



# 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 "opposition"-type retaliation, management liability for sexual harassment, "stress" as a disability, "protected activity" in reprisal claims, disability under "regarded as" definition, and anxiety as a disability.

Also included in this issue is some advice for managers about watching what they say in the workplace and new guidance from EEOC about intellectual disabilities.

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

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## I

### **VOCAL OPPOSITION TO SUPERVISOR'S SEXUAL CONDUCT CONSTITUTES "PROTECTED ACTIVITY" IN REPRISAL CLAIM**

One of the required elements of proof in a reprisal (*i.e.*, retaliation) claim is that the complainant must show that he or she engaged in prior "protected activity." When we think of protected activity, we generally think in terms of "participation" in the EEO complaint process as a complainant, a witness, or an EEO official. However, as the following case illustrates, employees may engage in protected activity simply by saying or doing something that communicates their "opposition" to a discriminatory practice or incident.

The complainant began work under a 30-day term appointment. The 30-day appointment was an interim measure designed to permit her to start working immediately, pending completion of the paperwork required for the one-year term appointment for which she had been hired. The complainant had relocated at her own expense in reliance on the employment offer.

Shortly after starting work, she was invited to attend a private party hosted by her second-line supervisor (hereinafter "RMO"), who was also the person who hired her. As she was leaving the party, the RMO kissed her on the lips.

The complainant immediately reported this incident to several co-workers, telling them that she was upset by the kiss and that she was going to demand an apology. The RMO, after learning through the grapevine that the complainant was discussing the incident with co-workers, confronted her, criticized her in a loud voice for spreading gossip, and alluded to certain "performance deficiencies." Feeling intimidated, she did not ask for an apology.

A few days later, however, she approached him and demanded that he apologize, which he declined to do. Two days later, the RMO met with his supervisor to discuss the complainant's alleged performance deficiencies. As a result of that discussion, the RMO's supervisor, without further inquiry, allowed the 30-day term appointment to expire, thus precluding the one-year renewal.

An EEOC judge concluded that the kissing incident did not constitute sexual harassment. Although clearly inappropriate, it was an isolated incident and, thus, failed to satisfy one of the essential elements of proof in a sexual harassment claim -- *i.e.*, that the conduct at issue must be severe or pervasive.

The judge, however, did find that the RMO retaliated against the complainant. But for the complainant's vocal opposition to her supervisor's inappropriate behavior, which she believed to be sexually harassing, her 30-day



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term appointment would have been renewed for one year. There was no evidence that the complainant's job performance was deficient, a dubious claim that the RMO made within only a few days after she began working and only after she related the kissing incident to several fellow employees.

It matters not in this case that the complainant was incorrect in her belief that the kiss constituted sexual harassment as a matter of law. Her oppositional activity was "protected" as long as she had a reasonable, good faith belief that a violation of discrimination laws had occurred.

Moreover, as the judge noted, it matters not that the complainant could have better handled the matter. Had she complained about the incident directly to the RMO rather than indirectly through her co-workers, she might have defused the situation. Despite her poor judgment in dealing with the problem, the law nevertheless protects her from retaliation.

## II

### ***VA FOUND LIABLE FOR SEXUAL HARASSMENT DESPITE IMMEDIATE AND APPROPRIATE CORRECTIVE ACTION BY MANAGEMENT***

A VA hospital hired the complainant as a Telecommunicator/Police Dispatcher. Shortly thereafter, one of her supervisors – a Police Lieutenant –

began to sexually harass her by engaging in lewd conduct, making inappropriate comments of a sexual nature, touching, and rubbing against her.

When the complainant confronted the supervisor and advised him that his conduct was unwelcome, he responded by reminding her that she was a probationary employee, thus leading her to believe that she would be fired if she dared to report these incidents to higher-level officials.

The harassing conduct continued on a frequent basis over a period of approximately six months until the complainant finally reported it to the Service Chief. The Chief took immediate and appropriate action upon learning of the matter, including relieving the supervisor of his duties and ordering an immediate investigation. Shortly after providing his affidavit to the investigator, the supervisor resigned.

After reviewing the evidence, including eyewitness testimony that corroborated much of the complainant's testimony regarding the harassment, an EEOC judge concluded that the complainant had established by a preponderance of the evidence that the supervisor had sexually harassed her, as alleged.

In addition, the judge found the Department liable for the harassment because it was unable to establish an affirmative defense – *i.e.*, it was unable to prove that (1) the facility had an effective policy addressing those



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situations in which the harassment is committed by supervisors, and (2) the complainant's delay in reporting the matter was unreasonable.

Some may look at the facts of this case and wonder why the Department should be held liable when the Chief had acted promptly, appropriately, and effectively as soon as he learned of the harassment. The answer is that the Chief's actions would have been sufficient to absolve the VA of liability if the harasser had been a coworker. In this case, however, because the harasser was a supervisor, a different rule for determining liability applies. When a supervisor is guilty of the harassment, and a tangible employment action is involved (*e.g.*, promotion, removal demotion, undesirable reassignment, etc.), the employer will be "strictly liable" (*i.e.*, automatically liable). No affirmative defense is available to the employer in such cases. If a supervisor is guilty of the harassment, but a tangible employment action is not involved, the employer will normally be liable unless it can prove an affirmative defense; to wit: (1) it took reasonable care to prevent and promptly correct harassment, **and** (2) the employee unreasonably failed to report the harassment or otherwise avoid harm.

In this case, because no tangible employment action was involved, the hospital had to prove both prongs of the above defense to avoid liability. It was unable to prove either. The judge found the hospital's harassment policy

(*i.e.*, its preventive measures) deficient because it failed to advise employees specifically to whom they should report harassment committed by a supervisor in their chain of command. In addition, the employee's delay in reporting the matter was not unreasonable under the circumstances, given her probationary status and the comments made by the harasser regarding that status.

Employer beware! When the harasser is a supervisor, and the harassment is proven, liability will almost always attach, even in cases such as this where management acted promptly, appropriately, and effectively.

### III

#### ***STRESS CAUSED BY DIFFICULT SUPERVISOR NOT A DISABILITY***

The disability claim raised by the employee in this case is not an uncommon one. Many employees at one time or another have blamed their health problems and inability to work on stress caused by an unreasonable supervisor. As seen in the following case, disability claims based on supervisor-induced "stress" often fail.

The complainant, a Food Service Worker in the Canteen Service, alleged that her supervisor was subjecting her to discrimination and harassment. She further alleged that the hostile environment created by this supervisor caused her to have a men-



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tal breakdown, thereby resulting in her being unable to report for work for a lengthy period.

