

Americans With Disabilities Act: How this Act Affects You and Your Business

by Susan Boyd, J.D.

In 1973, Congress created the Vocational Rehabilitation Act in an attempt to prevent discrimination against employees with disabilities. It didn't work.

Thus, in 1990, Congress created the Americans With Disabilities Act (ADA), which has proven to be the most significant civil rights law since the Civil Rights Act of 1964. The ADA is the Declaration of Independence for the disabled.

The ADA protects disabled persons against:

- intentional discrimination
- neutral policies which result in discrimination against the disabled
- discrimination due to barriers that can be overcome through accommodation

Of course, the ADA does not require an employer to hire a disabled person who is not qualified.

A qualified disabled person who has experienced discrimination and sues an employer must prove:

- he is disabled
- he is otherwise qualified
- if he needs special accommodation to perform the job, the necessary accommodation is reasonable, and
- he suffered a negative employment decision (terminated, demoted, etc)

What counts as a disability under the ADA? The ADA defines a disability as a:

- physical or mental impairment that substantially limits one or more of the major life activities of an individual
- a record of having such impairment,
- being regarded as having such impairment.

The Equal Employment Opportunity Commission (EEOC) defines "impairment" as any physiological disorder or condition affecting one or more of the following body systems:

- neurological
- musculoskeletal
- special sense organs
- respiratory, including speech organs
- cardiovascular
- reproductive
- digestive
- genito-urinary
- hemic and lymphatic

- skin
- endocrine
- mental or psychological disorder that substantially limits major life activities

The EEOC defines "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."

The EEOC defines "substantially limits" as "unable to perform a major life activity that the average person in the general population can perform; or significantly restricted as to the condition, manner, or duration under which an individual can perform a major life activity."

A very interesting part of the ADA is the recognition that other people's perceptions about a person's impairment can place him under ADA protection. Even though an employee's or potential employee's impairment DOES NOT substantially limit his major life activities, IF he is treated as disabled due to other people's attitudes toward his impairment, the ADA protects him from employment discrimination. Examples of impairments cited in lawsuits due to the employer's discriminatory treatment of the impaired individual have included:

- HIV positive diagnosis
- Morbid obesity
- Disfiguring facial scar

Like some other federal laws, the ADA applies to businesses with 15 or more employees. Unlike other laws, the ADA requires an employer to take PRO-ACTIVE steps to create an employment environment already workable for a prospective disabled person, RATHER than waiting until a problem occurs.

In order for you, as an employer, to know whether a disabled person is otherwise qualified, you must determine the essential functions of the position for which the person is being considered. These are the functions that are the very essence of the job. Therefore, the essential functions are only those that are fundamental to meeting the objectives for which the job was created. There may be some extra tasks that a person performing the job usually does, but if these are not critical to the job, they are not essential functions. A disabled person can't be barred from the job due to difficulty performing tasks that are non-essential. (A person with a hearing impairment cannot be barred from the job of file clerk just because that position occasionally answers the phone.)

The ADA is not requiring you to lower the standards of the position. The requirement is that you take an objective look at the position to assess what's really required to perform the job and what's really just extra. The ADA is to prevent employers from using the excuse that the job has certain, in actuality extraneous, requirements in order to discriminate against the disabled.

Reasonable Accommodation: Very often, a disabled employee can perform the essential functions and even all of the functions of a job with special

accommodation. Employers are required to make reasonable accommodations, designed to overcome the barriers that prevent the disabled person from doing the job, unless the accommodation places an undue burden on the employer.

The fact that some expense is involved does not, in and of itself, create an undue burden. In fact, most accommodations can be made inexpensively. The average cost to accommodate a disabled employee is \$261.

The term "*reasonable accommodation*" means:

- (i) Any modification or adjustment to a job application process that enables a qualified individual with a disability to be considered for the position such qualified individual desires, and which will not impose an undue hardship on the covered entities business; or
- (ii) Any modification or adjustment to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enables a qualified individual with a disability to perform the essential functions of that position, and which will not impose an undue hardship on the operation of the covered entities business; or
- (iii) Any modification or adjustment that enables a covered entity's employee with a disability to enjoy the same benefits and privileges as its other similarly situated employees without disabilities, and which will not impose an undue hardship on the operation of the covered entities business.

Reasonable accommodation may include but is not limited to:

- (i) Making facilities used by employees readily accessible to and usable by individuals with disabilities, and
- (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modification of examinations, training materials or policies; the provision of readers or interpreters; and other similar accommodations for individuals with disabilities.

The EEOC further states: In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

- (i) The nature and cost of the accommodation needed under this part;
- (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of people employed at such site, and *the effect* on expenses and resources;
- (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type, and location of its facilities;
- (iv) The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship *of* the site or sites in question to the covered entity; and

- (v) The impact of the accommodation upon the operation of the site, including the impact on the ability of other employees to perform their duties, and the impact on the site's ability to conduct business.

This article originally appeared in the Fall 2002 (Vol. 6, Issue 3) Family-Owned Business Institute newsletter, Heritage. Susan Boyd is an Applied Assistant Professor of Business Law at the University of Tulsa and the Director of the Genave King Rogers Business Law Center. You can email her at: susan-boyd@utulsa.edu.