

The Americans with Disabilities Act— It's Time to Get Reacquainted

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Washington Law—Where We've Been

- ◆ The Washington Law Against Discrimination has long made it unlawful for employers to discriminate against individuals with disabilities
- ◆ But the statute fails to define the term *disability*, in fact, the statute uses the term *handicap*, a term which has long had negative connotations for individuals with disabilities
- ◆ The absence of a statutory definition set the stage for mischief



Washington Law—Where We've Been

Two Types of Disability Claims

◆ Disparate Treatment Claims

- ◆ Employee claims he/she has been *treated adversely* in the terms or conditions of employment based on his/her claimed disability or a disability he/she has been regarded as having

◆ Reasonable Accommodation Claims

- ◆ Employee claims that employer *failed to reasonably accommodate* his/her claimed disability



Washington Law—Where We've Been

Disparate Treatment Cases

Washington State Human Rights Commission definition of disability:

A sensory, mental or physical condition that is medically cognizable or diagnosable that is abnormal and is the reason why the person with the condition was discriminated against

- ◆ Criticized as circular



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Reasonable Accommodation Cases

Pulcino v. Federal Express Corp., 141 Wn.2d
629 (2000)

Rejected HRC definition as unworkable,
and created a new definition:

- ◆ An employee is disabled if he or she:
 - ◆ has a mental or physical abnormality that
 - ◆ substantially limits his or her ability to do his or her job



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Pulcino v. Federal Express Corp., 141 Wn.2d 629 (2000)

- ◆ Court says the new definition applies whether employee is full-time, part-time, temporary
- ◆ Court contrasts WLAD with ADA, and says WLAD prohibits discrimination against those with temporary disabilities (e.g., broken foot)
- ◆ Disability triggers duty to offer reasonable accommodation



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- ◆ Difficulties for employers with Washington definition:
 - ◆ Broader than ADA
 - ◆ Difficult to apply to non-accommodation cases; Court of Appeals split on the definition; thus:
 - ◆ Different definitions for different claims
 - ◆ Also dual analysis required under WLAD and ADA
 - ◆ An obviously disabled individual might be excluded under the definition adopted (e.g., paraplegic)



Washington Adopts ADA Definition of Disability

McClarty v. Totem Electric, 157 Wn.2d 214 (2006)

- ◆ Rejects its own definition of *disability* as set forth in Pulcino
- ◆ Continues to reject HRC definition it earlier rejected in Pulcino
- ◆ Adopts ADA definition for the first time

Where do we go from here?



ADA: The *Advantages* For Employers

- ◆ Uniform definition (we think) under state and federal law
- ◆ Same analysis used for reasonable accommodation claims and disparate treatment claims
- ◆ Fewer individuals are legally *disabled* than under WLAD definition
- ◆ Does not focus on ability to do individual's job



ADA: The *Disadvantages* For Employers

- ◆ The analysis is now more complex because the ADA definition of disability is more complex and fluid
- ◆ We do not know the full extent to which the ADA now applies in Washington



What Does the ADA Provide?

An employer must not discriminate against:

- ◆ an individual with a known disability
- ◆ who is otherwise qualified for a position
- ◆ and capable of performing its essential functions with or without reasonable accommodation, and

An employer must:

- ◆ provide the individual with reasonable accommodation
- ◆ unless it would result in an undue hardship on the employer or a direct threat to the health or safety of the employee or others



ADA Definition of Disability

- ◆ Unlike the previous WLAD definition that focuses solely *on an individual's ability to do his/her job*, an individual has an ADA disability only if she or he:
 - ◆ Has a physical or mental *impairment* that substantially limits a major life activity; or
 - ◆ Has a record of such impairment; or
 - ◆ Is regarded as having an impairment



ADA Definition of Disability: Impairment

- ◆ Disorders affecting body systems (e.g., neurological or musculoskeletal systems, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hemic, lymphatic, endocrine, or the skin)
- ◆ Mental or psychological disorders (e.g., mental retardation, organic brain syndrome, emotional or mental illness, and certain learning disorders)
- ◆ Any disorder likely is an impairment



ADA Definition of Disability: What is NOT an Impairment?

