



Representing the Healthcare Worker with Disabilities

Bola A. Oyeleye, EdD, JD, MSN, M.Ed, RN-BC, CNE, CHSE, CPHQ



Objectives

- Recognize an overview of the Americans with Disabilities Act* as they relate to reasonable accommodation for employees.
- Discuss exemptions to the Americans with Disabilities Act.
- Discuss recent legal principles and decisions that relate to nurses and other health care workers with disabilities.

* ADA and ADAAA used synonymously

The Americans with Disabilities Act| Overview

1. Is a civil rights law that prohibits disabilities discrimination

2. Gives Individuals with disabilities (IWDs) the same rights and opportunities

3. Was enacted in 1990, amended in 2008

4. Has five titles

The ADA as a Civil Rights Law

Civil rights laws differ from other types of laws & regulations

- Individualized, fact-specific
- Applied to specific individual in a particular situation.
- Terms mean nothing except in context.



The Americans with Disabilities Act- Titles

- **Title I:** Employment
- **Title II:** Public Entities
 - States and local governments
- **Title III:** Private Accommodations
 - private businesses
 - a.k.a. places of public accommodation
- **Title IV:** Telecommunications
- **Title V:** Miscellaneous including protection against retaliation, etc.

2008 Amendments ADAAA: Purpose

- Reject severely narrow SCOTUS decisions
- Restore intent and protections of the ADA of 1990
- Change language in regulations for wider protection

What is an ADA Disability?

Seven horizontal lines for writing.

ADA's Definitions of Disability

- An individual has a "disability" under the ADA when:
- (1) she has a mental or physical impairment that substantially limits one or more major life activities;
- (2) she has a record of a disability; or
- (3) she is being regarded as having a disability. 42 U.S.C. §12102(1)(A)-(C).

Seven horizontal lines for writing.

Physical Impairments

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems:
- Neurological, Musculoskeletal, Special sense organs
- Respiratory, Cardiovascular, Reproductive
- Digestive, Genitourinary, Immune
- Circulatory, Hemic, Lymphatic, Skin, Endocrine

Seven horizontal lines for writing.

Mental Impairments

- Any mental or psychological disorder
 - intellectual disability
 - organic brain syndrome
 - emotional or mental illness
 - specific learning disability

Substantially Limits...

Major Life Activities

- Caring for oneself
- Performing manual tasks
- Seeing, hearing, eating, or sleeping
- Walking, standing, or sitting
- Reaching, lifting, or bending
- Speaking, breathing, or learning
- Reading, concentrating, or thinking,
- Writing or communicating,
- Interacting with others or working

Major Bodily Function

- Functions of the immune system
- Special sense organs and skin
- Normal cell growth, digestive genitourinary, bowel, or bladder
- Neurological, brain, respiratory, circulatory, cardiovascular, or endocrine
- Hemic, lymphatic, musculoskeletal, and reproductive systems
- The operation of a major bodily function includes the operation of an individual organ within a body system

Determining Substantial Limitation

- Broad interpretation maximum extent permitted the ADA
- Individualized, compared to general population
- No extensive analysis
 - Focus is not extent of impairment's substantial limitation
- Could be episodic or in remission, if substantially limiting when active

Determining Substantial Limitation (2)

- Consider condition, manner, or duration to perform major life activity
 - Difficulty, effort, time required, pain experienced
- Focus on limitation, not outcomes or results.
 - Learning disability + effort = high academic success
- Consider non-ameliorative effects of mitigating measures
 - Negative side effects/burdens associated with treatment regimen

Disregard Mitigating Measures



Record of Disability

Record of

- Historical disability
 - Client in line for a promotion,
 - Hx of cancer treatment, now cancer free
 - Not promoted, bosses are worried
 - if his cancer returns, he won't be able to do the job
- Disability Definition
 - No current mental or physical impairment that substantially limits major life activity/function
 - Discrimination is based on his hx/record
 - He qualifies under the ADA

Record of...

