AELE Monthly Law Journal

ISSN 1935-0007

Cite as: **2019 (8) AELE Mo. L. J. 201**

Employment Law Section – August 2019

Public Safety Employees and Disability Discrimination in Employment under the ADA: An Introduction and Overview

❖ Introduction

This three-part article serves as a brief introduction and overview to the topic of public safety employees and disability discrimination in employment under the Americans with Disabilities Act (ADA). It is by no means intended to be comprehensive, and additionally does not even touch on the many state and local laws also prohibiting disability discrimination in employment. The first part of this article focuses on a threshold issue—what is a disability under the statute (and what does it mean to be a qualified individual with a disability). The framework is current employees, leaving the discussion of protection for applicants for another day.

Part two next month discusses in detail the issue of what it means for an employer to provide a reasonable accommodation for an employee's disability, as well as the protection the ADA gives to employees who, even if they are not actually disabled, are "regarded as disabled" and therefore face discriminatory treatment by an employer. The details of how this aspect of the ADA works has changed dramatically over time through both case law and the amending of the statute.

Part three of this article in October will discuss specific disabilities, including diabetes and obesity, as well as exploring remedies available under the ADA. At the end of the series, there is a listing of useful and relevant resources and references.

❖ What is a Disability?

The Americans with Disabilities Act of 1990, 42 U.S.C. Sec. 12101 et. seq., prohibits disability discrimination in employment, public accommodations of various kinds, and the providing of government services and programs, as well as public transit and telecommunications. Title 1 (42 U.S.C. Secs. 12111-12117) focuses on employment discrimination and includes coverage for public employers.

The law states that a "covered entity" shall not discriminate against "a qualified individual with a disability." This protection extends to job application procedures, hiring, advancement, and discharge of employees, job training, and other terms, conditions, and privileges of employment. "Covered entities" include employers with 15 or more employees, as well as employment agencies, and labor organizations. There are strict limitations on when a covered entity can ask job applicants or employees disability-related questions or require them to undergo medical examination, and all medical information must be kept confidential.

Prohibited discrimination may include, among other things, firing or refusing to hire someone based on a real or perceived disability, or segregation, and harassment based on a disability.

In *Board of Trustees of the University of Alabama v. Garrett*,#99-1240, 531 U.S. 356 (2001), a portion of Title I was found unconstitutional by the United States Supreme Court as applied to the states as violating their sovereign immunity rights under the Eleventh Amendment to the United States Constitution. The Court ruled that state employees cannot sue their employer for violating ADA rules. State

employees can, however, file complaints at the Department of Justice or the Equal Employment Opportunity Commission, who can sue on their behalf. Additionally, in some cases, states or state agencies can be found to have waived Eleventh Amendment immunity by, among other things, particular acceptances of the receipt of federal funds. See *Arbogast v. Kansas Department of Labor*, #14-3091 (10th Cir. 2015). [Many of these cases involve claims under the Rehabilitation Act, another federal statute prohibiting disability discrimination, rather than the ADA].

Title I of the ADA also provides:

Medical Examinations and Inquiries: Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all new employees in similar jobs. Medical examinations of employees must be job related and consistent with the employer's business needs.

Medical records are confidential. The basic rule is that with limited exceptions, employers must keep confidential any medical information they learn about an applicant or employee. Information can be confidential even if it contains no medical diagnosis or treatment course and even if it is not generated by a health care professional. For example, an employee's request for a reasonable accommodation would be considered medical information subject to the ADA's confidentiality requirements.

Drug and Alcohol Abuse: Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use. Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations. Employers may hold illegal drug users and alcoholics to the same performance standards as other employees.

The statute also makes it illegal to retaliate against an individual for opposing employment practices that discriminate based on disability or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADA.

