

Welcome to the 2008 Legal Issues Webinar Series



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ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



These materials were developed by Equip for Equality under a subcontract with the DBTAC: Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability Rehabilitation and Research Award No. H133A060097.

Topics To Be Discussed

- ADA Disability Issues In General
- “Regarded As” Issues and Cases
- “Record Of” Issues and Cases
- “Association” Issues and Cases
- Practical Tips

ADA Coverage Issues

Overview





Classes Protected by ADA

To be protected by the ADA, a person must:

- Have a disability that substantially limits one or more major life activities;
- Be “regarded as” having a disability by the employer;
- Have a “record of” an ADA-qualifying disability; or
- Have a “relationship” or “association” with a person with such a disability.

Interpretations of these definitions of this would change under the ADA Amendments Act of 2008.

42 U.S.C. §§ 12102(2), 12112(b)(4);

See *also*, Great Lakes Brief on the ADA Restoration Act.

Definition of Qualified



- An employee must be "qualified" for his/her position.
- An employee is "qualified" for a position if s/he:
 - (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position and
 - (2) can perform the essential functions of the position, with or without reasonable accommodation.

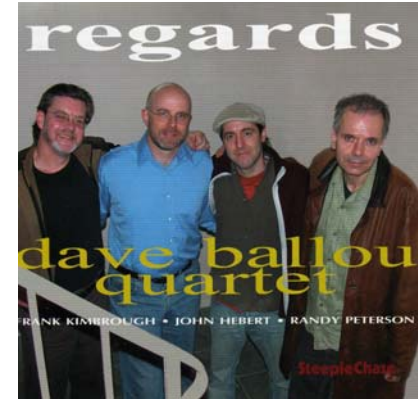
42 U.S.C. § 12111(8); 29 C.F.R. § § 1630.2(m), 1630.2(o); 29 C.F.R. pt. 1630 app. *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship.*

Employees “Regarded As” Having a Disability

Warm Regards



“Regarded As” Claims – In General



Generally, “regarded as” cases fall into two categories:

- The employer mistakenly believes that a person has an impairment that substantially limits a major life activity when the person does not have any impairment, or
- The employer mistakenly believes that an actual impairment substantially limits one or more major life activities when it is not so limiting.

Sutton v. United Air Lines, Inc. 527 U.S. 471, 487 (1999);

See also, 29 § C.F.R. 1630.2(I).

Employees Must Be Qualified

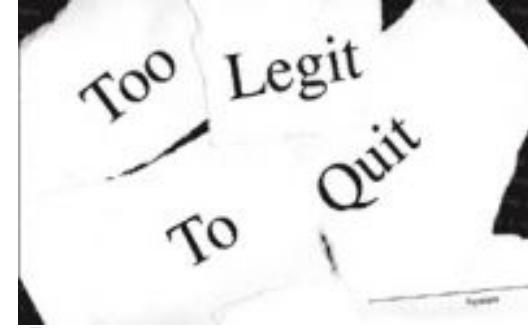
Generally, employers do not violate the ADA when there are valid, non-discriminatory reasons for adverse employment actions.

- The reasons must be legitimate, job-related and consistent with business necessity.
- In these situations, the employee would be unqualified, whether or not they have a disability under the ADA.
- However, if a reasonable accommodation would enable the employee to be qualified, it must be provided.

Examples of Valid, Non-Discriminatory Reasons



- The employee demonstrates poor job performance;
- The employee violates legitimate workplace rules;
- The employee poses a “direct threat” to the health or safety of themselves or others that cannot be eliminated or reduced by a reasonable accommodation.
- The employee is viewed as only being unable to perform one or more specific essential job functions;
- These should all be based on objective reliable criteria.



Employees Must Be Qualified

Employees must meet legitimate business expectations

- Attendance requirements;
- Quality requirements;
- Quantity requirements; and
- Complying with workplace rules;
 - ❖ Workplace rules should be job-related and consistent with business necessity.

Reasonable accommodations must be provided that would enable employees to meet qualification criteria.