Management officials requested her to provide medical information to document the need for her lengthy absence. She responded with a note from her physician. The note, however, was not specific enough to justify her absence, so management requested her physician to provide more specific information. In response, the physician provided essentially the same information contained in his initial note, but added that the complainant's health problems could easily be accommodated by simply transferring her to another job where she would not have to work under a hostile supervisor.

Eventually, after failing to comply with an order to return to work, the complainant was charged with absence without leave and removed. She thereafter filed a disability discrimination claim alleging that management violated *The Rehabilitation Act* by refusing to accommodate her medical condition per her physician's recommendation – *i.e.*, reassigning her away from her supervisor.

After reviewing the evidence of record, an EEOC judge concluded that the complainant's disability discrimination claim was without merit because she failed to prove that she was an "individual with a disability" – *i.e.*, that she has a physical or mental impairment that substantially limits any of

her major life activities. Although she claimed that she had trouble sleeping, concentrating, and working, she presented no medical evidence indicating the degree to which her impairment affected her ability to sleep or concentrate.

As for her ability to work, she presented no medical evidence that her condition significantly limited her ability to perform either a class of jobs (*e.g.*, food service worker), or a broad range of jobs in various classes (*i.e.*, other types jobs for which she was qualified). Such evidence is required to prove that a medical impairment substantially limits an individual's ability to work.

In this case, the complainant's evidence demonstrated only that she was unable to work in one particular job because of one particular supervisor. By her own admission she was able to work in other food service jobs and in any other jobs for which she was qualified, provided she did not have to work under this one particular supervisor. The inability to perform a single, particular job does not constitute a "disability" – *i.e.*, it does not constitute a substantial limitation on the ability to work.

Because the complainant was not an individual with a disability, management did not violate *The Rehabilitation Act* when it refused to grant her request for accommodation.



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## IV

### ***BEING NAMED A “RESPONSIBLE MANAGEMENT OFFICIAL” IS NOT “PROTECTED EEO ACTIVITY” FOR PURPOSES OF A REPRISAL CLAIM***

The complainant in this case was a Supervisory Program Analyst. In February 2003, OEDCA issued a decision finding that the complainant had unlawfully discriminated against an employee in a promotion action when he was unable to articulate a legitimate, nondiscriminatory reason for his selection decision. Thereafter, management officials took appropriate, corrective action to remedy the wrong, which included, among other things, issuing the complainant a written admonishment. In response to the admonishment, the complainant filed a discrimination complaint wherein he alleged, among other things, that the admonishment and several other personnel actions and events were acts of retaliation (reprisal) against him because he had been named as a Responsible Management Official (RMO) in the complaint in which OEDCA had found discrimination.

After reviewing the record, OEDCA issued a decision finding that the complainant was not subjected to unlawful retaliation in connection with the admonishment and other personnel actions mentioned in his complaint. Specifically, OEDCA concluded that the complainant could not

establish even a *prima facie* case of retaliation because he was unable to show that he had engaged in “protected EEO activity” prior to the complained of actions. “Protected EEO activity” consists of either participation in the EEO complaint process, or some other form of opposition to discriminatory practices. In this case the complainant’s claim was based on his prior “participation” in another person’s EEO complaint when named as an RMO.

OEDCA concluded that simply being named as an RMO in an EEO complaint does not, by itself, constitute “protected EEO activity.” The fact that management took disciplinary action against the RMO was clearly an appropriate -- and obviously not unexpected -- outcome of the OEDCA decision. The “participation” clause is intended to insulate from retaliation those individuals who, through use of the EEO complaint process, seek to avail themselves of the protections provided by EEO laws and regulations (*i.e.*, EEO complainants), or who otherwise participate in that process as witnesses; officials with EEO responsibilities, such as counselors and investigators; and representatives for complainants.

As he had not previously participated in the EEO complaint process, and absent any evidence of prior “opposition” activity<sup>1</sup>, the complainant was unable

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<sup>1</sup> Common examples of “opposition” activity include, but are not limited to, boycotts, picketing, protests, or voicing opposition to the press, management,



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to prove a *prima facie* case of retaliation.

Of course, an RMO disciplined for engaging in unlawful discrimination may claim disparate (*i.e.*, less favorable) treatment with respect to the nature or severity of the punishment received because of race, gender, or other protected category. In such a case the complainant could establish a *prima facie* case by showing that other similarly situated RMOs not of the same protected category, who were also found guilty of discrimination, were treated more favorably.

## V

### ***EMPLOYEE NOT “REGARDED AS” DISABLED DESPITE ORDER TO SUBMIT TO A “FITNESS FOR DUTY EXAM”***

The complainant, a “Nurse Manager”, alleged discriminatory harassment due to a perceived disability in connection with a number of events, including an order that she submit to a “Fitness for Duty” medical examination (FFD) and her subsequent removal from employment.

The order to report for the medical exam resulted from strange behavior exhibited by the complainant during the course of a routine meeting attended by nursing service personnel. Accord-

ing to several participants, the complainant interrupted the meeting a few minutes after it started, asked permission to address the group, and began to speak in a disjointed and incoherent fashion. She continued to ramble for more than 30 minutes on a wide range of topics that included vague references to such things as “conspiracies”, “evil people”, and an “evil agency.” Attendees described her as “animated”, “loud”, “upset”, “crying much of the time”, “manic”, “hard to follow”, and “a person in crisis.” They all agreed that her behavior was “out of character.”

A few days after the meeting, the complainant’s supervisor consulted with the HR Director who recommended an FFD. The FFD, however, was delayed because the complainant was out on leave, having indicated before her leave that she planned to deplete her sick leave balance and then retire. Despite orders to return to work or provide medical evidence justifying her absence from work, she failed to do either, claiming only that she needed time off to recover from knee surgery. She remained absent for more than three months, and was eventually placed in AWOL (absence without leave) status after refusing to report for limited duty involving the placing of telephone calls to veterans.

She did report for the FFD, and told the examining physician that she had numerous medical conditions, including a recent breast cancer diagnosis. She refused, however, to sign a medi-

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or other government officials of discriminatory practices, provided such opposition does not interfere with the orderly conduct of business.



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cal release form or otherwise provide medical documentation from her private health care provider that would be relevant to her assessment. Accordingly, the physician reported that he was unable to determine if the complainant was physically or mentally fit for duty as a nurse, or for any other purpose, because of her refusal to cooperate with the exam process.

The matter was thereafter referred to a Nurse Professional Standards Board, which recommended that she be removed as not physically fit for duty as a nurse. The hospital director accepted and implemented that recommendation.

Under *The Rehabilitation Act of 1973*, and its implementing regulations, an “individual with a disability” is one who (1) has a physical or mental impairment that substantially limits a major life activity, or (2) is regarded as having such an impairment, or (3) has a record of such impairment. To qualify as a “disability”, the impairment must generally be permanent or long-term, as opposed to temporary.

