

Community of Practice – Notes

Topic: How the ADA and Reasonable Accommodations Can Make or Break a RETAIN Case

Subject Matter Expert (SME): Leslie Dawson MA, CRC, NCC

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What are you most interested in learning about ADA and Accommodations?

- Would like to learn about ADA regarding job site accommodations, and when ADA could potentially protect employee from losing their job.
- How the ADA looks at accommodations that may be deemed unsafe for the worker or his or her coworkers and what flexibility do employers have if they think the accommodation would be unsafe.
- Our older employees are feeling uncertain about returning to work, how can we best address those issues and stay ADA compliant given the COVID 19 restrictions?
- In some smaller work settings, individuals perform multiple roles and kind of covering HR roles. We are interested in any kind of resources that we can provide to employers who might not have a lot of familiarity with dealing with the ADA.

Poll: Participants were asked to “rate your working knowledge of the ADA.”

1. I’ve heard of ADA and have not applied into practice.
2. I have an understanding of ADA but have not put it into practice.
3. I have an understanding of ADA and have put it into practice.
4. I am knowledgeable about ADA, have put into practice and this is just a refresher.

Responses show that most folks have an understanding of the ADA and have put it into practice and about 15% of folks are knowledgeable about ADA and have put it into practice.

Section 1 - Qualified Individual ¹

SME addressed the following:

- Who's covered and key concepts that justify a qualified individual essential job function.
- Discuss unreasonable accommodation, and undue hardship and direct threat
- Who is covered as an employer vs. private employer (15 or fewer employees and do not have to follow ADA)?
- ADA does cover private sector, government, and governmental entities.
- Individuals must have a physical or mental impairment that substantially limits one or more major life activities.

¹Source of information for Section 1 slides: U.S. Equal Employment Opportunity Commission (EEOC) <https://www.eeoc.gov/laws/types/disability.cfm>

Leslie Dawson – Section 1 (slides 10-20)

If you're working with a small company or small business, they may or may not know about reasonable accommodation. They may look at you like, "What is that?" Or they may say, "We don't have to provide a reasonable accommodation." It's important to know that any business with 15 or fewer employees basically doesn't have to abide by the ADA. Now ADA does cover private sector, government, and government entities. It does exclude tax exempt or private membership clubs, Indian tribes, and religious entities. So that means your state agencies and various entities like that do have to follow ADA. There are some other laws out there that under the Rehabilitation Act in different sections of that law that do put the requirement for reasonable accommodations on federal entities. They just provide it under a different section of the Rehab Act.

Let's talk about "what are limiting impairments?" The Amendments Act specified particular types of disabilities that are going to be considered eligible under ADA, and you can see the list here (slide 15-16). Okay, so when we get to one or more major life functions, this is where a big change was added into law because they started including things like reproduction and gastrointestinal. They really just covered every single thing, every part of the body. Again, it was the Department of Justice's way of saying, "Hey, we're going to make sure that the focus is no longer on whether somebody has a disability or not," that the focus is going to be on whether or not the person is being evaluated for a reasonable accommodation in the workplace. One thing I do want to point out is that if a person is currently using illegal drugs or using drugs illegally, then they are not covered under the ADA. So drug addiction is a disability that is covered under ADA, but it will not be covered if they're currently using illegal drugs or using drugs illegally.

Record of impairment really comes into play for hiring (slide 17). If an employer refuses to hire or they fire somebody because somebody has had a record of an impairment, then that could be seen as discriminatory. So this may come into play when you're helping somebody let's say, find another job within the same employer, or looking for a job with a different employer, but you've been talking to that new employer, so they know that there's a disability or there's something that occurred at the other job site. So failure to hire or terminate could be seen as discriminatory because they're considering that person to have had an impairment, just based on what they've heard. The thing with record of impairment though is that discrimination cannot come into play when you're talking about reasonable accommodations because there actually has to be disability in a limitation due to that disability, and in performing the essential functions in order for there to be discrimination in reasonable accommodation. So, under ADA, you have hiring discrimination; termination discrimination, and then you also have the reasonable accommodation discrimination.

