



# OEDCA DIGEST



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## SUMMARIES OF SELECTED DECISIONS ISSUED BY THE OFFICE OF EMPLOYMENT DISCRIMINATION COMPLAINT ADJUDICATION

### FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final agency decision on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include "pre-offer" medical examinations, compensatory *vs.* punitive damages, threatening complainants with lawsuits, racial harassment, disability accommodation (preferred *vs.* effective), Equal Pay Act claims, and findings of "reprisal *per se.*"

Also included in this issue is an article addressing romantic relationships with subordinate employees, and a recent fact sheet from the EEOC explaining how *The Americans with Disabilities Act* (ADA) might apply to job applicants and employees with epilepsy.

The *OEDCA DIGEST* is now available on the World Wide Web at: <http://www.va.gov/orm/newsevents.htm>.

CHARLES R. DELOBE

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## I

### **REQUIREMENT THAT APPLICANT FOR RN POSITION UNDERGO MEDICAL EXAM PRIOR TO JOB OFFER VIOLATES “REHABILITATION ACT”**

The procedure for hiring nurses in the VA differs significantly from the hiring procedures normally used for hiring most other Federal employees. VA hires its nurses under the authority provided by Title 38 of the United States Code and implementing regulations issued by the Secretary of Veterans Affairs.

Title 38 gives the Secretary wide latitude to determine nurse qualifications and make appointments “without regard to civil service requirements.”<sup>1</sup> The question that arose in this case was whether VA Directive 5005 (*Staffing*), which requires “pre-employment” medical examinations of RN applicants violated *The Rehabilitation Act of 1973*. After reviewing the facts of the case, OEDCA concluded that the requirement violated the Act or, at the very least, nursing officials at one VA hospital were interpreting the requirement in a manner that violated the Act.

The nurse in question applied for an RN staff nurse position. He had previously sustained a serious back injury

when a patient, whom he was trying to help, fell on him. As a result, the nurse is unable to lift more than 20 pounds. Shortly after receiving his application, nursing officials referred him to the VA Employee Health Physician for a physical examination.

The examining physician issued a report finding that the applicant was unqualified for an RN staff nurse position because of his lifting restriction. As a result, he was not referred to the Nurse Professional Standards Board (NPSB) for further consideration. He then filed a complaint alleging discrimination due to his disability.

After reviewing the evidence, OEDCA concluded that the nurse applicant was unqualified for the position by virtue of his lifting restriction. Hence, VA did not discriminate against him because of his disability when it did not hire him as an RN.

However, OEDCA also concluded that nursing officials committed a technical violation of *The Rehabilitation Act* when they required him to undergo a medical examination prior to deciding whether to make a job offer (*i.e.*, during the “pre-offer” stage). Those officials justified their action by pointing to VA Directive 5005, which states that a “pre-employment” physical examination is required of all employees appointed under Title 38. Moreover, they testified that they had always interpreted this directive as requiring a successful medical exam prior to refer-

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<sup>1</sup> Despite this language, VA’s Title 38 hiring procedures are subject to the requirements of *The Rehabilitation Act of 1973*.



ral of the applicant to the NPSB for further consideration.<sup>2</sup>

Such an interpretation, however, fails to comply with *The Americans with Disabilities Act of 1990* and EEOC's regulations and enforcement guidance implementing the Act.<sup>3</sup> The regulations and guidance prohibit employers from making disability-related inquiries or requiring medical examinations prior to an offer of employment, even if they are job-related.

The proper procedure in this case would have been referral to the Board for review of the applicant's administrative, educational, and experiential qualifications and credentials. Then, if the Board is inclined to make a job offer, it may make such offer conditional upon successful completion of a medical examination, provided such an examination is required of all entering RNs.

Obviously, the applicant in this case would have failed the medical examination and would not have been hired, even if proper procedures had been followed. Nevertheless, the facility violated *The Rehabilitation Act* when it required a "pre-offer" medical examination.

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<sup>2</sup> This interpretation is understandable. It would not seem logical to someone unfamiliar with disability law to refer an applicant to a Board, and then make a job offer following Board action, if the applicant is medically unqualified to begin with. We suspect that other VA facilities may be interpreting this directive in a similar manner.

<sup>3</sup> These regulations also apply to *The Rehabilitation Act of 1973*, which governs Federal employment.

As a result of this case, the VA's Office of General Counsel issued a formal opinion<sup>4</sup>, which concludes that the language of VA Directive 5005 pertaining to the requirement for "pre-employment" medical examinations under Title 38 could be construed as inconsistent with *The Rehabilitation Act*. Accordingly, OGC has recommended to the Veterans Health Administration that it revise the directive to clarify that medical examinations are to be conducted after a job offer has been made.

## II

### ***EEOC JUDGE'S "COMPENSATORY" DAMAGES AWARD HELD TO BE PUNITIVE RATHER THAN REMEDIAL***

This case highlights the difference between compensatory damages and punitive damages. The former compensate a victim for actual harm or injury suffered as a result of unlawful conduct. The latter punish the wrongdoer for engaging in the unlawful conduct, regardless of whether the victim suffers any actual harm or injury.

Under Section 102 of the Civil Rights Act of 1991, Federal employees who succeed in proving that they have been the victim of unlawful discrimination may be entitled to compensatory damages, upon requisite proof, up to

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<sup>4</sup> VAOPGCADV 4-2004, 2/23/04.



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\$300,000.<sup>5</sup> Punitive damages, on the other hand, are not available against governmental entities. Thus, in the EEO context, the Federal government must compensate employees for harm or injuries shown to have resulted from unlawful discrimination; but it cannot be “punished” by means of a punitive damage award for the actions or behavior of its employees.

In this case, an EEOC judge found that a VA facility had discriminated against an employee on the basis of disability (mental) in connection with a nonselection for a Police Officer position. After the nonselection, the employee’s mental condition declined significantly, and he eventually accepted a disability retirement. By way of relief, the judge awarded the employee back pay and nonpecuniary “compensatory” damages in the amount of \$17,500 for emotional harm.

After reviewing the evidence of record and the judge’s decision, OEDCA issued a Final Order accepting and implementing both the judge’s finding of discrimination and the back pay award; but rejecting and appealing the judge’s award of compensatory damages.