Protection for Employers



Employers do not automatically demonstrate that they regard employees as having disabilities when they take employment actions such as:

- Providing FMLA or medical leave;
- Granting sabbaticals;
- Referring a client to an EAP; and
- Providing workplace modifications;
 - ❖ Employers should document that these modifications are not being provided under the ADA.

See, e.g., Berry v. T-Mobile USA, Inc., 490 F.3d 1211 (10th Cir. 2007);
Benko v. Portage Area School District, 2007 WL 2041977 (3rd Cir. 2007);
Lucas v. Methodist Hospital, Inc., 2006 WL 1307452, (7th Cir. 2006).

Factors in “Regarded As” Cases



Statements and Actions of Employers are Important.

- These may demonstrate that the employer regarded the employee as disabled, (which may be discriminatory);
or
- These may demonstrate that the employer regarded the employee only as being unable to perform certain essential job functions, (which would not be discriminatory).



Medical Evidence

The nature of medical evidence is important.

- Employers are on strong ground if there is medical substantiation for the conclusion that the employee cannot perform essential job functions.
- However, when employers rely on the opinion of company doctors and ignore contrary medical opinions, especially those of treating physicians, courts are less likely to find for the employer.

EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), <http://www.eeoc.gov/policy/docs/guidance-inquiries/html>.

“Regarded As” Case – *Hoard*



Hoard v. CHU2A, Inc., 2007 WL 1828269 (11th Cir. 2007).

- Employee was terminated one year after being diagnosed with Grave's disease
- During six months prior to termination, had consistent problems at work including:
 - ❖ Being unable to account for 300 hours of work time;
 - ❖ Several altercations with a supervisor and co-workers.
- Supervisor made comments that the employee “developed behavioral problems” & was “inappropriately aggressive.”

“Regarded As” Case – *Hoard*



Court's Ruling

- Court found supervisor's comments reflected employee's behavior at work, not misconceptions about his abilities.
- Court held that employer had a valid performance-related reason to terminate the employee, hence no ADA violation.

Analysis

- Employers should be careful about comments although they didn't hurt in this case.
- Always document performance concerns.
- Focus on conduct, not medical conditions.

“Regarded As” Case – *Squibb*



Squibb v. Memorial Medical Center.,
497 F.3d 775 (7th Cir. 2007).

- Employee, a registered nurse, was issued a permanent work restriction from lifting more than 25-30 pounds.
- Because of restriction, she could no longer perform the essential duties of her job & was reassigned to a new one.
- Because of continued frequent absences, employee was placed on administrative leave.
- Employee was later terminated when she refused to return to work in a new position

“Regarded As” Case – *Squibb*



Court's Ruling

- Medical restriction instituted by employee's physician meant that she was no longer qualified for her position
- Employee was not “regarded as” being disabled in the major life activity of working.
- Employer did not mistakenly believe that employee had a substantial limitation in working, only that she was limited to the extent of her doctor's restriction.

“Regarded As” Case – *Squibb*



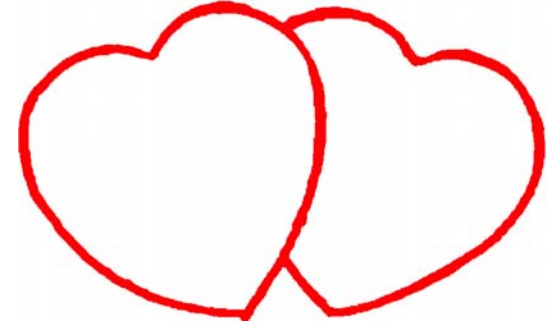
Analysis

- Employee’s medical information rendered her unqualified.
- When an employee is unqualified, employers may reallocate essential job functions but are not legally required to do so.
 - ❖ Therefore, reassignment, the accommodation of last resort, is the only available reasonable accommodation.
- Employee’s physician could have suggested reasonable accommodations that would have assisted her to lift; e.g. having co-worker assist or using assistive devices.

“Regarded As” Case – *Heartway*

EEOC v. Heartway Corporation,
466 F.3d 1156 (10th Cir. 2006).

