

Brown & Hofmeister, L.L.P.

Attorneys & Counselors

740 East Campbell Road, Suite 800

Richardson, Texas 75081

(214) 747-6100

www.bhlaw.net

The Legal Environment: Basics of Employment Law: Part Two

Terrence S. Welch

DISABILITY DISCRIMINATION AND THE ADA

Introduction

Until July 26, 1990, federal law did not require non-government-affiliated private employers to assure equal employment opportunity for job applicants with physical or mental disabilities. Sections 503 and 504 of the Rehabilitation Act of 1973 applied only to government contractors, subcontractors and the recipients of federal funds. In May, 1989, bills proposing different versions of the Americans With Disabilities Act of 1990 (ADA) were introduced with broad support in the House of Representatives and Senate. Within fifteen months Congress approved the new Act and President Bush signed it.

The primary purpose of the ADA is to eliminate discrimination against individuals with disabilities, and thereby to bring them into the economic and social mainstream of American life. The ADA has been described both as a civil rights act and employment legislation. It proscribes unequal treatment of the disabled in private sector employment, public services, public accommodations, transportation and telecommunications.

Whether the new legislation actually will achieve its purpose depends on its interpretation and manner of enforcement in years to come.

The Act's purpose, set forth in its Section 2(b), is to

1. Provide a clear and comprehensive national mandate for the elimination of discrimination against these individuals;
2. Provide clear, strong, consistent and enforceable standards addressing discrimination against individuals with disabilities;
3. Ensure that the federal government plays a central role in enforcing these standards; and
4. Invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and regulate commerce, in order to address the major areas of discrimination people with disabilities face daily.

Overview of the Americans With Disabilities Act

The ADA consists of five (5) major sections. Title I is devoted to employment practices. Title II relates to public services, including public transportation other than by aircraft or certain rail operations as well as by intercity and commuter rail. Title III deals with public accommodations and services operated by private entities. Title IV is devoted to

telecommunications for the hearing impaired and speech impaired, and Title V contains miscellaneous provisions. For purposes of this section, Titles I (employment) and V (miscellaneous provisions) will be discussed.

The ADA defines a person with a disability as someone who (i) has a physical or mental impairment that substantially limits that person in some major life activity, or (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

This definition distinguishes an actual physical or mental impairment from a mere physical condition, such as black hair or blue eyes, which is not included. By “major life activity” the definition means activities like walking, talking, breathing or working. An example of someone with a “record” of an impairment is a person who has recovered from cancer but who is discriminated against because of his or her past experience with a disability. An example of a person who is “regarded as having an impairment” is someone who has a significant physical burn on his or her face which does not actually limit that individual in any major life activity, but who is nonetheless discriminated against because of the disfigurement.

Employers with 25 or more employees fell under the provisions of the ADA two years after its enactment; that is, beginning on July 26, 1992. Employers with 15 to 24 employees were covered four years after enactment. The ADA does not apply to employers with fewer than 15 employees.

The ADA forbids an employer to refuse to hire someone solely on the basis of that person's disability, if the applicant is otherwise qualified to perform the job.

Reasonable Accommodation and Undue Hardship

An employer must make reasonable accommodations for an applicant's disability. The term “reasonable accommodation” includes the following:

- making existing facilities used by employees readily accessible to and used by individuals with disabilities
- job restructuring
- part-time or modified work schedules
- reassignment to a vacant position, acquisition or modification of equipment or devices where necessary to accommodate disabled employees

- appropriate adjustment or modification of examinations, training materials or policies
- provision of qualified readers or interpreters
- other similar accommodations for individuals with disabilities

In other words, if there is some modification in a job's requirements or structure that an employer can reasonably effect, and this modification will allow the disabled employee to do the job, then the change must be made. An employer may not deny employment opportunities to a job applicant or employee if the denial is based on the employer's need to make a reasonable accommodation for the employee's physical or mental impairment.

If an employer, however, can demonstrate that the accommodation would impose an undue hardship on the operation of the business, then the duty to accommodate is waived. An "undue hardship" is an action requiring significant difficulty or expense for the employer. The ADA instructs courts to consider the following factors in determining whether a reasonable accommodation creates an undue hardship:

- the nature and cost of the accommodation
- the overall financial resources of the facility involved in the provision of the reasonable accommodation
- the number of persons employed by this facility
- the effect on expenses and resources, or the impact of such accommodation upon the operation of the facility
- the overall financial resources of the employer
- the overall size of the employer with respect to the number of its employees
- the number, type, and location of the employer's facilities
- the type of operation or operations of the employer
- the composition, structure, and functions of the workforce of the employer
- the geographic separateness, administrative, or fiscal relationship of the facility to the employer

When the balance of these factors makes it unreasonably burdensome for an employer to accommodate a disabled job applicant or employee, then a court is likely to allow the employer to refrain from making the accommodation.