On appeal, the EEOC’s Office of Federal Operations agreed with OEDCA’s Final Order and declined to award damages. The OFO agreed with OEDCA that the judge’s decision awarding compensatory damages was

improper because the award did not represent compensation for harm caused by the discrimination; but was, instead, nothing more than a punitive sanction against the VA for having engaged in the unlawful discrimination. As noted by OEDCA in its appeal, the EEOC judge specifically stated in his decision that “the evidence ...does not establish that the discriminatory conduct was the proximate cause of the [employee’s] subsequent need to seek disability retirement.” The judge also noted that the employee was not credible regarding his claim for damages; and that while his medical information referenced numerous causes and events throughout his life that contributed to his mental state, his nonselection was not one of them.

Despite these findings, the EEOC judge went on to state that “damages” should be awarded because, “in view of the flagrant and egregious manner in which [management] discriminated against complainant in not selecting him for the advertised position, it is reasonable to assume, and I find, that the unlawful discrimination against complainant exacerbated his mental problems.”

Both OEDCA and EEOC noted that the judge’s conclusion was inconsistent with his findings and unsupported by any evidence in the record. Moreover, because the judge prefaced his conclusion by citing the “egregious”

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<sup>5</sup> Compensatory damages are not available if the finding of discrimination is based on age.



nature of the discrimination<sup>6</sup>, it was clear that the judge's award was a sanction designed to punish the VA for discrimination, not a remedy designed to compensate the employee for harm caused by the discrimination. Thus, although the judge labeled the damage award as "compensatory", it was in reality a punitive damage award. Such awards are not authorized in cases where the employer is a government or governmental entity.

### III

#### **RETALIATION FOUND WHERE SUPERVISOR THREATENED EMPLOYEE WITH A LAWSUIT.**

*(The following is not a VA case, but we are reporting it because it contains an important lesson for supervisors who are accused of sexual harassment.)*

The facts of the case are relatively simple. An employee (hereinafter referred to as "complainant") at the Federal Aviation Administration (FAA) testified before the Congressional Subcommittee on Aviation. During his testimony, he mentioned by name several supervisors at his facility as perpetrators of misconduct; namely, sexual harassment and retaliation for participating in the EEO process at the facility.

One week later, one of the supervisors, who was mentioned by name at the

hearing, made a statement to one of the complainant's coworkers. The coworker reported the statement to both the complainant and a human resources manager. According to the coworker, the supervisor told him that he was having his lawyer "look into" complainant's assets as a preliminary step to filing a civil action against the complainant. The coworker later told an EEO counselor that he took the statement to be a veiled threat against anyone who filed EEO complaints.

The complainant, believing he was the victim of retaliation, filed an EEO complaint wherein he alleged, among other things, that the statement made by the supervisor to his coworker constituted retaliation *per se*, even though the supervisor did not communicate the threat directly to him, and even though the supervisor never followed through on his threat to sue. The FAA issued a final agency decision finding no retaliation, arguing that the supervisor did not retaliate because he took no adverse action against the complainant (essentially a "no harm done" defense).

The complainant appealed the FAA decision to the EEOC's Office of Federal Operations. The OFO agreed with the complainant's arguments and found in his favor. In its appellate decision<sup>7</sup>, the EEOC noted that Title VII and other similar civil rights statutes prohibit retaliation against a worker for engaging in "protected activity."

<sup>6</sup> The judge did not explain his rationale for finding management's actions in this case to be "egregious."

<sup>7</sup> Reed v. DOT (FAA), EEOC Appeal No. 01A05085 (May 20, 2003)



The EEOC interprets these statutory retaliation clauses to prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter an individual from engaging in protected activity, including threats and harassment that occur in and out of the workplace. A violation occurs even if the supervisor ultimately takes no adverse action against the employee. It is unlawful merely to attempt to restrain or interfere with the individual's right to participate in the EEO process or to oppose unlawful discriminatory activity.

The EEOC and many courts have held that threats to file lawsuits in response to an individual's EEO protected activity constitute retaliation *per se*. The reason, of course, is the chilling effect such threats can have on the free exercise of rights granted by law. Individuals confronted with such threats must weigh the risk of incurring the substantial cost involved in defending themselves in the civil action against the desirability of obtaining a remedy for the alleged discrimination.

Supervisors are cautioned that any attempt, however subtle, to interfere with or restrain the free exercise of EEO rights may result in a finding of retaliation. In addition, as a general rule, supervisors would be well-advised not to mention the fact that an individual has filed an EEO complaint, as the EEOC has frequently found such comments to constitute evidence of a retaliatory motive. Even

negative comments by supervisors about the EEO complaint process in general have been cited either as evidence of retaliatory intent, or as grounds for a finding of reprisal *per se* because of the chilling effect of such comments.

Interestingly, the EEOC found reprisal in this case even though the supervisor did not communicate his threat directly to the complainant. The rationale, no doubt, was the near - if not absolute - certainty that the coworker would mention the threat to the complainant. Moreover, by communicating the threat to a third party, the supervisor was effectively threatening not only the complainant, but also others in the office, as evidenced by the coworker's remark to the EEO counselor that he too felt threatened by the supervisor's comment.

## IV

### ***RACIAL HARASSMENT OF SUBORDINATE EMPLOYEE RESULTS IN FINDING AGAINST THE VA***

The complainant, an Animal Caretaker since 1988, alleged numerous incidents of a racially harassing nature occurring over a period of several years. He also alleged that many of these incidents occurred because he is an African-American male and in retaliation for his complaints about racial harassment.



Some of the incidents involved racially derogatory and insulting comments and epithets. Other incidents had racial overtones, such as his supervisor bringing a cotton plant to his office and telling him to stop complaining about discrimination and “think about how lucky you are.” Other examples of the supervisor’s behavior included telling coworkers that the complainant was stalking a white female employee; drawing pictures depicting African-Americans in an unfavorable light; and allowing circulation of a drawing of KKK clansmen surrounding the complainant.

Although the supervisor denied that the incidents occurred, OEDCA concluded that the preponderance of the evidence in the record supported the complainant’s claims. One witness, a coworker, corroborated several of the allegations, and another witness testified that the complainant frequently told her about the supervisor’s racist behavior. One witness testified that she witnessed a hostile environment, but was reluctant to be more specific out of fear for her job. Moreover, OEDCA concluded that the supervisor lacked credibility because of his inconsistent testimony.