- Employee was terminated from cooking position after employer learned she was being treated for Hepatitis C.
- Employer made the following comments:
 - ❖ “How would you like to eat food containing her blood, if she ever cut her finger?”
 - ❖ “If this got out to the clients they . . . would have a mass exodus from the nursing home.”



“Regarded As” Case – *Heartway*

Court’s Ruling

- Court found that these comments indicated that the supervisor subjectively believed that employee should not work in any kitchen.
- Therefore, employee was “regarded as” being disabled and was protected by the ADA even though the actual impairment was not substantially limiting.

Analysis

- While safety is important in the food industry, here the employer acted on stereotypes rather than medical info.

“Regarded As” Case – *Heartway Analysis Continued*



- Here, the employer regarded the employees limitations more broadly than the employer did in *Squibb*.
- See EEOC Guidance titled, “How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers,” found at: http://www.eeoc.gov/facts/restaurant_guide.html.
- EEOC Guidance cites conditions that are transmittable via food & explores employers’ obligations to provide reasonable accommodations to food service employees.
- Employers should base decisions on objective information not stereotypes, generalizations, or preconceptions.

“Regarded As” Case – *Taylor*



Taylor v. USF-Red Star Exp. Inc.,
2006 WL 3749598 (3rd Cir. 2006).

- Employee, a fork-lift driver, experienced two seizures.
- A neurologist determined that his medical tests were consistent with seizure disorder.
- Employee told employer that he had “infantile epilepsy.”
- Employer did not let employee RTW for > 18 months.
- During this time, employee was examined by 2 physicians who cleared him for work, but reversed their opinions after speaking to the a physician retained by the employer.

“Regarded As” Case – *Taylor*



Court's Ruling

- Employer's refusal to let the employee return to work was based on the assessment of doctors who were reporting to, and retained by, the employer.
 - ❖ Clearly, employer used the company doctor to get the other doctors to change their medical opinions.
- Thus, the court found that the employer regarded the employee as disabled and held that it violated the ADA.

Analysis

- It's dangerous for employers to rely solely on company physicians and ignoring contrary opinions.

“Regarded As” Case – *Justice*

Justice v. Crown Cork and Seal Co.,
527 F.3d 1080 (10th Cir. 2008).

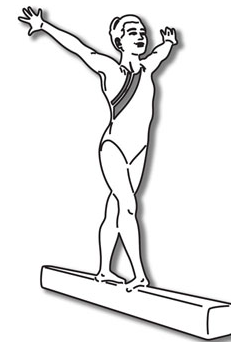
- Electrician had a stroke resulting in vertigo.
- He appeared unsteady to others, but had no difficulty walking or standing.
- Essential job functions included climbing ladders, walking on catwalks, and using power presses and cutters.
- Medical reports: No work at unprotected heights.
- He was able to work as an electrician with no problems until a new supervisor came on board and had concerns.
- Employer then requested several medical evaluations.

“Regarded As” Case – *Justice*



Justice v. Crown Cork and Seal Co., 527 F.3d 1080 (10th Cir. 2008).

- A physical therapist retained by the company initially cleared employee to work with safety equipment.
- However, after visiting work site, with the new supervisor, the PT recommended that employee find a new safer job.
- Final evaluation from Crown’s medical director restricted Justice from jobs that “require[d] him to maintain balance, work at heights, [or] work near moving equipment.”
- Employer then reassigned employee to a janitorial position (where he worked around moving equipment).
- Employee then filed at EEOC.



“Regarded As” Case – *Justice*

Court’s Ruling

- “Crown believed Justice's balance problems significantly restricted his ability to perform a broad range of jobs.” Therefore, he was “regarded as” disabled in working.
- **Issue of fact:** Was he qualified to work as an electrician?
- Justice was able to work safely with the unprotected height restriction, leading to the inference that he was able to do the electrician job despite this restriction.”
- “There is ... evidence that these hazards were imagined or exaggerated, and that Crown's purported reliance on Justice's medical restrictions was a pretext masking Crown's irrational fears about Justice's condition.

“Regarded As” Case – *Justice* Direct Threat Defense

Court’s Ruling

- Justice did not pose a “direct threat;” the potential harm was severe but the likelihood of that harm occurring was too small to constitute an imminent threat.

