Section 501, federal agencies also are required to provide reasonable accommodations to qualified people with disabilities, but only if the accommodations do not cause an undue hardship. Federal applicants and employees can make complaints about disability discrimination under Section 501. Technically, the ADA does not apply to federal employees. Instead, the ADA applies indirectly to federal employees through Section 501 of the Rehabilitation Act.

The Civil Rights Act of 1964, Amended 1972 and 1991 (Title VII) - The CRA prohibits discrimination based on race, color, religion, sex, or national origin. The CRA also includes the prohibition against sexual harassment. Agencies are required to process complaints of disability discrimination under the same procedures and regulations that they utilize to process complaints of discrimination under the CRA.

Equal Employment Opportunity Commission (EEOC) Regulations (See 29 CFR '1614.203) - The responsibility for overseeing the implementation of the Rehabilitation Act was vested in the EEOC in 1979 with the issuance of Executive Order No. 12106. Shortly thereafter, the EEOC issued Section 504 regulations, which required federal agencies to establish and implement their own set of regulations consistent with the EEOC's basic guidelines. (See 29 CFR 1614) Pursuant to the guidelines, agencies must

give full consideration to the hiring, placement, and advancement of qualified mentally and physically disabled persons. An agency must not discriminate against a qualified physically or mentally disabled individual. An agency must make reasonable accommodations to the known physical and mental limitations of an applicant or employee, who is a qualified individual with a disability, unless the agency can demonstrate that the reasonable accommodation would impose an undue hardship.

Family and Medical Leave Act (FMLA), 5 USC Section 6381-6387 Consult Chapter 15, Handling Discrimination Complaints for discrimination based on pregnancy. The regulations implementing the FMLA are found at 5 CFR 630.1201-630.1211. Each agency is required to inform its employees of their entitlements and responsibilities under the FMLA. 5 CFR 630.1203 (g). The FMLA provides an employee twelve work weeks of unpaid leave during any twelve-month period if the leave is needed to care for the employee's own serious health condition if that health condition makes the employee unable to perform the functions of his or her job. An employee can also take FMLA leave to care for family members. Generally, FMLA leave is without pay. You may substitute paid leave for unpaid leave. You need not take your twelve weeks of FMLA leave all at once. If your need for FMLA leave is foreseeable and based on a planned medical treatment, you are required to provide the agency with at least 30 days notice of your intention to take leave. If you could not foresee the need for leave, then you must provide notice as soon as possible. Agencies may require you to provide medical certification of the need for leave. If you take FMLA leave, upon your return to the agency, you are entitled to the same position you held when the leave started, or to an equivalent position, with equivalent benefits, salary, status, and other terms and conditions of employment. 5 CFR Section 630.1208. An employee who takes FMLA leave is entitled to maintain health insurance coverage. An employee may pay the employee share of the current premiums on the current basis or pay upon return to work. 5 CFR Section 630.1209. You should also consult your contract to see what rights an employee has. Often the employee can use the contract and FMLA rights together. Thus an employee may use contractually granted leave in tandem with appropriate FMLA leave. Consult your National Field Representative for more details.

Prohibited Personnel Practices (See 5 USC '2302 (b).) - Discrimination based on any conduct that does not adversely affect the performance of the employee or the performance of others is prohibited.

III. DEFINITIONS

Individual with a Disability or Handicap(s): One who (1) has a physical or mental impairment that substantially limits one or more of the person's major life activities; (2) has a **record of** such an impairment, or (3) is **regarded as having** such an impairment.

Physical or Mental Impairment: (1) any **physiological** disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, cardiovascular, reproductive, digestive, genio-urinary, hemic and lymphatic, skin, and endocrine; or (2) any **mental or psychological** disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. (For example, under the right circumstances, the following have been found to be handicapping impairments: allergies, sickle cell anemia, diabetes, and HIV/AIDS Bragdon v. Abbott, 524 U.S. 624 (1998)).

Major Life Activities: These are generally considered those activities that are central to most people's daily life. They include, but are not necessarily limited to, such things as walking, sleeping, seeing, speaking, breathing, hearing, caring for children, learning, working, performing manual tasks, reproducing and attending to personal grooming. As new diseases and impairments are identified, the concept of what constitutes a major life activity may change.

