

What we will cover:

1. Definitions
2. Who is covered
3. Medical evidence
4. Making Reasonable Accommodations
5. GINA

DISABILITY AND ISSUES IN EMPLOYMENT

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Nebraska Equal Opportunity Commission

AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT (“ADAAA”)

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

56.7 MILLION PEOPLE HAVE A DISABILITY IN THE UNITED STATES

- ⦿ In NE number of disabled: 189,914
- ⦿ Of the United States NE is 42nd: 10.5%
- ⦿ Percentage of US employed disabled: 33.1%
- ⦿ Percentage of NE employed disabled: 45.1%
- ⦿ 2011 median earnings of non-disabled: \$30,285.00
- ⦿ 2011 median earnings of disabled: \$19,735.00

Source: U.S. Department of Commerce, US Census
...and Omaha World Herald (July 21, 2013)



NEOC 2013-2014 STATS

Employment disability cases filed: 348

Of these, 16 cases decided: Reasonable Cause and of these, 10 were based on a business's failure to provide a reasonable accommodation.

Some of the amounts related to mediation/settlement/conciliation of reasonable accommodation cases:

1. \$10,000 back wages and \$40,000 lump sum
2. \$11,500 back pay and \$11,250 compensatory damages
3. \$10,000 back wages and \$57,500 compensatory damages

WHO IS PROTECTED **BY TITLE I OF THE** **ADAAA?**



Person
with a disability
who can perform
essential functions of a job
with or without
a reasonable accommodation.

The Americans With Disabilities Act Amendments Act of 2008

Signed into law
September 25, 2008,
effective January 1, 2009.



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

WHAT IS REJECTED

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

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

Case also narrowed the scope of “regarded as”

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

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

WHO MUST COMPLY

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

***Employees** : full, part-time, temporary, and seasonal.

***Employers** : agents, managers, supervisors, foremen, and others who act for the employer,

&

- ***Labor Organizations**
- ***Employment Agencies**
- ***Governmental Agencies**
- ***Political Subdivisions**

DISABILITY DISCRIMINATION

Of NEOC cases decided in favor of the charging party that were successfully conciliated, 1/3 of the cases were filed on disability and of those cases, 3 were based on a failure to provide a reasonable accommodation.

There was one case not successfully conciliated, and that case was filed on the basis of disability and was closed based on a private settlement between the parties.



Definition of Disability

Physical or Mental

impairment

which

“substantially limits” = *broad coverage

one or more

major life activities of such individual

***The maximum extent possible.**

WHO IS IN THE PROTECTED CLASS?

Actual impairment

Record of an impairment

Regarded as having such an impairment

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

OTHER COVERAGE UNDER THE ADAAA

Person(s) **retaliated against** for
complaining of disability
discrimination.

EXAMPLES OF DISABILITIES COVERED

- ⦿ Paralysis
- ⦿ Significant lifting and bending restrictions
- ⦿ Vision impairments
- ⦿ Psychiatric disorders

Major Bodily Functions include:

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

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

“REGARDED AS”

An individual may establish that he or she has been subjected to an ADAAA prohibited action because of an actual or perceived impairment, whether or not the impairment limits or is perceived to limit a major life activity.

Is a medical condition of the employee a motivation for the employment decision?

“REGARDED AS”

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

...but the ADAAA does not require a showing that the employer *believed* the impairment substantially limited a major life activity.

It is discrimination when there is an Adverse Action taken because of an actual, record of, or a perceived impairment.



“Regarded as”

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

(2) not entitled to consideration for reasonable accommodation.



Exclusions not changed:

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



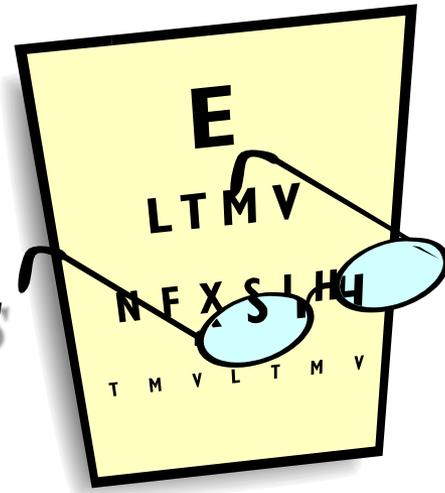
If the person who is participating or has been successful in completing a drug rehabilitation program, and no longer engages in the use of illegal drugs, the person is regarded as having a medical condition requiring consideration of a reasonable accommodation.

The same is true for alcoholism: a person under medical treatment, or has successfully completed medical treatment, is regarded as having a medical condition requiring consideration of a reasonable accommodation.