Participant Question: I think this goes back to the slide before where we talked about the folks who are using drugs illegally or using illegal drugs. So it can be difficult to know whether someone has active substance abuse or is in recovery giving the frequency of relapse. Do you have any guidance about that? Do they usually consider it on a case by case basis?

Response - Leslie Dawson: Yes, a lot of this guidance comes from the EEOC. Basically what they're saying is that if somebody let's say they get sent for a drug test, and it comes back that they're actively using illegal drugs or drugs illegally, and then the person says, "Well, I have a drug addiction problem." The EOC

is allowing or the ADA allows the employer that flexibility or the ability to say, "I can't hire you or you violated policy and procedure, you're not supposed to have illegal drugs in your system or using drugs illegally." The employer can terminate upon that measurement. Now with alcohol, it is a little bit different because it is a legal drug. However, if employer says, "You cannot be using alcohol." Currently on the job site, if that's one of the policies, then the ADA is pretty much going to allow the employer to be able to follow their policy when it comes to drug or alcohol addictions. Now, what this does mean though is somebody comes up to an employer and says, "Hey, I've been addicted to pain meds, and I need to go for treatment." At that point in time, the employer would need to let them go for treatment. So, the accommodation would be additional leave or extended leave in order to receive treatment for that addiction.

Facilitator-Ann: I see. It sounds like it is on a case by case basis. I'm glad that you brought up painkillers, and I know a lot of the states are focusing on supporting individuals who are opioid dependent. I think that the accommodation to that, to treatment is important to put here.

Participant Question: For the extended leave that employers are supposed to provide for them to go to treatment, would that fall under FMLA or would that be in addition to?

Response-Leslie Dawson: The person would need to use their FMLA and then ask for a reasonable accommodation. Now leave as a reasonable accommodation does not mean that the employer has to pay for the leave or provide paid leave for that person to be off. They just have to consider it. Now, they could claim undue hardship if the person is off that long or they had to fill that position. But in order to claim undue hardship or undue burden is that the proof would be on the employer. They would have to show financially they couldn't bring in a temp worker or reassign those duties while the person was on leave. So basically after 12 weeks of FMLA, the reasonable accommodations, they can grant that, but it will not be necessarily work protection

Participant Question: A question about marijuana being legal. Is it handled like alcohol?

Response-Leslie: On the federal level, marijuana is still not legal. So I would default to say this is still kind of being discussed and contemplated. But what I've heard the EEOC say is that if the employer's policy is no alcohol, no drugs, no marijuana, that sort of thing on the job, then they're going to default to the employer's policy, although it is legal, it is not at the federal level. So there's a little bit of play there. Federal law always trumps state law. But when it comes to marijuana, it's a little bit different. So I think the EEOC is still trying to figure that out.

Leslie Dawson:

Before the Amendments Act, mitigating measures was not included. For example, mitigating measures are like medication, medical equipment, those sorts of things, hearing aids, a prosthetic, various things like that. Before the Amendments Act, the attorneys were saying, "Well, they have a prosthesis, so they're not disabled, their prosthesis mitigates the disability." The Department of Justice then through the Amendments Act said, "No, we're not going to include that anymore. If the person were not to have that mitigating measure, like if they didn't have the prosthesis, would they be considered disabled? If the answer is yes, then they are going to still be covered under ADA. One thing that is important to note under mitigating measures is that if the mitigating measure, such as medication, let's talk about psychotropic medications for mental illness that causes extreme thirst and need for restroom breaks. Then those effects or limitations from the mitigating measure must also be accommodated.

So again, any limitations or effects from the mitigating measures must be accommodated. That is something that is fairly new to employers and they don't realize that.

Poll: Does the ADA protect the person's job? What do you think? Yes or no?