The ADA was amended substantially in 2008 in the ADA Amendments Act (ADAAA). The law defines a covered disability as a physical or mental impairment that substantially limits one or more major life activities, a history of having such an impairment, or being regarded as having such an impairment. The EEOC developed regulations limiting an individual's impairment to one that "severely or significantly restricts" a major life activity. The ADAAA required the EEOC to amend its regulations and replace "severely or significantly" with "substantially limits," which is intended to be a more lenient standard.

The amendment of the law broadened the definition of "disability," providing protection to a larger number of people. It also added to the ADA's examples of "major life activities" by including, but not limiting them to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working" along with the operation of several specified major bodily functions.

The amendment act overturned a 1999 U.S. Supreme Court case Sutton v. United Air Lines, Inc. #97-1943, 527 U.S. 471 (1999) that held that an employee was not disabled if the impairment could be corrected by mitigating measures. Instead, it provides that such an impairment must be determined without considering such ameliorative measures. It also overturned the court restriction that an impairment which substantially limits one major life activity must also limit others to be considered a disability.

To be a qualified person with a disability, however, an employee must be able, with or without reasonable accommodation, to perform the "essential functions" of their job. In *Stragapede v. City of Evanston*, #16-1344, 865 F.3d 861 (7th Cir. 2017), an employee of a city's water services department suffered a traumatic brain injury at home. He was placed on temporary leave of absence to recover and rehabilitate. He returned to work when medically cleared to do so, but suffered some minor mishaps, including driving through an intersection while looking down and going to the wrong address. After a few weeks, he was placed on administrative leave and then terminated. He sued for violation of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101.

A jury found the city liable and awarded $225,000 in damages. The trial judge also concluded that he was entitled to back pay plus interest from the date he was fired until the time of judgment. A federal appeals court upheld the awards, rejecting arguments that the plaintiff was not a qualified person under the ADA because he was unable to perform the essential functions of his job; that even if he was qualified, he posed a direct threat to himself and to others, which is a statutory defense to liability; and that the judge incorrectly calculated the back pay award.

In *Colon-Fontanez v. Municipality of San Juan*, #10-1026, 660 F.3d 17 (1st Cir. 2011), a city employee had severe attendance difficulties due to health problems. When she was denied a closer parking space at work that she had requested as a reasonable accommodation because of her difficulty walking, she sued the city for disability discrimination under the Americans with Disabilities Act (ADA). A federal appeals court ruled that she was not an otherwise qualified employee for purposes of the ADA, because her attendance was unpredictable, and regular attendance was an essential function of her job.

The record also showed that her absenteeism problem was present long before she was diagnosed with fibromyalgia, her claimed disabling condition. The court also rejected the plaintiff employee's retaliation claim, since she could not show that she suffered any adverse employment action in retaliation for requesting the accommodation of the closer parking space.

Medical difficulties that do not impair major life activities do not qualify as disabilities. In *Robinson v. Morgan Stanley*, #07-3359, 269 Fed. Appx. 603, 2008 U.S. App. Lexis 6229; 20 AD Cases (BNA) 644 (Unpub. 7th Cir.), a federal appeals panel upheld a trial court ruling that a worker with allergy type sensitivity to perfumes and other fragrances is not disabled under the ADA. Although the plaintiff claimed that her allergy hampered her ability to walk, see, speak, breath, learn and care for herself, the court found that headache, sore throat, fatigue, and shortness of breath "are not substantial as a matter of law."

The fact that an employee is, in fact, disabled, does not prevent discipline or termination for legitimate non-pretextual reasons unrelated to the disability. In *Whitfield v. State of Tennessee*, #09-6488, 639 F.3d 253 (6th Cir. 2011), a state employee was fired because of her persistent mistakes, not her disability. The

plaintiff, who is blind in one eye and has cerebral palsy, made serious errors while performing tasks that were not impacted by her disabilities.