- Must be more than a medical diagnosis.
 - Stermer v. Caterpillar, 102 F. Supp. 3d 959 (N.D. Ill. 2015)
 - admitted that these diagnoses never impacted him
 - only actual record only state his medical diagnoses and medications
 - conclude that the plaintiff is ready and able to work
 - Plaintiffs failed to demonstrate a record of disability
- More than just history/record
 - Important for plaintiffs to identify the impact of their impairment
 - Chamberlain v. Securian Financial Group, Inc.
 - The plaintiff repeatedly testified and stated he had no limitations as a result of alcoholism
 - Without any limitations in any major life activities
 - Plaintiff failed to establish "record of" an impairment despite history of alcoholism

Regarded as Having a Disability

“Regarded As” Under the Amendments

- Most viable avenue for ADA coverage
 - No need to prove actual disability or record of disability, individual may not be disabled at all 29 C.F.R. § 1630.2(g)(3)
 - No need to prove that impairment “substantially limits a major life activity”, (Section 12102(3)(A))
- Not entitled to reasonable accommodation
 - OR Nurse with a degenerative joint disease and arthritis in her knee
 - Exhausted FMLA, requested accommodations: ltd standing, stooping, kneeling, etc
 - Employer denied, employee filed suit, alleging “regarded as” having a disability
 - Court dismissed
 - ADAAA does not require employers accommodate employees who are “regarded as” having a disability (Ryan v. Columbus Regional Healthcare System, 2012 WL 1230234, at *4-5 (E.D.N.C. Apr. 12, 2012))

Regarded as...Some Cases and Decisions

- Alexander v. Wash. Metro. Area Transit Authority, 826 F.3d 544 (D.C. Cir. 2016).
 - All plaintiff needed to do was show that employer took a prohibited action against because of a perceived impairment
- Cannon v. Jacobs Field Services, 813 F.3d 586 (5th Cir. 2016).
 - Employee cleared to work but manager said employee would not be able to meet the project needs due to his accommodation needs
- Stragapede v. City of Evanston, 69 F. Supp. 3d 856 (N.D. Ill. 2014)
 - Fired because of his perceived mental impairment following a head injury, no substantial limitation is necessary

“Regarded As”-Transitory and Minor Exception/Defense

- Transitory?
 - An impairment which actually lasts or expected to last for six months or less not considered a disability under the “regarded as” definition 42 U.S.C. § 12102(3)(B).
- Minor?
 - No consistent definition
- Transitory AND Minor?
 - Court found that an employee sufficiently pled that she was regarded as having a disability, even though her back and shoulder impairments may have been “transitory”, because there was nothing to suggest that her impairments were “minor”. (Davis v. NYC Dept. of Education, 2012 WL 139255, at *5-6 (E.D.N.Y. Jan. 18, 2012))
- Burden is on a covered entity to establish that, objectively, an impairment is “transitory and minor” and therefore not covered by the ADA. (68 35-508(9) and 38-250(9)).
 - Kruger v. Hamilton Manor Nursing Home, 2014 WL 1345333 (W.D.N.Y. Mar. 26, 2014)
 - Licensed practical nurse claimed that a shift transfer constituted a demotion
 - Also admitted that her activities had been only “temporarily impacted.”
 - Defendant’s motion to dismiss granted because the plaintiff’s broken arm was “transitory and minor.”

