Duquesne Law Review

Volume 32 | Number 2 Article 5

1994

Does the Americans with Disabilities Act of 1990 Impose an Undue Burden on Employers?

Rebecca Mastrangelo

Comments

Does The Americans with Disabilities Act of 1990 Impose an Undue Burden on Employers?

Sally has recently completed a post-high-school business course and begins interviewing for a position as a telemarketer. In response to a newspaper advertisement, she applies to a medium-sized company which employs telemarketers to solicit customers for a company that refurbishes kitchen cabinets. The telemarketers' primary duties include calling a list of numbers each day and setting up appointments for free estimates to be given in the customers' homes. The telemarketers must also make follow-up calls to those customers who purchased the service and record any customer comments. The telemarketers work in shifts of either 9:00 a.m. to 5:30 p.m. or 12:00 p.m. to 8:30 p.m., and the shifts alternate weekly.

Sally is completely deaf in her right ear and partially hearing impaired in her left ear. However, with the help of a hearing aid, she is able to understand most normal levels of speaking.

Sally arrived at the personnel office and filled out an application, listing her hearing impairment where the application asked for any physical conditions which might affect the applicant's ability to perform the work. At the interview, the personnel manager noticed that Sally was wearing a hearing aid and inquired as to the extent of her hearing loss. She responded that the aid was adequate for face-to-face conversation but that she needed an amplifier for telephonic communication. At that point, the personnel manager told her that he would set up an appointment for her to take a hearing test, and that if she met the minimum standards, she would be hired. He told her that she could use any specialized equipment she needed in order to pass the test, but that she would have to

supply the equipment herself. Sally did not have a portable telephone amplifier and, therefore, did not pass the hearing test. She was not hired.

Has the employer discriminated against Sally in violation of the Americans with Disabilities Act?[1]

The Americans with Disabilities Act of 1990[2] ("ADA" or "the Act") was promulgated in response to the growing number of disabled persons in the United States and to the wide-ranged discrimination they face, especially in the areas of employment and public accommodations.[3] Such discrimination is not necessarily the result of a conscious intent to exclude disabled persons, but may often be caused by a subconscious fear or unfounded belief that disabled persons are unable to perform as capably as those without substantial disabilities.

The purpose of the employment section[4] of the ADA is to eliminate such discrimination by ensuring that persons with disabilities will not be excluded from employment opportunities unless they are actually unable to do the job. The Act does not, however, guarantee equal rights, nor does it establish quotas.[5] The ADA does not require affirmative action on the part of employers. It is intended only to enable disabled persons to compete in the workplace based on the same performance standards as nondisabled persons.[6] In addition to its own protections, the ADA expressly provides that it will not preempt any other federal, state, or local laws that provide equal or greater protection of the rights of the disabled with regard to remedies, rights, or procedures.[7]

The ADA's predecessor, the Rehabilitation Act of 1973,[8] ("the Rehabilitation Act") first granted rights of action to persons discriminated against based on their disabilities. The Rehabilitation Act requires affirmative action on behalf of employers for the "hiring, placement, and advancement of individuals with disabilities."[9] However, it became necessary for the Rehabilitation Act to be

---

1. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (Supp. 1993)).
2. 42 U.S.C. §§ 12101-12213 (Supp. 1993).
3. 42 U.S.C. § 12101(a) (Supp. 1993).
4. 42 U.S.C. §§ 12111-12117 (Supp. 1993).
5. 29 C.F.R. app. § 1630 (1993).
6. 29 C.F.R. app. § 1630 (1993).
7. 42 U.S.C. § 12201(b) (Supp. 1993).
8. 87 Stat. 357 (1973) (codified as amended at 29 U.S.C. §§ 701-96 (1985 & Supp. 1993)).
9. 29 U.S.C. § 791(b) (1985 & Supp. 1993).

amended (as it was by the ADA) because of its inherent limitations. It was limited in that: (1) its employment section applied only to the federal government, federal contractors, and recipients of federal funds;[10] and (2) many courts gave a narrow interpretation to the requirement of reasonable accommodation, partly due to the absence of any substantial legislative history relating to the extent of an employer's burden.[11]

The ADA adopted many of the terms and definitions set forth in the Rehabilitation Act as legislated and interpreted by court decision. Although the ADA more concretely defines and describes what is required of employers, there is still much room for judicial speculation. With the ADA in effect for slightly over one year, the precedent established by the Rehabilitation Act's cases may still be used persuasively although perhaps their authority should be questioned when the decisions stray from the intent of the 101st Congress which enacted the ADA.

