

Dinsmôre

DISABILITY DISCRIMINATION

Presented by:

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Part 1: Overview of the ADA

- **Passed and signed into law by G.H. W. Bush in 1990**
- **Adopted the following definition of Disability:**
 - A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - A record of such an impairment; or
 - Regarded as having such an impairment

Coverage under the ADA

Title I: Prohibits employment discrimination against:

- An otherwise “qualified individual” based on disability
- By private employers with 15 or more employees

Part 2: Changes under the ADAAA (2008)

- **The Supreme Court had effectively narrowed the definition of disability through a series of decisions**
 - 1999 – 3 cases finding that mitigating measures must be taken into account
 - 2002 – case setting a high bar for what it means to have a “substantial limitation” on a “major life activity”
- **The ADAAA clarifies the meaning intended for each element of the disability definition**

Part 3: Definition of Disability

- **Maintains 3 categories:**
 - Having an actual physical or mental impairment that substantially limits one or more major life activities
 - Having a record of such an impairment
 - Being regarded as having such an impairment
- **Requires broad application for coverage under these 3 categories**

Definition of Disability

- **Episodic impairments, or impairments in remission= Disability, IF the impairment would substantially limit a major life activity when the impairment is active**
- **Modifies the 3rd category – “Regarded As”**
 - Overrules Sutton v. United Air Lines
 - Does not apply to minor and transitory impairments (expected or does last 6 months or less)
 - Does not require “Reasonable Accommodation”

Substantially Limits

- **Overruled Case Law re: Mitigating Measures**
 - Sutton, Murphy, Albertsons
 - Exceptions: Ordinary Eyeglasses/ contacts
- **Overruled Case Law re: Degree of limitation**
 - Toyota
- **Substantial Limit on one MLA is sufficient**
- **Directs EEOC to revise regulations on “substantially limits”**

Major Life Activity

- **Adds list of MLAs to the Statute – Includes new ones not in current regulations**
- **Adds the Operation of Major Bodily Functions to list of MLAs**

Qualified

- **Burden to prove the individual with a disability is “qualified” for the job remains on the Employee/Applicant Plaintiff**

Reverse Discrimination

- **Clarifies: No claims for reverse disability discrimination are allowed under the ADA**
- **Explains that claims based on a lack of disability are not actionable**

ADA: Workers' Compensation

- **Workers' Compensation**
 - **Nothing in the Act alters the standards for determining eligibility for benefits under state workers' compensation laws or under state and federal disability benefit programs**

Part 4: Practical Considerations for Employers

- **Impact of the ADAAA on the workplace**
 - Increased number of employees protected by federal law
 - Range of coverage and protections afforded will expand significantly
 - Broad coverage and protections afforded by the ADAAA shift the focus from the “disability” inquiry to the interactive process for reasonable accommodations

Operating under the ADA as an Employer

- **Employers should review their policies and practices governing the interactive process set forth in the ADA and focus on their reasonable accommodation procedures**
- **Upon request for a reasonable accommodation, engage in an interactive process with employees or applicants regardless of whether medication, aids or other mitigating measures may be available to them**
- **If an employee or applicant demonstrates a physical or mental impairment that would limit his or her ability to request an accommodation, initiate an informal interactive process to accommodate the employee**

Operating under the ADA as an Employer

- **Keep detailed records of requests made and accommodations granted or denied, along with some evidentiary back-up for the rationale behind the decisions**
- **Review and update Job Descriptions (Essential Functions)**
- **Consider refresher training for management and supervisors as to the ADA's requirements**

What Can Employers Do to Avoid Liability Under the ADA?

- **Starts before an employee even begins**
 - Handbook
 - Discrimination and Harassment Training

Employee Handbook

- **Train supervisors and managers on administration of handbook**
- **Ensure all policies are communicated to employees**
 - **DOCUMENT** their understanding
- **Apply consistently**

Employee Handbook

- **Your handbook should include...**
 - Anti-discrimination/anti-harassment policy
 - Reporting procedure
 - Make sure burden is on the employee
 - Disciplinary Procedures
 - List of rules that if violated will lead to discipline, suspension and/or discharge

Prevent discrimination or harassment in our workplace?

- **An employer liable for discrimination or harassment by a supervisor that results in a tangible employment action**
 - Hiring, firing, promotion, demotion, change in pay or benefits, and work duties.
- **If the harassment does not result in a tangible employment action, the employer may still be liable unless it proves that:**
 - 1) It exercised reasonable care to prevent and promptly correct any harassment; and
 - 2) The employee unreasonably failed to complain to management or to avoid harm otherwise
- **A company can be liable for non-employees**

Preparing a Paper Trail for Litigation

Prepare long before lawsuit

Why document?