Regarded As... Association

- Overwhelming majority of cases brought on behalf of family members
 - Association need not be familial.
 - Plaintiff must allege a specific association with a particular IWD, not general advocacy
 - Chan v. County of Lancaster, 2013 WL 2412168, at *25-26 (E.D. Pa. June 4, 2013)
 - Summary judgment on plaintiff's associational discrimination claim where plaintiff's claim "rest[ed] upon the theory that she was fired in retaliation for her efforts, on behalf of disabled individuals."
- Generally
 - Plaintiffs must show that employer knew of the association & of their associate's disability.
- However, Straub v. Cty. of Maui, 2018 WL 762383, at *5 (D. Haw. Feb. 7, 2018)
 - Not necessary to prove actual knowledge
 - Disabled wife of plaintiff well known in the community
 - Court permitted plaintiff's claim of association discrimination

Regarded As...by Association

3 Theories of Associational Discrimination

- Expense
 - Adverse action against an employee because of the costs potentially related to the individual with a disability, most frequently costs of health insurance.
- Potential Disability by association
 - Employer fears that the employee may contract the associate's disability or is genetically predisposed to developing the disability.
- Distraction
 - Employer fears that employee will be inattentive at work or will need leave to care for their associate.

Associational Discrimination-Cases-Expenses

- **Trujillo v. PacifiCorp, 524 F.3d 1149 (10th Cir. 2008)**
 - Two employees of same company had a child with cancer & a brain tumor.
 - Relapse treatment exceeded \$62,000 within six weeks
 - Both employees fired within the period
 - The Tenth Circuit ruled for plaintiff
 - Temporal proximity between the termination, their son's relapse, and the medical bills
 - Evidence that the company was "keeping tabs" of healthcare claims
- **Lester v. City of Lafayette, Colorado, 2015 WL 881677 (D. Colo. Feb. 27, 2015)**
 - Alleged termination because of association with daughter's bipolar disorder & resulting insurance costs.
 - Employer knew of her daughter's diagnosis for five years prior to her termination
 - No evidence that employer tracked her daughter's healthcare costs, or that it was expensive
 - Summary judgment to the employer
 - Must provide evidence connecting adverse action to the additional costs

Associational Discrimination-Cases-Disability by Association

- Courts recognized two examples of this situation:
 - Employee's companion has a contagious disease
 - Employer fears that employee may also become infected
 - Employee's blood relative had a genetic condition
 - Employer fears that employee will likely develop that disease as well
- Few cases brought under it
- Plaintiffs often fail when disability is neither contagious nor genetic.
 - **Williams v. Union Underwear Co., 614 F. App'x 249, 255 (6th Cir. 2015)**
 - No evidence that Vascular Disease is contagious or that
 - Supervisors feared that plaintiff would infect other employees

Associational Discrimination-Cases-Distracted

- The largest category of the three theories
- **Reiter v. Maxi-Aids, Inc., 2018 WL 557864 (E.D.N.Y. Jan. 19, 2018)**
 - Plaintiff disclosed that daughter was hospitalized for mental health reasons
 - Supervisor: "if you're not here, you're useless to me," fired him next day
 - Ruling: Supervisor "prospectively feared that plaintiff would be distracted during daughter's treatment and recovery."
- **Buffington v. PEC Management, 2014 WL 2567181 (W.D. Pa. June 5, 2014).**
 - Fired for breaking a corporate rule
 - Court upheld jury decision
 - Company's explanation was pretextual
 - Comments during the employee's termination meeting that
 - "[w]e need someone whose head is there 100 percent" and
 - "[n]ow you can go spend all your time with your son

Disability by Association, No Reasonable Accommodation

- Reasonable accommodation not for employees without disabilities (FMLA)
- *Milchak v. Carter*, 2016 WL 6248074 (E.D. Mo. Oct. 26, 2016).
 - Employee requested return to a second-shift to care for wife with disability
 - Second shift was eliminated for financial reasons, employee did not transfer out
 - Worked for a while, then retired and brought an ADA lawsuit.
 - Court agreed with defendant that generally, the law does not require accommodation for employees without disabilities based on association with an IWD
- Employment decisions must not be based on expectation that employee will need large amounts of leave time.