After holding a hearing, an EEOC judge issued a decision finding that the complainant had failed to prove that she was an individual with a disability, as defined above. Despite the numerous medical conditions she described during her FFD, she presented no evidence that she had impairments that, either separately or together, substantially limited any of her major life activities. Nor did she present

evidence that she had a record of such impairments. Instead, her claim rested solely on her belief that management perceived her as having such an impairment.

The EEOC judge correctly noted that the mere act of ordering an employee to undergo an FFD is not, in itself, evidence that an employer regards the employee as having an impairment that substantially limits a major life activity. In this case, it indicated only that the employer had a reasonable concern that the complainant might have a cognitive impairment affecting her ability to function as a Nurse Manager. That, however, is not the same as believing (*i.e.*, “regarding” or “perceiving”) that she has a permanent or long-lasting impairment that substantially limits her in a major life activity. Under EEOC’s governing regulations, an individual is “regarded as” disabled only if the employer acts on the basis of myths, fears, or stereotypes associated with disabilities. Management in this case did not act on those bases.

As the complainant was unable to prove that she was an “individual with a disability”, she was unable to prove that the VA discriminated against her because of a disability.<sup>2</sup>

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<sup>2</sup> The EEOC judge also considered the question of whether the VA had authority under EEOC’s regulations to require the complainant to submit to a medical exam or otherwise provide medical information. The judge concluded, under the facts of this case, that the VA had such authority because (1) the complainant was already an employee, and (2) the VA had a reasonable belief that she may have a medical condi-



## VI

### ***ANXIETY DISORDER FOUND NOT TO BE A DISABILITY***

The following case illustrates the principle that not every medical condition or impairment is a disability, as such term is defined under Federal civil rights laws and regulations.

A VA hospital hired the complainant as a nursing assistant, subject to a one-year probationary period. Management officials terminated her employment prior to the end of that period for conduct and behavioral issues. The complainant alleged, however, that her termination was due to a disability, which she described as an anxiety disorder that periodically results in panic attacks.

When asked to describe how her condition affects her major life activities, she stated that she could not go for walks outside, does not like “wide-open spaces”, has difficulty going out of her “safe zone”, and thus has problems going to places like Wal-Mart or other large areas. According to medical information she provided during a pre-employment medical examination, she has “mild anxiety”, which is “well controlled” with medication (Paxil).

An EEOC judge determined that the complainant, despite her anxiety dis-

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tion that might interfere with her ability to function as a Nurse Manager. Hence, the FFD was authorized because it was job-related and consistent with business necessity. *See*, 29 CFR Section 1630.14(c)

order, was not an “individual with a disability”, as she was unable to show that her condition substantially limited any of her major life activities. Although she identified a medical condition that has an adverse impact on her life, she was unable to identify any major life activity in which she is substantially limited. Despite her panic attacks, she is able to care for herself physically and otherwise, and perform her job in all respects. She was able to obtain a job, work in a large facility such as a VA hospital, and socialize normally. Her conduct and behavior problems on the job were not related to her medical condition. Her condition was described as mild and well controlled with regular use of medication, which she was taking. According to the hearing record, she never requested any form of accommodation prior to her termination.

Absent evidence of a disability, the complainant was unable to establish a *prima facie* case of disability discrimination in connection with her termination.

## VII

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***MANAGERS – WATCH WHAT YOU SAY, OR YOUR WORDS MAY COME BACK TO HAUNT YOU!***



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Everyone knows that the federal workplace is a professional setting and is subject to a wide variety of strict rules and regulations that must be followed by everyone. In that vein, it is important for managers to remember that the workplace is a formal environment when they have discussions with colleagues and subordinate employees. We raise this issue because there are times when a manager may say something that is inappropriate or offensive - or that can be construed by someone else as such - and the comment is later used as a basis for disciplinary action against the manager.

The problem arises most often when a manager becomes too comfortable talking with someone who is considered to be a friend or close colleague. Do not be fooled by the informality that can come with close workplace relationships. You still need to watch what you say in the office because you never know if someone else will overhear the conversation, if your comments will be relayed to a third party, or if your “friend” may be personally offended by your comments and end up filing a complaint against you. You also need to keep in mind that when the conversation turns to more personal topics, your comments can be misconstrued in a way you never intended. “Locker room” talk, sexually explicit language, and casual gossiping simply have no place in the office, even if the conversation is just among workplace “friends.”

Other inappropriate remarks are sometimes “accidentally” made during more formal meetings, and this can lead to trouble as well. For example, comments made by several managers who “joked” about a “diversity bonus” after they removed a male supervisor without cause and replaced him with a less qualified female employee were used against them, in part, for the EEOC to reach a finding of gender discrimination against their agency.

While managers can certainly develop friendships and close working relationships with others in the workplace, they need to remember that they are, first and foremost, professionals. This means managers should always maintain a certain level of formality and professionalism within the office environment. Inappropriate and offensive remarks simply have no place at the office. Not only do they set a bad example for subordinate employees, but they have the potential to haunt you down the road. Be smart and watch what you say at work – no matter whom you are talking to.

## VIII

*(The following guidance concerning intellectual disabilities was recently issued by the Equal Employment Opportunity Commission)*

### ***Questions & Answers about Persons with Intellectual Disabilities in the Workplace and “The Americans With Disabilities Act”***

#### **Introduction**



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*The Americans with Disabilities Act* (ADA) is a federal law that prohibits discrimination on the basis of disability. Title I of the ADA makes it unlawful for any employer to discriminate against a qualified applicant or employee because of a disability in any aspect of employment. The ADA covers employers with 15 or more employees, including state and local governments. Section 501 of the Rehabilitation Act provides the same protections for federal government employees and applicants. 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.

This guide is the third in a series of fact sheets addressing particular disabilities in the workplace.<sup>(1)</sup> It explains how the ADA might apply to job applicants and employees with intellectual disabilities.<sup>(2)</sup> In particular, this guide discusses:

- when a condition qualifies as a disability under the ADA;
- under what circumstances an employer may ask an applicant or employee or a third party (such as the family member of an applicant or employee) questions about an intellectual disability;
- what types of reasonable accommodations may be needed

by applicants and employees with intellectual disabilities;

- how to address safety concerns and conduct issues in the workplace; and
- how an employer can prevent harassment of employees with intellectual disabilities.