- Reminder
- Excellent Evidence
- Employees make paper too!



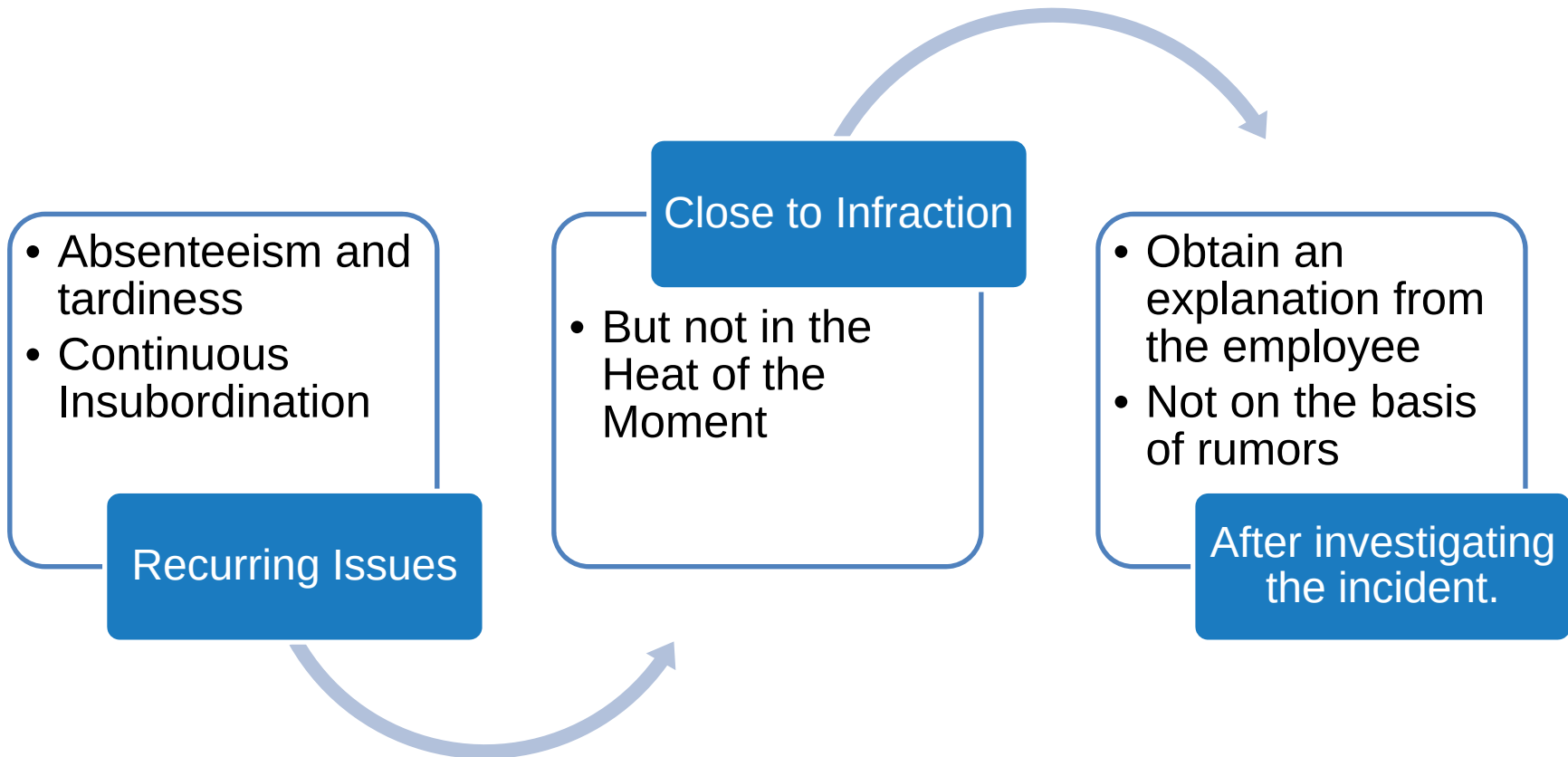
Investigate

- **Duty to investigate ALL reports of discrimination and harassment**
- **Conducting an investigation:**
 - Suspend offending employee
 - Interview
 - Preserve statements, evidence, documents
 - Document
 - Have uninterested party review

Investigate

- **Consistent with**
 - Company's policies, procedures, and practices
 - Similarly situated employees
- **Keep on need-to-know basis**