Exclusions

The term "disability" does not include -

- Transvestism, transsexualism
- Pedophilia, exhibitionism, voyeurism,
- Gender identity disorders not resulting from physical impairments
- Other sexual behavior disorders
- Compulsive gambling, kleptomania, or pyromania
- Psychoactive substance use disorders d/t current illegal drug use
- Compulsive gambling, kleptomania, or pyromania; or

[28 CFR § 35.108](#)

Peculiarities of the Healthcare Industry

What is the Healthcare Industry?

- Public and private hospitals
- Nursing and residential care facilities
- Offices of physicians, dentists, and other health care practitioners
- Home health care services
- Outpatient care centers and other ambulatory health care services
- Medical and diagnostic laboratories

Who are Healthcare Workers?

- Include but not limited to:
 - Physicians and surgeons, dentists, dental hygienists and assistants
 - Registered nurses, licensed practical & licensed vocational nurses
 - Physician's assistants, social workers, physical therapists, psychiatrists, psychologists
 - Radiologists, audiologists, chiropractors, dieticians & nutritionists, pharmacists
 - Optometrists, podiatrists, medical records & **health information technicians**
 - Clinical lab & diagnostic-related technologists & technicians
 - Emergency medical technicians & paramedic
 - **Ambulance drivers**, nursing aides, home health aides, orderlies & attendants
 - Occupational therapists, **speech-language pathologists**, medical assistants
 - Personal & home care aides, **med. transcriptionists**, **custodial & food service workers**
 - Management or administrative support roles for workers who provide direct services

Risk in the HC Environment- It's a Jungle Out There!

- Largest industry in the American economy
- High incidence of occupational injury and illness
- Greater range of significant workplace hazards than others
 - Potential exposure to airborne and bloodborne infectious disease
 - Sharps injuries
 - Physically demanding
 - Mentally stressful
 - Back injuries
 - Latex allergy
 - Shift work
 - Multiple jobs

Representing the Client

Title I: Employment

- Applies to employers with 15 or more employees
- Provide same employment opportunities to all
- Provide reasonable accommodations to **qualified applicants/employees**
- Regulated and enforced by the U.S. EEOC

Is the Client an Employee or an Independent Contractor

- The ADA applies to applicants and employees
- Does not cover independent contractors
- Many HCWs referred to as independent contractors
 - Placed through temporary or staffing agencies
- Fact-based and case-specific, depends on a variety of factors

Is Applicant/Employee Qualified Under ADA?

- Qualifying disability
- Be qualified for the job
 - Satisfy the requisite skill, experience, education, other job-related requirements (“qualification standards”) of the position held or desired, and
 - Be able to perform the job's **essential functions**
 - With or without a reasonable accommodation.

Essential Functions

What are Essential Functions?

- Basic job duties that an employee must be able to perform
- Job-related, not marginal or incidental job functions
- Consistent with business necessity.
 - E.g. Professional licenses
- Must adequately predict individual's ability to perform the essential functions.

Requirement that Does Not Predict Ability to Perform Essential Function

- A certified nursing assistant with an intellectual disability, I.Q. of 66
 - No H.S. Diploma, no GED d/t disability
 - Performing successfully for five years
 - Employer imposed a high school education or G.E.D. requirement

Requesting Reasonable Accommodation

An Interactive Process

Obligations: Employee

- Request reasonable accommodation, no special lingo necessary
 - Provide medical documentation, if disability not obvious
- Employer must not be left to guess
 - "A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith."
 - [Beck v. University of Wisconsin Board of Regents](#), 75 F.3d 1130 (7th Cir. 1996)

Obligations: Employer

- When need is not obvious
 - May require documentation of the need for accommodation." 29 C.F.R. §1630, App. §1630.9 (1996).
- Initial request triggers interactive process
 - *Menghini v. Runyon*, 114 F.3d 415 (3rd Cir. 1997)
 - A successful interactive process advances the purposes of the ADA
- Must act in good faith in the interactive process
 - See *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130 (7th Cir. 1996)
- If no job that employee (with or without accommodations) is capable of performing, then no liability under the ADA
 - *Willis v. Conopco, Inc.*, 108 F.3d 282 (11th Cir. 1997)
 - Plaintiff's physician indicated "[t]here is nowhere within that building that she would be safe."
 - "Undue burden exception"