MAJOR LIFE ACTIVITIES INCLUDE:

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

***Other than ordinary
eyeglasses or contact lenses***



**whether an impairment
substantially limits a major
life activity shall be made**

without regard to

the ameliorative effects of

mitigating measures

MITIGATING MEASURES

- ◉ **Medical supplies**
- ◉ **Equipment**
- ◉ **Appliances**
- ◉ **Prosthetics**
- ◉ **Oxygen therapy equipment and supplies**
- ◉ **Hearing aids and cochlear implants; other implantable hearing devices**
- ◉ **Mobility devices**
- ◉ **Use of assistive technology**
- ◉ **Reasonable accommodations or auxiliary aids or services**
- ◉ **Learned behavioral or adaptive neurological modifications**



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



EMPLOYMENT PRACTICES **COVERED**

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

Disability issues at Pre-Offer Stage

At the pre-offer stage, if an applicant requests **a reasonable accommodation in order to complete the hiring process**, the prospective employer may ask for documentation regarding this need. The **documentation sought is limited** to verification that the accommodation is needed to complete the hiring process.

Permissible Pre-Offer of Employment Inquiries:



- 1. Ability to perform the essential functions**
- 2. The non-medical qualifications for the position**
- 3. How an applicant would perform the job tasks**

PROHIBITED ADA QUESTIONS

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

PERMITTED POST OFFER INQUIRIES

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

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

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

MEDICAL EVIDENCE

The employer decides whether a person is qualified based upon the

best and objective

medical information available:



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

REASONABLE **ACCOMMODATION**

Any reasonable

modification or adjustment

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

WHAT IS REASONABLE?

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

Why make a reasonable accommodation?

1. Equality in the application process
2. Enables the person to perform the essential functions of a job, and
3. Enjoy the benefits and privileges of employment.



AN EMPLOYEE MAY REQUEST AN ACCOMMODATION

Employee states they are having difficulty due to a medical condition

A person acting on behalf of the employee with a disability informs the employer

Employee submits a medical prescription which demonstrates there is a connection between the disability and the need for the accommodation

QUESTIONS AN EMPLOYER *MIGHT* ASK TO ACCOMMODATE



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

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

The employer initiates a discussion about reasonable accommodation when:

1. Employer knows the person has a disability
2. Knows or suspects the person is having *performance or attendance problems* because of a disability
3. Knows or suspects the person has a **disability** which prevents them from requesting a reasonable accommodation.

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



People of extreme size or weight may need special accommodations.



People with hearing difficulties may not receive all communications.





IDENTIFY AND MAKE A REASONABLE ACCOMMODATION

- 1. What are the essential functions of the job?**
- 2. What are the employee's specific abilities and limitations?**
- 3. What are possible accommodations how effective would each be?**

Employee's preference may be considered



FACTORS TO CONSIDER:

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



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WHAT'S AN ESSENTIAL FUNCTION?

1. Are employees actually required to perform the function?
2. Would removing that function fundamentally change the job?



It's essential if....

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

EXAMPLES OF REASONABLE ACCOMMODATIONS

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

WHAT IS UNDUE HARDSHIP?

“Excessively costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.”



OTHER CONSIDERATIONS FOR WHETHER AN ACCOMMODATION IS REASONABLE:

• Jobs with Multiple Functions

• Essential Functions of a Changing Job

• Attendance as an Essential Function:

(Regular attendance can be an essential function of a job, and the employer may ask any individual if s/he can meet the attendance requirements at the pre-offer stage.)

“DIRECT THREAT” WHAT IS IT?

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

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

BUSINESS NECESSITY:

WHAT DOES THAT MEAN?

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

DECISIONS MUST BE:

- 1. Job-related**
- 2. Consistent with business necessity**

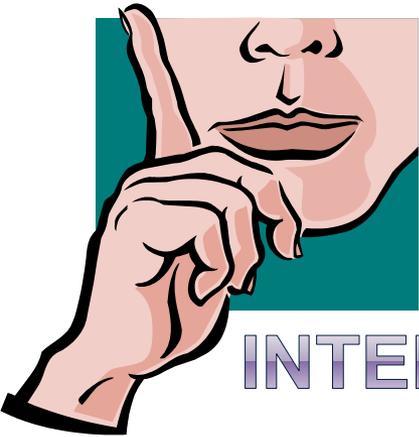
Employer is not required to lower quality or quantity of work unless applied to all applicants/employees in the same job. Hiring decision is based only on the individual's ability to perform the essential function of the job with or without a reasonable accommodation

Case Study

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

The applicant states the incident occurred before she was diagnosed as being schizophrenic-bipolar, and following treatment which included medication, she has not engaged in violent behavior for over 5 years, which is affirmed by the criminal records reviewed.

What do you do?



CRIMINAL HISTORY & ADA INTERSECTION OF CRIMINAL HISTORY AND DISABILITY

Verify and Decide (Interactive Process)



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



Hold the person to the same performance and attendance requirements as others.