Substantial Limitation: "Substantially limits" means the person is unable to perform a major life activity that the average person in the general population can perform; or that he/she is significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the average person in the general population can perform that same major life activity. When the major life activity is "working," "substantially limited" means 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 in the major life activity of working. 29 CFR 1614.2(j). More recently the Supreme has held that the determination of whether a person is "substantially limited" must also take into consideration any mitigating measures he/she uses, such as medication, a prosthesis, or a hearing aid. A person who is no longer *substantially* limited when using a mitigating measure is not "disabled" within the meaning of the law. Sutton v. United Airlines, 527 U.S. 471 (1999) (eyeglasses). Murphy v. U.P.S., 527 U.S. 516 (1999) (high blood pressure medication). Mitigating measures however, may still leave an employee limited or even cause their own limitations. In such circumstances an employee would still be "substantially limited". In Albertsons v. Kirkingburg 527 U.S. 555 (1999), the Supreme Court extended Sutton to individuals who develop compensating behaviors to mitigate the effects of an impairment. Thus, even if an employee with a physical or mental impairment takes no medication and uses no medical devices, compensating behaviors he has developed that mitigate the effects of his impairment must be considered in determining whether he is "substantially limited." These three cases, underscore two things. First, an assessment of whether a person is handicapped is an individualized inquiry and determinations must be made on a case-by-case basis. It is not sufficient to simply identify a medical condition. Second, the steward must assess to what extent the person is functionally limited with all mitigating measures he/she takes or uses. A condition does not have to be permanent to qualify as a disability. On the other hand, a condition that is of very short duration will not qualify as a disability. The EEOC's regulations point to the

following examples of temporary impairments that do not substantially limit major life activities:
(See 29 CFR '1630.2 (j).)

- Broken limbs
- Sprained joints
- Concussions
- Appendicitis
- Influenza

Qualified Individual: The disabled individual must also satisfy the requirement of being a “qualified individual.” **This term is defined as a person who, with or without reasonable accommodation, can perform the essential functions of the position without endangering the health and safety of that person or others.** This person would have to, depending on the type of appointing authority being used, meet the requisite skills, educational, and other job related requirements or meet the criteria for appointment under one of the special appointing authorities for disabled persons. (See 29 CFR'1613.702 (f).)

Essential Functions: In order to be qualified for a position, an applicant or employee must be able to perform the essential functions of the position. **The term “essential functions” is defined in the EEOC regulations as “the fundamental job duties of the employment position the individual with a disability holds or desires.”** (See 29 CFR 1630.2 (n).) Those essential functions do not include the marginal functions of the position.

Reasonable Accommodation: A duty imposed on the employer to alter certain workplace practices when such practices adversely affect persons with disabilities. Reasonable accommodation was defined by Congress through examples of changes or modifications to be made, or items to be provided, to a qualified individual with a disability. The statutory definition of reasonable accommodation does not include any quantitative, financial, or other limitations regarding the extent of the obligation to make changes to a job or work environment. The only statutory limitation on an employer’s obligation to provide reasonable accommodation is that no such change or modification is required if it would cause undue hardship on the agency.

Undue Hardship: This refers to 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. Undue hardship addresses quantitative, financial, or other limitations on an employer’s ability to provide reasonable accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the agency. The agency must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship.

IV. DUTY TO PROVIDE REASONABLE ACCOMMODATIONS

A fundamental aspect of disability nondiscrimination law is the need for employers to make adjustments and modifications to the workplace and to policies, practices and procedures that govern the structure and performance of jobs so that individuals with disabilities have a fair chance to do particular jobs. The duty to provide a reasonable accommodation is triggered only if the person with a disability meets all of the employer's criteria, except those criteria that the individual is unable to perform because of his or her disability. As long as the failure to meet any of the essential job requirements is due to the disability, the employer is obligated to consider making the reasonable accommodation to enable the qualified employee to perform the essential functions of the job. The duty to make reasonable accommodations applies to all employment decisions including the job application process, the work environment, benefits and privileges.

A. Statutory Basis for Reasonable Accommodation Requirement

The Rehabilitation Act of 1973, through its implementing regulations, imposed a reasonable accommodation mandate upon employers. Additionally, in 1990, the Americans with Disabilities Act (ADA) made the following employment practices discriminatory: “[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate the accommodation would impose an undue hardship on the operation of the business of such covered entity.” Congress subsequently provided that the standards for employment discrimination under the Rehabilitation Act are the standards of the ADA. This means that the provisions of the ADA, although not expressly applicable to the federal government, are controlling in the area of reasonable accommodations.

B. Types of Reasonable Accommodations

The ADA provides seven distinct categories of reasonable accommodations.

- (1) Making facilities used by employees readily accessible to and useable by individuals with disabilities;
- (2) Job restructuring;
- (3) Part-time or modified work schedules;
- (4) Reassignment to a vacant position;
- (5) Acquisition or modification of equipment or devices;
- (6) Appropriate adjustment or modifications of examinations, training materials or policies;
- (7) the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

This section will address each one of these categories separately.

Accommodation One: Making facilities used by employees readily accessible to and useable by individuals with disabilities.