The ADA tolerates employers' screening of prospective employees strictly on the basis of "business necessity" and "job-related" skills and qualifications. The Act puts the burden on the employer to ensure that

qualification standards and tests do not otherwise discriminate against candidates on the basis of their non-job-related impediments.

Although an employer may inquire about a job applicant's ability to perform job-related functions, it may not otherwise make inquiries into the existence, nature or severity of an applicant's disabilities. There are only two instances in which requiring a medical examination is permissible: when it is conducted after an offer of employment is made, or when it is voluntary and part of an employee health program that maintains separate confidential files for participating employees.

An offer of employment may be conditioned upon the results of a medical examination if the following two conditions are met. First, all entering employees must be subjected to the examination, regardless of whether they have a disability. Second, all information obtained from such a medical examination must be collected and maintained on separate forms and in separate medical files. The information must be treated as a confidential medical record.

The ADA does not protect current users of illegal drugs from employment discrimination on the basis of their drug use. The ADA does protect individuals, however, who have successfully completed a supervised drug rehabilitation program and who no longer engage in the illegal use of drugs, or who have otherwise been rehabilitated successfully and no longer engage in illegal drug use. The ADA also protects participants who are enrolled in a supervised rehabilitation program, if they no longer use illegal drugs. Finally, the ADA protects persons who are regarded as engaging in illegal drug use but do not so engage. The Act provides that nothing in it prohibits or authorizes drug testing of job applicants or employees, although drug tests are not to be considered medical examinations.

Employers may prohibit the use of illegal drugs or alcohol at the workplace by all employees; may require that employees not be under the influence of illegal drugs or alcohol in the workplace; and may hold a drug user or alcoholic to the same qualifications, performance and behavioral standards to which all employees are held. This is true even if unsatisfactory performance or behavior is related to the individual's drug use or alcoholism. Finally, an employer in an industry that is subject to the alcohol and drug use regulations of the Department of Defense, Nuclear Regulatory Commission or Department of Transportation, may require that its employees comply with the alcohol and drug use regulations of these federal agencies.

People with AIDS and people who are HIV-infected are covered under the ADA, just as they have been covered under Section 504 of the

Rehabilitation Act. In order to allay any fears about the contagiousness of diseases, the ADA requires the Secretary of Health and Human Services to study all infectious and communicable diseases and how they are transmitted, and to compile and disseminate information about such diseases. Employers in the food services industry will be able to reassign workers whose diseases may be spread to customers through contact with food, as determined by the Secretary of Health and Human Services.

Prohibited Employment Practices Under the ADA

Discrimination on the basis of disability is expressly prohibited by the ADA. The general rule is that no covered entity shall discriminate against a qualified individual with a disability because of the disability in regard to job application procedures, hiring, advancement or discharge of employees, compensation, job training, or other terms, conditions and privileges of employment. A “qualified individual” is an employee who, with or without reasonable accommodation, can perform the essential functions of the job. Prohibited employment practices include:

- limiting, segregating, or classifying a job applicant or employee in a way that adversely affects his or her opportunities or status;
- participating in an arrangement or relationship (including that with an employment or referral agency, labor union, fringe benefits organization or an organization providing training and apprenticeship programs) that would have the effect of subjecting a covered entity’s qualified applicant or employee to discrimination;
- using standards, criteria or methods of administration that lead to, or perpetuate, discrimination on the basis of disability;
- excluding or otherwise denying equal jobs or benefits to a qualified individual because of his or her relationship or association with an individual with a known disability;
- failing to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the covered entity’s business; or denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if the denial is based on the covered entity’s need to make reasonable accommodation to any physical or mental impairments of the employee or applicant;

- using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or class of individuals with disabilities unless the standard, test or other selection criteria used by the covered entity are shown to be job-related for the position in question and consistent with business necessity; and
- failing to select and administer employment tests in the most effective manner to ensure that a job applicant or employee's skills, aptitudes or whatever other factors the test purports to measure are reflected, rather than reflecting the impaired sensory, manual or speaking skills of such employees or applicants (except where such skills are the factors that the test purports to measure).