Analysis

- Be wary of the direct threat defense; it’s a strict standard.
- Employees “regarded as” posing a direct threat in any workplace may be “regarded as” substantially limited in the major life activity of working.
- Train new supervisors!
- Cases often involve multiple issues on defn. of disability.

Employees with a “Record of” a Disability

ROLLING STONES LET IT BLEED



ROLLING STONES - LET IT BLEED

The Rolling Stones
1969

“Record of” claims – In General



The “Record of” prong of the ADA’s “disability” definition covers employees who have:

- Histories of substantially limiting conditions that are not so limiting any more only because they are:
 - ❖ Controlled by medication (e.g., diabetes, epilepsy);
 - ❖ Assisted by reasonable accommodations (working);
 - ❖ No longer active (e.g., cancer, drug or alcohol use).
- Latent episodic conditions that have previously limited major life activities and would do so again if active (e.g., mental illness).
- Would change under the ADA Amendments Act of 2008.



Factors in “Record of” Cases

Employees must show that:

- They have a record of having an impairment that substantially limits at least one major life activity
 - ❖ Or that they were misclassified as having such an impairment;

AND

- Their employers knew of a substantially limiting condition.

“Record of” Case – *Sarmiento*

Sarmiento v. Henry Schein, Inc.,
2007 WL 4553408 (9th Cir. 2007).

- Employee with a back condition had a “record of” apparently minor lifting, bending, and pushing restrictions.
- “[A] lifting restriction impairing an employee's ability to work only one particular job is not “substantially limiting” and therefore not a ‘disability.’”
- Thus, the employee did not have a current disability, a “record of” a disability, and was not “regarded as” having a disability under the ADA.

“Record of” Case – *Kampmier*

Kampmier v. Emeritus Corporation.,
471 F.3d 930 (7th Cir. 2007).

- Employee had endometriosis and a record of surgeries without complications.
- Employee was terminated when she failed to report to work after indicating she would need another surgery.
 - ❖ She did not submit a required doctor’s note.
- Court held there was no “record of” a substantial limitation in a major life activity, therefore no ADA protection.



“Record of” Case – *Knight*

Knight v. Metropolitan Government of Nashville & Davidson County, Tennessee, 2005 WL 958237 (6th Cir. 2005).

- Employer refused to reinstate police officer after doctor cleared him to return to work from disability leave.
- Employee showed that supervisors told him:
 - ❖ City never reinstated officers after disability leave and had an unofficial policy to that effect;
 - ❖ City was afraid he would go back on disability leave;
 - ❖ Officers on disability leave are viewed as permanently “disabled”

“Record of” Case – *Knight*



- Knight also prevented evidence that he was sometimes unable to work at all because of his neck and back injuries while he was on disability leave.
- Court held employee had a “record of” a disability & the employer discriminated against him by not reinstating him.
- He was also “regarded as” having a disability.
- Jury awarded \$150,000 compensatory damages + reinstatement + back pay.
- **Analysis:** Employer statements hurt their case, but not as much as their policy of not reinstating officers after leave.



“Record of” Case – *Doe**

Doe v. The Salvation Army of the U.S.,
2008 WL 2572930 (6th Cir. 2008).

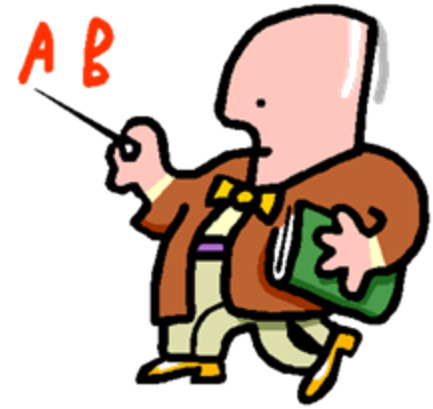
- After interviewee admitted he had used psychotropic medications for mental illness; interview was terminated.
- Court found that applicant had a “record of” a disability.
- The court held that the employer acted improperly when it refused to hire him based on this record.
- Employer may have also inappropriately asked Doe about the medications he was taking.