- ◆ EEOC says these conditions are not:
 - ◆ Physical characteristics (left-handedness)
 - ◆ Personality traits (being irresponsible; having poor judgment)
 - ◆ Homosexuality/bisexuality
 - ◆ Normal pregnancy
 - ◆ Normal deviations in height, weight, or strength



ADA Definition of Disability: What is NOT an Impairment?

- ◆ EEOC says not impairments even if substantially limiting:
 - ◆ transvestism
 - ◆ transsexualism
 - ◆ voyeurism
 - ◆ kleptomania
 - ◆ compulsive gambling



ADA Definition of Disability: What is NOT an Impairment?

- ◆ Courts have said these are not:
 - ◆ Irritability
 - ◆ Chronic lateness
 - ◆ Quick temper (Goodyear Tire and Rubber Co., 344 F.3d 819 (8th Cir. 2003); Wells v. Mut. of Enumclaw, (unpublished) (D. Idaho 2005))
 - ◆ Job-related stress caused by an unpleasant boss or work duties (Dewitt v. Carsten, 941 F. Supp. 1232 (N.D. Ga. 1996); Rohm v. Homer, 367 F.Supp. 2d 1278 (N.D. Cal. 2005))
 - ◆ Normal pregnancy



ADA Definition of Disability: Substantial Limitation

- ◆ Toyota Motor Manuf., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002)
 - ◆ "considerable" or "to a large degree"
 - ◆ “[I]ndividual 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.”
- ◆ Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)
 - ◆ Individual's medicated condition or mitigating measures taken should be considered
 - ◆ “Regarded as” definition not met simply because employer has decided that some limiting impairment, that is not substantially limiting, makes some individuals not ideal candidates for job



ADA Definition of Disability: Substantial Limitation

- ◆ Key factors include:
 - ◆ Nature of the impairment;
 - ◆ Severity of the impairment;
 - ◆ Duration of the impairment;
 - ◆ Long-term effects of the impairment.



ADA Definition of Disability: Major Life Activity

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

- ◆ Major life activities are those of central importance to daily life
- ◆ Analyzed Plaintiff's claim that she was substantially limited in the major life activity of "manual tasks"
- ◆ Impairment's impact must be permanent or long-term
- ◆ Court's analysis clearly delineates how ADA analysis is different than WLAD's:
 - ◆ Main inquiry under ADA when addressing activity of performing manual tasks is whether individual is "unable to perform the variety of tasks central to most people's daily lives," not whether the individual is unable to perform the tasks associated with his/her specific job



ADA Definition of Disability: Major Life Activity

- ◆ Examples:
 - ◆ Thinking
 - ◆ Learning
 - ◆ Walking
 - ◆ Interacting with others
 - ◆ Exercising judgment
 - ◆ Working



ADA Definition of Disability: Major Life Activity

- ◆ Lifting
- ◆ Sleeping
- ◆ Reproduction (Bragdon v. Abbott, 524 U.S. 624 (1998))
- ◆ Sex (McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999) (sexual relations is a major life activity); Contreras v. Suncast Corp., 237 F.3d 756 (7th Cir. 2001) (no substantial limitation because plaintiff's frequency of sex decreased from twenty times per month to twice per month because of back injury))
- ◆ Reading (Head v. Glacier Northwest, Inc., 413 F.3d 1053 (9th Cir. 2005) (reading is a major life activity); Szmaj v. AT&T (7th Cir 2002) (unpublished) ("ability to read all day long is not a major life activity" unless we were a "society of bookworms"))).



ADA Definition of Disability: What is NOT a Major Life Activity?