## **General information about intellectual disabilities**

An estimated 2.5 million people in the United States have an intellectual disability- approximately 1% of the United States population.<sup>(3)</sup> Estimates also indicate that only 31% of individuals with intellectual disabilities are employed, although many more want to work.<sup>(4)</sup>

An individual is considered to have an intellectual disability when: (1) the person's intellectual functioning level (IQ) is below 70-75; (2) the person has significant limitations in adaptive skill areas as expressed in conceptual, social, and practical adaptive skills; and (3) the disability originated before the age of 18.<sup>(5)</sup> "Adaptive skill areas" refers to basic skills needed for everyday life. They include communication, self-care, home living, social skills, leisure, health and safety, self-direction, functional academics (reading, writing, basic math), and work.

Intellectual disabilities will vary in degree and effect from person to person, just as individual capabilities vary considerably among people who do not have an intellectual disability.



ity.<sup>(6)</sup> People should not make generalizations about the needs of persons with intellectual disabilities. In some instances an intellectual disability will not be obvious from a person's appearance, nor will it be accompanied by a physical disability.

Persons who have intellectual disabilities may have other impairments as well. Examples of coexisting conditions may include: cerebral palsy, seizure disorders, vision impairment, hearing loss, and attention-deficit/hyperactivity disorder (ADHD). Persons with severe intellectual disabilities are more likely to have additional limitations than persons with milder intellectual disabilities.

Persons with intellectual disabilities successfully perform a wide range of jobs, and can be dependable workers. The types of jobs people with intellectual disabilities are able to perform will depend on individual strengths and interests. Examples include: animal caretakers, laundry workers, building maintenance workers, library assistants, data entry clerks, mail clerks, store clerks, messengers, cooks, printers, assemblers, factory workers, photocopy operators, grocery clerks, sales personnel, hospital attendants, housekeepers, statement clerks, automobile detail workers, and clerical aides.<sup>(7)</sup>

Yet, many employers still exclude persons with intellectual disabilities from the workplace because of persistent, but unfounded myths, fears, and

stereotypes. For instance, some employers believe that workers with intellectual disabilities will have a higher absentee rate than employees without disabilities. Studies show that this is not true and that workers with intellectual disabilities are absent no more than other workers. Another popular misperception is that employing people with intellectual disabilities will cause insurance costs to skyrocket. Studies show, however, that employing workers with intellectual disabilities will not lead to higher insurance rates or more workers' compensation claims.<sup>(8)</sup>

## **1. When is someone with an intellectual impairment covered by the ADA?**

Not everyone with an intellectual impairment is covered by the ADA. A person may meet the ADA's definition of "disability" in any one of three ways:

An individual's impairment must substantially limit one or more major life activities. Major life activities are activities that an average person can perform with little or no difficulty. Examples include walking, seeing, hearing, thinking, speaking, learning, concentrating, performing manual tasks, caring for oneself, and working.

*Example:* A person with an intellectual impairment is capable of living on his own, but requires frequent assistance from family, friends, and neighbors with cleaning his apartment, grocery shopping, getting to doc-



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tors' appointments, and cooking. He is unable to read at a level higher than the third grade, and so needs someone to read his mail and help him pay bills. This person is substantially limited in caring for himself and therefore has a disability under the ADA.

A person may have two or more impairments that are not substantially limiting by themselves, but that taken together substantially limit one or more major life activities. In that situation, the person has a disability.

*Example:* An employee has a mild intellectual disability and a mild form of ADHD. Neither impairment, by itself, would significantly restrict any major life activity. Together, however, the two impairments substantially limit the employee's ability to concentrate, learn, and work. The employee is a person with a disability.

Even if an impairment does not currently substantially limit a major life activity, if the person has a past record or history of a substantially limiting intellectual disability, the person is covered under the ADA.

*Example:* A person was erroneously diagnosed as having an intellectual disability that substantially limited his ability to learn when he was attending high school. The applicant has a past record or history of a disability.

The ADA also protects persons who do not have a substantially limiting intel-

lectual disability, but are treated by an employer as if they do.

*Example:* An applicant with a facial deformity that affects her speech applies for a position as a secretary. The applicant is denied employment because the interviewer believes she has an intellectual disability and that the condition will make her unable to communicate with clients effectively. The employer has regarded the applicant as a person with a disability.

## **2. Can a person who has a family member with an intellectual disability be protected under the ADA?**

In some instances, yes. The ADA's protections extend to people who do not have disabilities themselves but are discriminated against on the basis of their association with a person with a disability. The association may be with family members, friends, or any other person. A person who experiences discrimination based on such an association has a right to protection under the ADA, but is not entitled to reasonable accommodation.<sup>(9)</sup>

*Example:* The parent of a child with an intellectual disability applies for a position as an attorney at a law firm and mentions during a discussion with one of her interviewers that she has a child with an intellectual disability. She is denied employment because the employer believes the child's disability will cause her to be absent from work



and will affect her productivity. The parent is protected under the ADA.

Obtaining and using medical information

Title I of the ADA limits an employer's ability to ask questions related to disability and conduct medical examinations at three stages, including: pre-offer, post offer and during employment.

### ***Job Applicants:***

#### **Before an Offer of Employment is Made:**

The ADA limits the kinds of medical information that an employer can seek from a job applicant. An employer may not require a job applicant to take a medical examination or ask about a person's disability before making a job offer. However, the employer can ask an applicant questions about his/her ability to perform job-related functions, as long as the questions are not phrased in terms of a disability.

*Example:* An employer may not ask the following questions:

- whether or to what extent a person has an intellectual disability;
- whether the applicant has ever filed for workers' compensation;
- whether the applicant takes medication;
- whether the applicant has been hospitalized in an institution; or

- whether the applicant is receiving psychiatric treatment.

*Example:* An employer may ask the following questions if they relate to performance of the job:

- whether the applicant can lift a 45 pound load;
- whether the applicant can put files in alphabetical order; and
- whether the applicant can place items in numerical order.

If an applicant voluntarily tells an employer that s/he has an intellectual disability or if the disability is otherwise obvious, an employer may only ask questions regarding the need for a reasonable accommodation and/or what kind of accommodation may be needed.

*Example:* An applicant for a position as an office clerk voluntarily discloses to the employer that she has an intellectual disability and will need some type of work plan or technological device to remind her what her duties are. The employer may ask the applicant questions about reasonable accommodation, such as whether she prefers a detailed checklist or the use of a computer with touch screen (where verbal instructions and images guide her through the steps in a task). However, the employer may not ask questions about medications, or about whether the employee will have problems with her attendance or job performance because of her intellectual disability.



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## At the pre-offer stage:

An employer is also prohibited from asking a third party (such as a job coach, family member, or social worker attending an interview with an applicant who has an intellectual disability) any questions that it would not be permitted to ask the applicant directly.