Specific Exclusions Under the ADA

Section 608 of the ADA specifies that the terms "disabled" or "disability" will not apply to an individual solely because that individual is a transvestite. Section 511 of the Act deals with other exclusions under the term "disability." For purposes of the Act, homosexuality and bisexuality are not impairments and, therefore, do not qualify as disabilities under the Act. The term "disability" also does not include:

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; or
3. psychoactive substance use disorders resulting from current illegal use of drugs.

Miscellaneous Provisions

Section 501 deals with how the ADA is to be construed. Nothing in the ADA is designed to apply lesser standards than those applied under Title V of the Rehabilitation Act of 1973, or to invalidate or limit any remedies, rights or procedures of any federal or state laws, including those of any political subdivision of a state or jurisdiction, that provide greater or equal protection for the rights of individuals with disabilities. The Act is not to be construed to prohibit or impose restrictions on smoking in work places covered by Title I, transportation covered by Title II or Title III, or public accommodations covered by Title III.

Section 501(d) provides that nothing in the ADA is to be construed to require an individual with a disability from accepting any

accommodation, aide, service, opportunity or benefit he or she does not want.

Section 503 of the ADA prohibits discrimination for purposes of retaliation against an individual who has opposed any act or practice which is unlawful under the ADA. Likewise, it is unlawful to coerce or intimidate, threaten or interfere with any individual in the exercise or enjoyment of, or because he or she has aided or encouraged any other individual to exercise and enjoy any right or remedy granted or protected under the Act.

THE TEXAS WHISTLEBLOWER ACT

The Texas Whistleblower Act, found in Chapter 554 of the Texas Government Code, was designed by the Legislature to protect public sector employees who report violations of law by their government employers. Prior to being amended in 1995, a prevailing employee was able to recover punitive damages in amounts limited only by a jury's imagination. As a result, there was a period of time when these types of lawsuits were very popular. The Legislature amended the Whistleblower Act in 1995, doing away with punitive damages and putting a cap on the amount of damages a plaintiff could hope to recover. The result has been a decided decrease in the numbers of these types of cases being filed.

A public employee, in order to bring a claim, must prove that he or she: (1) reported a violation of law (2) in good faith (3) to an appropriate law enforcement authority, and (4) was suspended, terminated or suffered some adverse employment action as a result of making the report.

The following definitions apply in considering whistleblower violations. A *report* must be a direct communication of a specific violation of law (or at the least, the suspicion of a violation). The *violation of law* may be a local, state or federal statute, an ordinance or a rule adopted pursuant to a statute or ordinance. *Good faith* requires a showing that the employee actually believed at the time of the report that a violation of law had occurred or was imminent and that this belief was objectively reasonable in light of his or her experience and training. An *appropriate law enforcement authority* refers to an authority that is part of a state or local governmental entity or the federal government that an employee in good faith believes is authorized to enforce the law allegedly being violated or investigate or prosecute the violation. “[T]he media clearly is not an appropriate ‘law enforcement authority.’”

The following defenses may be available to the employer: (1) Plaintiff failed to prove that “but for” the report, he or she would not have been terminated (or demoted, etc.); (2) the employer had a legitimate reason for

the adverse employment action; (3) Plaintiff failed to initiate internal grievance procedures; (4) Plaintiff failed to file suit within 90 days of the date of the alleged violation or within 30 days after the grievance procedures were exhausted. [Note: before the 1995 amendments, the plaintiff had a total of 120 days to initiate suit even if the grievance procedure had not been completed.]

The following damages are available to a successful plaintiff: (1) personal liability - Plaintiff may seek a civil penalty against a supervisor who violates the Texas Whistleblower Act, such amount not to exceed \$15,000; however, it should be noted that this penalty must be paid by the supervisor and it may not be paid by the governmental entity; (2) damages, as noted below, as well as:

- injunctive relief;
- actual damages for mental anguish, lost future wages and loss of future earning capacity;
- court costs;
- reinstatement;
- past lost wages and benefits; and
- reasonable attorney's fees.

Under the 1995 amendments, however, damages are limited. The total damages available for any claim based on conduct that occurred after June 15, 1995, are limited as follows:

- \$ 50,000 - if the employer has fewer than 101 employees;
- \$100,000 - more than 100 employees and fewer than 201;
- \$200,000 - more than 200 employees and fewer than 501;
- \$250,000 - more than 500 employees.

The number of employees is calculated by determining the number of employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year.

As a public employer, educate all of your managers (from the top down) about the importance of taking any report of illegal activity seriously and launching an immediate investigation. The failure to do so may result in liability for an individual supervisor or the governmental entity.