This comment will highlight the important passages of the Americans with Disabilities Act of 1990 as they relate to the employment process. It will conclude with this author's opinion that the Act does not impose undue hardship on accommodating employers.

What is Discrimination Under the ADA?

With regard to employment, the Act states that "no covered entity shall discriminate against a qualified individual with a disability because of the disability."[12] This rule applies to all aspects of employment, including pre-employment applications and procedures, the hiring process, compensation, fringe benefits, training, advancement, discharge, and any other term, condition, or privilege of employment.[13]

"Discrimination" is given a broad reading within the Act. In addition to its common meaning, disability discrimination includes: any type of segregation or classification of a job applicant or em-

---

10. 29 U.S.C. § 793 (1985 & Supp. 1993).

11. Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. Pa. L. Rev. 1423, 1424-25 (1991).

12. 42 U.S.C. § 12112(a) (Supp. 1993). The ADA became effective on July 26, 1992, for any employer in an industry affecting commerce, having twenty-five or more employees in each of twenty or more calendar weeks. On July 26, 1994, such employers with fifteen or more employees will be subject to the Act. 42 U.S.C. § 12111(5)(A) (Supp. 1993).

13. 42 U.S.C. § 12112(a) (Supp. 1993).

ployee in a way that adversely affects the applicant's opportunities;[14] any type of administrative methods which have the effect of disability discrimination;[15] any type of employment tests or selection criteria that tend to screen out disabled persons (unless such criteria are shown to be job-related and consistent with business necessity);[16] the failure to use tests which determine the applicant's or employee's skills rather than merely reflect impairment(s);[17] and not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability (unless such accommodation would impose an undue hardship on the employer's business)[18] or not hiring an otherwise qualified individual with a disability because of the need to make such accommodation.[19] Applicants or employees who believe they are being discriminated against in violation of the Act need not prove discriminatory intent on the part of the employer. Rather, the applicant or employee must merely establish a prima facie case that the challenged standard disparately disadvantages the protected group (disabled persons, of which the applicant or employee is a member).[20]

What is a Disability Under the ADA?

The Act defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities" of a person.[21] Major life activities include (but are not limited to): walking, talking, breathing, seeing, hearing, performing manual tasks, and working.[22] Whether one or more of these activities are "substantially limited" by one's disability requires a case-by-case inquiry into the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long-term or expected permanent or long-term impact of the impairment.[23]

---

14. 42 U.S.C. § 12112(b)(1) (Supp. 1993).
15. 42 U.S.C. § 12112(b)(3) (Supp. 1993).
16. 42 U.S.C. § 12112(b)(6) (Supp. 1993). See note 101 and accompanying text.
17. 42 U.S.C. § 12112(b)(7) (Supp. 1993).
18. 42 U.S.C. § 12112(b)(5)(A) (Supp. 1993). An undue hardship is defined by the ADA as "an action requiring significant difficulty or expense." 42 U.S.C. § 12111(10)(A) (Supp. 1993).
19. 42 U.S.C. § 12112(b)(5)(B) (Supp. 1993).
20. Prewitt v. United States Postal Serv., 662 F.2d 292, 306 (5th Cir. 1981).
21. 42 U.S.C. § 12102(2)(A) (Supp. 1993).
22. 29 C.F.R. § 1630.2(i) (1993).
23. 29 C.F.R. app. § 1630.2(j) (1993).

Not only are those individuals who actually have disabilities covered, but those who have a history of a disability (a prior record of a physical or mental impairment) and those who are regarded as having a disability are also covered.[24] One regarded as having a disability can be: (1) a person with a condition such as high blood pressure, which is usually not substantially limiting; (2) one with an impairment, such as disfigurement, which is only substantially limiting because of the attitudes of others concerning the impairment; or (3) a person with no disability who is treated as if he has one (one rumored to be HIV-infected).[25] Those conditions that are not considered disabilities for the purposes of the Act are such things as old age, height and weight, current drug use, homosexuality, sexual behavior disorders, pregnancy, and most temporary impairments, such as broken bones.[26]

Who is Protected by the ADA?