“Record of” Case – *Ainsworth*

Ainsworth v. Independent School District No. 3 Tulsa City, Oklahoma., 2007 WL 1180420 (10th Cir. 2007).

- Substitute teacher did not tell employer that he had a seizure disorder when he was hired.
 - ❖ As he did not require a reasonable accommodation, he was within his rights not to disclose his disability.
- Several months later, he told the substitute teacher coordinator about his seizure disorder, but did not describe how it affected him.



“Record of” Case – *Ainsworth*

- While on assignment, the substitute teacher exhibited unusual and inappropriate behavior.
 - ❖ In an 8th grade math class he wrote “sex” on the overhead projector & asked students to discuss their experiences.
- The principal reported the behavior to the substitute teacher coordinator who then decided to remove employee from the substitute teacher list.

“Record of” Case – *Ainsworth*



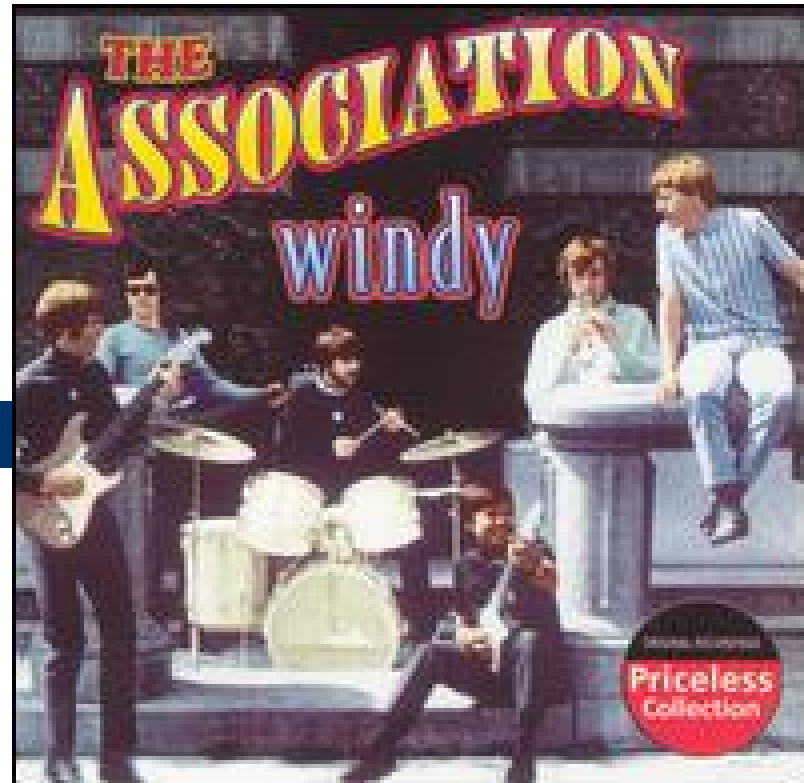
Court Ruling

- No evidence that employer knew of his “record of” an ADA qualifying disability, thus no discrimination.
- Inappropriate classroom behavior constituted grounds for terminating any teacher’s employment;
- Was a valid, nondiscriminatory reason for the termination.

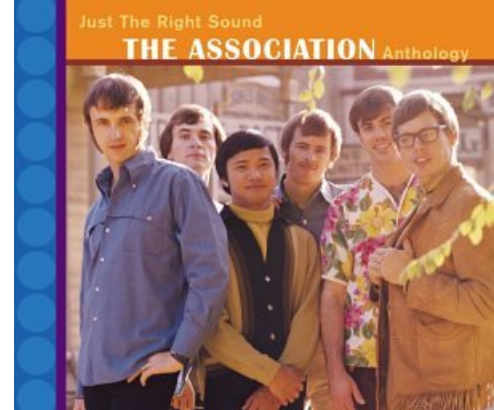
Analysis

- Employer documented and focused on conduct.
- Employees should be careful about disclosure, but should make sure they disclose enough info to establish disability when they do.