## After an Offer of Employment is Made:

Once the employer has made a job offer, the employer may ask questions about the applicant's health (including questions about the applicant's disability) and may ask for or require a medical examination, as long as all applicants are treated the same, *i.e.* all applicants are asked the same questions and are required to take the same examination.

After an employer has obtained basic medical information from all individuals who have received job offers, it may ask specific individuals for more medical information if it is medically related to the previously obtained medical information. An employer must keep all obtained medical information confidential as discussed in Questions 4 and 5 below.

## ***Employees***

The ADA strictly limits the circumstances under which an employer may ask questions about an employee's medical condition or require the employee to undergo a medical examina-

tion. Generally, to ask an employee for medical information, an employer must have a reason to believe that there is a medical explanation for changes in the employee's job performance, or must believe that the employee's medical condition may pose a direct threat to safety. (See Question 4 for other instances when an employer may obtain medical information.)

### **3. May an employer routinely ask for medical information from an employee known to have an intellectual disability if the employee has performance problems?**

No. Poor job performance may be unrelated to an intellectual disability and should generally be dealt with according to an employer's existing quality performance policy. Medical information can be sought only when an employer has a reasonable belief, based on objective evidence, that a medical condition may be the cause of the employee's performance problems.

*Example:* A bathroom attendant with an intellectual disability and Attention Deficit Disorder who has performed his job successfully for five years starts to show up to work late and appears anxious and emotional. The supervisor observed these changes soon after the employee moved into his brother's house. The supervisor can ask the employee why his performance has declined and may explore ways to improve his performance. However, the supervisor may not ask him ques-



tions about his intellectual disability unless there is objective evidence that his poor performance is related to his disability.

### **Keeping Medical Information Confidential**

An employer must keep all medical information separate from general personnel files, and treat it as a separate, confidential medical record.

#### **4. May an employer ever disclose the fact that someone has an intellectual disability?**

Yes, in limited circumstances. The ADA's confidentiality requirements also include limited exceptions. An employer may disclose the fact that someone has an intellectual disability

- to supervisors and managers where necessary to provide a reasonable accommodation or to meet an employee's work restrictions;

*Example:* An employee in a fast food chain with an intellectual disability has worked under the same manager for two years. When the manager takes a job at another store, he leaves a detailed description for the new manager of the employee's job duties and her reasonable accommodations. This disclosure does not violate the ADA because the information is necessary for the employer to provide the employee the accommodations.

- to first aid and safety personnel if an employee would need emergency treatment or require some other assistance in the event of an emergency;

*Example:* An employee with an intellectual disability works the assembly line of a manufacturing plant that bottles a highly flammable liquid. In the event of an emergency, the employee will need assistance to safely exit the premises. The employer tells the floor's designated safety captain that the employee has an intellectual disability and appoints the floor captain as the employee's emergency evacuation partner. This disclosure is permissible

- to individuals investigating compliance with the ADA and similar state and local laws; and
- where required for workers' compensation or insurance purposes, for example, to process a claim.

#### **5. May an employer tell employees who ask why a particular employee is receiving what seems like "special treatment" that the employee is receiving a reasonable accommodation?**

No. Telling co-workers that an employee is receiving a reasonable accommodation amounts to a disclosure of the employee's disability. Rather than disclosing that the employee is receiving a reasonable accommoda-



tion, the employer should focus on the importance of maintaining employee privacy. Employers may be able to avoid many of these kinds of questions by giving all employees training on the requirements of EEO laws, including the ADA.

## **Accommodating persons with intellectual disabilities**

Under the ADA, employers must provide reasonable accommodations to the known physical or mental limitations of persons with disabilities. An accommodation is any modification or adjustment to a job or work environment that will permit a qualified applicant or employee with a disability to do the job, as well as enjoy equal benefits and privileges of employment. Once an employer determines that an individual has a disability that requires an accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. A third party may often request an accommodation on behalf of the person with an intellectual disability. If this happens, the employer must respond to the request as if the employee or applicant requested the accommodation.

Accommodations vary depending on the needs of the person with a disability. In some instances, the appropriate accommodation will be readily apparent. In others, the proper accommodation is not obvious. In those situations, the employer should have an informal and interactive discussion

with the person and/or his representative to determine a suitable accommodation.

## **6. What types of reasonable accommodations do people with intellectual disabilities need for the application process?**

Some persons with intellectual disabilities will need reasonable accommodations to apply and/or interview for a job. Such accommodations might include:

- providing someone to read or interpret application materials for a person who has limited ability to read or to understand complex information;
- demonstrating, rather than describing, to the applicant what the job requires;
- modifying tests, training materials, and/or policy manuals; and
- replacing a written test with an "expanded" interview.<sup>(10)</sup> An expanded interview allows applicants who have difficulty describing their abilities to demonstrate their skills at the employment office or work site.

*Example:* A person with an intellectual disability applies for a position as a baker and is scheduled for an interview with the employer. The applicant also has a speech and hearing impairment. The employer can accommodate the applicant by conducting an expanded interview in which



the applicant can demonstrate his ability to do the job.

## **7. What specific types of reasonable accommodations may employees with intellectual disabilities need to do their jobs or to enjoy the benefits and privileges of employment?**

The following are accommodations that employees with intellectual disabilities may need:

- Job restructuring (e.g., exchanging non-essential functions between employees)

*Example:* A crew of three employees works the concession stand of a baseball stadium. One of the employees has an intellectual disability. He helps stock the counter with candy and snacks; at closing time he cleans the counters and equipment and restocks the counters with supplies. However, he cannot perform the marginal function of counting money at closing time. The marginal functions of another concession stand employee include placing empty boxes and trash in designated bins at closing time, which is something that the employee with an intellectual disability can perform. Switching the marginal functions performed by the two employees is a reasonable accommodation.

- Training for the Job

The employer may:

- have the supervisor give instructions at a slower pace;
- give the employee additional time to finish the training;
- break job tasks into sequential steps required to perform the task;
- use charts, pictures, or colors;

*Example:* As part of his job, a restaurant worker with an intellectual disability refills condiment containers. The manager uses color coding so the employee can identify the specific condiment that goes in each container.

*Example:* A retail store employee with an intellectual disability and Attention Deficit Disorder loads customers' cars with purchased items. The store has a dress code that he often fails to follow. His supervisor gives him a sheet with photographs illustrating both proper attire and items of clothing prohibited by the store's employee dress code.

- provide a tape recorder to record directions as a reminder of steps in a task;
- use detailed schedules for completing tasks; and
- provide additional training if there are any on-the-job changes.

*Example:* A hotel cleaning crew worker with an intellectual disability and autism has not performed his cleaning duties to company quality standards. His supervisor offers him additional training and allows him to



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bring a third party to the training sessions to assist him in learning proper cleaning techniques.