The Act covers only "qualified individuals with disabilities," defined as those who, "with or without reasonable accommodation, can perform the essential job functions of the employment position."[27] This means that those covered under the Act's employment provisions must be qualified for the desired position in terms of skill, education, and experience. The qualified individual must also be able to perform duties essential to the position. In determining what tasks are essential, Congress has allowed for consideration to be given to the employer's views and any written job descriptions that identify job duties.[28] A job function that is only incidental to the work, or one in which it is not necessary that all employees in the position be required to do, is usually not considered essential.[29] Some additional factors which may be considered in determining the "essential job functions" of a position are: whether the position exists to perform the function; the number of employees available to perform the task;[30] whether the function re-

---

24. 42 U.S.C. § 12102(2)(B), (C) (1993 Supp).

25. 2 ADA Practice and Compliance Manual § 7:28 (Law. Co-op. 1992) [hereinafter ADA Manual].

26. 2 ADA Manual § 7:26.

27. 42 U.S.C. § 12111(8) (Supp. 1993).

28. *Id.*

29. 2 ADA Manual § 7:42.

30. 29 C.F.R. § 1630.2(n)(2) (1993). The number of available employees becomes important when an otherwise qualified individual with a disability can perform all the essential tasks but perhaps one or two. An employer with a large number of employees performing these tasks may be able to redistribute them with a lesser impact than an employer with

quires a certain degree of skill or specialization; the amount of time spent on that function by each employee; and any other relevant factors.[31] One who cannot perform the essential job functions of a position is not "otherwise qualified" and is, therefore, not protected by the Act.

The Ninth Circuit strictly construed the job requirements of a clerical position in *Lucero v. Hart*,[32] decided under the Rehabilitation Act. The typist clerk position required its holders to be able to type forty-five words per minute. The plaintiff was hired for a six-month training period, at the end of which she became eligible for a permanent position.[33] She was certified as capable of typing forty-five words per minute, and at the end of her probation period, she accepted an entry level position.[34] Several weeks later, it was discovered that her typing test had been misgraded and that her typing level was only at forty-four words per minute, and she was discharged.[35] At that time, the employer learned of the plaintiff's emotional handicap and attempted to make arrangements for a retest.[36] The plaintiff failed to respond to the opportunity to retest and subsequently filed suit.[37] The court held that she was not "otherwise qualified" for the position because she could not type forty-five words per minute.[38] It opined that the standard was forty-five, not forty-four, words per minute, and reflected that if forty-four was permitted, it would be difficult to draw a cut-off line.[39]

Often, a finding that a plaintiff is "not otherwise qualified" results because of the conduct of the individual plaintiff. When a head nurse arrived two hours late for work several days a week because of depression and related physical symptoms, the Second Circuit held that she was not "otherwise qualified" for the head nurse position because she could not perform the essential job functions which required the head nurse to arrive at 8:00 a.m. in

---

only a few employees, each having to be able to perform every task incident to the position. 29 C.F.R. app. § 1630 (1993).

31. 29 C.F.R. § 1630.2(n)(2) (1993).
32. 915 F.2d 1367 (9th Cir. 1990).
33. *Lucero*, 915 F.2d at 1369.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 1370. Plaintiff's suit alleged, in part, a violation of the Rehabilitation Act.
38. *Lucero*, 915 F.2d at 1371-72.
39. *Id.*

order to attend meetings and consult with the night supervisor.[40]

In light of the holdings of these cases, is Sally, from the opening hypothetical, a "qualified individual with a disability"? She has a physical impairment that substantially limits a major life activity: she is hearing impaired. Moreover, it appears that she is "otherwise qualified" for the telemarketing position because she is able to perform the essential job functions (making phone calls and recording certain information) with a reasonable accommodation (an amplifier).

What Type of Protection is Available?

Once it has been determined that an individual with a disability is "otherwise qualified" for a particular position, the need for a "reasonable accommodation" must be examined. If the disabled individual can perform the essential job functions in spite of the handicap, no accommodation may be necessary. If, however, the individual needs some type of equipment or modification of the job, the need for a reasonable accommodation arises.