We have some disagreements brewing. About 53% of folks are saying yes and a few less are saying no. Let's see, it looks like about 70% of folks are saying yes, it does protect someone's job. About 30% of folks are saying, "No, it sure doesn't." Does it? Okay, well, this is a very good pool question that leads us into this next section- "the qualified individual."

Section 2: Key Concepts – Qualified Individual and Essential Job Function²

SME addressed the following:

- **Qualified Individual**
- **Essential Job Functions**

Leslie Dawson – Section 2 (slides 22-25)

Basically, I think "the qualified individual" is probably one of the most important concepts to learn about and keep in mind. This is a conversation I've had to have with several of my clients, my participants, as far as what makes them "qualified" for a job and what doesn't. ADA says that if a person is otherwise qualified for the job and can perform the essential functions of the job with or without a reasonable accommodation, then they cannot be discriminated against. So, it doesn't necessarily mean they can't be hired or fired but it just means they can't say, "All right we're not going to hire you or we are not going to continue to employ you because of your disability. So, ADA considers whether the person is qualified or not for the job when we look at whether an employer made an adverse hiring or firing decision. If the otherwise qualified individual with a disability cannot perform an essential job function because of the disability, the employer must consider whether there are modifications or adjustments that may possibly enable the person to perform the function. (See slide 27).

Now I want to briefly talk about essential functions of a job versus marginal functions. It's extremely important that you get your job descriptions from the employer in working with a return to work situation. You need to identify what are the essential functions of the job, not marginal function. Every job is essential. Every job has marginal functions. The ADA basically says "We don't want you to discriminate, but we also recognize that you have a business to run, and you have to make decisions. You have to make whatever is financially best for your company as far as decisions are concerned. So what the ADA says is we're not trying to keep you from firing somebody with a disability. We just want you to make sure you're not discriminating against people with disabilities". So, the ADA is not an affirmative action law, like Civil Rights is. ADA basically says, "We just do not want you Mr. Employer to discriminate." But again, because they recognize that the employer has a business to run, what they've come back and said is, "We will give you this, if the person is otherwise qualified for the job, but they cannot perform the essential functions of the job with or without a reasonable accommodation, then they're no longer qualified to do the job. If they are terminated, then it's basically legitimate."

² Source of information for Section 1 slides: U.S. Equal Employment Opportunity Commission (EEOC) <https://www.eeoc.gov/laws/types/disability.cfm>

To summarize, if you're working with an individual, and they've been with that employer for six years, and they now have sustained a disability, musculoskeletal, mental illness, it doesn't matter. If they cannot perform the essential functions of their job with or without a reasonable accommodation, then they are no longer qualified for the job. This is where one of the biggest misunderstandings on part of the employee and on the part of the employer come into play. So, an employer that doesn't have an understanding of ADA may think ADA is an affirmative action rule and they have to keep the person and we can work to keep the person there. But employers that are larger and have attorneys know that if the person can't perform the essential functions of the job, then they're no longer qualified to do the job. So that's why it's very important that you know what the essential functions of the job are. Basically, an essential function of the job is that function that is essential because the position exists to perform the function. There's also a limited number of other employees available to perform the function or the function is highly specialized. So those are some of the definitions for essential functions. It's also important to know the evidence for essential functions includes 1) the employer's judgment, and 2) it has to be on the job description before advertising.

Now, an employer can make a change in a job description after hiring, but it usually must be done in conjunction with a performance appraisal. Then if the person says, "Hey, I have a disability. I have an issue performing this essential function." Then the employer has to look at accommodations at that time. The employer is also going to look at time spent on the function. What happens if that function is not performed? What's the experience of people on the past job, and what's the experience of people that are in similar jobs? So that kind of helps give that evidence regarding a function. Again, one of the most important takeaways about who's a qualified individual in essential functions, depends on whether the person can perform an essential function with a reasonable accommodation? Now, productivity is an essential function, quality of work is an essential function, and then actually performing the task is also an essential function. So if the person is not able to meet the productivity requirements even if an accommodation has been put into place, then they may not be qualified for that position, and the employer does not have to keep them in that job.