- Job Coach - A Job Coach can:
  - assist the employee to reach job stabilization by helping her learn how to do the job. Once the employee learns her job duties, the Job Coach can gradually reduce the amount of time spent working with her;
  - provide intensive monitoring, training, assessment and support to workers with intellectual disabilities;
  - help develop a healthy working relationship between management and the employee by encouraging appropriate social interaction and maintaining open communications; and
  - assist the parties in determining what reasonable accommodation is needed.
- Modified Work Schedule

*Example:* A grocery stock worker with an intellectual disability is scheduled to attend group counseling sessions on Tuesdays, during working hours. Her employer has granted her request for a modified work schedule, allowing her to leave two hours early each Tuesday to attend the counseling sessions, and to make up for the time by beginning work two hours early on Tuesdays.

- Help in Understanding Job Evaluations or Disciplinary Proceedings

An employer may allow the employee to bring someone to a job evaluation or disciplinary meeting to help him ask questions and to explain the job evaluation results or the purpose of the meeting.

- Acquisition or Modification of Equipment or Devices

*Example:* A receptionist with an intellectual disability and fetal alcohol syndrome has difficulty remembering the telephone numbers of office workers when transferring calls. As a reasonable accommodation, the employer purchased a large-button telephone with a speed dial and clearly labeled buttons with the names of office staff.

- Work Station Placement:

*Example:* An employer relocates a data entry employee with an intellectual disability and Attention Deficit Disorder from a large open area where employees work side-by-side to a quieter part of the office to accommodate limitations on the employee's ability to concentrate.

## **8. How does a person with an intellectual disability request a reasonable accommodation?**

The request for a reasonable accommodation must be communicated to the employer. However, no magic



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words (e.g., "reasonable accommodation" or "ADA") are needed. The request may be made in "plain English," orally or in writing, and it may come from a family member, friend, job coach or other representative.

*Example:* A person with an obvious intellectual disability wants to apply for a job in a large retail store. The store manager gives him the application forms. The applicant tells the manager that he needs someone to assist him with the application. This is a request for a reasonable accommodation.

*Example:* A video store clerk with an intellectual disability and Prater-Willi Syndrome [\(11\)](#) tells his supervisor that he needs to change his work schedule because the medication he takes every night makes it difficult for him to wake up very early in the morning. This is a request for a reasonable accommodation.

*Example:* The mother of a clerk with Down Syndrome calls the clerk's supervisor to tell him that she wants to schedule a meeting to discuss problems that her son is having with his job and some possible solutions. This is a request for a reasonable accommodation.

## **9. When should a person with an intellectual disability request a reasonable accommodation?**

A person can ask for a reasonable accommodation at any time during the

application process and any time the need develops during employment. An employee may also request a reasonable accommodation if there are new tasks on the job that make accommodations necessary. An employee with an intellectual disability may ask for a reasonable accommodation even if s/he did not ask for one when applying for a job or after receiving a job offer.

*Example:* A cleaning company crew member with an intellectual disability has been working the same floor of an office building for two years. For efficiency reasons, the cleaning company decides to start rotating staff to different floors every week. The crew member has difficulty adjusting to alterations to his daily routine. The employee's Job Coach contacts his supervisor and asks that he be allowed to work on one floor permanently, or that he work on one floor for two months, allowing him additional time to adjust to the change. This is a request for a reasonable accommodation.

## **10. Are there circumstances when an employer must ask whether a reasonable accommodation is needed when a person with an intellectual disability has not asked for one?**

Yes. An employer has a legal obligation to initiate a discussion about the need for a reasonable accommodation and to provide an accommodation if one is available if the employer: (1) knows that the employee has a disability; (2) knows, or has reason to know,



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that the employee is experiencing workplace problems because of the disability; and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.<sup>(12)</sup>

*Example:* A flower shop employee with an intellectual disability is in charge of stocking the containers in the refrigerators with flowers as they arrive from the suppliers. Each type of flower has a designated container and each container has a specific location in the refrigerator. However, the employee often misplaces the flowers and containers. The employer knows about the disability, suspects that the performance problem is a result of the disability, and knows that the employee is unable to ask for a reasonable accommodation because of his intellectual disability. The employer asks the employee about the misplaced items and asks if it would be helpful to label the containers and refrigerator shelves. When the employee replies that it would, the employer, as a reasonable accommodation, labels the containers and refrigerator shelves with the appropriate flower name or picture.

## **11. Does an employer have to grant every request for an accommodation?**

An employer does not have to grant every request for an accommodation. The decision will depend on the individual situation and whether the request may cause "undue hardship."

Undue hardship is an action requiring significant difficulty or expense when considered in light of an employer's size, financial resources, and the nature and structure of its operation.

In most cases, accommodating persons with intellectual disabilities is not expensive. Studies show that most workers with intellectual disabilities require no special accommodations and that the cost of accommodations is minimal.<sup>(13)</sup> If an employer believes that a particular accommodation would result in undue hardship, however, it must consider an alternative accommodation.

An employer does not have to remove an essential job function (*i.e.*, a fundamental job duty), lower production standards, excuse violations of conduct rules that are job-related and consistent with business necessity (see Question 17 below), or provide employees with personal use items, such as wheelchairs, eyeglasses, hearing aids, and other devices needed both on and off the job.

## **12. Does an employer have to provide the specific reasonable accommodation the person wants?**

The employer may choose among different reasonable accommodations as long as the chosen accommodation is effective. Therefore, as part of the interactive process, the employer may offer more than one suggestion for a reasonable accommodation. Where two possible reasonable accommoda-



tions exist, and one costs more or is more burdensome than the other, the employer may choose the less expensive or less burdensome as long as it is effective. Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. The preference of the person with a disability should be given primary consideration.

*Example:* A photocopy clerk with an intellectual disability has great difficulty reading the many work-related memoranda that her supervisor sends to the office staff. The employee has no difficulty understanding oral communication. The clerk asks her employer to tape record all the memoranda that are distributed. The supervisor asks whether having someone read and explain the memoranda would work instead, and the employee agrees that it would. Since both accommodations are effective, the supervisor may decide to have someone read and explain the memoranda to the employee.

### **13. May an employer ask for documentation when a person requests a reasonable accommodation?**

When a person's disability is not obvious, the employer may ask the person to provide reasonable documentation about his/her disability. The employer is entitled to know that the person has a covered disability for which a reasonable accommodation is needed. The employer may not request docu-

mentation unrelated to the disability at issue, or the accommodation requested. If a person has more than one disability, an employer may only ask for information related to the disability that requires accommodation. The employer may request that information or documentation of a person's impairment be provided by a physician or an appropriate professional. Information about a person's functional limitations can also be obtained from non-professionals, such as the applicant, his/her family members, and friends.