Determining Undue Hardship

- Employer not required to provide accommodation that would impose undue hardship on the business 29 C.F.R. Pt. 1630, App. § 1630.2(p)
 - significant difficulty or expense in, or resulting from, the provision of the accommodation."
- Cost does not constitute an undue hardship as a matter of law
 - *Reyazuden v. Montgomery County, Maryland* -Budget
 - Plaintiff's expert claimed accommodation software cost \$129,000, employer's expert, \$648,000, county's total budget \$3.73 billion
 - Fourth Circuit held that
 - Employers should not look only to their accommodations budget when determining undue hardship.
 - Budget allocated for accommodations was an irrelevant factor
 - employer could budget \$0 for reasonable accommodations and thereby always avoid liability."

Determining Undue Hardship

- *Cost of accommodation not to be compared to employee salary*
 - *Searls v. Johns Hopkins Hospital*
 - Plaintiff nursing graduate offered employment contingent on a health screening
 - Requested a full-time ASL interpreter, employment offer was rescinded. Plaintiff sued
 - Defendant hospital claimed interpreter cost was an undue hardship
 - Nurse's salary between \$40,000 and \$60,000, interpreter approximately \$120,000
 - Court explained
 - Employer should compare the cost of accommodation to overall budget, not the nurse's salary or the department's resources
 - Interpreter cost was only .007% of the hospital's overall budget.

Reassignment

Reassignment- Not Mandated

- Plaintiff Nurse
 - Worked in a psych unit, Developed spinal stenosis, arthritis ; started using a cane
- Defendant Employer
 - Restricted her from working in her position, cane could be used as a weapon, Gave 30 days to apply for new position.
- The EEOC sued
 - Hospital violated the ADA by requiring RN to compete for vacant position when it should have automatically placed her in it.
- Defendant Employer
 - ADA does not mandate reassignment without competition
- The District Court & Eleventh Circuit agreed
 - ADA statutory language: reasonable accommodation "may" include reassignment to a vacant position
 - U.S. Supreme Court in *U.S. Airways v. Barnett*:
 - It is not reasonable to violate a best-qualified hiring policy or a transfer policy.

Other Circumstances that Exclude Reassignment

- When there is a well-established, bona fide seniority system.
 - *Henschel v. Clare County Road Commission*
 - Employer declined to reassign an excavator returning from a leave to another position
 - Sixth Circuit : "there is no requirement that an employer violate a collective bargaining agreement."
 - Reassignment would have required employer to move a more senior employee from his position
- Where there is a collective bargaining agreement
- Reassignment is an accommodation of last resort
 - "only when accommodation within the individual's current position would pose an undue hardship,"
 - If a position is not available

Leave Policies

Return to Work Policies (RTW)

- Reasonable accommodation requirements apply also to employees who RTW
 - After recovery from an illness
 - While receiving medical treatment or
 - While undergoing rehabilitation.
 - With temporary or ongoing medical limitations or restrictions.

Leave Policies that Violate the ADA

- Inflexible employment policies
- "100% healed" policies
 - Require RTW without any medical restrictions or face termination
 - Employers improperly bypassed the ADA individualized assessment process
 - Mistakenly presume employee unable to perform the duties of his or her job
 - Without duly considering whether the employee's restrictions can be accommodated
- Per se ADA violation.
 - Powers v. USF Holland, Inc., 667 F.3d 815 (7th Cir. 2011)

In-Flexible Leave Policies

- *EEOC v. Dialysis Clinic, Inc.*, 2:14-cv-01623-TLN-KJN in U.S. District Court for the Eastern District of California.
- Plaintiff Nurse at the company for 14 years
 - Approved medical leave for mastectomy surgery and chemo treatments.
- Defendant Dialysis Clinic
 - Terminated for exceeding time limit dictated by medical leave policy.
 - Would have to reapply for open positions
 - Applied two months later, was rejected, and,
 - Shortly after, Dialysis Clinic hired a newly licensed nurse.
- EEOC
 - Dialysis Clinic violated federal law by
 - Firing and refusing to rehire nurse who needed more medical leave to complete her treatment for breast cancer.
 - Terminating a qualified employee because of a disability
 - Obligation to provide reasonable accommodation to unless doing so would impose an undue hardship
- Providing an extended medical leave can be a reasonable accommodation.

