

The ADA and Competitive Integrated Employment

Presentation by
EEOC Commissioner Chai R. Feldblum to the
Advisory Committee on Increasing Competitive
Integrated Employment of Individuals with Disabilities
January 23, 2015

Overview

- EEOC's enforcement process
- Brief review of ADA's requirements
- **Examples of EEOC enforcement actions under the ADA**

About the EEOC

- The EEOC is the federal agency that enforces the employment provisions (Title I) of the ADA.
- We investigate complaints of discrimination, attempt to settle them, and will sometimes file litigation.
- We also produce regulations and sub-regulatory guidance, file amicus briefs, and issue decisions in our federal sector cases.

EEOC's Enforcement Process

- Most cases begin with the filing of a charge of discrimination in one of EEOC's 53 field offices
- May also be initiated by a Commissioner's Charge
- Respondent is notified of the charge and given an opportunity to respond
- Mediation may be offered prior to investigation
- EEOC has 180 days to investigate
- If "no cause," NTRS is issued.
- If "cause," then conciliation; NTRS or EEOC files a lawsuit

ADA's General Provisions

- Prohibits employment discrimination on the basis of disability
- Covers private employers with 15+ employees
 - State and local employers of the same size also covered
- Analogue in the federal sector – Section 501 of the Rehabilitation Act

ADA “Qualified” Prerequisite

To be protected under the ADA, the person must be qualified.

“Qualified” means employee/applicant:

- Satisfies requisite skill, experience, education, and other job-related requirements
- Is able to perform the essential functions of the job, with or without reasonable accommodation

ADA Raises the Bar

- High expectations – people with disabilities can work in competitive integrated employment
- Discrimination on the basis of disability will not be tolerated

Prohibited forms of discrimination

- Disparate treatment on the basis of disability
- Paying less for doing the same work as non-disabled employee
- Limiting, segregating, or classifying in a discriminatory manner
- Failing to provide reasonable accommodation
- Using employment tests in a discriminatory manner
- Harassing on the basis of disability
- Retaliating for participating in the EEO process or opposing discriminatory conduct

Available remedies

- Reinstatement, back pay, and other injunctive relief (e.g. many EEOC conciliation agreements and consent decrees include nondiscrimination provisions and training requirements)
- Compensatory and punitive damages up to \$300,000
- Attorney's fees, court costs

Examples of EEOC Disparate Treatment Enforcement Action

- Restaurant cleaner with autism and an intellectual disability and who was non-verbal successfully performed job with the assistance of a job coach. Despite the vigorous protests of the restaurant manager, the district manager terminated the employee because he did not want “those people” working in the restaurant.
 - *EEOC v. Chuck E. Cheese’s Restaurant* (\$13 million jury verdict)

Examples - continued

- Debt collection agency refused to hire a qualified applicant because she was blind. The company's manager stated "this isn't going to work out," even after the applicant attempted to explain that she had done similar work for over eight years with the aid of assistive technology.
 - *EEOC v. Sentry Credit, Inc.* (Case No. CV-09-0147 MJP) (resolved by consent decree)

Reasonable Accommodation

- A reasonable accommodation is a change in the workplace, or in the way things are usually done, that provides equal employment opportunities for individuals with disabilities
- ***General rule:*** An employer must provide a reasonable accommodation needed because of the physical or mental limitations of an otherwise qualified individual with a disability if requested and if doing so does not pose an undue hardship

Reasonable Accommodation – continued

- Includes:
 - Physical modifications to the workplace
 - Job restructuring, part-time work, or modified work schedules
 - Sign language interpreters or readers
 - Leave
 - Reassignment to a vacant position

Reasonable Accommodation – continued

Actions not required:

- Removing an essential function or hiring someone else to perform it
- Excusing misconduct
- Providing personal use items, such as eyeglasses, wheelchairs

➤ *Note that although not required, these actions are certainly permitted*

Examples of EEOC Reasonable Accommodation Cases

- Individual with developmental disability terminated after retail store rescinded the individual's workplace accommodation of being given written job assignments, which had been key to the individual being able to successfully perform his job.
 - *EEOC v. Wal-Mart Stores, Inc.*, Civil Action No. 14-cv-50145 (pending)