Participant Question: What is the appropriate way to get an employer to take ADA regulations into consideration to hire an applicant with a disability?

Response-Leslie Dawson: That's a good question. So what we tend to do is use certain language when we have conversations or discussions with the employer or if the employee doesn't want us talking to their employer, we educate the employee on how to have conversation that includes certain terminology and language that clues that employer that the employee knows what they're talking about. Usually that kind of sparks the employer to say, "I might need to go do some research," or "I might need to contact somebody to find out if I'm doing this right or not. Some of those key terms would be "reasonable accommodation" because that is verbatim from the ADA. The other thing is to use the term, "Americans with Disabilities Act." If you have an employer that seems to be completely clueless about ADA, then it is always good to prepare your consumer to ask those questions. For example, "I'm going to need a reasonable accommodation under ADA. How do I request that reasonable accommodation? Or if you're talking with the employer, you yourself could say, "This person might need a reasonable accommodation in order to perform such and such task. Can we look into what reasonable accommodation the person would need?" Now, again, that's just my recommendation.

Participant Question: To clarify, an employer is not allowed to ask a job applicant about personal medical conditions prior to making the job offer, is that correct?

Response -Leslie Dawson: Yes, that is correct. Now, in an interview, what's important to remember is that an employer cannot ask questions that will elicit a confirmation of a disability. So when an employer, first of all, in the application, it should not be anywhere. But in the interview, an employer can ask the

person, "Can you perform the essential functions of the job with or without a reasonable accommodation?" This is a legal question. The reason why that question is legal is because the answer doesn't tell the employer if the person has a disability or not. It just tells the employer if they can perform the essential functions of the job with or without a reasonable accommodation. That goes back to are they then a qualified individual? Well, they said they were so we can't discriminate based on what we assume, if they say they can perform the essential functions of the job with without a reasonable accommodation, all we know is they can perform the essential functions of the job. Now if the individual says, "No, I cannot," then the employer can ask additional questions such as "Well, what job task are you unable to perform with or without a reasonable accommodation?" That can start the discussion there. Or if the applicant brings up the disability from the very beginning, then the employer can ask questions, but the employer has to keep those questions related to the essential functions of the job. That's why essential functions are so very important.

Participant Question: How would you recommend I talk to an employee about disclosing their newly acquired illness or injury when either seeking employment or getting accommodations with the job that they currently have?

Response -Leslie Dawson: I think it is important that if the person's not going to have any problems on the job and they're not going to need accommodations, then it's best that they wait. If it's a newly acquired disability, if it's a new job, or current job, they really need to wait to see if they're going to have issues. However, I want to point this out that I think it's very important to note that if the employee is realizing, "I am having problems either performing the task, or meeting productivity, or the quality of work is going to be affected," then it's very important for them to bring up the discussion with the employer. The reason is because an employer can implement disciplinary processes and procedures. So an employer can go ahead and issue a verbal warning, written warning, anything like that, if the person hasn't brought up the disability. So, it's very important that you educate your employee that if you know you're going to have a problem doing this, you need to go ahead and bring it up to the employer. An employee can bring it up by saying "I need to request a reasonable accommodation. What is the company's process for doing this?" All an employee has to say is, "I'm having problems performing this function or I'm having problems meeting my production requirements because I have a disability." According to the ADA, that's enough to justify a request for an accommodation to that employer. Most employers, especially federal contractors, have a process in place when somebody requests a reasonable accommodation. And all of their supervisors and managers should know what that process is, and be able to get that started right away. That's not always the case. But it's always good that you can prompt somebody to ask questions and use those specific words, reasonable accommodation, ADA, Americans with Disabilities Act. That will clue in the employer that this person knows what they're talking about.

