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INDIVIDUALS PROTECTED BY THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

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ABSTRACT

On July 26, 1990, President George Bush signed into law the Americans with Disabilities Act of 1990. The main purpose of the Act is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." Like the Civil Rights Act of 1964 that prohibits discrimination on the basis of race, color, religion, national origin, and sex, Title I of the ADA seeks to ensure access for the disabled to equal employment opportunities based on merit. However, it does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities. Therefore, in order to be covered by Title I of the Act, a person must be a qualified individual with a disability. However, the determination as to who is a "qualified individual with a disability" is difficult under the ADA since it does not provide a list of specific conditions constituting a covered disability. This article examines the Act's definition of disability and what it takes to be a "qualified individual with a disability."

On July 26, 1990, President George Bush signed into law the Americans with Disabilities Act of 1990 (after this called ADA or Act) [1]. The main purpose of the Act is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" [1, at §§ 12101(b)(1) and (2)]. More specifically, the ADA prohibits discrimination against the disabled in employment and in the provision of goods and services to the public. It also requires transportation

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systems, telecommunication systems, and most public facilities to become accessible to the disabled.

The ADA consists of five basic titles. Title I of the act is designed to remove barriers that prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities. Like the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, national origin, and sex, Title I of the ADA seeks to ensure access to equal employment opportunities based on merit. It does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities.

DISABILITY DEFINED

Instead of providing a list of conditions constituting a covered disability, the ADA uses a functional definition of disability that is much more flexible in application. Under the ADA, the term "disability" means any individual who has one of the following:

1. A physical or mental impairment that substantially limits one or more of that person's major life activities;
2. An individual with a record of such an impairment; or
3. An individual regarded as having such an impairment [1, at § 12102(2)].

This is basically the same definition Congress adopted to define a "person with a handicap" for purposes of Title V of the Rehabilitation Act of 1973 [2]. The main difference is that the ADA uses the preferred term "disability" rather than "handicap."

A Physical or Mental Impairment

Under the first prong of the definition of disability, an individual is considered disabled if that person has a physical or mental impairment that substantially limits one or more major life activities. A physical impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary, hemic/lymphatic, skin, and endocrine. A mental impairment is any mental or psychological disorder such as mental retardation, emotional or mental illness, or specific learning disability [3].

An impairment, therefore, is some type of physical or mental disorder. For example, diseases, conditions, infections, and disorders such as HIV disease, muscular dystrophy, cancer, heart disease, severe depression, and orthopedic, vision, speech, and hearing impairments would be considered impairments. Furthermore, it is important to note that the existence of an impairment is to be

determined without regard to mitigating measure such as medicines or assistive devices. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition was corrected with a hearing aid.

However, it is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments. The definition of "impairment" does not include physical characteristics such as eye color, hair color, or heft-handedness. Likewise, the definition does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Nor does the definition include environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record.

Determining whether a physical or mental impairment exists is only the first step in deciding whether an individual is disabled. Many impairments do not affect an individual's life to the extent they constitute disabling impairments. An impairment rises to the level of disability only if the impairment *substantially* limits one or more of the individual's major life activities. "Major life activities" are those basic activities the average person in the general population can do with little or no difficulty. For example, activities such as caring for oneself, performing manual tasks, procreation, having intimate personal relations, walking, sitting, standing, lifting, reaching, seeing, hearing, speaking, breathing, and learning would be considered major life activities. Furthermore, the activity of working may also be considered a major life activity under certain conditions [3, at § 1630.2(i)].

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are permanently paralyzed is substantially limited in the major life activity of walking because that person is unable, due to the impairment, to perform that major life activity. Multiple impairments that combine to prevent an individual from performing a major life activity also constitute a disability. Alternatively, an impairment or combination of impairments is substantially limiting if it/they significantly restrict the duration, manner, or condition under which an individual can perform a particular major life activity as compared to the average person. Accordingly, an individual whose impairment allows that person to walk only for very brief periods of time would be substantially limited in the major life activity of walking [3, at § 1630.2(j)(l)].

The determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis without regard to mitigating measures such as medicines or assistive devices. In deciding whether an

impairment is substantially limiting, look at the following three factors: 1) the nature and severity of the impairment; 2) the duration or expected duration of the impairment; and 3) the permanent or long-term impact, or the expected permanent or long-term impact of the impairment. For example, impairments such as broken limbs, sprained joints, and influenza are usually not disabilities because they are nonchronic impairments of short duration, with little or no long-term or permanent impact [3, at § 1630.2(j)(2)].