The goal of this accommodation is to remove or avoid creating architectural, communication or transportation barriers that constitute impediments to access by people with disabilities. Examples of modifications that may be needed to make facilities accessible and usable for particular individuals include:

- (1) installing a ramp at the entrance of a building;
- (2) removing raised thresholds;
- (3) reserving parking spaces close to the work site that are wide enough to allow people using wheel chairs to get in and out of vehicles;
- (4) making restrooms accessible, including toilet stalls, sinks, soap and towels;
- (5) rearranging office furniture and equipment;
- (6) making a drinking fountain accessible;
- (7) making accessible, and providing an accessible path of travel to, equipment and facilities used by an employee, such as copying machines, meeting and training rooms, lunchrooms and lounges;
- (8) removing obstacles that might be potential hazards in the path of people without vision;
- (9) adding flashing lights, when alarm bells are normally used, to alert an employee with a hearing impairment to emergencies.

Accommodation Two: Job Restructuring

This particular accommodation requires employers to rearrange or change the allocation of the tasks assigned to particular workers in order to accommodate an employee with a disability. Job restructuring may take the form of eliminating nonessential elements from a position, re delegating assignments among workers, exchanging assignments with another employee, or redesigning procedures for task accomplishment. In certain situations, the employer will be required to modify the essential functions of a job by changing how or when they are performed. For example, an employee with a disability that interferes with his writing ability may be permitted to computerize records that were ordinarily maintained manually. The job restructuring accommodation, however, does not entail having another employee perform the essential tasks for the employee with a disability.

Accommodation Three: Part-time or Modified Work Schedules

The ADA requires employers to consider part-time or modified work schedules to accommodate employees with a disability. Modified work schedules can take many forms, including flexibility in scheduling work hours each day, scheduling workdays for each week, or

approving part-time work status. The following situations describe accommodations that can be made by the employer to the disabled worker's schedule:

- (1) an accountant with a mental disability required two hours off, twice weekly, for sessions with a psychiatrist. He was permitted to take longer lunch breaks and to make up time by working later on those days.
- (2) a machinist has diabetes and must follow a strict schedule to keep blood sugar levels stable. She must eat on a regular schedule and take insulin at set times each day. This means she cannot work the normal shift rotations for machinists. As an accommodation, she is assigned to one shift on a permanent basis.
- (3) where an individual with epilepsy requires constant regular shifts rather than rotation from day to night shifts, the employer is required to make such an accommodation.
- (4) an employer also may be required to permit the use of accrued paid leave or providing additional unpaid leave so that an employee with a disability would be able to get treatment needed because of the employee's disability.

Accommodation Four: Reassignment to a Vacant Position

This accommodation requires employers to consider the possibility of reassigning the disabled worker to a vacant position in order to accommodate the individual's needs. The ADA's reassignment provision expressly applies to vacant positions, so the individual with a disability may not bump another employee to create a vacancy. Furthermore, the Rehabilitation Act Amendments of 1992 require that the position to which the individual is reassigned be:

- (1) vacant;
- (2) located in the same commuting area;
- (3) serviced by the same appointing authority;
- (4) at the same grade or level.

Finally, the reassignment accommodation is available only to persons already employed, not to applicants for positions.

Accommodation Five: Acquiring or Modifying Equipment or Devices

Among the types of equipment or devices the courts have required to be provided or modified as a reasonable accommodation are:

- (1) straight-backed chair needed by a worker with an amputated leg;
- (2) hearing aids and telephone amplification devices for a job applicant with a hearing impairment;
- (3) a paper mask for an employee with an asthmatic condition;

- (4) Braille materials and electronic braille devices for blind workers;
- (5) equipment to assist in heavy lifting for a worker with an injured knee;
- (6) laminated cards containing frequently used phrases;
- (7) teletypewriter for a blind employee;
- (8) appropriate assistive devices, including gloves, rubber tips, jewelers magnifying glass, equipment to make lifting and carrying easier, etc. for workers with varied disabilities.

The EEOC has provided examples of equipment and devices that may be required as reasonable accommodations:

- (1) telecommunication devices for the deaf that make it possible for people with hearing/speech impairments to communicate over the telephone;
- (2) telephone amplifiers are useful for people with hearing impairments;
- (3) special software for standard computers and other equipment can enlarge print or convert print documents to spoken words for people with vision or reading disabilities;
- (4) tactile markings on equipment in braille or raised print are helpful to people with visual impairments;
- (5) telephone headsets and adaptive light switches can be used by people with cerebral palsy or other manual disabilities;
- (6) talking calculators can be used by people with visual or reading disabilities;
- (7) speaker phones may be effective for people who are amputees or have other mobility impairments.

Finally, it is important to remember that the employer's obligation to provide or modify devices or equipment does not extend to items that are primarily for the personal benefit of the person with the disability.