OEDCA further concluded that the VA was liable, as it failed to prevent further harassment, despite being advised of the problem on numerous occasions. Complainant first reported the racial hostility to the former Associate Chief of Staff for Research (deceased) in 1990, and again in 1994.

No action was taken. In 1996, he contacted an EEO Counselor, who discussed the problem with management officials. Again, no action was taken. In 1997, he complained to the former Chief of Staff for Research and the former Systems Specialist (retired). Once again, no action was taken.

## V

### ***EMPLOYEE NOT ENTITLED TO ACCOMMODATION OF CHOICE***

A part-time Food Service Worker sustained an on-the-job injury involving his back, shoulder, and elbow. After a six-month absence, he returned to duty, subject to certain physical restrictions, which included no bending or stooping and no lifting of more than two pounds continuously or four pounds intermittently.

After temporarily performing light duty assignments in the Office of Human Resources, he was given light duty assignments in the domiciliary kitchen.

The complainant objected to his assigned tasks, claiming that they exceeded his medical restrictions. Cleaning the salad bar required bending and stooping, and carrying cardboard boxes to the garbage violated his lifting restriction.

The preponderance of the evidence, however, demonstrated that all of the complainant’s light duty tasks, with



the exception of cleaning the salad bar, could be performed without violating the specified medical restrictions. As soon as the complainant objected to cleaning the salad bar, management eliminated that task from his duty list.

OEDCA concluded that, while the complainant was a qualified individual with a disability, management had satisfied its obligation to provide him with a reasonable accommodation. Dissatisfied with OEDCA's decision, the complainant appealed. On appeal he argued that the accommodation was insufficient because he had expressed a preference to be placed in the "Meet and Greet" program rather than in the kitchen.

The EEOC rejected the complainant's argument and affirmed OEDCA's finding of no discrimination. In so doing, EEOC noted that *The Rehabilitation Act* of 1973 and its implementing regulations do not require an employer to provide an employee's preferred accommodation as long as the employer provides an effective accommodation. If there are two possible reasonable accommodations and one costs more or is more difficult or burdensome, the employer may choose the less costly or less burdensome alternative, as long as it is effective. The employer is not required to show that it would be an undue hardship to provide the more expensive or burdensome alternative. If more than one accommodation is effective, the preference of the individual should be given primary consid-

eration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations.<sup>8</sup>

## VI

### ***OEDCA'S REJECTION OF JUDGE'S FINDING OF SEX-BASED WAGE DISCRIMINATION UPHELD BY EEOC***

The Equal Employment Opportunity Commission recently affirmed a Final Order issued by OEDCA wherein it rejected an EEOC judge's decision that found an Equal Pay Act violation involving six licensed practical nurses (LPNs). The judge issued her decision without holding a hearing.

Six female LPNs filed a discrimination complaint alleging that they were being paid less than a male LPN [hereinafter "comparator"] despite having duties and responsibilities substantially equal to those of the comparator.

The medical center hired the comparator in September 2000 as an LPN, GS-6, Step 9, which amounted to an annual salary of \$33,238.00. The six complainants were hired between 1982 and 1998, some at the GS-5 level and some at the GS-6 level. At the time of the comparator's hire, five of the six complainants were making less than the comparator's starting salary.

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<sup>8</sup> See, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act*, Q&A 9 (10/17/02).



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In response to alleged Equal Pay Act violations, facility officials presented an affirmative defense; *i.e.*, that the pay differentials were based on a legitimate factor other than sex. Specifically, the facility noted that there had been an LPN shortage during the preceding two to three year period, and that it was having difficulty attracting well-qualified LPNs. Initially, the facility had offered the comparator a job at the GS-5 level, but he rejected the offer, as it was less than his then-current salary in the private sector. He thereafter requested a comparable salary, and the facility agreed, but only after (1) confirming his private sector salary, (2) requesting and obtaining additional information from the comparator regarding his qualifications and experience, and (3) determining that he was qualified for the GS-6 level based on the additional information he provided.

The EEOC administrative judge concluded from the above facts that an Equal Pay Act violation had occurred. Specifically, she found that the comparator was not better qualified than the six complainants in terms of qualifications or skills; that the jobs involved similar working conditions and were substantially equal in terms of skill, effort and responsibility; and that the facility had initially qualified the comparator only for a GS-5 level position.

After reviewing the record, OEDCA concluded that the judge's analysis was incorrect and that the facility had

persuasively demonstrated that the comparator's higher salary rate was based on a legitimate factor other than sex. All six complainants appealed OEDCA's Final Order, but the EEOC's Office of Federal Operations affirmed the Final Order, finding no EPA violation and no intent to discriminate on the basis of gender.

The Commission found that three of the six complainants had failed to establish even a *prima facie* case, because one of them was earning more than the comparator at the time of the comparator's hire, and two of them (both GS-5s) had jobs whose skill, effort, and responsibility were not comparable to those of the comparator.

The Commission found that the remaining three complainants did establish a *prima facie* case because, like the comparator, they were functioning at the GS-6 level in comparable jobs, yet were making less than the comparator's starting salary at the time he was hired.

The Commission next concluded that OEDCA was correct in finding that the pay differentials were justified based on the LPN shortage and the need to match the comparator's private sector salary. The complainants did not dispute the existence of the shortage. In fact, one of them conceded in her affidavit that there was such a shortage. Moreover, the record indicated that the problems caused by the shortage were exacerbated by recent staffing changes that resulted in



a reduction in the number of registered nurses and a corresponding increase in the need for LPNs. In addition, the evidence confirmed that the facility had five LPN vacancies for which it had been recruiting aggressively for well over a year prior to the comparator's hire.

Finally, the Commission found no evidence to support the judge's finding that the facility had intentionally discriminated on the basis of gender.

The facts of this case are not uncommon. Many Equal Pay Act claims filed against the VA stem from pay differentials caused by recruiting difficulties and the need to match private sector salaries. Such differentials can obviously cause morale problems. Nevertheless, the Equal Pay Act does permit employers to consider prior or current salary along with market demand; and such considerations, if reasonable, will constitute "a factor other than sex", an affirmative defense that excuses the employer from liability. Other affirmative defenses available under the Act include differentials based on a seniority system, a merit system, or a system based on quantity or quality of production.