- ◆ Continuous keyboarding and handwriting
- ◆ Physical exertion
- ◆ Working on stairwells or on ladders
- ◆ Knitting, sewing, braiding hair
- ◆ Participating in sports
- ◆ Driving
- ◆ Getting to and from work/commuting
- ◆ Mowing lawn and driving manual transmission cars



Examples of Disabilities

- ◆ Insulin dependent diabetes (sometimes): Fraser v. U.S. Bancorp, 342 F.3d 1032 (9th Cir. 2003) (diabetes was disability despite medication because eating regimen was perpetual, severely restrictive, and highly demanding)
- ◆ HIV
- ◆ Epilepsy
- ◆ Morbid obesity ("regarded as" cases): Cook v. Rhode Island, 10 F.3d 17 (1st Cir. 1993) (morbid obesity is an impairment and employer regarded plaintiff as disabled because employer believed obesity foreclosed broad range of jobs)
- ◆ Alcoholism
- ◆ Recovering drug addict (not current or casual drug users)



Disability's Effect on Ability to Work

- ◆ Old Washington definition (reasonable accommodations): whether disability tied to individual's ability to perform his or her job
- ◆ Majority ADA rule: disability need not affect person's ability to work
- ◆ Nexus between impaired major life activity and the job (Chenoweth v. Hillsborough County, 250 F.3d 1328 (11th Cir. 2001))



Unchanged: *Qualified Individual* with a Disability

- ◆ Does he or she satisfy the job prerequisites (experience, licenses, etc.)?
- ◆ Is he or she able to perform the essential functions of the job, with or without reasonable accommodation?
 - ◆ Employer need not eliminate the essential functions of the job



Unchanged: Essential Job Functions

- ◆ Functions that are essential to do the tasks required of the position (not those that only are marginally related to the position)
- ◆ **Ask yourself:** Would removing that function from the job "fundamentally alter" the position?



Unchanged: Essential Job Functions

- ◆ Consider:
 - ◆ Job description (but this is only one factor and it needs to match the reality of the job)
 - ◆ Time spent performing the job function
 - ◆ What would happen if employee was not required to perform that function
 - ◆ The work experience of former or current employees
 - ◆ Have you eliminated the function for others?



Unchanged: Reasonable Accommodations

- ◆ Modifications or adjustments to the way things are customarily done, leading to equal opportunity, access and/or participation
- ◆ Examples:
 - ◆ Job restructuring
 - ◆ Modified/flexible schedule
 - ◆ Flexible leave
 - ◆ Counseling services
 - ◆ Changes in physical environment



Unchanged: Reasonable Accommodations

- ◆ Employees are not required to use "magic words" to request a reasonable accommodation
- ◆ Employer may request documentation when the need for accommodation is not obvious



Unchanged: Process for Identifying a Reasonable Accommodation

1. Adopt a “can do” attitude
2. Identify essential job functions
3. Consult with the individual
4. During consult, identify possible accommodation options
5. If no identification of possible accommodations, seek outside assistance
6. Choose “reasonable” accommodation



Unchanged: Reasonable Accommodation is a Continuing Duty

- ◆ Humphrey v. Memorial Hospital (9th Cir. 2001)
 - ◆ Employee with attendance problems caused by obsessive compulsive disorder
 - ◆ Employer offers leave of absence—employee refuses
 - ◆ Flexible schedule—does not work
 - ◆ Employer rejects work at home suggestion
 - ◆ Holding: Employer did not do enough; reasonable accommodation is a continuing duty



Unchanged: What If No Accommodation in Current Position?

- ◆ Employer must take affirmative steps to make known vacant job opportunities
- ◆ Must offer other position to disabled employee if qualified, even if not the best qualified individual
- ◆ Not required to bump an employee from a job to create a vacancy



Unchanged: Leaves of Absence and ADA

- ◆ FMLA and Family Care Act
 - ◆ Someone on FMLA or taking Family Care Act leave may or may not be disabled under ADA
 - ◆ If leave ends and employee cannot return, evaluate under ADA