Section 3* - The ADA and Reasonable Accommodations³

SME addressed the following:

- **Undue Burden**
- **Direct Threat**

Leslie Dawson – Section 3 (slides 27-44)

Now let's talk about reasonable accommodation. So what is a reasonable accommodation? Well, I think we all kind of know that a reasonable accommodation is a modification or adjustment to a job, the work environment or "the way things are usually done" that enables a qualified individual with a disability to enjoy an equal employment opportunity. Accommodations focus on how it needs to be done for example, if you have somebody with a muscular skeletal disorder, and their job description says that they must be able to lift and carry 50 pounds. Well, what needs to be looked at is "why". Why does the person have to be able to lift and carry 50 pounds? Is it because every now and then, they may have to move a very heavy 50-pound garbage can or is it because they must take 50 pound tires off a belt in a manufacturing environment? Then the accommodation comes into play as in how can they get that task completed? If they must lift and move the trashcan, do they have to lift and move the tire or is there another mechanism? Is there an accommodation, or a modification in the way things have always been done that allows them to get that task performed? That's basically what you look at to make a modification to a job. Instead of focusing on WHAT is done, accommodations focus on HOW.

Basically, reasonable accommodations are required to ensure equal opportunity in the application process, to enable a qualified individual with a disability to perform the essential functions of the job, and to enable an employee with a disability to enjoy the benefits and privileges of employment. So that means access to break rooms, if there's a company party or picnic, the location needs to be accessible as well. (slide 30) So these are just a few areas to consider for reasonable accommodations, but it lets you know the areas that they can include. I want to talk about policy compliance quick. Policy compliance is the way that the Equal Employment Opportunity Commission (EEOC) looks at, "Is this a fair policy? Are you practicing it across the board? Does it relate to every position that you have?" Accommodations must be provided unless it can be shown to cause an undue hardship, and the employer must prove why it would be an undue hardship. Again, as we've talked it does apply to all aspects of employment. Employment cannot be denied because of the need of an accommodation. But it can be denied if the person is not able or qualified to perform the essential functions. It is the obligation of the individual to request the accommodation. However, if an employer is seeing that the person is having problems performing their job, or their productivity is suffering, or their quality of work is going down, and they know that this person has a disability, then the EEOC would like for the employer to bring it up to the employee.

When an employee feels that they have been discriminated from a job due to Americans with Disabilities Act, the first step is that they have to file a complaint with the EEOC. Then, the EEOC will start an investigation. After their investigation, the EEOC may give that employee a right to sue later if they feel

³ Source of information for Section 1 slides: U.S. Equal Employment Opportunity Commission (EEOC)
<https://www.eeoc.gov/laws/types/disability.cfm>

like yes, there was a violation, or at any time the employee can request a right to sue letter, and they can give that over to an attorney. But it's important to note that the EEOC is the federal agency that will take a first look to see if discrimination has happened. Okay, so when does an employee request an accommodation? Of course, they can request it at any time during the application process, anytime during employment. But again, as we discussed earlier, when the employee knows that there is a barrier due to the disability, they need to request an accommodation. They also need to request it before their performance suffers.

The last bullet (slide 32) states that ADA does not preclude an employee accommodation request after hire. What that means is that technically, when an employee is hired, they may not know that they're going to need accommodation. If they're in the interview, and they're asked the question, "Can you perform the essential functions of the job with or without a reasonable accommodation?" They say, "Yeah, sure. Yeah." Well, they may have thought "I could" But then let's say they get hired and three months in or six months into the job, they realize, "I need an accommodation." An employer cannot come back and say, "You lied during the interview. You didn't tell me you needed accommodation.