## VII

### ***ADVISING INTERVIEW PANEL OF EMPLOYEE'S EEO COMPLAINT FOUND TO BE REPRI-SAL "PER SE"***

A finding of reprisal does not necessarily require an adverse action against an employee, as the manager in the following case discovered.

The complainant applied for the position of Supervisory IT specialist. The applicants were referred to an interview panel consisting of subject matter experts who interviewed the applicants using performance-based interviewing techniques. The panel then recommended the person whom they considered to be the best-qualified applicant to the selecting official (SO). The SO accepted the panel's recommendation, and the complainant was later notified of his nonselection. The complainant filed an EEO complaint alleging that he was better qualified than the selectee was, and that his race and prior EEO complaint activity (*i.e.*, reprisal or retaliation) were the real reasons for his nonselection.

After conducting a hearing and reviewing the evidence, an EEOC administrative judge found that the complainant's qualifications were not clearly superior, and that the interview panel's recommendation was supported by a preponderance of the credible evidence and was not influenced by the complainant's race or prior EEO complaint activity. Moreover, the evidence showed that the SO, as a matter of practice, always accepted the recommendation of an interview panel when making selections. Thus, the interview panel was always the *de facto* decision maker.



These findings notwithstanding, the judge went on to find that the Department engaged in reprisal “per se” because of a comment made by the selecting official to two of the interview panel members prior to the interviews; namely, that the complainant had previously filed an EEO complaint. The testimony of two of the panel members indicated that the SO had mentioned this fact to them at some point prior to the interviews. They also, testified, however, that the SO’s comment in no way influenced their recommendation, and the judge found their testimony to be credible and supported by persuasive evidence in the record.

So, if the panel’s recommendation was not influenced by the complainant’s prior EEO activity, why the finding of reprisal? The answer is that the SO’s comment to the panel members could have influenced their recommendation, and such a comment, in itself, is sufficient to support a finding of reprisal “per se” (*i.e.*, a technical finding). Contrary to the rulings of several Federal appellate courts, the EEOC’s regulatory guidance on reprisal (retaliation) currently permits a finding of reprisal even in the absence of an adverse action influenced by retaliatory motive. In other words, where the conduct of an official could have a chilling effect on the exercise of rights under civil rights laws, a finding of reprisal *per se* is permitted, even if there is no adverse action involved, or there is no evidence that an adverse action

was actually influenced by a retaliatory motive.

For example, a mere comment by a management official to an employee that he does not appreciate EEO complaints being filed against his organization would be actionable (*i.e.*, would state a claim of reprisal), even if no adverse actions ensue. The reason is the likelihood that such a statement will deter employees from the exercise of their EEO rights.

Of course, if there is no adverse action involved, or no evidence that an adverse action was influenced by such a statement, the relief available to an individual who prevails on such a claim may be limited.

As we have noted in several previous editions of the *OEDCA Digest*, managers should avoid making comments about the EEO complaint process, or about employees who utilize that process, as such comments could result in a finding of reprisal *per se*, or might be used as evidence in support of a finding that retaliation was the motivating factor behind an adverse action.

## VIII

### **ROMANCING SUBORDINATES IS RISKY BUSINESS**

*The following article is reproduced with permission of “FEDmanager”, a weekly e-mail newsletter for Federal executives, managers, and supervisors published by the Washington,*



*D.C. law firm of Shaw, Bransford, Veilleux, and Roth, P.C. Although Valentine's Day has come and gone, the advice contained in this article is nonetheless timely.*

With the approach of Valentine's Day, it's a good idea to review some of the guidelines for managers and supervisors when it comes to workplace romantic relationships. Contrary to popular belief, there is no specific law prohibiting federal managers from having romantic relationships with their subordinate employees.

With that said, though, managers need to tread carefully and use common sense. Romantic relationships between supervisors and subordinates are generally a bad idea. They can lead to inquiries by higher-level managers and to serious perception problems within the workplace. For instance, if the manager's other subordinates learn of the relationship, they may think that the manager's romantic partner is receiving preferential treatment, such as higher performance appraisal ratings, performance awards, or promotions. Also, the manager may be slow in taking disciplinary action if a romantic partner/subordinate employee engages in misconduct. All of this could lead to an embarrassing administrative investigation, EEO complaints, and/or discipline prompted by the manager's other employees feeling that they are being treated differently.

Moreover, managers need to think about what could happen if the romantic relationship sours or ends.

Not only could it cause an uncomfortable situation in the office, but the former romantic partner/subordinate employee could later file a sexual harassment complaint against the manager, especially if the manager appears to be giving that employee less favorable treatment after the change in the romantic relationship. On the other hand, if the manager is the one left unhappy, then the manager, either subconsciously or intentionally, may take an adverse action against the subordinate to retaliate against the subordinate ending the relationship.

Finally, whether the romantic relationship is brewing, ongoing, or over, it is often hard for people to completely leave the romantic relationship outside of the workplace, which could expose the manager to potential liabilities. With that in mind, managers and subordinates should keep their interactions on a professional basis. If a relationship develops with a subordinate, it is a good idea for either the manager or subordinate to seek a reassignment to avoid any questions. In fact, some agencies require such separations to occur if a relationship develops.

The bottom line is that workplace romances between bosses and their workers carry legal and professional entanglements (but not prohibitions) and are best avoided.



## IX

### **QUESTIONS AND ANSWERS ABOUT EPILEPSY IN THE WORK- PLACE AND THE AMERICANS WITH DISABILITIES ACT (ADA)**

#### **Introduction**

The Americans with Disabilities Act (ADA) is a federal law that prohibits discrimination against individuals with disabilities. Title I of the ADA covers employment by private employers with 15 or more employees as well as state and local government employers of the same size. Section 501 of the Rehabilitation Act provides the same protections for federal employees and applicants for federal employment. In addition, most states have their own laws prohibiting employment discrimination on the basis of disability. Some of these state laws may apply to smaller employers and provide protections in addition to those available under the ADA.

The U.S. Equal Employment Opportunity Commission (EEOC) enforces the employment provisions of the ADA. This document explains how the ADA might apply to job applicants and employees with epilepsy.<sup>(1)</sup> Topics discussed include:

- when epilepsy is considered a disability under the ADA;
- when an employer may ask an applicant or employee questions about epilepsy and how it

should treat voluntary disclosures;

- what types of reasonable accommodations employees with epilepsy may need;
- how an employer should handle safety concerns about applicants and employees with epilepsy; and
- how employers can ensure that no employee is harassed because of epilepsy or any other disability.