Once confirmation is obtained through competent and independent source(s), avoid taking any review or action of harsher treatment or scrutiny of the employee

Tell the applicant of the reason for the final decision.

OTHER FREQUENTLY ASKED QUESTIONS RELATED TO THE ADA

- ⦿ What is disability by association?
- ⦿ What about a “wellness” program?

REMEMBER



Not all disabilities are visible

The nature of a person's disability is a private matter

An employer *is not* entitled to inquire for details

EEOC ENFORCES:

Genetic Information Nondiscrimination Act of 2008

To prohibit discrimination on the basis of genetic information with respect to health insurance and employment.

Prohibited: Using any information about an applicant's or employee's genetic tests, the genetic tests of family members of the individual, or the manifestation of a disease or disorder in family members of the individual, to make employment decisions.

GENETIC INFORMATION NON-DISCRIMINATION ACT OF 2008

- ⦿ **Effective November 2009**
- ⦿ **Many genetic conditions and disorders are tied to particular ethnic and racial groups, and to gender**
- ⦿ **Includes the use of genetic information from genetic services**
- ⦿ **Does not include using information about the sex or age of any person**

Family and Medical Leave Act

Reasons for taking leave:

- **To care for the employee's child after birth, or placement for adoption or foster care;**
- **To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or**
- **For a serious health condition that makes the employee unable to perform his/her job.**

QUESTIONS?



RETALIATION DISCRIMINATION

Discrimination against a person who has opposed an illegal practice or participated in an investigation

The Opposition Clause

Opposition is protected if the employee had a reasonable and good faith belief that the practice opposed was a violation of the Act.



Opposition includes:

- **Peaceful picketing**
- **Public protest of an employee by an employee who is also a consumer**
- **Devoting small amounts of office time to complaint-related work**
- **Refusing to perform a directive that is a violation of the state or federal law**

Opposition may not include:

- **Disruption of the workplace**
- **Neglecting work duties to perform complaint activities**
- **Willful violation of legitimate company rules**
- **Complaining outside the chain of command**

“Participation” includes...

- **Filed a charge**
- **Refused to be a cooperative witness for the employer**
- **Testified for a coworker**
- **Become a probable witness**
- **Gathered evidence to support a charge of discrimination**
- **Expressed an intent to file a charge**

The Participation Clause

**Protection is not
lost if the
employee is
wrong on the
merits of the
charge.**



Nebraska Fair Employment Practice Act

Section 48-1114. Opposition to unlawful practice; participation in investigation; discrimination prohibited.

It shall be unlawful employment practice for an employer to discriminate against any of his or her employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership because he or she...

Section 48-1114 (FEPA)

- (1) has opposed any practice made an unlawful employment practice by the Nebraska Fair Employment Practice Act
- (2) has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act
- (3) has opposed any practice or refused to carry out any action unlawful under the laws of the United States or this state.

Nebraska Age Discrimination in Employment Act

Section 48-1004(3): It shall be an unlawful employment practice for any employer or labor organization to discharge, expel or otherwise discriminate against any person, because he opposed any unlawful employment practice...or has filed a charge or suit, testified, participated, or assisted in any proceeding under the provisions of (the) sections...

Equal Pay Act of Nebraska

Section 48-1221(4): No employer may discharge or discriminate against any employee by reason of any action taken by such employee to invoke or assist in any manner the enforcement of the provisions...

Overview

The law prohibits discrimination against:

- Current employee
- An applicant for employment
- A former employee



Threshold Issue

Does the complaint allege harm based on a protected class and a covered issue?

Prima Facie Elements of a charge of Retaliation

1. Person has: (1) opposed any practice made an unlawful practice (2) has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Acts, (3) has opposed any practice or refused to carry out any action unlawful under the laws of the United States or Nebraska
2. C suffered an adverse action by the business
3. There exists a temporal and causal connection between the protected activity and the business's action

Mattson v. Caterpillar, Inc., 359 F.3d 885 (7th Circuit 2004)

A discrimination complaint that is unreasonable, meritless, and motivated by bad faith does not qualify for protection under the participation clause of Title VII's retaliation provision.

Deravin v. Kerik, 335 F.3d 195 (2d Circuit 2003)

Defending oneself against a charge of discrimination by participating in a Title VII proceeding or investigation constitutes protected activity.

Cross v. Cleaver, 142 F.3d 1059 (8th Circuit 1998)

The court rejected a “knew or should have known” standard for employer liability in favor of a vicarious liability standard that depends on the status of the retaliator and the nature of the retaliation.

Types of Retaliation by Employers

1. Threat to file a counterclaim in court
2. Suspension with pay
3. Changing the qualifications for an open position sought
4. Selective strict enforcement of a policy
5. Harassment
6. Manipulation of union contract rights
7. Reprimands
8. Extending Probation
9. Transfer to a lower grade or salary
10. Intimidation of witnesses during an internal investigation of a complaint