Accommodation Six: Modifying Examinations, Training Materials, and Policies

The ADA contains a provision that makes it an act of discrimination to select and administer tests that do not accurately reflect the skills and aptitude of an employee with a disability. This means, for example, that an employer is to provide an employee with a disability more time on an examination or to administer a different type of examination that is more suited to the individual with the disability. The following four situations involve reasonable accommodations that can be provided by the employer:

- (1) allowing an employee with a disability to take the bar examination on four days rather than two as a reasonable accommodation;
- (2) allowing an employee with dyslexia to take a different examination;
- (3) modifying a policy that prohibited animals in the workplace in order to permit a visually impaired person to use a guide dog;

(4) adjusting policies on providing information to ensure that information is available in accessible formats for employees with disabilities

The ADA also requires employers to adjust or modify training materials as a reasonable accommodation. This means that the employer may be required to:

- (1) provide accessible training sites;
- (2) provide training materials in alternate formats;
- (3) modify the way training is provided, such as by affording people with learning disabilities or mental impairments more time and extra assistance in training.

Accommodation Seven: Providing Qualified Readers or Interpreters

This accommodation requires the employer, in certain situations, to provide readers to assist blind employees or interpreters to assist hearing impaired employees. A reader or interpreter should assist the employee with the disability to perform the essential functions of the job. A reader or interpreter, however, should not perform the essential functions of the position.

C. Limits to the Reasonable Accommodations Requirement

Both the ADA and the Rehabilitation Act contain limitations on the employer's duty to provide reasonable accommodations to employees with disabilities. First, the employer is only required to accommodate the known physical or mental limitations of a qualified employee or applicant with a disability. This means that the employer is not expected to accommodate disabilities about which it is unaware. Second, an employer is not required to implement any job accommodation that would impose an undue hardship on the operation of the organization.

The undue hardship exception can be broken down into three categories:

- (1) Undue Costliness;
- (2) Undue Disruption;
- (3) Fundamental Alteration.

1. Undue Costliness

The courts have not established a test for determining whether the implementation of a particular accommodation will impose excessive costs on the organization. The court's assessment of costliness will involve an analysis of the overall financial resources of the employer, the overall size of the business, and the number, type, and location of the employer's facilities. Despite this broad framework, undue hardship determinations entail highly fact-specific inquiries that vary from case to case. Nonetheless, courts have held that a needed accommodation would not cause an undue hardship simply because it would entail substantial costs.

2. Undue Disruption

Accommodations may also create an undue hardship because they interfere too drastically with the operations of the employer. A proposed accommodation may impose an undue hardship if it would significantly undermine the efficiency of performing the job to be done at the work site. Similarly, a proposed accommodation would constitute an undue hardship if it would create a safety hazard in the workplace.

3. Fundamental Alteration

A proposed accommodation may also cause an undue hardship if it would fundamentally alter the nature of an employer's business or program. For example, where a diabetic special agent requested only light duty assignments, the FBI was not required to meet this accommodation because it would require a fundamental alteration in the nature and description of a special agent.

HANDLING MEDICAL ISSUES IN THE WORKPLACE

Below are some medical problems you may have seen, or will see:

an employee with sub-standard performance claims his lack of productivity is due to a degenerative knee problem

an employee facing discipline for threatening a co-worker produces medical documentation of a bipolar disorder that can be stabilized if he's provided the right medication and a supportive work environment

an alcoholic employee says his performance deficiencies and attendance problems are caused by his condition

an older employee can no longer perform a key duty because of an obvious medical problem, but refuses to retire

an employee injured at work comes back with a doctor's note saying he should be placed on permanent light duty because of chronic back problems

In this area you need to be able to sort the issues, know how to proceed, and apply the relevant laws and regulations.

Rule 1: Supervisors Must Deal Only with Performance and Conduct

Supervisors must deal only with performance and conduct, not medical problems because Federal personnel law and applicable regulations are specifically designed to keep government managers from considering matters that don't affect conduct or performance. Supervisors can't be expected to make medical and psychiatric evaluations, or to determine an appropriate course of treatment for such problems.

Consider the example of the employee with hypertension and heart problems. How is the

supervisor supposed to know how high blood pressure has to get before it endangers somebody? Obviously, he or she can't. Consequently, there's no way at this point to know if there is, in fact, a problem that needs to be accommodated. But what about the employee who obviously has a medical condition but won't seek treatment, or ignores medical advice? There's nothing wrong with the supervisor simply mentioning the possibility of medical problems to an employee, or suggesting that he/she get medical attention. But absent a performance or conduct problem, if he or she attempts to take an involuntary action to deal with a perceived medical issue--such as reassigning the employee or removing certain duties--the supervisor is open to a meritorious EEO complaint alleging disability discrimination.

Step One: Raising the Issue

The first issue you must deal with in handling medical problems is determining when to start trying to deal with the medical issue. To illustrate the problem, consider the following situations drawn from actual cases:

- an employee mentions that he takes blood pressure medication and has a history of heart problems
- another employee who spends a lot of time on his feet has serious degenerative knee problems that seem to be affecting his work
- yet another employee has a history of paranoia and tells her supervisor that the CIA is watching her through her television set

So what do you do now? Advise the supervisors to ignore these things and hope for the best? Tell them to start trying to work out accommodations of some sort immediately? Or simply advise them that these are problems they'll just have to learn to live with in light of the ADA and the Rehabilitation Act? Correct answer: None of the above.