#### **General Information About Epilepsy**

About 2.3 million people in the United States or one percent of the population have some form of epilepsy, with more than 180,000 new cases diagnosed each year in Americans of all races and ages.<sup>(2)</sup> Epilepsy is a general term that includes various types of seizures. A seizure happens when abnormal electrical activity in the brain causes an involuntary change in body movement or function, sensation, awareness, or behavior. People diagnosed with epilepsy have had more than one seizure, and they may have had more than one kind of seizure. A seizure can last from a few seconds to a few minutes. Some individuals recover immediately from a seizure, while others may be dazed and sleepy for a period of time following a seizure. The severity of epilepsy and the type of seizure vary from person to person.<sup>(3)</sup> For most people with epilepsy, no single cause has been determined. Seizures may result from illness (includ-



ing high fever), head trauma, stroke, brain tumor, poisoning, infection, inherited conditions, brain disorders, or problems during fetal development.

Individuals with epilepsy successfully perform all types of jobs, including heading corporations, teaching and caring for children, and working in retail and customer service positions. Individuals with epilepsy also can perform jobs that might be considered "high-risk," such as police officer, firefighter, welder, butcher, and construction worker. Yet, many employers wrongly assume that people with epilepsy automatically should be excluded from certain jobs.<sup>(4)</sup> For example, many employers believe that anyone with epilepsy cannot safely operate certain types of machinery, drive, or use computers.<sup>(5)</sup> The reality is that because antiseizure medications and other treatment methods totally control seizures for more than half of the people with epilepsy, many employers do not know when someone in the workplace has this condition. Some people whose epilepsy is not completely controlled experience a sensation or warning called an "aura" that lets them know that they are about to have a seizure. Many other people with epilepsy only have seizures while asleep (nocturnal seizures) or seizures that do not cause loss of consciousness or motor control.

Some employers also fear hiring individuals with epilepsy because they are concerned about higher workplace insurance rates or believe that employ-

ees with epilepsy will use a lot of sick leave. Workplace insurance rates, however, are determined by how hazardous the type of work is and by an employer's overall claims record in the past, not by the physical condition of individual employees. There is no evidence that people with epilepsy are more prone to accidents on the job than anyone else. Finally, because medications usually can control seizures for most people, they do not need to take time off from work because of their epilepsy.

## ***1. When is epilepsy a disability under the ADA?***

Epilepsy is a disability when it substantially limits one or more of a person's major life activities. Major life activities are basic activities that an average person can perform with little or no difficulty, such as walking, seeing, hearing, speaking, breathing, performing manual tasks, caring for oneself, learning, and working. Major life activities also include thinking, concentrating, interacting with others, reproduction, and sleeping.

Epilepsy may be a disability because of limitations that occur as the result of seizures or because of side effects or complications that can result from medications used to "control" the condition.

*Example:* A court concluded that an individual who had brain surgery to control seizures, but still continued to experience two or three seizures per



month, was an individual with a disability because she was substantially limited in several major life activities, such as walking, seeing, hearing, speaking, and working, while having a seizure and often was limited in caring for herself (sometimes for more than a day) following particularly severe seizures.

*Example:* Some individuals take drugs that control their seizures but make them drowsy, unable to concentrate, or unable to sleep. An individual who is substantially limited in major life activities such as sleeping, thinking, concentrating, or caring for himself as a result of these side effects would have a disability under the ADA.

Epilepsy also may be a disability because it was substantially limiting some time in the past (*i.e.*, before seizures were controlled).

*Example:* A job applicant has had epilepsy for five years. For the past three years she has been seizure-free, but prior to that she experienced severe and unpredictable seizures. As a result, she had to move back home with her parents because she could not live alone, she was unable to drive, and rarely socialized with friends because she feared having a seizure in public. Even if the individual's epilepsy is not now substantially limiting, it substantially limited major life activities such as caring for herself and interacting with others in the past.

This individual has a record of a disability.

Finally, epilepsy is a disability when it does not significantly affect a person's everyday activities, but the employer treats the individual as if it does.

*Example:* An employer who refuses to hire someone with epilepsy because it assumes the individual is incapable of working without hurting himself or others regards the individual as having a disability.

Under the ADA, the determination of whether an individual has a disability is made on a case-by-case basis.

## **Obtaining, Using, and Disclosing Medical Information**

### **Applicants**

The ADA limits the medical information that an employer can seek from a job applicant. An employer may not ask questions about an applicant's medical condition or require an applicant to take a medical examination before it makes a conditional job offer. This means that an employer cannot ask an applicant questions such as:

- whether she has epilepsy or seizures;
- whether she uses any prescription drugs; or
- whether she ever has filed for workers' compensation or was injured on a job.



After making a job offer, an employer may ask questions about an applicant's health and may require a medical examination as long as it treats all applicants the same.

***2. Does the ADA require an applicant to disclose that she has epilepsy or some other disability before accepting a job offer?***

No, the ADA does not require applicants to disclose that they have epilepsy or another disability unless they will need a reasonable accommodation for the application process. Some individuals with epilepsy, however, choose to disclose their condition to eliminate any surprise should a seizure occur in the workplace. Often the decision to disclose depends on the type of seizure a person has, the need for assistance during or after a seizure, the frequency of seizures, and the type of work for which the person is applying.

Sometimes the decision to disclose depends on whether an individual will need a reasonable accommodation to perform the job. A person with epilepsy, however, may request an accommodation after becoming an employee even if she did not ask for one when applying for the job or after receiving the job offer.

***3. May an employer ask any follow-up questions if an applicant voluntarily reveals that she has epilepsy?***

If an applicant voluntarily discloses that she has epilepsy, an employer only may ask two questions: whether she needs a reasonable accommodation, and if so, what type. The employer also must keep any information an applicant discloses about her medical condition confidential. (See "Keeping Medical Information Confidential" on p. 19.)

*Example:* An individual applies for a data clerk position. She tells the interviewer that she does not have a driver's license due to epilepsy and will need a flexible schedule because public transportation is not always reliable.<sup>(6)</sup> She also mentions that she has not had a seizure in more than six months. The interviewer may ask the applicant additional questions about her requested accommodation, such as how early she can start to work and how many hours she can work each day, but cannot ask for details about her epilepsy, such as how long she has had epilepsy or whether she has had to miss work in the past because of her condition.

