INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



Work Session: GENERAL WORK SESSION II

Title: The ADA and Public Transportation

by

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ADA Today:
What Policy Makers Need to Know About the ADA to Make Effective Policy Decisions.

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Title I:

General prohibition against Discrimination:
Title I's general prohibition is set forth in 42 USCA §12112(a) as follows:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, condition and privileges of employment.

In deciding whether an individual has been discriminated against based on a disability under the ADA, the courts look at the specific facts of each case.

Applicants:
Title I impacts all aspects of employment from application through termination. With regard to applicants, employers are limited in the questions that can be asked concerning the nature or severity of a disability. Before an offer of employment is extended, an employer is limited to asking applicants about their ability to perform job-related functions. *See* EEOC *ADA Technical Assistance Manual* for a listing of impermissible questions (www.eeoc.gov) Moreover, pre-offer medical examinations are not permitted. Tests for illegal drugs are not considered to be medical examinations and can be administered pre-offer. Title I does permit employers to administer post-offer medical examinations and to condition employment on the results of these tests, provided all employees in the same job category are subject to the examination.

Disability:
To be considered an "individual with a disability," the person must:

- Have a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- Have a record of such an impairment; or
- Be regarded as having such an impairment. 42 USCA §12102(2)

Whether a person has a disability must take into consideration whether the person is substantially limited in performing a major life activity when using a mitigating measure. Therefore, if the person has little or difficulty performing any major life activity because they use a mitigating measure, then that person will not be disabled as defined by the ADA. Sutton v. United Airlines, Inc. (1999), 527 U.S. 471; Murphy v. United Parcel Service, Inc. (1999), 527 U.S. 516; Albertson's Inc. v. Kirkingburg (1999) 527 U.S. 555.

Courts make determinations of disability on a case-by-case basis. For example:
- Morbid obesity not related to an underlying physiological cause is not an "impairment" under the ADA. EEOC v. Watkins Motor Lines Inc. (6th Circ. 2006), 463 F. 3d 436.
- Attention deficit hyperactivity disorder did not constitute a disability under the ADA. Knapp v. Columbus (6th Circ. 2006), 192 Fed. Appx. 323; 2006 WL 1878332.
- Employee with type 2 diabetes not disabled. Scheerer v. Potter (7th Circ. 2006), 443 F. 3d 916.
- Adjustment disorder that does not substantially limit ability to work not disability under the ADA. Myers v. Cuyahoga County, Ohio (6th Circ. 2006), 182 Fed. Appx. 510; 2006 WL 1479081.

Reasonable Accommodation:
Employers are required to make reasonable accommodations for any qualified individual with a disability, which is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 USCA §12111(8) Reasonable accommodation must be provided to qualified employees regardless of whether they are part-time, full-time or probationary.

Reasonable accommodations may include: making existing facilities readily accessible and usable; job restructuring; reassignment, acquisition or modification of equipment; training; or providing qualified readers or interpreters. An accommodation is any change in the work environment or in the way things are done that enables an individual with a disability to enjoy equal employment opportunity. However, an employer does not have to reallocate essential job functions. Moreover, an employer does not have to violate an established bargaining-unit, seniority system to grant an accommodation as that request is "unreasonable." US Airways, Inc. v. Barnett (2002), 535 U.S. 391.

If an employee can demonstrate that his or her requested accommodation is objectively reasonable, the employer must either provide it or show that accommodating the employee's request would be an undue hardship. The employer bears the burden of proving an accommodation is an undue hardship and refers to any accommodation that would be unduly costly, extensive, substantial or disruptive. *See* 42 USCA §12111(10)(A) & (B); 29 CFR

§1630.2(p). An employer does not have to provide every requested accommodation, and may select the accommodation it wishes to provide.

Title II:

Title II contains two parts:

- Part A – Prohibition Against Discrimination and Other Generally Applicable Provisions
- Part B—Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory

A public entity includes: any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102 (4) of title 49). 42 USCA §12131(1).