Discrimination on the Basis of An “Association”



“Association” claims – In General



The “Association” clause protects relatives and caregivers from adverse employment actions based on misconceptions, fears, or assumptions related to the individual’s relationship with a person with disabilities.

Employers may still take actions against employees for non-discriminatory reasons such as:

- Poor performance;
- Attendance problems;
- Direct threats related to their association with a person with disabilities (strict standard);
- Reductions in force made for valid business reasons.

“Association” claims – In General



Court have identified three situations in which the “association” clause may apply:

- Adverse action based on expenses that an employer may incur because of employee’s relationship with a person with disabilities; e.g. costs to an employer because of medical expenses;
- Employer regards employee as disabled because of relationship with someone with a disability (e.g., HIV)
- Employer fears that the associate’s disability may distract the employee from satisfactorily completing job duties.



Factors in “Association” Cases

- Whether the associate has an ADA-qualifying disability requires a case-by-case determination & an individualized assessment
- Whether the employer knew about the employee’s association with a person with a disability
- Whether the employer took adverse action against the employee because of this knowledge
 - ❖ Does not need to be the only factor, but must be a determining factor in the employer’s decision.

Ennis v. National Ass’n of Business and Educational Radio, Inc.,
53 F.3d 55, 59 (4th Cir. 2008).

“Association” Case – *Ennis*



Ennis v. National Ass’n of Business and Educational Radio, Inc., 53 F.3d 55 (4th Cir. 1995).

- Employee, guardian for a child who was HIV-positive, was warned several times about her poor performance.
 - ❖ *E.g.*, late work and frequent errors.
- Employer terminated her because of poor performance.
- Employee claimed she really was terminated because of her son’s expensive medical bills.
 - ❖ A memo six months prior to termination warned that a few expensive cases could dramatically increase the company’s insurance rates.

“Association” Case – *Ennis*



Court Ruling

- Employee did not establish that:
 - ❖ Her son’s HIV qualified him for ADA-protection because it substantially limited a major life activity;
 - ❖ Her employer actually knew of her son’s condition.
 - ❖ There was a connection between her employer’s memo about insurance rates and her termination
 - Too distant in time to indicate a connection (7 mths)
 - No evidence that employer specifically feared her son’s medical bills.



“Association” Case – *Ennis*

Court Ruling

- Poor performance is a valid nondiscriminatory basis for terminating employment. (Undisputed)

Analysis

- Always document poor performance and follow policies regarding progressive discipline.
- HIV status was not seen as a *per se* disability.
 - ❖ But see, *Bragdon v. Abbott*, 524 U.S. 624 (1998), (A person with asymptomatic HIV was protected by the ADA as a person with a disability.
- Was son “regarded as” having a disability?

“Association” Case – *Trujillo*

Trujillo v. PacifiCorp, 524 F.3d 1149 (10th Cir. 2008).

- Employees’ son developed a brain tumor and accumulated at least \$62,000 in medical bills under the employer’s health plan. Employer was self-insured.
- Within weeks of a relapse, both parents were terminated, purportedly for falsifying time sheets.
- Employer was inconsistent in time sheets procedures;
- PacifiCorp designated claims > \$50,000 as high-dollar ones, concerning supervisors.
- Co. had a “keen eye” on costs; each employee’s healthcare costs were factored into budget as labor costs.

“Association” Case – *Trujillo*



Court Ruling

- Temporal proximity between relapse & investigation into time sheets (11 days) suggested a causal relationship
- There was disparate treatment of these employees.
- To determine whether employers have non-discriminatory reasons, courts consider “weaknesses, implausibilities, inconsistencies, or contradictions...”
- Court distinguished *Ennis*, due to differences in temporal proximity and knowledge and concern of employer.

“Association” Case – *Trujillo*

Analysis

- Employer’s concerns about med. costs & suspicious discipline created an inference of discrimination.
- Consistency in procedures among managers is important.
- Document all employment decisions to establish that actions are taken for legitimate business reasons.
- However, the burden is still on the employee to demonstrate pretext.
- *But see, Larimer v. I.B.M.*, 370 F.3d 698 (7th Cir. 2004), where employee did not try to show concern by employer.