When to Discipline



Progressive Discipline

Design

Severity
Increases

Administration of Policies

Makes
Administration
Fair and
Consistent

Skipping Steps

Warranted in
Some
Instances

Documenting Discipline

- **Good documentation**
- **Performance evaluations**
- **Documentation of performance problems**
- **Prior to protected activity**

Disciplinary Documentation for the Employee

General Information

- Date
- Employee's name
- Placed in personnel file

Description

- Purpose
- Infraction
- Evidence

Do not include

- Witnesses
- Complaining parties

Employee Signatures

- **Sign warnings**
 - Had discussion
 - Received document
 - Understand
- **Refusal?**
 - Note it
 - Send follow-up

Avoiding Retaliation Claims

- **Timing of the Decision**
 - Recent Complaint
 - Relating to any protected activity
 - Complaining about discrimination, harassment
 - Giving truthful testimony
 - Taking leave
 - Disability
 - Workers' Compensation Claim

Reasonable Accommodation under the ADA

According to the EEOC:

The Americans with Disabilities Act (ADA) requires an employer with 15 or more employees to provide reasonable accommodation for individual with disabilities, unless it would cause undue hardship.

- Changes to a job application process
- Changes to the work environment, or to the way a job is usually done

ADA's Reasonable Accommodation Requirement

- **Employer must engage in interactive process and provide:**
 - “reasonable” accommodation that will allow employee to perform essential functions of position
- **Accommodations are not considered “reasonable” if the employer can demonstrate undue hardship**
- **Enforced by EEOC and private litigation**

Types of Reasonable Accommodations

- **Job Restructuring**
 - Changing job duties, such as shifting non-essential functions to others, or altering when and/or how a job task is performed.
- **Modifying Workplace Policies**
 - For example, granting an employee time off from work or an adjusted work schedule may involve modifying leave or attendance policy.

Types of Reasonable Accommodations

- **Reassignment to a vacant position**
- **The following criteria apply:**
 - The employee 1) is qualified for the new position, *i.e.* possesses the skill experience, education, and other job related requirements for the position; and 2) can perform the essential functions of the job, with or without reasonable accommodation.
 - The new position should be equal in pay and status, or one that is as close as possible if an equivalent position is not available.
 - Employee is not required to “bump” an employee to create a vacancy.

Types of Reasonable Accommodations

- **Modified or part-time schedule**
- **Adjusting arrival or departure times, providing breaks, altering when certain tasks are performed, allowing employees to use accrued paid leave or taking unpaid leave**
- **Doctor's appointments**

Light Duty as Reasonable Accommodation

- The ADA does not require an employer to “create” a new position including a “light duty position” as a reasonable accommodation.
- If the employer provides “light duty” to injured workers, however, it should probably provide such “light duty” as a reasonable accommodation particularly if the “disability” is only temporary.
- Can’t just provide to Workers’ Comp employees

Leave as a Reasonable Accommodation

- May be required to extend already granted leaves unless to do so would constitute undue hardship.
- Indefinite leave generally not reasonable accommodation.

Undue Hardship under the ADA

- **"Undue hardship" is defined as an "action requiring significant difficulty or expense" when considered in light of a number of factors.**
- **Factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation.**
- **Undue hardship is determined on a case-by-case basis.**

Examples of Undue Hardship

- **An undue hardship may exist if the accommodation:**
 - Requires the creation of a new position
 - Eliminates one or more of position's principal duties
 - Reduces workplace safety
 - Infringes on employee rights

Examples of Undue Hardship

- **An undue hardship may exist if the accommodation:**
 - Hurts employee benefits
 - Lowers job efficiency in other areas of the business
 - Exposes the employer to greater liability
 - Breaks another law

Recoverable Damages Under the ADA

- **Remedies under the ADA include**
 - Hiring, reinstatement, back pay, court orders to stop discrimination, and reasonable accommodation.
 - Compensatory damages may be awarded for actual monetary losses and future monetary losses, mental anguish, and inconvenience.
 - Punitive damages may be available as well, if an employer acts with malice or reckless indifference.
 - Attorneys' fees may also be awarded.



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Are these discriminatory actions? Why or why not?

- A supervisor increases Jane's workload but not Jim's workload and Jane just got back from disability leave.
- A supervisor assigns Jane to the graveyard shift because she is always late.
- A supervisor prohibits Jane, a diabetic, from driving routes.

What if . . .

- Edith, a great employee, tells you that another employee made inappropriate remarks to her about her disability. What should you do?
- Edith tells you that a **contract** trucker made inappropriate remarks to her about her disability. What should you do?
- A security guard who works for another company informs you that one of your employees made inappropriate remarks to her about her disability. What should you do?

Accomplish more.™