

Disability Discrimination in the Workplace

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Despite increased sensitivity to physical and mental disabilities, many of America's workers find themselves to be victims of employment discrimination due to their disability. The Equal Employment Opportunity Commission (EEOC) reports that in 2010 there were more than 25,000 charges filed by employees against employers alleging disability discrimination.

The Americans with Disabilities Act (ADA) is a federal law that prohibits employers from discriminating on the basis of a "qualified" disability. Employees living with a physical disability have the protection of federal law, not to give them preferential treatment, but to level the playing field. With the protection of the ADA, a worker who, despite a disability, is able to perform the essential functions of his job is entitled to reasonable accommodation from the employer, if needed. If you feel that you have been a victim of disability discrimination, it is important that you know your legal rights, and the actions you must take to prevent loss of your right to a remedy. **This article is not designed to provide legal advice or render legal opinions for specific situations. The law in other states may vary from Colorado on these issues. For specific legal questions, contact the attorney of your choice. If you wish to consult with the author on any matter relating to Colorado employment issues, you may contact him at (303) 825-5529 or by email at nathandavidovich@talk-law.com.**

WHAT IS DISABILITY DISCRIMINATION?

Disability discrimination is the process of making decisions affecting an employee based wholly, or partly, upon the real or perceived disability of the employee, in those cases where the employee is a "qualified" individual under the ADA. The ADA prohibits employment discrimination 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, conditions, and privileges of employment. A "qualified individual" 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." "Disability" is defined as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

The ADA was amended by the ADAAA effective on January 1, 2009. In enacting the ADAAA, Congress made it easier for an individual seeking protection under the ADA to establish a disability within the meaning of the statute. Several Supreme Court decisions were overturned that Congress believed had interpreted the definition of "disability" too narrowly, resulting in a denial of protection for many individuals with impairments such as cancer, diabetes, and epilepsy. The ADAAA states that the definition of disability should be interpreted in favor of broad coverage of individuals.

The Regulations adopted under the ADAAA define *Physical or mental impairment* to include:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the major body systems; or
- (2) Any mental or psychological disorder, including specific learning disabilities.

The Regulations include *Major Life Activities* as functions such as caring for oneself, walking, seeing, and hearing, as well as working.

The Regulations tie the definition of *Substantially limits* to the ability of the general population, and includes being unable to perform a major life activity that the average person in the general population can perform, or being significantly restricted in its performance.

The Regulations detail a number of factors to consider in making a determination of disability, including the nature and severity of the impairment as well as the expected duration of the impairment. A detailed

description of the EEOC Regulations can be found in the Code of Federal Regulations located at [29 CFR 1630](#).

The ADA requires those claiming to be a "qualified individual" to prove their disability by offering evidence that the extent of the limitation caused by their impairment, in terms of their own experience, is substantial. However, unlike the case law before Congress amended the ADA by the ADAAA, the determination of whether a limitation is substantial must be interpreted consistently with the findings and purposes of the ADAAA. Instead of the major focus being on whether the individual's impairment is a disability under the ADA, the primary focus should be on whether entities covered under the ADA have complied with their obligations. The ADAAA states that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

The determination of whether an individual has a disability, substantially limiting a major life activity, is not necessarily based on the name or diagnosis of the impairment the person has, except in those circumstances where the EEOC regulations have listed specific impairments as constituting "substantial limitation", such as cancer, diabetes, epilepsy and many others. Rather, the determination is based on the effect of that impairment on the life of the individual, and such determination is to be made on a case-by-case basis.