See also *Curley v. City of North Las Vegas*, #12-16228, 772 F.3d 629 (9th Cir. 2014), involving a man who had been a city employee for approximately 13 years. He claimed that his termination was disability discrimination based on his hearing impairment, as well as retaliatory for his having filed an EEOC complaint and requested accommodation of his hearing disability. Rejecting these arguments, a federal appeals court found that the evidence showed that he was actually fired for nonperformance of duty, including conducting and soliciting personal business at work, excessive personal phone calls, disparaging remarks and intimidation of coworkers through threats of violence.

In *Brumfield v. City of Chicago*, #11-2265, 735 F.3d 619 (7th Cir. 203), a female police officer started to experience unspecified psychological difficulties after seven years on the job. She was found fit to continue to work during four psychological exams she was ordered to undergo. She sued, asserting that making her take the exams amounted to race, sex, sexual orientation, and disability discrimination. She was suspended without pay pending discharge proceedings twice and then a discharge proceeding was begun. After that, she filed a second lawsuit for disability discrimination, dismissing the first suit. The second lawsuit was dismissed, finding no evidence of disability discrimination. She then filed a third lawsuit, repeating the disability discrimination claim, which was dismissed as barred by the earlier lawsuit.

Upholding this result, a federal appeals court noted that while she claimed that she was vulnerable to workplace stress, she didn't claim that this prevented her from performing an essential job function, rendering her an otherwise qualified disabled person. She did not show that she was suspended or terminated because of her disability.

Mere difficulties in getting along with others may not constitute a disability. In *Weaving v. City of Hillsboro*, #12-35726, 763 F.3d 1106 (9th Cir. 2014), a police officer was fired because he had severe interpersonal problems with other officers. He claimed that these problems stemmed from his attention deficit hyperactivity disorder (ADHD) and that his firing constituted disability discrimination in violation of the Americans with Disabilities Act (ADA).

Rejecting this claim, and overturning a jury verdict for the plaintiff, the appeals court found that the record did not contain substantial evidence that the officer's ADHD substantially limited his ability to work, rendering him disabled, as he was in many ways a skilled police officer and there was testimony that he had developed compensatory mechanisms enabling him to succeed in his job. While his condition may have impaired his ability to get along with others that was not the same as a "substantial limitation" on that ability. No reasonable jury could find him disabled as defined in the ADA.

When an individual, even if based on a medical condition, simply is not able to handle the requirements of the job, with or without reasonable accommodation, they cannot recover for disability discrimination. In *Koessel v. Sublette County Sheriff's Dept.*, #11-8099, 717 F.3d 736 (10th Cir. 2013), an officer was properly terminated as a result of the lingering effects of a stroke that he suffered. He was initially assigned to desk duties but also allowed to make traffic stops during his daily commute. After he was flustered after being unable to remember a word during a traffic stop, there was concern over his fitness for duty.

He was ultimately placed on medical leave, put in a low stress position after evaluation coordinating emergency management services, but there were no funds for that position for the long term, and he was told that there were no available jobs for which he was medically cleared. He was not otherwise qualified under the Americans with Disabilities Act as repeated medical evaluations found him unfit for duty as an officer and no substitute jobs were available. He presented no evidence that he could handle stressful emergency situations.

In accord is *Robert v. Board of County Commissioners of Brown County*, #11–3092, 691 F.3d 1211 (10th Cir. 2012), in which a county employee had worked as supervisor of released adult offenders for a decade before developing sacroiliac joint dysfunction. This condition rendered her unable to work outside of her home, or to visit the offenders in the jail or at their homes. She was granted a lengthy leave of absence, but was still unable to perform all of her job functions. She was then fired. Her claims under the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) were both properly rejected as she could not show that she could return to her job, with or without reasonable accommodations when her FMLA leave ended.

She was not an "otherwise qualified" disabled person under the ADA, as supervising offenders in person was a necessary component of her job which she could not perform. At the time she was fired, the employer had no reasonable estimate of when, if ever, she would be able to resume all of her essential job functions.