***4. What should an employer do when it learns that an applicant has epilepsy after he has been offered a job?***

The fact that an applicant has epilepsy may not be used to withdraw a job offer if the applicant is able to perform the fundamental duties ("essential functions") of a job, with or without reasonable accommodation, with-



out posing a direct threat to safety. ("Reasonable accommodation" is discussed in Questions 10 -15. "Direct threat" is discussed in Questions 5, 6, 16, and 17.) The employer, therefore, should evaluate the applicant's present ability to perform the job effectively and safely. After an offer has been made, an employer also may ask the applicant additional questions about his epilepsy, such as whether he takes any medication; whether he still has seizures and, if so, what type; how long it takes him to recover after a seizure; and/or, whether he will need assistance if he has a seizure at work.

The employer also could send the applicant for a follow-up medical examination or ask him to submit documentation from his doctor answering questions specifically designed to assess the applicant's ability to perform the job's functions and to do so safely.

*Example:* An experienced chef gets an offer from a hotel resort. During the post-offer medical examination, he discloses that he has had epilepsy for ten years. When the doctor expresses concern about the applicant's ability to work around stoves and use sharp utensils, the applicant explains that his seizures are controlled by medication and offers to bring information from his neurologist to answer the doctor's concerns. He also points out that he has worked as a chef for seven years without incident. Because there is no evidence that the applicant will pose a significant risk of substantial harm while performing the duties of a

chef, the employer may not withdraw the job offer.

## **Employees**

### ***5. When may an employer ask an employee if epilepsy, or some other medical condition, may be affecting her ability to do her job?***

An employer may ask questions or require an employee to have a medical examination only when it has a legitimate reason to believe that epilepsy, or some other medical condition, may be affecting the employee's ability to do her job, or to do it safely.

*Example:* Several times during the past three months, a supervisor has observed a newly hired secretary staring blankly, making chewing movements with her mouth, and engaging in random activity. On these occasions, the secretary has appeared to be unaware of people around her and has not responded when the supervisor has asked if she was okay. The secretary has no memory of these incidents. She also has seemed confused when the supervisor asked her to make corrections on documents she (the secretary) recently typed. The supervisor may ask the secretary whether a medical condition, such as epilepsy, is affecting her ability to perform the essential functions of her job.

On the other hand, when an employer does not have a reason to believe that a medical condition is causing an employee's poor job performance, it may not ask for medical information but



should handle the matter as a performance problem.

*Example:* Lately, a normally reliable receptionist with epilepsy has been missing work on Mondays and leaving work early on Fridays. The supervisor noticed these changes soon after the receptionist's fiancé moved to another state. The supervisor can ask the receptionist about her attendance problems but may not ask her about her epilepsy.

An employer also may ask an employee about epilepsy when it has a reason to believe that the employee may pose a "direct threat" (*i.e.*, a significant risk of substantial harm) to himself or others. An employer should make sure that its safety concerns are based on objective evidence and not general assumptions. (See also section below on "Concerns About Safety.")

*Example:* A line cook with epilepsy had three seizures in his first six weeks on the job. Although the cook did not injure himself or anyone else during his seizures, the employer may send him for a medical examination or ask him to submit documentation from his doctor indicating that he can safely perform his job, which requires him to work around flat top grills, hot ovens, and fryers with boiling oil.

***6. May an employer require an employee on leave because of epilepsy to have a medical exam or provide documentation before allowing her to return to work?***

Yes, if the employer has a reasonable belief that the employee may be unable to perform her job or may pose a direct threat to herself or others. However, the employer may obtain only the information needed to make an assessment of the employee's present ability to perform her job and to do so safely.

*Example:* A pool cleaner called his supervisor on Monday morning and told him he was taking sick leave because he had a seizure over the weekend -- his second in six months. Given the safety risks associated with the pool cleaner's job, the employer may ask him to have a medical exam or provide medical documentation indicating that he can safely perform his job without posing a direct threat before allowing him to return to work.

*Example:* A cashier, who has occasional nocturnal seizures, took two weeks off to adjust to a new medication. She works the day shift and never has been late for work, never has had difficulty performing her duties, and never has had a seizure on the job. The employer may not require the cashier to have a medical examination or ask her for medical documentation before allowing her to return to work because there is no indication that her epilepsy will prevent her from doing her job.

*Example:* A budget analyst with epilepsy has a seizure at work. She explains to her manager that following a seizure she is typically very tired



and needs to rest for several hours. She says that she will be fine the next morning and will be back at work, but asks if she could call someone to drive her home and take off for the rest of the day. Because there is no reason to believe that the analyst will be unable to do her job or will pose a safety risk, the employer may not require her to submit a doctor's note clearing her to return to work the next day.

***7. Are there any other instances when an employer may ask an employee about epilepsy?***

An employer also may ask an employee about epilepsy when the employee has requested a reasonable accommodation because of his epilepsy or as part of a voluntary wellness program.<sup>(7)</sup> In addition, an employer may ask an employee with epilepsy to justify the use of sick leave by providing a doctor's note or other explanation, as long as it requires all employees to do so.

**Keeping Medical Information Confidential**

With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee. An employer, however, under certain circumstances may disclose to particular individuals that an employee has epilepsy:

- to supervisors and managers, if necessary to provide a reason-

able accommodation or meet an employee's work restrictions;

- to first aid and safety personnel if an employee would need emergency treatment or require some other assistance if she had a seizure at work;<sup>(8)</sup>
- to individuals investigating compliance with the ADA and similar state and local laws; and,
- as needed for workers' compensation or insurance purposes (for example, to process a claim).

***8. May an employer explain to other employees that their co-worker is allowed to do something that generally is not permitted (such as have more breaks) because he has epilepsy?***

No. An employer may not disclose that an employee has epilepsy or is receiving a reasonable accommodation. However, an employer certainly may respond to a question about why a co-worker is receiving what is perceived as "different" or "special" treatment by emphasizing that it tries to assist any employee who experiences difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal and it is the employer's policy to respect employee privacy.