12-Month Leave Policy

- *EEOC v. United Parcel Serv., Inc.*, Case No. 1:09-cv-05291 (N.D. Ill. Feb. 11, 2014)
- UPS leave policy:
 - Employees will be "administratively separated from employment" after 12 months of leave.
- EEOC
 - Leave policy acted as a "100% healed" requirement and
 - Limited the ability of qualified individuals IWDs to return to work.
 - Policy was a qualification standard, employment test, or other selection criteria that screens out or tends to screen out a class of individuals with a disability and is not job-related or consistent with business necessity (42 U.S.C. § 12112(b)(6))

General Principles on RTW

- Medical certification or doctor's note on physical limitation or restriction due to a medical issue
 - Should be treated as a request for an accommodation
 - The request triggers employer obligation to engage in interactive process
 - A case by case basis
 - Determine possible accommodations that would allow employee's RTW

Exceptions

Alcoholism

- Covered Under the ADA if the alcoholism
 - Currently substantially limits a major life activity
 - Was substantially limiting in the past, or
 - is regarded as substantially limiting.
- Employer may need to accommodate a qualified applicant/employee
 - With past or present substantial limitations relating to alcoholism
 - Who can competently perform his job
 - Can comply with uniformly-applied employer conduct rules
 - prohibiting drinking alcohol at work or being under the influence at work

Drugs

- Not covered under the ADA if:
 - Currently engaging in the illegal use of drugs
 - May be denied employment, disciplined, or fired for current illegal use
- May be covered
 - If employee only has a history of past drug addiction that substantially limited a major life activity, or regarded
- May need to accommodate if
 - Addiction is in the past
 - Otherwise qualified applicant
 - Can competently perform the job and
 - Comply with uniformly-applied employer conduct rules.

Drugs Cases

- Lopreato v. Select Specialty Hosp.-N. Ky., 2016 WL 374086 (6th Cir. Jan. 29, 2016).
- Plaintiff nurses
 - Previously caught stealing narcotic drugs
 - Entered the Kentucky Alternative Recovery Effort for Nurses program ("KARE")
 - Had restrictions on their nursing licenses, later removed removed.
- Defendant Select
 - Terminated plaintiff nurses
- Plaintiffs
 - Plaintiffs' supervisor recommended them to Select
 - Select applied its policy of not employing nurses with current or previous restrictions on their licenses
 - Filed suit alleging disparate treatment because they are in recovery from drug addiction
- The 6th Circuit upheld summary judgment for defendant.
 - Neutral policy of not employing nurses with current or previous license restrictions is a legitimate
 - Policy applied to all nurses who had or did have license restrictions for any reason
 - Select reasonably viewed past misconduct as suggesting a greater risk for future misconduct.

Not Impairments

- Common cold or the flu
- Sprained joint
- **Minor** and non-chronic gastrointestinal disorders
- Broken bone that is expected to heal completely
- Compulsive gambling
- Pregnancy (some impairments that are related to pregnancies may qualify: pregnancy discrimination)
- Old age
- Lack of education
- Poor judgment
- Bisexuality or homosexuality

Summary

- Employers should provide reasonable accommodation to otherwise qualified applicants and employees, unless it is an undue burden
- It is an interactive process
- Not every impairment is covered
- Individuals **without** disabilities may be covered because of association
- Fact specific inquiry
- **Focus is on how to keep the individuals working**