“Association” Case – *Erdman*

Erdman v. Nationwide Insurance,
510 F.Supp.2d 363 (M.D. Pa. 2007)

- New supervisor revoked employee’s PT schedule to care for her child with a heart condition and Down’s syndrome.
- She agreed to go FT but was told her scheduled vacation was no longer approved. Employee sought FMLA leave.
- On same day, supervisor heard employee using improper language, “This is a personal call and should not be reviewed for quality purposes, a*****s.”
- Employee was terminated her the following day.

“Association” Case – *Erdman*



Court Ruling

- Employer may have violated the ADA.
- Revoking vacation time and denying FMLA leave showed employer’s concern with time needed for child care.
- No ADA violation by revoking the PT schedule – there are no reasonable accommodation in “record of” cases.

Analysis

- Don’t put ADA covered employees under a microscope.
- No FMLA violation as employee was not FMLA-eligible.
- ADA may also provide leave.

Practical Tips for Employers



- Base actions on observable conduct, not medical conditions, assumed traits of conditions, or suspected conditions.
- Perform “individualized assessments.”
- Document events relevant to decisions.
- Be careful of relying only on a company dr.
- Follow proper procedures in seeking medical info.
- All employees must be qualified.

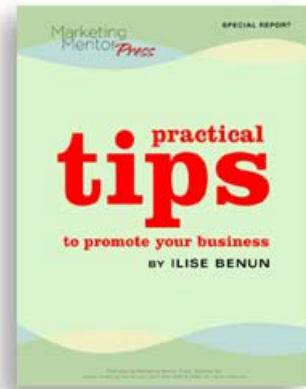
Practical Tips for Employers

- Train all new supervisors.
- Train staff on a regular basis.
- “Adverse employment actions” is broadly defined.
- Don’t give in to fears, stereotypes, or assumptions
- Be wary of finding an employee a “direct threat.”
 - ❖ Must have supporting medical evidence.
 - ❖ May mean employee is regarded as substantially limited in working.
 - ❖ Use the “best available objective medical evidence.”
 - ❖ Examine reasonable accommodations



Practical Tips for Employees

- Document everything relevant including statements and actions of supervisors.
- Disclosure of a disability is not required unless a reasonable accommodation is needed.
- You may need to request a reasonable accommodation to be qualified.
- Reasonable Accommodations are generally not required in “regarded as,” “record of,” or association cases.

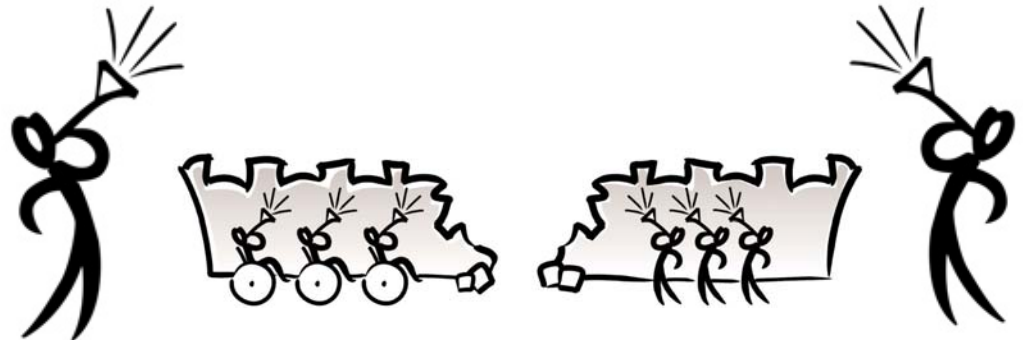


Practical Tips for Employees

- Disclose necessary information in connection with an accommodation request, including:
 - ❖ The medical condition;
 - ❖ (Substantial) Limitations caused by the condition;
 - ❖ A suggested accommodation, if known;
 - ❖ How the accommodation would be effective..
- While filing a claim of discrimination, plead all three prongs of the definition of “disability.”

ADA Coverage Beyond Disabilities: Regarded As, Record Of, and Association

THE END



Thank you for Participating In Today's Session



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September 23, 2008

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