General Prohibition against Discrimination:

Title II sets forth that:

> "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 USCA §12132

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. 42 USCA §12131(2)

Public Transportation:

Public transportation providers are required to make their systems accessible and usable to persons with disabilities. For example:

- Public entities shall maintain in operative condition, those features of facilities and vehicles that are required to make the vehicles and facilities readily accessible to and usable by persons with disabilities. These features include, but are not limited to, lifts and other means of access to vehicles, securement devices, elevators, signage and systems to facilitate communications with persons with impaired vision or hearing. Accessibility features shall be repaired "promptly" if they are damaged or out of order. When a feature is out of order, the entity shall take reasonable steps to accommodate individuals who would use the feature. 49 CFR 37.161.
- Each public entity operating a fixed route system shall provide paratransit or other special service to individuals with disabilities that is "comparable" to the level of service provided to individuals without disabilities who use the fixed route system. 49 CFR 37.121(a). The service shall be origin to destination service within a corridor with a width of three-fourths of a mile on each side of the fixed route and around each rail station. 49 CFR 37.129(a) & 37.131. Paratransit service shall be available throughout the same hours and same days as

the fixed route service. 49 CFR 37.131(e). Each public entity shall provide paratransit service to visitors. 49 CFR 37.127.

Accessibility includes all components of the transportation service, for all modes of travel:

- All vehicles shall provide a level-change mechanism or boarding device (lift or ramp) to permit a wheelchair or other mobility aid user to reach a securement location; and at least two securement locations on vehicles in access of 22 feet. The lift shall be designed to load at least 600 pounds. Lifts shall accommodate persons using walkers, crutches, canes or braces or who otherwise have difficulty using steps. The securement system shall be placed as near to the accessible entrance as practicable and shall have a clear floor area of 30 x 48 inches. 49 CFR 38.23.
- Each public entity providing light or rapid rail service shall ensure that each train, consisting of two or more vehicles, includes at least one car that is readily accessible to and usable by individuals with disabilities. 49 CFR 37.93(c).

Likewise, public transportation providers are required to ensure that its facilities, both newly constructed and altered, are accessible and usable by persons with disabilities, including persons using wheelchairs. 49 CFR 37.41. Public entities must determine which of its rail stations are "key" based on specific criteria and then must ensure that they are accessible. 49 CFR 37.47. The deadline for making key stations accessible was July 26, 1993 unless the FTA granted an extension. If a structure is "altered," the altered portions must be made compliant with the requirements of the ADA and the ADAAG, and accessible to and usable by persons with disabilities "to the maximum extent feasible." Normal "maintenance" is not an alteration and does not require the same compliance. 49 CFR 37.3 & 49 CFR 37.43.

Title V:

The ADA's prohibition against retaliation, coercion, interference or intimidation is contained in Title V of the Act. 42 USCA §12203

Related Materials:

42 United States Code (USC) 12101-12213

28 Code of Federal Regulations (CFR) 35.101, et. seq.
49 Code of Federal Regulations (CFR) 27.1, et. seq.
49 Code of Federal Regulations (CFR) 37.1, et. seq.
49 Code of Federal Regulations (CFR) 38.1, et. seq.

ADA Accessibility Guidelines for Building and Facilities (ADAAG), amended July 23, 2004. Available through www.access-board.gov.

U.S. Department of Transportation, Federal Transit Administration, Americans with Disabilities Act (ADA) Paratransit Eligibility Manual, September 1993.

National Council on Disabilities, *The Current State of Transportation for People with Disabilities in the United States,* June 13, 2005. Available through www.ncd.gov.

The ADA Today: What Policy Makers Need to Know About the ADA to Make Effective Policy Decisions.

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Goals of the ADA
(42 USCA §§12001-12213)

- Independence
- Integration
- Self- Sufficiency



Titles of the ADA

- Title I – Employment
- Title II – Public Entities (municipal, county, state programs/ facilities & public transportation)
- Title III – Privately operated public accommodation.
- Title IV- Telecommunications
- Title V – Retaliation & Misc. (architectural & vehicle guidance)

Enforcement

- Title I – Equal Employment Opportunity Commission (EEOC) & private lawsuits.
- Titles II – Federal governmental agencies (e.g., Department of Transportation), Department of Justice & private lawsuits.

Private Party Enforcement

- Parties may file a complaint with the government.
  - If substantiated & not corrected, the government may suspend or terminate or refuse to grant/ continue federal financial assistance, & may institute an action in court.
- Parties may file a private lawsuit.
- States & other public entities are NOT immune from suit under the ADA.

Remedies Available

- If a party prevails in court, the party is entitled to:
  - Make whole remedies (e.g., reinstatement & back pay);
  - Injunctive relief;
  - Compensatory damages; and
  - Attorney's fees.
- Punitive damages are NOT permitted against federal funding recipients.