HOW TO DETERMINE IF YOU HAVE BEEN A VICTIM OF DISABILITY DISCRIMINATION

Litigation pursuant to the Federal discrimination statutes is very fact intensive. Thus, there is no black and white rule by which you can decide if you have been the victim of disability discrimination. It will be dependent upon the particular facts of your case. The fact that you are a "qualified individual" with a recognized disability and have had an adverse employment experience does not necessarily mean that you have been the victim of discrimination. Employers have the right to discipline and fire an employee with disabilities, as long as the decision is not based upon discriminatory or other impermissible factors. I recommend that, if you in any way suspect that you have been a victim of disability discrimination, you should immediately arrange for a consultation with a knowledgeable employment attorney. After reviewing the facts of your case, a seasoned

attorney will be able to give you an opinion as to whether any adverse employment action was the likely result of discrimination. Prompt consultation with an attorney is extremely important due to various laws that require you to take certain action within a certain period of time after the occurrence of discrimination. Failure to act in a timely manner may result in loss of your rights to recover, even if you can prove the existence of discrimination. Also, with the passage of time, valuable evidence can be lost and the memories of witnesses may fade.

Disability discrimination can take many different forms. It can consist of comments about the disability, made by managers or executives, accompanied by some type of adverse employment action or decision. Such action might include a failure to promote, less favorable employment conditions, disciplinary proceedings, layoff or termination. It may consist of situations in which the worker is able to perform the "essential functions" of the job, with reasonable accommodation, and the employer refuses to accommodate. One of the keys in determining whether you have a claim under the ADA is whether the comments about the disability, the failure to make reasonable accommodation, or other discriminatory actions, in fact were the reason, or part of the reason, for the adverse employment action.

WHAT IS "REASONABLE ACCOMMODATION"?

An employer is not required to guess that an employee has a disability requiring accommodation. The employee must first advise the employer of his disability and make a request for a reasonable accommodation. Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. Thus, an employer is not solely responsible for identifying a reasonable accommodation.

Reasonable accommodation may include making existing facilities used by employees readily accessible to and usable by individuals with disabilities. It may also include job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals

with disabilities.

In cases where an employee is unable to perform the essential functions of his present job, "reasonable accommodation" may include reassignment of the employee to a vacant position. The United States Supreme Court held that an employer is "not required to find another job for an employee who is not qualified for the job" he is doing. However, an employer cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.

PROCEDURAL STEPS TO PRESERVE YOUR ADA CLAIM

In order to obtain the right to sue in federal or state court you must first file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). That charge must be filed within 180 days of the alleged act of discrimination. Many states, such as Colorado, have a law which prohibits disability discrimination in employment and authorizes a state agency to grant relief. In such cases, the charge must be filed, with the EEOC, within 300 days of the last act of discrimination, or sooner in certain instances. If you do not file an EEOC charge within the required time period, you will probably be prevented from further pursuing your rights. A lawsuit claiming discrimination under the ADA must be filed within ninety days of receipt of a Right to Sue Letter from the EEOC. If the EEOC has not acted within 6 months of the date of filing the charge, the employee may request the issuance of a Right to Sue Letter. Failure to follow the required time periods may cause you to lose your rights to seek a remedy for disability discrimination under the ADA.

Because of the intricacies of the various fact situations in relation to the legal principles, in addition to various time barriers, it is most important to consult with an experienced employment lawyer, who will be able to guide you through this maze. I make this recommendation despite the fact that you do not need a lawyer to file a charge with the EEOC. However, my experience has taught me that it may be a serious mistake to try to proceed on your own, even as to the initial filing of a charge. If you fail to include certain allegations, you may be prevented from bringing them up in a later lawsuit.

AMOUNT OF RECOVERY

Under Title VII, an employee who has been a victim of disability

discrimination may recover the economic losses that would have been earned, but for the discrimination, compensatory damages for emotional trauma, and attendant physical suffering, punitive damages, attorney fees and court costs. Depending on your individual circumstances, you may be entitled to additional recoveries under state, rather than Federal, law.

CONCLUSION

The fight against disability discrimination in the workplace involves analysis of multiple factors, specific to your case. Many of these factors have not been discussed in this article. Learn more about protecting your rights by selecting a competent lawyer to represent you.

[Nathan Davidovich](#) practices employment law in the state of Colorado, and he is available for consultation on any matters arising in the state of Colorado. Please contact Nathan Davidovich by email at <mailto:nathandavidovich@talk-law.com>, or by telephone at (303) TALK-LAW/(303)825-5529.

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