The Employee's Burden: Raising the Issue

Every EEOC or MSPB case addressing the subject has placed the burden of raising medical problems squarely on the employee. The employee must first raise the issue, usually either as:

- a defense to a potential or proposed action based on sub-standard performance or misconduct; or
- a request for some type of accommodation or relief from a burdensome condition of employment (e.g., heavy lifting)

The employee need not make a written request or fill out a form. However, he or she must somehow specifically state that either:

- a. a medical problem is causing the performance or conduct problem the supervisor is concerned about, or
- b. he or she wants some sort of other agency action or modification because a medical problem is creating work-related problems

Ask the employee for specifics and ask for medical documentation. You must find out exactly what the employee is suffering from and what effect it has on the job. Here are some examples drawn from actual cases:

In the case of an employee with a mental disorder who engages in outbursts on the job, among other things you would want to know:

1. the name of the ailment.
2. what triggers the outbursts.
3. how often the person suffers the attacks.
4. what the employee does during the outbursts, e.g. violence, threats, abuse.
5. the potential for danger to himself and coworkers.
6. whether the condition is temporary or permanent.
7. whether the condition is treatable?

Similarly, with a typist claiming carpal tunnel syndrome as the reason for typing errors you want to find out:

1. is the condition constant or recurring.
2. is the condition stable, or can it worsen or get better.
3. can the condition be treated with any medication or exercises.
4. are there degrees of the ailment.
5. can the employee type at all--and if so, for how long.
6. whether the problem occurs only with certain types of assignments, or happens all the time.
7. how it limits the person's dexterity.
8. can the effects be mitigated with any restructuring of duties.

In the situation of an employee with a vision problem, you'd need to know:

1. exactly what the employee can and cannot see.
2. if the condition is worsening or is stable.
3. if anything on the job makes the condition worse.
4. if the problem is treatable.
5. if any devices could help the employee see better.

Do not make the mistake of trying to move onto the next steps until you have this information. If you start trying to fashion accommodations without this information, or the Agency refuses to accommodate based on limited information, you may regret it later.

Step Three: Encourage the Employee to Articulate the Desired Accommodation

This is an easy step to overlook, but it is absolutely essential. The employee should tell you exactly what he or she wants the agency to do to accommodate the medical condition. This is both a legal and a practical burden. At this point it may be helpful to contact your National Field Representative for assistance.

The courts, the MSPB, and the Commission have all stated that the employee is responsible for articulating exactly what accommodation he or she desires.

Step Four: Determine the Reasonableness of the Accommodation

The Rehabilitation Act of 1973 prohibited federal agencies from discriminating against "qualified handicapped" employees. The law went on to describe a qualified handicapped employee as someone who:

1. suffers from a physical or mental handicap/disability, and
2. could perform the "essential functions of the position with or without reasonable accommodation."

Thus, whether somebody is a "qualified" handicapped/disabled person involves two separate issues:

1. whether the person suffers from a disability; and
2. whether the person could do the job with or without some sort of accommodation.

The Disability

EEOC and MSPB have given the term "disability" a broad interpretation. Consequently, the safest course of action is to assume that a third party will consider a medical or psychological impairment to be a qualifying disability.

The law and case law have created a two-part test for a disability:

1. presence of a medical impairment, and
2. an effect on the employee's performance.

The Impairment

Nowhere will you find a list of qualifying disabilities. There's nothing in the Rehabilitation Act, the ADA or EEOC regulations that pinpoints an "official" or "approved" list of disabilities. The regulations simply state that a disability is an impairment that "substantially limits¹/₄major life activities." 29 CFR 1614.203(a)(3). They go on to explain that:

"Physical or mental impairment": means (i) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body system: neurological; musculoskeletal; special sense organs; cardiovascular;

reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
(ii) any mental or psychological disorder, such as mental retardation; organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 CFR 1614.203(a)(2)

Affect Upon the Position

The second, and more important aspect of the impairment is its relationship to the duties of the position. Is it the type of problem that "generally forecloses" somebody from working in his or her career field.? If not, it won't "qualify" the employee. The idea is that even if you have a medical problem that affects you in the particular job you're in, *it is only a "handicap" or "disability" if it prevents you from working entirely in that particular career field.*

The Accommodation

The second step in deciding whether somebody is a qualified handicapped/disabled employee is determining whether the person can perform the "essential functions of the position with or without reasonable accommodation." Whether or not the accommodation is "reasonable" depends upon whether it creates an "undue hardship" on the employer.

The following grounds may be used by the agency to resist reasonable accommodation of employees. If you are faced with any of these, contact your National Field Representative.