Unchanged: Leaves of Absence and ADA

- ◆ Unpaid leave is a recognized accommodation
 - ◆ Employers usually must hold the job open for the duration of the leave
 - ◆ No pre-set length for leave required
 - ◆ Relationship to undue hardship (Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999) (might not be an undue hardship to hold job open for lengthy time period where benefits policy allowed up to one year of leave and regularly hired seasonal employees))
 - ◆ ADA does not require *indefinite* leave, but it may require a long leave
 - ◆ Kimbrow v. Atlantic Richfield Co., 889 F.2d 869 (9th Cir. 1989)



Unchanged: Undue Hardship

- ◆ A circumstance that:
 - ◆ Is unduly expensive
 - ◆ Is unduly extensive
 - ◆ Is unduly disruptive
 - ◆ Would alter the nature or operation of the business

- ◆ Employer must prove

- ◆ It's a sliding scale: The same accommodation may be unreasonable for a small business and reasonable for a big business



Unchanged: Difficulties in Proving Undue Hardship

- ◆ Might be required to open financial books or justify other expenditures
 - ◆ Favorite plaintiff's tactic: Compare cost of executive's country club membership (or the like) to the cost of the proposed accommodation
- ◆ Likely unsuccessful if made same or similar modification to others
- ◆ Hard to show certain hardships (e.g., disruption)



Direct Threat Exception

- ◆ ADA does not require an employer to place or retain an individual in a position if doing so would present an undue threat to his/her own safety or that of other employees



Assessing Whether Direct Threat

- ◆ Consider:
 - ◆ The duration of the risk
 - ◆ The nature and severity of the harm
 - ◆ The likelihood that harm will occur
 - ◆ The imminence of the potential harm
 - ◆ Must be substantiated by medical evidence (DO NOT make conclusions based on mere fears, prejudice or suspicions)



ADA Checklist

1. Are you on notice that the individual may have a disability?
 - ◆ Has the individual disclosed a condition that could be a disability or claimed a disability?
 - ◆ Are there obvious signs of a physical or mental impairment?
 - ◆ Have other employees reported any physical or mental impairment?
2. Does the individual have a disability?
 - ◆ Does the individual have an impairment?
 - ◆ Any major life activities affected?
 - ◆ Any major life activities substantially limited?
 - ◆ Does the individual claim a record of disability?
 - ◆ Is the individual regarded as having a disability?



ADA Checklist

1. Is the individual qualified for the job?
2. Does the individual need a reasonable accommodation?
 - ◆ Needed because of a disability?
 - ◆ Engage in interactive process?
 - ◆ Did you document your efforts?
 - ◆ If no reasonable accommodation available for current position, did you assist employee in identifying open positions for transfer that he or she would be qualified for?



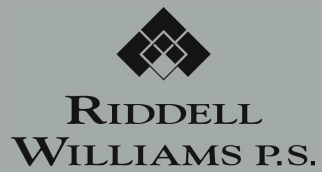
Responding to Impairments: Focus on Job Performance

- ◆ What do you do when you notice an employee's performance has declined but you don't know if it's due to a medical condition?
 - ◆ Talk with the employee about *their job performance*
 - ◆ Ask the employee if you can help in any way to address something that may be causing or contributing to their performance problems
 - ◆ Don't *regard* the employee as having a disability
 - ◆ Don't raise the issue of disability: NEVER use the term *disability*
 - ◆ Evaluate whether condition qualifies as a disability
 - ◆ Engage in *interactive process* to identify whether reasonable accommodation needed
 - ◆ Document



State Law vs. ADA: Open Issues

- ◆ Temporary disabilities
 - ◆ WLAD has traditionally protected
 - ◆ ADA traditionally has not protected
- ◆ Will Washington courts use the ADA analysis?
- ◆ McClarty v. Totem Electric
 - ◆ Only adopts ADA definition of disability
 - ◆ Does not otherwise say what will happen to prior state disability law
 - ◆ Will Washington Legislature or Human Rights Commission develop a framework to use with the ADA definition or will we adopt in whole the ADA disability formulation?



Questions?

Please contact us any time with additional questions.

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