***9. If an employee has a seizure at work, may an employer explain to***



***other employees or managers that the employee has epilepsy?***

No. Although the employee's co-workers and others in the workplace who witness the seizure naturally may be concerned, an employer may not reveal that the employee has epilepsy. Rather, the employer should assure everyone present that the situation is under control. The employer also should follow the employee's plan of action if one has been created. (See footnote 8.)

*Example:* During a staff meeting, an attorney's arm and leg suddenly start jerking. Although she appears awake, she does not say anything. When another employee asks whether he should call an ambulance, a manager calmly explains that no first aid is necessary and that the attorney will be okay in a few minutes. He adjourns the meeting and stays with the attorney until she recovers from her seizure.

An employer also may allow an employee voluntarily to tell her co-workers that she has epilepsy and provide them with helpful information, such as how to recognize when she is having a seizure, how long her seizures generally last, what, if anything, should be done if she has a seizure, and how long it generally takes her to recover. However, even if an employee voluntarily discloses that she has epilepsy, an employer is limited in sharing this information with others. (See section on "Keeping

Medical Information Confidential" above for the only circumstances in which an employer may disclose that an employee has epilepsy.)

**Accommodating Employees with Epilepsy**

The ADA requires employers to provide adjustments or modifications to enable people with disabilities to enjoy equal employment opportunities unless doing so would be an undue hardship (i.e., a significant difficulty or expense). Accommodations vary depending on the needs of an individual with a disability. Not all employees with epilepsy will need an accommodation or require the same accommodation, and most of the accommodations a person with epilepsy might need will involve little or no cost.

***10. What types of reasonable accommodations may employees with epilepsy need?***

Some employees may need one or more of the following accommodations:

- breaks to take medication
- leave to seek treatment or adjust to medication <sup>(9)</sup>
- a private area to rest after having a seizure
- a rubber mat or carpet to cushion a fall
- adjustments to work schedules

*Example:* A library schedules employees to work eight-hour shifts starting as early as 8:00 a.m. and as late as 1:00 p.m. A librarian who has epi-



lepsy and experiences nocturnal seizures, which leave her tired in the early morning, requests that her shifts start in the late morning or early afternoon. The employer determines that because there are a sufficient number of staff available between 8:00 a.m. and 10:00 a.m. to respond to requests from the public for assistance, the accommodation can be granted without undue hardship.

- a consistent start time or a schedule change (e.g., from the night shift to the day shift)

*Example:* A home nurse rotated from working the 7:00 a.m. to 3:00 p.m. shift to the midnight to 8:00 a.m. shift. His doctor wrote a note to the employment agency indicating that interferences in the nurse's sleep were making it difficult for him to get enough rest and, as a result, he was beginning to have more frequent seizures. If eliminating the nurse's midnight rotation would not cause an undue hardship, this would be a reasonable accommodation.

- a checklist to assist in remembering tasks

*Example:* A box packer would have absence seizures while packing boxes and forget what he was doing. The supervisor created a checklist for each step of the job. Now, when the box packer has a seizure, he simply looks at the checklist to see what steps he has completed.

Other employees with epilepsy may need:

- to bring a service animal to work <sup>(10)</sup>
- someone to drive to meetings and other work-related events
- to work at home

*Example:* When a medical transcriber started having frequent, unpredictable seizures at work, she asked her supervisor if she could work at home until her seizures were controlled. Because the transcriber can do the essential functions of her job at home without day-to-day supervision, the employer granted her request.

Although these are some examples of the types of accommodations employees with epilepsy commonly need, other employees may need different changes or adjustments. An employer should ask the employee requesting an accommodation because of his epilepsy what is needed to do the job. There also are extensive public and private resources to help employers identify reasonable accommodations. For example, the web site for the Job Accommodation Network (JAN) ([www.jan.wvu.edu/media/epilepsy.html](http://www.jan.wvu.edu/media/epilepsy.html)) provides information about many types of accommodations for employees with epilepsy.

***11. Does an employer ever have to reassign an employee with epilepsy to another position?***



Yes, reassignment may be necessary where an employee with epilepsy no longer can perform his job, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship. The new position should be equal in pay and status to the employee's original position, or as close as possible if no equivalent position is available. The new position does not have to be a promotion, although the employee should have the right to compete for promotions just like other employees.

*Example:* A telephone repairman submits a note from his doctor stating that he recently has been diagnosed with epilepsy and must avoid climbing and working at heights above ground level. Although the employer would not have to "bump" another employee from a position to create a vacancy, the employer should determine whether there is another position for which the repairman is qualified that will meet his restrictions.

***12. How does an employee with epilepsy request a reasonable accommodation?***

There are no "magic words" that a person has to use when requesting a reasonable accommodation. A person simply has to tell the employer that she needs an adjustment or change at work because of her epilepsy.

*Example:* A teacher tells her principal that she recently has been diagnosed with epilepsy and needs three

weeks off to find out whether medication will control her seizures. This is a request for reasonable accommodation.

A request for reasonable accommodation also can come from a family member, friend, health professional, or other representative on behalf of a person with epilepsy. If the employer does not already know that an employee has epilepsy, the employer can ask the employee for verification from a health care professional.

***13. Does an employer have to grant every request for a reasonable accommodation?***

No. An employer does not have to provide an accommodation if doing so will be an undue hardship. Undue hardship means that providing the reasonable accommodation would result in significant difficulty or expense. If a requested accommodation is too difficult or expensive, an employer still would need to determine whether there is another easier or less costly accommodation that would meet the employee's needs.

***14. Is it a reasonable accommodation for an employer to make sure that an employee takes antiseizure medicine as prescribed?***

No. Employers have no obligation to monitor an employee to make sure that she does not have a seizure. However, an employer may have to provide a flexible work schedule or al-



low the employee breaks to rest or to take medication to keep her epilepsy under control.

***15. If an employee does not have a license because of epilepsy, does an employer have to eliminate driving from his job duties?***

If driving is an essential function of a job, an employer does not have to eliminate it. However, an employer should carefully consider whether driving actually is a job function or simply a way of accomplishing an essential function. If an accommodation is available that would enable an employee with epilepsy to perform a function that most employees would perform by driving, then the employer must provide the accommodation, absent undue hardship.

*Example:* A qualified sales clerk applies for promotion to assistant manager of a store. The employer promotes someone else because it claims that an essential function of the assistant manager's job is driving store receipts to the bank. Because depositing the receipts in a safe and timely manner, not driving, is the actual function of the job, the employer should have determined whether the sales clerk could have done the job with a reasonable accommodation (e.g., having another employee drive her or paying for her to take a taxi).