1. Inability to Perform

Reasonable accommodation does not mean that an agency must put somebody into a job that he or she cannot do. Agencies are not required to:

- lower performance standards or other performance expectations as a "reasonable accommodation" for a disability
- place an employee on permanent light duty
- patch together a new position from bits and pieces of others

2. Danger to Self or Others

The Rehabilitation Act itself specifically states that part of being a qualified handicapped employee is that the person must be able to perform the job without endangering himself or others.

3. Administrative Disruption

The accommodation cannot be something that creates an undue administrative disruption to the agency.

4. Cost

Cost is a relative issue. The Rehabilitation Act says that cost cannot be considered in absolute terms because so much depends upon the size of the agency, the budget item affected, the numbers of employees affected, and other factors. For

example, in one case where the employee was asking for substantial modification to the building, the EEOC looked at the cost as a portion of the agency's overall construction costs, and found it would have accounted for an excessive percentage of the budget. In some cases only a few thousand dollars have been found excessive for the same reason: they were a large percentage of a budget item. For example, training requests have been rejected as excessive because they would have eaten up a big chunk of the training budget.

5. Program Modification

Many court decisions have noted that agencies are not required to modify the way they do business to accommodate disabled employees.

Dealing with Psychological Issues

Handling psychological problems on the job does not require any particular extra expertise beyond the skills already discussed. It's important to keep in mind the agency cannot discriminate against people solely based on psychological problems. There is nothing about having psychological problems that automatically disqualifies an employee from federal employment. It is the affect upon performance or conduct that may do so.

Reassignment as an Accommodation

Both the EEOC and the MSPB have ruled that agencies consider reassignment as an accommodation. Unfortunately, the rules for reassignment place no great burden on the agency. The EEOC has said that the agency is only required to reassign the employee if: (a) there is a vacant position at the same grade, (b) he or she meets the qualification requirements for the position, and (c) the position is within the commuting area.

VI. ALCOHOL AND DRUGS AS MEDICAL PROBLEMS

As a result of 1996 MSPB and EEOC decisions, drug and alcohol problems on the job are considerably simpler than they were previously. Nonetheless, you will find it helpful to understand how the current state of the law developed. Both the ADA and the Rehabilitation Act prohibit covered employers from discriminating against individuals with disabilities. 42 U.S.C. Section 12112; 29 U.S.C. Section 794. Under both Acts, individuals engaging in current, illegal use of drugs are excluded from coverage. 42 U.S.C. Section 12114 (a); 29 U.S.C. Section 706(8)(c)(i). Each Act, however, contains a safe-harbor provision that affords coverage to an individual who:

- has successfully completed a supervised drug rehabilitation program and is no longer engaged in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
 - is participating in a supervised rehabilitation program and is no longer engaging in such use; or
 - is erroneously regarded as engaging in such use, but is not engaging in such use⁴⁴²
- U.S.C. Section 12114(b); 29 U.S.C. Section 706(8)(C)(ii).

Alcoholism and Drug Addiction as Impairments

Although the Rehabilitation Act doesn't explicitly mention alcohol or drugs, soon after its passage in 1973, both alcoholism and drug addiction were deemed "impairments" for purposes of the Act. The case law in the mid-1970's and early 1980's then developed the principle that the "reasonable accommodation" for alcoholism or drug addiction had to be special. Agencies had to provide an "opportunity to rehabilitate" before removing employees for alcohol or drug-related misconduct. That usually meant delaying or foregoing action based on misconduct or poor performance while waiting to see if rehabilitation efforts took hold. From 1981 through 1996 the Board and the courts also held that agencies had to give employees a "firm choice" between rehabilitation and removal for their alcohol and drug-related offenses. In numerous cases removals for serious acts of misconduct were reversed when it was determined that management had not sufficiently warned employees with removal before eventually firing. In 1996 both the MSPB and the Commission reversed their previous doctrines and said that agencies were no longer required to give employees a "firm choice" before taking disciplinary action. Agencies could hold those with alcohol and drug problems to the same standards of performance and conduct as everybody else.

In the EEOC's *Johnson v. Babbitt*, 98 FEOR 14708 (8/11/98), and the MSPB's *Kimble v. Navy*, 96 FMSR 5216 (6/11/96), decisions, both agencies said that the "opportunity to rehabilitate" did not include a requirement that agencies convincingly threaten employees with removal before firing them for drug or alcohol-related offenses.

Dealing with Addiction Situations

The case law on alcoholism and drug addiction has evolved into a doctrine that fits with the way agencies are required to handle other medical problems. Agencies now deal with alcoholism and drug addiction using almost exactly the same steps.

