OUTLINE OF TODAY’S PRESENTATION

• Primer on Basic Legal Analysis.
• Student Issues.
  • Disability Services Office.
• Employee Issues.
  • Human Resources.
• Questions and Answers.
STUDENT ISSUES
APPLYING DISABILITY LAW

MHRA  
ADA  
504
FUNDAMENTAL POINTS

• No different treatment.
  o No discrimination.
  o No harassment.

• Access through reasonable accommodations.
“REGARDED AS”

Being regarded as having a disability based on an actual or perceived impairment even if the student is not impaired.

This can be a form of disability discrimination.
Disabled

Qualified

Known

REASONABLE ACCOMMODATION
Basic Analysis

• Disability = student has physical or mental impairment that substantially limits a major life activity.

• Qualified = student meets the essential requirements of a program with or without accommodation (and not a threat to self or others).

• Known = student requests accommodation and provides adequate documentation from a qualified assessor.
An accommodation is a modification or support that gives a student with a disability an equal opportunity to participate and benefit from college. Accommodations are adjustments to how things are usually done. The purpose of effective accommodations is to increase a student’s chances for success.
I need help

I have a disability

OK

My doctor suggests...

I will TRY that for now...

OK

How can we help?

We will need some details

That’s an idea, but how about...

Keep in touch – Let us know how it works out...

Interactive Process
Reasonable modifications to ensure equal access

Removal of architectural barriers

Provision of auxiliary aids or services

Exceptions:
Fundamental alteration, direct threat or undue burden
KEY CONCEPTS IN STUDENT DISABILITY ACCOMMODATIONS

• Individualized Assessment.

• Interactive Process.

• Communication Between the Disability Services Office and Academic Affairs on Program Technical Standards (what is or is not a fundamental alteration)
  o Communication particularly important with things like skills tests, labs, etc.
SCOPE

• All Services, Programs and Activities
  o Field Trips, Overseas Study, etc.
  o Emergency Response.
  o Customized Training.
STUDENT CONDUCT

• Behavior rules apply to all students = it would be a fundamental alteration to accommodate misbehavior.

• BUT – an institution can choose to consider many factors in deciding an appropriate sanction.
SERVICE DOGS AND EMOTIONAL SUPPORT ANIMALS

• Service Animal – dog individually trained to work or perform tasks for an individual with a disability. Task performed must be directly related to the person’s disability.

• Examples:
  o Person with diabetes – dog trained to alert when blood sugar too high or low.
  o Person with epilepsy – dog trained to detect onset of seizure.
EMOTIONAL SUPPORT ANIMALS

• Emotional Support Animal (sometimes called an assistance or companion animal) – not a service animal.

• Fair Housing Act.
  o Is a dorm subject to the Fair Housing Act?
    ▪ Yes, per some recent authority (Nebraska-Kearney case).
    ▪ Emotional Support Animal = animal designated by a qualified medical provider as affording an individual with a disability an equal opportunity to use and enjoy a dwelling. (Essentially an Accommodation Request).
RESOURCES ON SERVICE AND EMOTIONAL SUPPORT ANIMALS

• Resources

  o United States Department of Justice, Frequently Asked Questions about Service Animals and the ADA.  

  o Minnesota State University Moorhead, “Service Dogs and Emotional Support Animals Policy.”  

PRACTICE POINTER: Your Disability Services Office will have resources.
EMPLOYEE ISSUES
Issues Related to Accommodation and Discipline
“Disabled” defined as:

- Having a physical or mental impairment that substantially limits one or more major life activity; OR
  - “Substantially limits” standard is individualized and not intended to require extensive scientific analysis
  - Compare individual’s ability to perform the activity to ability of most people in the general population
  - “Substantially limits” ≠ prevents or severely restricts
  - Limitation assessed without regard to ameliorative measure (e.g., medication, hearing aids, behavioral modifications) or remission status
- Having a record of such impairment; OR
- Being regarded as having such impairment (not illegal drug use/alcohol use that actively impairs performance).
Disability or Not?

Practice Tips:

• In response to accommodation requests from employees, focus your efforts on being reasonable, not on all the nuances of the definition of “disability.”

• Although the legal definition of “disability” is broader now than when the ADA was first adopted, not every health condition or impairment will constitute a “disability” under the ADA. Some general exceptions:

  o Common vision impairments that simply require ordinary contact lenses or glasses
  o Pregnancy, unless accompanied by physical or mental impairments that meet the “substantially limiting” test (e.g., preeclampsia)
  o Temporary conditions that are minor (e.g., colds, the flu, sprains), provided that no serious, long-term complications result (Note: Temporary conditions of a short duration are not per se excluded.)
EEOC Regulations and Guidance

• “Any mental or psychological disorder, such as an intellectual disability “formerly termed “mental retardation”, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 29 C.F.R. § 1630.2(h)(2).

• EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (dated 3/25/1997): An “emotional or mental illness” include[s] major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders. These conditions will meet the definition of “disability” even if they are (a) episodic, (b) in remission, or (c) well controlled by medication. The EEOC’s Guidance further states that individual traits or behaviors (e.g. being aggressive or lacking social tact) are not mental illnesses. Likewise, “stress” it not a stand-alone mental illness unless it is symptomatic of an impairment that meets the ADA standard for a disability.
The EEOC regulations read “it should be easily concluded” that major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia will, at a minimum, substantially limit brain function. §1630.2(j)(3)(iii) and “will as a factual matter, virtually always be found to impose a substantial limitation on a major life activity, . . . [the] “necessary individualized assessment [to determine whether a substantial limitation exists] should be particularly simple and straightforward.” Id. At §1630.2(j)(3)(ii).
Accommodation Process

Notice:

• Employer must have notice that something is being requested.

• Courts have long held that no “magic words” are required to trigger the Employer’s obligations. Notice can be: formal or informal.

✓ Courts have held that in mental disability there is a lower burden for employee seeking accommodation
Accommodation Process

Common Sense, Good Judgment, and Legal Compliance:

• Use forms and process established by MMB.
• Use good judgment – if requested job modification is easy and no future adverse consequences, simply provide the modification.
• Do not require submission of medical records release as a condition for proceeding to address the accommodation request. **Begin to engage in the interactive process.**
• Analyze accommodation request. Familiarize yourself with facts about disability and types of accommodations other employers have used.
• Interactive Process of Accommodation.
The Interactive Process for Reasonable Accommodations

• Employee request – ask questions, explore how requested accommodation will alleviate problem
  o Enable employee to do job’s essential functions and be feasible for employer under the circumstances.
  o There must be a causal connection between the accommodation sought and the major life activity limited by the disability.
  o Accommodation offered by employer need not be the best of all accommodations nor must the employer accept the employee’s suggested accommodation.
The Interactive Process for Reasonable Accommodations

• Health professional recommendation
• Employer response
  o Always respond with some modification or help
  o Do research
  o Identify essential functions, align employee’s suggestion and employer response
  o Employer has the right to seek medical information

Always document the steps in the interactive process. Remember – the employer has the final say in what accommodations it provides, but the accommodation must be effective.
Types of Reasonable Accommodations

• Physical environment modification
• Medical leave
• Temporary part-time
• Job restructuring – but not elimination of essential functions
• Light duty
• Telecommuting
• Transfer
Accommodating Mental Disability

- Psychological disabilities not obvious
- Employees may be uncomfortable sharing
- Employer may have heightened obligation
Employer “Defenses” to Failure to Accommodate

• Direct threat to the health and safety of others – must identify specific behavior
• Undue hardship
  o Nature and cost of accommodation
  o Nature of employer – many employees, financial resources
  o Type of employer
  o Impact of accommodation operation
• Employee misconduct – may discipline even if disability caused the misconduct
• Prior discipline – refusal to waive discipline not an accommodation violation
Employer Response to Direct Threat

A direct threat exists when 1) the employee poses a significant risk of substantial harm to themselves or others, 2) the risk cannot be eliminated through reasonable accommodation, 3) specific behaviors pose threat:

- Safety first – if threat is imminent call security or police
- Make medical inquiries from treating mental health professionals
- Consider independent medical exam – focus should be on the essential functions of job and safety
Employer Response to Direct Threat

- Factors to be used in employment decision
  - Duration of risk
  - Nature and potential severity of harm
  - Likelihood of harm
  - Imminence of harm
Employer Response to Direct Threat

- Medical inquiries from treating mental health professionals
- Independent medical exam
- Threat dictates response not disability
Misconduct, Discipline, and the ADA

- Disability cannot be basis for discipline.
- However, employees are not protected from the consequences of their misconduct, even if the misconduct was caused by disability.
- Legitimate, non-discriminatory reason: discipline because of misconduct, not disability.
- Examples: Court granted summary judgment where alcoholic employee was terminated for being intoxicated while on duty.
- Martinson v. Kinney Shoe Corp., 104 F.3d 683 (4th Cir. 1997) “Misconduct—even misconduct related to a disability—is not itself a disability, and an employer is free to fire an employee on that basis.”
Misconduct, Discipline, and the ADA

• Employer must provide reasonable accommodation to enable employee with a disability to meet conduct standard in the future, if:
  - Assuming employer did not decide to terminate employee because of the misconduct
  - Assuming employee requests (or employer on notice of need for) reasonable accommodation
  - Assuming accommodation poses no undue hardship

• *E.g.*, Employer decides to suspend alcoholic employee for violating alcohol policy, can go forward with suspension, but also must grant employee’s request for leave of absence to seek treatment.
Retaliation is Prohibited!!

• Adverse action should never be taken BECAUSE a person exercised rights under FMLA or ADA. Adverse action is any conduct that would deter a reasonable person from engaging in protected conduct such as requesting leave or an accommodation.

• Actions need not have a tangible economic effect on employment to be materially adverse and constitute retaliation.

   Ask: *Would the action deter a reasonable person from exercising rights such as requesting leave under the FMLA or an accommodation under the ADA?*

• FMLA and ADA leave cannot be counted against an employee under the agency’s excessive sick leave policy but employee must strictly adhere to absence policy with respect to notice to the employer.
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