Examples - continued

- Employee working in cash services, whose previous supervisor could communicate in ASL, denied sign language interpreter.
 - *EEOC v. Bank of America Corp.*, Case No. 2:13-CV-1754 (pending)
- Individual with vision impairment denied customer service representative job; company refused to let individual try to perform the job while using JAWS.
 - *EEOC v. EchoStar* (\$8 million jury verdict)

Reasonable Accommodation and Support Services

- Support services & reasonable accommodation NOT mutually exclusive
- Support services may go beyond ADA obligations
- Provision of support services does not necessarily negate need for reasonable accommodation
- Allowing an individual to use support services on the job (e.g., a job coach) is itself a reasonable accommodation

Examples of RA Cases Involving Job Coaches

- Employee with Down Syndrome who had been working successfully with the assistance of an independently employed job coach was terminated after an operating partner visited the restaurant and ordered that the employee be fired.
 - *EEOC v. PJ Utah LLC, PJ Cheese, Inc., PJ United, Inc.*, Case No. 2:14-cv-00695-BCW (pending)

Examples – continued

- Job coach for cart attendant with cerebral palsy and intellectual disability was not notified of in-person meetings involving work issues and job performance, as had been requested.
 - *EEOC v. Target Stores, Inc.*, Case No. SACV 09-0963 (resolved by consent decree)

Examples – continued

- Food service worker with hydrocephalus requested additional training time and the assistance of a temporary job coach so that he might effectively learn his job and perform his job duties. A non-profit organization would have provided job coaching services at no cost to the employer.
 - *EEOC v. Kaiser Foundation Hospitals dba Kaiser Permanente*, Case No. 3:13-cv-02062-MMA-WVG (resolved by consent decree)

Non-discriminatory Wage Rates

- Employee who can perform essential functions of the job with accommodation and produce the same quality and quantity of work is entitled to wages commensurate with those being paid non-disabled workers.

Example of EEOC Wage Rate Enforcement Action

- Employees paid \$65 per month while contracted to work on a turkey evisceration line
- Court ruled that the employees should have been compensated at the average wage of \$11 or \$12 per hour, reflecting pay typically earned by non-disabled workers who performed the same or similar work
 - *EEOC v. Hill Country Farms (Henry's Turkey Service)*, 2012 WL 4747265 (Sept. 18, 2012)

Harassment

- ADA prohibits harassment, or offensive conduct, based on disability
- Offensive conduct may include offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, offensive objects or pictures, etc.
- Must be so frequent or severe that it creates a hostile or offensive work environment

Examples of EEOC Harassment Enforcement Actions

- Hotel employee harassed because of his developmental disability. Repeatedly called “retarded” by his supervisors.
 - *EEOC v. Swissotel Employment Services, L.L.C and Swissotel Chicago, Inc.*, No. 08-5131 (N.D. Ill.)
(resolved by consent decree)

Examples – continued

- Fast food restaurant employee harassed because of his intellectual disability. Called “dumb,” “retarded,” and “stupid” and was physically threatened.
 - *EEOC v. McDonalds*, Civil Action No. 09-4347
(resolved by consent decree)

Examples - continued

- Co-worker sexually harassed an employee with an intellectual disability. Store management was aware of the harassment, failed to take prompt or effective action to remedy the hostile work environment, and terminated the employee shortly after she made a formal complaint.
 - *EEOC v. WalMart* (No. 5:13-cv-795-SL) (resolved by consent decree)

Employment Tests

- Administration of tests
 - A test must be selected and administered in the most effective manner to ensure that it does not measure impaired sensory, manual, or speaking skills, unless those skills are what the test is intended to measure.
 - Reasonable accommodations are required to allow applicants or employees with disabilities to take tests related to employment, unless the accommodation would result in undue hardship.

In addition to enforcement actions. . .

EEOC working on competitive integrated employment in a number of ways:

- Amicus briefs
- Regulations and policy guidance
- Commission meetings
- Curb Cuts Initiative