- First*, management must focus on dealing with performance and conduct, rather than with the underlying medical condition of alcoholism or drug addiction.
- Second*, the burden is on the employee to raise the issue of alcohol or drugs as an impairment, just as with any other medical problem.
- Third*, if the employee raises a defense of alcoholism/addiction, the burden is on him or her to prove the ailment. This is no small task. In cases of alcoholism especially, third parties have required employees raising the alcoholism defense to produce medical evidence showing that they suffer from the disease of alcoholism--not just that they are heavy drinkers.
- Fourth*, the employee must articulate the accommodation he or she desires. Typically, this will involve time off for treatment, flexible work schedules, and other arrangements. Unreasonable accommodation requests--for example, a request to work only when the employee happens to be in a condition to do so--are not something agencies must agree to.
- Finally*, the agency must accommodate through flexibility, not the excusal of unacceptable performance or conduct.

The agency's role in accommodating the alcoholic or addicted employee is to be considerate and flexible while the person is going through treatment and rehabilitation. It should allow the individual:

- the necessary leave or leave without pay to enter in-patient recovery services
- a flexible work schedule for outpatient and rehabilitation appointments during working hours
- a liberal leave policy for attending counseling services and other rehabilitation efforts.

VII. PROCESSING A COMPLAINT OF DISCRIMINATION:

The chapter leader does not have to make a final judgment as to whether or not discrimination has occurred when determining whether or not to file a grievance. If it looks like the employee has a case, or you cannot rule out whether or not he or she has a case, file the grievance. If, however, the complaining employee would like to file a formal EEO or MSPB complaint against the agency, instead of filing a grievance, consult your National Field Representative first. NTEU does not have a duty to represent employees in the EEO or MSPB complaint procedure.

A. Where to file a Complaint

The disabled employee must choose between three separate forums when bringing a charge of discrimination against the employer. (For a detailed explanation, refer to chapter 15, Handling Discrimination Complaints):

1) Negotiated Grievance Procedure Consult your contract to ensure that it allows for discrimination complaints to be brought under the grievance procedure.

- Advantages:

- You can combine the civil rights issues with allegations that the contract has also been violated. This gives the arbitrator two different ways to find in your favor.
- Most chapter leaders are familiar with the process.
- The process is relatively simple.
- Union has input in choosing the arbitrator.
- Arbitrators are more likely to find discrimination than the EEOC.
- The discovery process favors the union.
- It is a timely process; much faster than the EEO complaint procedure and generally faster than the MSPB.

- Disadvantages:

- Arbitrations can become costly.
- There is a duty of representation in effect.
- Not generally available to probationary employees.

2) EEO Complaint Procedure through the Equal Employment Opportunity Commission (EEOC) - Every federal agency has an office that handles EEOC complaints. Consult the administrative procedure for processing an EEOC complaint (See Chapter 15, Handling Discrimination Complaints)

- Advantages:

- The investigation can often uncover facts the grievance process cannot, e.g., affidavits, statistical data.
- There is no duty of representation.
- The hearing is free to the union and employee.

- Disadvantages:

- If you file under this procedure, you forfeit the right to pursue any contract violations based on the same set of facts.
- It is much slower than the grievance or the MSPB procedures.
- The union has no control over who hears the case.

3) Merit Systems Protection Board (MSPB) - The passage of the Civil Service Reform Act of 1978 created sweeping changes in federal personnel law. One of the Act's creations, the Merit Systems Protection Board, has jurisdiction over certain personnel actions. Discrimination complaints can only be filed at the MSPB if they also concern such matters as a removal, downgrade, RIF, or other illegal personnel actions which could be appealed independently to the MSPB. The MSPB's decision on the discrimination aspect of a case can be reviewed by the EEOC.

The MSPB hears "mixed case complaints." A mixed case complaint is defined as a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, or disability related to or stemming from an action that can be appealed to the MSPB. (29 CFR 1614.302 (a)(1))

An example of a mixed complaint case is when an agency proposes to terminate an employee for lack of performance. If the employee's response to the termination proposal includes a complaint that they have not been provided a reasonable accommodation necessary to perform the function that they are being terminated over, this case would be a mixed case, reviewable by the MSPB.

At the time the agency issues its final decision on a mixed case complaint, or 121 days after the initial filing of the mixed case complaint with the agency, the employee has the right to appeal the matter to the MSPB for review. The MSPB would review and decide on the discrimination issues of the case. Consult with your National Field Representative before recommending this course of action to an employee.

- Advantages:
 - No duty of representation.
 - No direct cost to the chapter (excluding staff time and use of NTEU resources.)
- Disadvantages:
 - You generally have to raise the complaint in connection with a personnel action otherwise appealable to MSPB, e.g., adverse action.
 - The MSPB decision-makers are very conservative and often find for management.
 - You cannot raise contract violations.
 - The union has no control over who hears the case.