An individual is not substantially limited in a major life activity if the limitation, when viewed based on the factors above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as the result of a physical impairment, that person was able to walk only at an average or moderately below average speed. Also, remember that the restriction on the performance of a major life activity must be the result of a condition that is an impairment and not some physical or psychological characteristic, or some environmental, cultural, or economic disadvantage that substantially limits a major life activity.

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. However, if an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if a person is blind and, therefore, substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working.

The reason the major life activity of working is treated this way is because it is more difficult to show a substantial limitation in working as compared to all of the other major life activities. Under Equal Employment Opportunity Commission (EEOC) regulations, the term "substantially limits" with respect to working 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 following factors may be considered in deciding whether an individual is substantially limited in the major life activity of working:

1. The geographical area to which the individual has reasonable access;
2. The job from which the individual has been disqualified because of an impairment, and the number and types of jobs using similar training, knowledge, skills, or abilities within that geographical area from which the individual is also disqualified because of the impairment; and/or
3. The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not using similar training, knowledge, skills, or abilities within that geographical area from which the individual is also disqualified because of the impairment [3, at § 1630.2(j)(3)].

For example, an individual who has a back condition that prevents that person from performing any heavy-labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates that person's ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, such as the class of semiskilled jobs. Similarly, suppose an individual has an allergy to a substance found only in high-rise office buildings that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high-rise office buildings, the individual would be substantially limited in working.

However, the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. Thus, an individual is not substantially limited in working just because that person is unable to do a particular job for one employer, or because that person is unable to do a specialized job or profession requiring extraordinary skill, ability, or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline copilot or a pilot for a carrier service would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both examples, the individuals are not substantially limited in their ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized job or a narrow range of jobs [4].

The determination of whether an individual is substantially limited in working must also be done on a case-by-case basis. Plus, the terms "number and types of jobs" and "number and types of other jobs" used above are not intended to require a burdensome evidentiary showing. Instead, the terms require the presentation only of evidence of general employment demographics and/or recognized occupational classifications that show the approximate number of jobs (e.g., "few," "many," "most") from which an individual would be excluded because of an impairment.

Individuals With a Record of a Disability

Under the second prong of the definition of disability, an individual is considered disabled if that person has a *history of,* or has been *misclassified as having,* a mental or physical impairment that substantially limits one or more major life activities. One reason for this provision is to ensure that people are not discriminated against because of a history of disability. For example, this provision protects *former* cancer patients from discrimination based on their prior medical history. It also ensures that individuals are not discriminated against because they have been misclassified as disabled. Accordingly, an individual wrongly

classified as mentally retarded would be protected from discrimination by this provision [5].

Furthermore, it is important to emphasize that this prong applies only to individuals who have a history of, or who have been misclassified as having, a *physical* or *mental impairment* that substantially limited one or more of their major life activities. Therefore, the fact that a person has a record of being a disabled veteran, or who is classified or misclassified as disabled for other purposes, does not guarantee the person will satisfy the definition of disability under this prong. Other statutes, regulations, and programs may have a definition of disability that is different from the definition set forth in the ADA.

Individuals Regarded as Being Disabled

Under the third prong of the definition of disability, an individual is considered disabled if that person is *regarded* as having a physical or mental impairment that substantially limits one or more of that person's major life activities. There are three different ways in which an individual may satisfy this third prong of the definition:

1. The individual may have a physical or mental impairment that is not substantially limiting but is perceived by the covered entity as constituting a substantially limiting impairment;
2. The individual may have a physical or mental impairment that is only substantially limiting because of the attitudes of others toward the impairment; or
3. The individual may have no physical or mental impairment at all but is regarded by the covered entity as having a substantially limiting impairment [5, at § 1630.2(i)].

An individual satisfies the first part of the definition if the individual has an impairment that is not substantially limiting, but the covered entity perceived the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if that person continues to do strenuous work, the employer would be regarding the individual as disabled.

An individual satisfies the second part of the definition if the individual has an impairment that is only substantially limiting because of the attitudes of others toward the condition. For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability.

Finally, an individual satisfies the third part of the definition if the covered entity erroneously believes the individual has a substantially limiting impairment

even though the individual has no such impairment. For example, suppose an employer discharges an employee in response to a rumor that the employee has HIV disease. Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered a person with a disability because the employer perceived this individual as being disabled. Thus, in this example, the employer is discriminating on the basis of disability by discharging this employee.