So, we're going to let you go." ADA says, "No, you can't do that. You have to start when the person tells you that they're having problems and start at that particular time within the interactive process." As far as how to request a reasonable accommodation, it doesn't have to be in writing. The employee doesn't have to say, "Oh, I need a reasonable accommodation under the Americans with Disabilities Act." They basically can just come in and say, "I'm having difficulty performing my job duties because of a disability," and that then starts the clock ticking that an employer has to quickly respond. Well, I say quickly, the EEOC likes to look at a reasonable timeframe. That usually is within two to three weeks that they need to be having that conversation and looking at reasonable accommodation. So after a request for an accommodation is made, the employer should begin discussing what is needed, identifying what those limitations are, what the essential functions of the job are that are affected by those limitations, and what accommodations can be put in place. At this time, an employer can discuss more about that disability. They can ask them more specifics about the disability as it relates to the job tasks being performed.

Participant Question: Another question following on that, in states where things are shut down, but are opening up, and employers are being told they can't have people come back who are at high risk, does that just fall under the state directive or how does the ADA play into that? Because employers are asking us how they're supposed to identify people with personal medical conditions that would make it unsafe for them to come back?

Response -Leslie Dawson: That's a good question. The EEOC guidelines have said is that whatever the CDC is saying in those regards is what they're going to follow. However, if the employer doesn't know that the employee has any known pre-existing medical issues, because let's say they haven't ever asked for an accommodation, then the employer may ask them to come back to work. If they feel like it's not safe, then in that case, they can ask for an accommodation to still stay at home. Now, if the employer does know that they have a pre-existing medical condition, and maybe they were getting accommodations on the job, and the employer feels that it's not safe for them and want them to stay at home, then I think that that would have to be looked at on a case by case basis and suggest researching what the CDC is saying.

Leslie Dawson: I want to point out the selection of a reasonable accommodation (slide 38), this is an important slide. Then the rest of them are just kind of some examples and things that can be used. But when it comes to selection of a reasonable accommodation, it's important to remember that this is an employer's law. Therefore, they could choose the reasonable accommodation. Some employers may not have a clue what to choose, and that's when they're going to be looking to you guys to help them make that choice. Some employers may choose a completely different accommodation and that's okay because the burden is on the employer. However, ADA does say that the selection must be effective. The employer does not have to show an undue hardship to provide a least expensive accommodation. If an employee is requesting a \$1,000 piece of equipment, but a \$200 piece of equipment will do just fine, then the employer can go with a \$200 piece of equipment. The employer should consider the preference of the individual, but again, the employer chooses the accommodation. Also, the employer cannot require the qualified individual to accept the accommodation. So, the employer cannot say "Hey, look, if you don't take this, then we're going to fire you."

However, it's very, very important that you let your employees/participants know that if they refuse the accommodation offered, and it was a reasonable accommodation, and it would have helped the situation, and their performance starts to suffer, they may no longer be qualified to perform that job. At that point in time, the employer will probably start disciplinary procedures. That's a hard conversation that we had to have with our participants is to say, "You have to try it. Even if you don't think it's going to work, we have to try it." Because the selection must be effective, we need to show why it is not effective. Because if you don't use it, then the employers are going to start giving you warnings based on your productivity or your quality of work. If the person tries it and it doesn't work then you've got enough proof and backing to explain to the employer and say, "We tried, this is not working, can we try something else." If the employee refuses to do or use the accommodation, then they can face disciplinary process, not because they didn't use the accommodation, but because their performance is suffering. This next slide about unreasonable modifications or accommodation (slide 39) states that the employer does not have to eliminate essential functions, they don't have to lower productivity standards and they don't have to accommodate for personal use items, such as a prosthesis for example. An employer would not have to provide the personal use item. However, an employer would need to accommodate any limitation that the person has in performing a task because they have the prosthesis. But as far as accommodating for personal use items, that means they do not have to provide the wheelchair.

Thank you for participating in today's Community of Practice! Unfortunately, we've run out of time. The remaining COP slides 41-50 will be posted on the RETAIN Online Community web site. If you would like one to one time with today's SME Leslie Dawson, please let your State Liaison know and they will coordinate a TA consult.