B. Theories of Discrimination

There are a few theories that can be put forth in the complaint to support a disabled employee's claim of discrimination due to their disability:

1) Failure to Provide A Reasonable Accommodation:

The duty to provide a reasonable accommodation is triggered when an employee with a disability, or their NTEU representative, requests an accommodation that will enable the employee to perform due to the disability. Once an employee fulfills their duty to request an accommodation, the employer is obligated to consult with the employee and investigate various accommodations for the employee with a disability. A disability discrimination charge is warranted if the employer either refuses to investigate accommodation options or refuses to implement a reasonable accommodation. In a reasonable accommodation case, the *prima facie* test of discrimination that a chapter leader will need to be prepared to present is the following:

- Except for the disability, the applicant is qualified for the position;
- The employee has a disability which prohibits him/her from meeting the requirements of the position; and
- There are plausible reasons to believe that the disability could be accommodated.

2) Disparate Treatment:

If a disabled employee applies for a promotion, reassignment or detail and is denied, the employee may be able to charge that his or her rights were violated. The complainant would be alleging **disparate treatment**; that the employee was treated less favorably by management on the basis of their disability. Following the guidance of McDonnell-Douglas v Green (411 U.S. 792 (1973)), the union will have to establish the following *prima facie* case:

- The employee has a physical or mental impairment;

- The impairment substantially limits the employee's ability to perform a major life activity;
- The employee has a record of the impairment, or is regarded as having a record of the impairment;
- The agency knows of the employee's disability;
- The employee can perform the essential functions of the job, with or without a reasonable accommodation; or
- There is direct evidence of discriminatory intent.

After the union has established the above factors, two things happen:

- Management is obligated to present some legitimate, nondiscriminatory reason for nonselection of the complaining employee; then
- The union will have to present evidence that the agency's reason for treatment of the employee is pretextual or not the real reason why they treated the employee the way they did.

3) Disparate Impact:

The employee can also file a complaint alleging disparate impact of the agency policies and practices on qualified employees with disabilities. The disabled employee must first establish a *prima facie* case by demonstrating that:

- Even though the agency's policy or practice was not intended to discriminate, the employee is impacted or disadvantaged by the agency's employment policy or practice.

After the union has established the above factor, the agency must then show that:

- The agency policy or practice is job-related and is a business necessity.

The burden shifts back to the union to show that:

- Even if the employer met its burden above, there is a less restrictive alternative practice or policy, or that a reasonable accommodation is possible.

VIII. REMEDIES

In any discrimination action you file, you should ask for all of the following remedies unless it is obvious that one or more will not apply. These not only make the employee whole, but also give you more bargaining room to settle the case and raise the stakes of management letting the case go to a hearing.

- (1) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered, or a substantially equivalent position;
- (2) Payment to each identified victim of discrimination on a make-whole basis for any loss of earnings the person may have suffered as a result of the discrimination;
- (3) Payment up to \$300,000 for provable damages to victims of intentional discrimination;
- (4) Appropriate punishment of any managers involved in the discrimination pursuant to 5 USC '2303 (b)(1);
- (5) Notification to all employees in the appointing office of their right to be free of unlawful discrimination and assurance that this discrimination will not recur;
- (6) Commitment that corrective or preventive action will be taken so that similar violations will not reoccur;
- (7) Commitment that the agency will cease from engaging in the specific unlawful employment practice found in the case;
- (8) Reasonable and appropriate attorney fees.

IX. CHECKLIST FOR EVALUATING A DISABILITY DISCRIMINATION ALLEGATION

Under the Rehabilitation Act, the questions that need to be asked when filing a complaint alleging a failure to provide a reasonable accommodation include:

- _____ Does the employee have a physical or mental impairment?
- _____ Does this impairment substantially limit the employee's ability to perform a major life activity? **Note: the degree of impairment must be measured *after* the employee takes or uses whatever mitigating measures are available (e.g. medication, equipment or prosthetic devices).**
- _____ Does the employer know that the employee is disabled?

- _____ Is the employee otherwise qualified for the position sought?
- _____ What are the essential functions of the position sought?
- _____ Did the employee request a reasonable accommodation? (Note that by simply requesting an accommodation does not amount to a formal complaint, although it may satisfy the notice of an employer requirement.)
- _____ What actions did the agency take to identify and/or implement possible accommodations? What accommodation, if any, did the employee suggest? What actions did the agency take to consider the employee's suggestion?
- _____ If an accommodation has been identified, will this accommodation enable the employee to perform the essential functions of the job?
- _____ Did the agency provide an accommodation?
- _____ What reason has the agency given for its refusal to provide the accommodation?
- _____ If the agency contends that a particular accommodation would impose an undue hardship on its operations, are these reasons sufficient to establish an undue hardship defense?

X. MODEL FORM TO REQUEST A REASONABLE ACCOMMODATION

Date _____ NTEU Chapter # _____ Grievance Step _____

Grievant _____

Position and Work Station _____

Union Representative & Telephone # _____

Grievant's Immediate Supervisor _____

Nature of Disability _____

Reasonable Accommodation Requested _____