The rationale for the third prong of the definition of disability was articulated by the Supreme Court in the *Arline* case [6]. In this case, Gene Arline had been hospitalized with a case of tuberculosis in 1957. When the school board discovered this fact, it fired her, fearing she was contagious even though this was not true. The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." The Court concluded that by including "regarded as" in the definition of disability, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment" [6, at 283-84].

An individual rejected from a job or otherwise discriminated against because of the myths, fears, and stereotypes associated with disabilities would be covered under this part of the definition of disability. This would be true regardless of whether the employer's or covered entity's perception was shared by others in the field and whether the individual's actual physical or mental condition would be considered a disability under the first or second prong of the definition. If the employer or other covered entity cannot articulate a nondiscriminatory reason for its action, a conclusion that the employer or covered entity is acting based on myth, fear, or stereotype can be drawn.

Exceptions/Those Not Covered

The ADA specifically excludes certain categories of individuals from coverage under its definitions of disability. First, the ADA removes the following select group of mental and sexual disorders from coverage: 1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; 2) compulsive gambling, kleptomania, or pyromania; and 3) psychoactive substance use disorders (e.g., hallucinations) resulting from current illegal use of drugs. Furthermore, since homosexuality and bisexuality are not considered impairments, they are not disabilities under the ADA [7].

Second, individuals currently engaging in the illegal use of drugs are not covered when the covered entity acts based on such use. "Illegal use of drugs"

refers to the use of unlawful drugs, such as cocaine, and the unlawful use of prescription drugs. The term noes not include the use of a drug taken under the supervision of a licensed health care professional, or other uses of drugs authorized by other provisions of federal law. The word "current" means any illegal use of drugs recent enough to justify a belief that the individual is actively engaged in such conduct. It is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the covered entity's action in question. Furthermore, this provision applies regardless of whether the person is a casual user or drug addict, and regardless of whether the drug use has any adverse impact on the person's job performance [7, at § 1630.3(a); 8].

However, individuals who are erroneously perceived as engaging in the illegal use of drugs, but are not in fact illegally using drugs, are not excluded from the definition of disability. In addition, individuals who are no longer illegally using drugs and who have either been rehabilitated successfully or are in the process of completing a rehabilitation program are not excluded from the definition of disability. The term "rehabilitation program" refers to both inpatient and outpatient programs as well as to appropriate employee assistance programs or professionally recognized self-help programs such as Narcotics Anonymous.

Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem. The reasonable assurances that employers may ask applicants or employees to provide include evidence that the individual is participating in a drug treatment program and/or evidence, such as drug test results where such drug tests are not otherwise illegal, to show that the individual is not currently engaging in the illegal use of drugs. An employer, such as a law enforcement agency, may also be able to impose a qualification standard that excludes individuals with a history of illegal drug use if it can show that the standard is job-related and consistent with business necessity.

Finally, a person who is dependent on alcohol is not excluded from the definition of disability. However, under the ADA, an employer may hold a person with alcohol dependency to the same qualification, performance, and behavioral standards to which all employees are held, even if unsatisfactory performance or behavior is related to the individual's alcohol dependency. Therefore, if a person dependent on alcohol has excessive absenteeism or poor job performance because of his or her dependence on alcohol, that person may be disciplined or terminated according to company policy [8, at § 12114(b)(4)].

INDIVIDUALS PROTECTED BY TITLE I

Meeting the definition of disability alone does not mean the individual will be automatically protected under Title I of the ADA. Instead, Title I has a further requirement that the person be a "qualified individual with a disability." This means the person must, with or without reasonable accommodation, be able to

perform the essential functions of the position such individual holds or desires [1, at § 12111(8)]. Or put another way, a "qualified individual with a disability" is a disabled person who satisfies the necessary skill, experience, education, and other job-related requirements of the job such individual holds or desires, and who with or without reasonable work environment modifications can perform the essential functions of that job. Accordingly, the determination of whether an individual with a disability is qualified involves a two-step process.

The first step in determining whether an individual is qualified is to see whether that person possesses the minimum requirements for the position in question. For example, suppose a person in a wheelchair applies for a vacant accounting position that has as a minimum requirement the possession of a certified public accountant's license. The first step in deciding whether this person is qualified is to examine his or her credentials to see whether he or she is a licensed CPA. If that person is not a CPA, he or she is not a "qualified individual with a disability" and cannot be hired to fill the position regardless of whether a reasonable accommodation would have been needed. This first step determines whether the individual is "otherwise qualified" for the position.