*Example:* A marketing office clerk has a mild intellectual disability and Attention Deficit Disorder which, when combined, create a substantial limitation on his ability to concentrate. The clerk meets with his supervisor every morning to discuss his tasks for the day. In order to remember his assigned tasks, the clerk needs his instructions in writing, but due to his disability, he has difficulty writing clearly. The clerk tells his supervisor about his disability and requests a personal digital assistant (PDA) where his supervisor can record and he can retrieve, step-by-step audio and video instructions regarding his tasks. Because neither the disability nor the need for accommodation are obvious to his supervisor, his supervisor may ask him for reasonable documentation about his impairment; for instance, the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment



limits his ability to perform the activity or activities. The supervisor also may ask why the disability requires the use of a PDA.

**14. May an employer be required to provide more than one reasonable accommodation for the same person with a disability?**

Yes. Certain individuals require only one reasonable accommodation, while others may need more than one. Additionally, because the obligation to provide reasonable accommodation is ongoing, an employer may have to provide a different reasonable accommodation when an employee's disability-related needs or the nature of a job change.

**15. Do persons with intellectual disabilities need more supervision than other employees?**

The type and amount of supervision required for employees with intellectual disabilities will depend on the type of work and the person's individual strengths. It may take persons with intellectual disabilities longer to master the tasks associated with a job. However, studies have established that when workers with intellectual disabilities are properly trained, they can perform as effectively as workers without intellectual disabilities in the same job.<sup>(14)</sup> In other situations, modifying supervisory methods may be an appropriate form of reasonable accommodation. Some employees with intellectual disabilities may benefit

from additional day-to-day guidance or feedback, or from having a large task broken down into smaller parts that are easier to understand.

**Safety concerns**

It is a common misperception that persons with intellectual disabilities are more susceptible to accidents in the workplace and present an increased safety risk. A number of surveys indicate that employees with intellectual disabilities do not create an increased safety risk in the workplace and that their safety records are equivalent to those of employees without disabilities.<sup>(15)</sup> An employer may refuse to hire a person because of her disability only if she in fact poses a "direct threat" to her own health or safety, or to the health and safety of others in the workplace. The term "direct threat" means "significant risk to the health or safety of the individual with a disability or others that cannot be eliminated by reasonable accommodation."<sup>(16)</sup>

**16. How does an employer determine if a person poses a direct threat?**

The employer must evaluate the person's ability to safely perform the essential functions of the job. Factors the employer must consider are the duration of the risk, nature and severity of the potential harm, the likelihood that it will occur, and the imminence of the potential harm. The effect of any reasonable accommodation



that would reduce or eliminate the risk of harm must also be considered. The employer's assessment of direct threat must not be based on fears, myths, or stereotypes, but on credible and objective evidence.

*Example:* An employer cannot deny an applicant with an intellectual disability a job preparing food in a restaurant kitchen based on the assumption that people with intellectual disabilities are incapable of using sharp knives or working around hot ovens without injuring themselves. To assess whether the applicant would actually pose a direct threat, the employer must consider information from a medical professional and the applicant himself concerning the limitations imposed by the disability. The employer should also consider any training or prior work experience the applicant may have had, and whether he has had safety problems performing tasks similar to those required for the current position.

*Example:* An employer may deny a factory job requiring work around dangerous machinery to someone whose intellectual disability makes it impossible for her to understand and follow safety procedures.

## **Conduct**

As with any employees, circumstances may arise when employers must determine whether to discipline employees with intellectual disabilities for misconduct.

## **17. May an employer discipline a person with an intellectual disability for violating a conduct rule?**

An employer does not have to excuse violations of a uniformly applied conduct rule that is job-related and consistent with business necessity. An employer may discipline an employee with a disability for engaging in misconduct, as long as the employer imposes the same discipline on an employee without a disability. This means, for instance, that an employer does not have to tolerate or excuse violence, threats of violence, stealing, or destruction of property.

*Example:* An employee with an intellectual disability works in a retail store stocking shelves. The employee engages in sudden and unprovoked violent behavior by striking other employees. The employer has a "zero-tolerance" policy that results in the termination of any employee who strikes a co-worker, and the employer applies this policy consistently. The employer may discipline the employee in accordance with this policy.

*Example:* A person with an intellectual disability works in the warehouse of a hospital complex opening boxes and placing newly received merchandise in the appropriate shelf area. He has no contact with hospital patients and has limited contact with other employees. Warehouse co-workers have complained that he often uses



curse words in the work area. Although the employer has a workplace conduct rule that prohibits all employees from cursing and enforces this rule with workers who have frequent contact with the public, other warehouse employees violate the rule and are never disciplined. In this case, the conduct rule is not job-related and consistent with business necessity because the employee has no contact with hospital patients and does not come into frequent contact with other employees. Also, the conduct rule is not enforced uniformly among all employees. Thus, applying the conduct rule relating to cursing to this employee would violate the ADA.

## **Harassment**

The ADA prohibits harassment based on disability just as other federal laws prohibit harassment based on race, sex, color, gender, national origin, religion, or age. Approximately 20% of the employment discrimination claims brought by persons with intellectual disabilities under the ADA allege harassment based on disability.<sup>(17)</sup> The EEOC has litigated a number of these cases.<sup>(18)</sup>

### **18. What constitutes actionable harassment under the ADA?**

The ADA prohibits offensive conduct that is sufficiently severe or pervasive to create a hostile or abusive work environment. Acts of harassment may include verbal abuse, such as name-calling, behavior such as graphic and

written statements, or conduct that is physically threatening, harmful, or humiliating. The law does not protect workers with disabilities (or any workers) from merely rude or uncivil conduct. To be actionable, conduct related to an employee's intellectual disability must be sufficiently severe or pervasive as to be both subjectively hostile and abusive (to the person) and to a reasonable person.

*Example:* A fast food restaurant worker with an intellectual disability is often yelled at by the restaurant's assistant manager. The assistant manager calls her derogatory names that specifically relate to her disability. Specifically, the assistant manager constantly refers to her Job Coach as her "nanny" and yells in front of her co-workers, "Hey, where's your nanny, you stupid baby?" The assistant manager also treats her in a disparaging manner, for example, by making her eat her lunch away from everybody else in the break room. The manager's statements and behavior are actionable disability-based harassment.