Similarly, if driving is a marginal (or non-essential) function, the fact that an individual with epilepsy does not

have a driver's license cannot be used to deny the individual an employment opportunity.

*Example:* College orientation guides are hired to hand out information packets and give tours of the campus. Occasionally, a guide also may be asked to drive prospective students to and from the airport. Not every guide is asked to perform this function, and there are always other guides available to perform the function if a particular individual is unavailable. Because driving is not an essential function of the job, the college cannot refuse to hire a person to be a guide who does not have a driver's license because of epilepsy but, rather, would have to assign someone else to perform that task.

### **Concerns about Safety**

When it comes to safety, an employer should be careful not to act on the basis of myths, fears, generalizations, or stereotypes about epilepsy. Instead, the employer should evaluate each individual on his knowledge, skills, experience, and how having epilepsy affects him. In other words, an employer should determine whether a specific applicant or employee would pose a "direct threat" or significant risk of substantial harm to himself or others that cannot be eliminated or reduced through reasonable accommodation. This assessment must be based on objective, factual evidence, including the best recent medical evi-



dence and advances to treat and control epilepsy.

***16. When may an employer prohibit a person who has epilepsy from performing a job because of safety concerns?***

An employer may prohibit a person who has epilepsy from performing a job when it can show that the individual may pose a direct threat. In making a "direct threat" assessment, the employer must evaluate the individual's present ability to safely perform the job. The employer also should consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and, (4) the imminence of the potential harm. The harm also must be serious and likely to occur, not remote and speculative. Finally, the employer must determine whether any reasonable accommodation would reduce or eliminate the risk.<sup>(11)</sup>

*Example:* A tool inspector with epilepsy applies to be a welder for the same company. During the past two years, the employee has on several occasions failed to take prescribed medication and has experienced sudden and unpredictable seizures at work. Because of the likelihood that the employee would experience sudden and unpredictable seizures and the serious consequences that would result if the employee had a seizure while working as a welder, the employer may deny the employee the job.

***17. What should an employer do when another federal law prohibits it from hiring anyone who has epilepsy?***

The employer has a defense to a charge of discrimination under the ADA if a federal law prohibits it from hiring a person with epilepsy. The employer should be certain, however, that compliance with the law actually is required, not voluntary, and that the law does not contain any exceptions or waivers.

**Harassment**

Employers are prohibited from harassing or allowing employees with disabilities to be harassed in the workplace. When harassment is brought to the attention of a supervisor, the supervisor must take steps to stop it.

***18. What should employers do to prevent and correct harassment?***

Employers should make clear that they will not tolerate harassment based on disability or on any other basis (i.e., race, sex, religion, national origin, or age). This can be done in a number of ways, such as through a written policy, employee handbooks, staff meetings, and periodic training. The employer should emphasize that harassment is prohibited and that employees should promptly report such conduct to a manager. Finally, the employer should immediately conduct a thorough investigation of any report of harassment and take swift and appropriate corrective action.



For more information on the standards governing harassment under all of the EEO laws, see [www.eeoc.gov/policy/docs/harassment.html](http://www.eeoc.gov/policy/docs/harassment.html).

## Footnotes

1. This document is the second in a series of fact sheets issued by the EEOC that addresses a particular medical condition. The first fact sheet, Questions and Answers About Diabetes in the Workplace and the ADA, can be found at [www.eeoc.gov/facts/diabetes.html](http://www.eeoc.gov/facts/diabetes.html).
2. Source: Centers for Disease Control (CDC), [www.cdc.gov/nccdphp/epilepsy/index.html](http://www.cdc.gov/nccdphp/epilepsy/index.html)
3. For example, some seizures result only in small involuntary movements or brief lapses of attention. In other instances, consciousness (the ability to react to external stimuli in a meaningful and appropriate way) may be unaffected, lost completely, or altered but not lost completely. In addition, motor control may be partially affected (*e.g.*, a person's hand may shake or she may be alert but cannot speak) or completely lost.
4. Many occupations have their own health regulations. Some federal laws may prohibit an employer from hiring an individual who still has seizures or takes medication for epilepsy. See Question 17.
5. There is a rare condition called photosensitive epilepsy in which seizures are triggered by flashing or flickering

lights or by certain geometric patterns. People who are photosensitive are most likely to react to lights that flicker between five and 30 times per second. Modern computers usually operate at a higher frequency and do not tend to provoke seizures.

6. Every state licenses people with epilepsy to drive, though eligibility requirements vary. The most common requirement is that individuals be seizure free for a specified period of time and submit a physician's evaluation of their eligibility to drive safely. Some states require individuals with epilepsy to submit periodic medical reports for as long as they remain licensed.

7. The ADA allows employers to conduct voluntary medical examinations and activities, including obtaining voluntary medical histories, which are part of an employee health program as long as any medical records acquired as part of the program are kept confidential.

8. Although many individuals who have seizures do not require any first aid or assistance, an employee who might need assistance may want to work with his employer to create a plan of action that includes such information as: who to contact in an emergency; warning signs of a possible seizure; how and when to provide assistance; when to call an ambulance, *etc.* The employee and employer also should discuss who in the workplace should know this information. Some individuals also might want to ask their employers for an opportunity to educate their co-workers about epi-



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lepsy to dispel any misperceptions or unsubstantiated fears they may have about the condition.

9. An employee with epilepsy also may be entitled to leave under the Family and Medical Leave Act (FMLA), which provides up to 12 weeks of unpaid leave for a serious health condition. The U.S. Department of Labor enforces the FMLA. For more information, go to [www.dol.gov/esa/whd/fmla](http://www.dol.gov/esa/whd/fmla).

10. Service animals are animals that are trained to perform tasks for individuals with disabilities such as guiding people who are blind, alerting people who are deaf, pulling wheelchairs, alerting and protecting a person who is having a seizure, or performing other special tasks.

11. If the individual is a current employee, reasonable accommodation must include consideration of reassignment to a vacant position for which the employee is qualified.

*(The above guidance was recently issued by the EEOC and can be found on its website at [www.eeoc.gov/facts/epilepsy.html](http://www.eeoc.gov/facts/epilepsy.html))*