If the person is "otherwise qualified," the second step is to determine whether the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation. The purpose here is to ensure that disabled individuals who can perform the *essential* functions of the job held or desired are not denied employment opportunities because they are unable to perform the *marginal* functions of that job. The determination of whether an individual is qualified under both the first and second steps is made at the time of the employment decision, and such determination should be based on the present capabilities of that person rather than on speculation about what may occur in the future [9].

"Essential Functions"

As can be seen from the discussion above, the determination of which functions are essential and which functions are marginal may be critical in deciding whether a disabled person is qualified. In general, "essential functions" are the fundamental job duties and responsibilities of the job in question. The term does not include the marginal functions of that position [9, at § 1630.2(n)(l)].

The first step in determining whether a function is essential is to see whether the employer actually requires its employee(s) in that position to perform that function. For example, an employer may assert that being able to drive is an essential function of a particular job. However, if the employer has never required any employee in that position to drive as part of his or her job, this would indicate driving is not actually an essential function of the job.

If the employer does require its employees to drive as a part of their job, the second step in determining whether this function is essential centers around

whether removal of the function would fundamentally alter that job. A job function may be considered essential under this second step for any of several reasons, including one or more of the following three reasons. First, a function may be essential because the reason the job exists is to perform that function [9, at § 1630.2(n)(2)(i)]. For example, an employer may hire a chauffeur for its top executives to use. In this situation, the ability to drive would be an essential function since this is the only reason the job exists.

Second, a function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed [8, at § 1630.2(n)(2)(ii)]. For example, assume that a small retail business can afford to employ only one person and, therefore, this person must be able to open up, stock, sell, do checkout, close, and deposit the daily receipts. If it is necessary to be able to drive to make the daily deposit, driving would be an essential function of this job since there is no one else who can perform this task [10].

Third, the function may be highly specialized so that the person in the job is hired for his or her expertise or ability to perform that particular function [9, at § 1630.2(n)(2)(iii)]. Although it may appear similar to the first reason that a function may be essential, this third factor is actually different because it centers on characteristics of the person hired for the job as opposed to the reason the job exists. For example, if an employer needed someone to perform the function of driving its top executives wherever they needed to go, it could hire any person with a valid chauffeur's license. But, if the company needed someone to perform the function of driving their "Indy 500" race car that they used for promotional purposes, the person hired would have to possess the ability to drive such a car.

Whether removal of a function would fundamentally alter a job and, therefore, be considered essential under this second step is a factual determination that must be made on a case-by-case basis. In deciding whether a particular function is essential, all relevant evidence should be considered. Evidence such as the employer's judgment as to which functions are essential, any written job descriptions prepared before the job was advertised or applicants were interviewed, and the amount of time spent on the job performing the function may help in this determination. Furthermore, evidence such as the consequences of not requiring the person holding the job to perform the function, the terms of any collective bargaining agreement covering that particular job and its functions, the work experience of past employees in the job, and/or the current work experience of employees in similar jobs also may help in this determination [9, at § 1630.2(n)(3)].

CONCLUSION

To ensure access to equal employment opportunities for the disabled, the ADA uses a functional definition of disability so that all disabled persons are covered.

However, Title I of the Act requires the disabled person to be "qualified" so that employers do not have to set quotas or preferences favoring individuals with disabilities over those without disabilities. This promotes the mandate for the elimination of discrimination against individuals with disabilities while ensuring access to equal employment opportunities based on merit.

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END NOTES

1. 42 U.S.C. §§ 12101 et seq. (Supp. 1990).
2. 29 U.S.C. § 706(8)(B) (Supp. 1990).
3. 29 C.F.R. § 1630.2(h) (1991).
4. See *Forrisi v. Bowen,* 794 F.2d 931 (4th Cir. 1986); *Jasany v. U.S. Postal Service,* 755 F.2d 1244 (6th Cir. 1985); *E. E. Black, Ltd. v. Marshall,* 497 F.Supp. 1088 (D. Hawaii, 1980). Note: The decisions in these cases were based on the Rehabilitation Act of 1973, which is essentially the same as the ADA in this area.
5. 29 C.F.R. § 1630.2(k) (1991).
6. *School Board of Nassau County v. Arline,* 480 U.S. 273 (1987).
7. 29 C.R.F. §§ 1630.3(d) and (e) (1991).
8. *See also* 42 U.S.C. §§ 12114(a) and (b) (Supp. 1990).
9. C.F.R. § 1630.2(m) (1991).
10. *See Treadwell v. Alexander,* 707 F.2d 473 (11th Cir. 1983).

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