Another decision focused on an employee's inability to perform essential job functions is *Dargis v. Sheahan*, #05-2575, 526 F.3d 981 (7th Cir. 2008). In this case, following a stroke, a county corrections officer failed to demonstrate that he could perform the essential functions of his correctional officer position after his physician placed him on restrictions that required no inmate contact. In public safety jobs, in particular, courts have taken into account whether an employee's presence on the job may constitute a danger to themselves or others.

In *Michael v. City of Troy Police Dep't.*, #14-2478, 808 F.3d 304 (6th Cir. 2015), for instance, a patrol officer underwent two brain surgeries to remove non-cancerous brain tumors, and returned to work. There were allegations at one point that he was accompanying a cocaine dealer to drug deals. After he underwent the second surgery, after his surgeon cleared him to return, the department asked for a psychological evaluation. A neuropsychologist said that he might be "a threat to himself and others." Placed on unpaid leave, a second neuropsychologist found him fit for duty, but a third disagreed. Two others, who reviewed his file but did not examine him, concluded that he could return to work. The officer himself went to see a professor of neuropsychology at a university, who found that if he were to return to work, his safety with the use of weapons and high-speed driving "would be in question." The officer kept that report to himself and sued for disability discrimination. A federal appeals court upheld summary judgment for the city, ruling that the evidence showed that the plaintiff was not qualified for the job of patrol officer.

In *Puletasi v. Wills*, #07-15015, 290 Fed. Appx. 14, 2008 U.S. App. Lexis 15073 (Unpub. 9th Cir.), a federal appeals court rejected the disabilities discrimination claim of a criminal investigator with Guillain-Barre Syndrome, a disease that causes temporary paralysis of his body. The plaintiff is not a "qualified individual with a disability" under the ADA, because he cannot perform the essential functions of the employment position, which requires "running, climbing, negotiating obstacles, and physically subduing and lifting uncooperative individuals."

No ADA disability was found in *Carothers v. County of Cook*, #15-1915, 808 F.3d 1140 (7th Cir. 2015). In this case, an African-American woman was hired by a county detention center as an administrative assistant hearing officer, with duties that included handling juvenile detainee grievance hearings. During a riot, she had a physical altercation with a detainee, injuring her hands, and going on leave, resulting in a workers' comp settlement. She was released to return to work with a restriction precluding her from interacting with detainees, which her job duties required. Told to apply for disability benefits, she attempted to return to work and had to be taken from work in an ambulance after Physical Restraint Techniques training and De-escalation training.

Ultimately, a hearing officer recommended that she be fired due to more than 10 unauthorized absences, and failure to follow instructions. When she was fired, she sued, claiming to have developed an anxiety disorder and asserting that her firing constituted disability, race, and sex discrimination. A federal appeals court upheld summary judgment for the defendant county. The plaintiff failed to show that she was disabled within the meaning of the Americans with Disabilities Act, as her alleged anxiety disorder only prevented her from interaction with juvenile detainees, which was a requirement of the hearing officer position, but would not interfere with her performing other jobs.

Not every medical condition is a disability. See *Sulima v. Tobyhanna Army Depot*, #08-4684, 602 F.3d 177, 23 AD Cases (BNA) 27 (3rd Cir. 2010), an ADA action in which the Third Circuit found that a need for long, frequent toilet breaks, which are a side-effect of an OTC (over-the-counter) weight loss medication, is not a disability in the absence of a showing that the treatment is required in the prudent judgment of the medical profession.

Similarly, unique body dimensions, standing alone, do not constitute an ADA disability. See *Quinn v. Ohio State Hwy. Patrol*, #2007-05474, 2009 Ohio 6075, 2009 Ohio Misc. Lexis 289 (Ohio Ct. Cl. 2009), ruling that a 6'10" former sergeant was not "disabled" under the ADA, and the Highway Patrol did not have to honor his request for an accommodation. He claimed that the installation of a protective cage and an overhead shotgun rack reduced the vehicle's headroom and prevented him from sitting in an upright position while on patrol.

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