### **19. What are the employer's responsibilities in the event of harassment based on a person's disability?**

An employer is responsible for maintaining a workplace that is free of harassment based on disability. Failure by an employer to take appropriate steps to prevent or correct harassment may contribute to employer



liability for unlawful harassment. Generally, an employer will be liable for unlawful harassment by a supervisor unless it can show the following: (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. <sup>(19)</sup>

An employer is liable for unlawful harassment by coworkers or non-employees if the employer knew or should have known about the harassment and failed to take immediate and appropriate corrective action. <sup>(20)</sup>

*Example:* A janitor with an intellectual disability and a hearing impairment is teased and undermined by his co-workers. They move their fingers at him as though they were using sign language, pretend they are talking to him by making mouth movements just to confuse him, call him "deaf and dumb," and do not write notes to him about important things he needs to know. The employee has complained to his supervisor, but his supervisor has failed to take any action. The employer is liable for harassment based on disability.

Eliminating disability-based harassment in the workplace must begin with prevention. An employer may take the following steps to prevent and correct harassment:

- disseminate and clearly explain policy statements prohibiting discrimination based on disability in a way that ensures that all employees will understand them;
- provide training for management and employees;
- establish grievance procedures to address disability harassment;
- respond immediately to disability harassment by investigating incidents thoroughly and promptly, taking prompt and effective action to end the harassment and prevent it from recurring, and remedying the effects on the employee who was harassed.

## **20. What are the employee's responsibilities in the event of harassment based on disability?**

Employees who believe they have been subjected to harassment because of their intellectual disability should not ignore the harassment and should take appropriate steps at an early stage to prevent further harassment. An employee may take the following steps if he or she has been subjected to harassment:

- keep a journal with detailed information on instances of harassment, including times, places and the names of people who might have seen the harassment occur;



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- discuss the situation with a family member, friend, Job Coach, or social worker for support and guidance;
- tell the person who engaged in harassment that his or her actions are not welcome;
- let supervisors or other management officials know about the harassment;
- contact the person responsible for handling harassment complaints;
- notify the next higher official in the employer's chain of command in the event that the employee's direct supervisor is the alleged harasser.

## Retaliation

The ADA prohibits retaliation by an employer against someone who opposes discriminatory employment practices, files a charge of employment discrimination, or testifies or participates in any way in an investigation, proceeding, or litigation.

1. See Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA) at <http://www.eeoc.gov/> and Questions and Answers About Epilepsy in the Workplace and the Americans with Disabilities Act (ADA) at <http://www.eeoc.gov/facts/diabetes.html>.
2. The EEOC's use of the term "intellectual disabilities" follows the model of the President's Committee on Intellectual Disabilities (formerly known as the President's Committee on Mental Retardation). The Committee adopted this term to "update and improve the image of people with disabilities who were formerly referred to as people with mental retardation and to help reduce discrimination

against these citizens." The Committee also "sought to reduce the public's confusion between the terms mental illness and mental retardation and to remove the use of terms which resulted in faulty name-calling." President's Committee for People with Intellectual Disabilities. <http://www.acf.hhs.gov/>

3. See Peter David Blanck, *The Americans with Disabilities Act and the Emerging Workforce: Employment of People with Mental Retardation*, American Association on Mental Retardation (1998) at 17, citing *Ability: The Bridge to the Future*, President's Committee on Employment of Persons with Disabilities, Educational Kit (July 1997).

4. See Sheryl

Larson, Charlie Lakin, Nohoon Kwak & Lynda Anderson, *Functional Limitations of Adults in the U.S. Non-Institutionalized Population: NHIS-D Analysis, MR/DD Data Brief*, Research and Training Center on Community Living, Institute on Community Integration, University of Minnesota, October 2001, Vol.3, No. 3, at 11.

5. According to the American Association on Mental Retardation (AAMR), the following five assumptions are essential to the application of this definition:

(1) Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.

(2) Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor and behavioral factors.

(3) Within an individual, limitations often coexist with strengths.

(4) An important purpose of describing limitations is to develop a profile of needed supports.

(5) With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve.

<http://www.aamr.org/>

6. <http://www.thearc.org/>

7. <http://www.thearc.org/>

8. See Blanck, *supra* note 3, at 131. See also, *Equal to the Task II: 1990 Du Pont Survey of Employment of People with Disabilities*.



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9. A reasonable accommodation is any work-related modification that will permit an employee or prospective employee with a disability to participate in the job application process, to perform the essential functions of a job or to partake of the same benefits and privileges of employment as are enjoyed by employees without disabilities. (See Questions 6-15 for more information on reasonable accommodation.)

10. Institute for the Study of Exceptional Children and Youth at the University of Maryland at College Park. The Untapped Resource: The Employee with Mental Retardation (n.d.).

11. Prater-Willi Syndrome is a genetic disorder that typically causes obesity, developmental delays, behavioral issues and delayed sexual development. See Prater-Willi Syndrome Association at <http://www.pwsausa.org/>.

12. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act at 54-56. This enforcement guidance is available at <http://www.eeoc.gov/>.

13. See Blanck, supra note 3, at 42-43. See also, Job Accommodation Network at <http://www.jan.wvu.edu/>.

14. <http://www.thearc.org/>

15. See Blanck, supra n. 3 at 131. See also, Equal to the Task II: 1990 Du Pont Survey of Employment of People with Disabilities.

16. 29 C.F.R. § 1630.2(r).

17. See Blanck, supra note 3, at 56 and 61.

18. See EEOC v. Luby's, Inc., No. CV-04-1094PHX (DGC) (D. Ariz. May 27, 2004) (claiming that the charging party was subjected to harassment based on her intellectual disability when other employees physically threatened her, she was denied her reasonable accommodations and she was retaliated against); EEOC v. Renaissance Roofing, Inc., No. 02-C-50370 (N.D. Ill. Sept. 27, 2002) (company charged with discriminating against an employee with a mild intellectual disability by subjecting him to harassment and discharge because of his disability); EEOC v. Spylen of Denville, Inc., d/b/a Wendy's, No. 02-4091 (WHW) (D.N.J. March 16, 2004) (alleging that defendant subjected charging party to a hostile work environment because of his dis-

ability, Down's Syndrome, causing charging party's constructive discharge. The case was resolved through a consent decree.); EEOC v. GMRI, Inc., d/b/a Olive Garden, No. C-01-44-M (D.N.H. Feb. 7, 2001) (alleging that defendant, a nationwide restaurant chain, subjected the charging party, a dishwasher, to daily physical and verbal abuse because of his intellectual disability. The case was resolved through a consent decree).

19. The standard for employer liability for harassment by supervisors was established by the Supreme Court in two decisions addressing sexual harassment: Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

20. In these cases, the employer's liability employer's liability for harassment by non-employees may be affected by the degree of control the employer exercises over the alleged harasser. See 29 C.F.R. § 1606.8(e).