The Act, while not defining "reasonable accommodation," sets forth several possibilities for accommodating the disabled. Reasonable accommodation can be accomplished by making existing facilities readily accessible to or usable by disabled persons.[41] It could include nonphysical adaptations such as job restructuring, developing part-time or modified work schedules, or making reassignments to vacant positions.[42] Finally, a reasonable accommodation may require the purchase or modification of equipment or devices or the employment of qualified readers or interpreters.[43] The types of reasonable accommodations are limited only by the imaginations of the employer and the disabled individual seeking the accommodation, and the fact that the reasonable accommodation need not be made if it would place undue hardship on the employer's business.[44]

In *Guice-Mills*, the hospital attempted to accommodate the plaintiff by offering her a position as a staff nurse, thus accommo-

---

40. Guice-Mills v. Derwinski, 967 F.2d 794, 798 (2d Cir. 1992). The hospital attempted to provide the plaintiff with a reasonable accommodation by offering her a position as a staff nurse with the same pay, but such accommodation was refused. *Guice-Mills*, 967 F.2d at 798.

41. 42 U.S.C. § 12111(9) (Supp. 1993).

42. *Id.*

43. *Id.*

44. 42 U.S.C. § 12112(b)(5)(A) (Supp. 1993).

dating her need to begin the workday at 10:00 a.m. instead of 8:00 a.m.[45] This is permissible under the ADA because the head nurse position could not be restructured to accommodate the later shift and because the plaintiff's salary would not have been reduced.[46] The plaintiff, however, declined to accept the subordinate position, and thus was entitled to no relief under the Act.[47] A disabled person does not have to accept an employer's offer to accommodate, but if such refusal renders the individual unable to perform the essential job functions of the position, the disabled person will not be considered "otherwise qualified" and will not be protected by the ADA.[48]

In *Arneson v. Heckler*,[49] the plaintiff had a neurological disorder, apraxia, which resulted in difficulty in comprehending written and spoken language, poor reading and writing skills, poor organizational skills, and inability to concentrate.[50] He was employed as a claims representative and spent the majority of his workday on the telephone interviewing claimants regarding social security information and work and medical history.[51] To accommodate his disability, the employer put the plaintiff's desk in a small room which had been formerly used as a stockroom, supplied him with a headset, and gave him assistance in organizing his work.[52] Upon receipt of these accommodations, the quality of his work greatly improved.[53] Subsequently, the plaintiff volunteered to work at another branch of the company.[54] There, his desk was in the same room as other claims representatives, although it was placed in the back in order to aid his need to be free from distraction.[55] He was supplied with a headset and received the level of organizational help as had been provided before.[56] When his work at the new

45. *Guice-Mills*, 967 F.2d at 798.

46. An employer may reassign an employee to a lower graded position if there are no positions of the same grade available. An employer is not, however, required to maintain the reassigned employee's salary. 29 C.F.R. app. § 1630 (1993). The court in *Guice-Mills* went one step further, stating that when an employee is offered an alternative position without a significant reduction in pay and benefits, the offer constitutes a reasonable accommodation "virtually as a matter of law." *Guice-Mills*, 967 F.2d at 798.

47. *Guice-Mills*, 967 F.2d at 797.

48. 29 C.F.R. app. § 1630 (1993).

49. 879 F.2d 393 (8th Cir. 1989).

50. *Arneson*, 879 F.2d at 394-95.

51. *Id.* at 395.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Arneson*, 879 F.2d at 395.

56. *Id.*

branch was deemed unsatisfactory, he was discharged.[57] The employer argued that the plaintiff was accommodated as far as possible, but that there were no available private rooms.[58] It declined, as against company policy pertaining to security, to accommodate the plaintiff's suggestions that he be permitted to work at hours when others were off or to take work home with him.[59] The employer also rejected his request for an assistant because it would have required the company to pay two people to do the job of one.[60] The court remanded the case to look into the possibility of accommodating the plaintiff's disability by either hiring a part-time assistant to proofread his work or transferring him back to his prior position at the other branch.[61]

In determining whether an accommodation is reasonable or possible, the plaintiff has the initial burden of coming forward with evidence that the handicap can be accommodated.[62] The employer then has the ultimate burden of showing inability to accommodate.[63] In *Strathie v. Department of Transportation*,[64] the plaintiff was hired as a school bus driver, but after working one day, his license was suspended because he wore a hearing aid which indicated his hearing was weaker than permitted for school bus drivers.[65] Given the fact that the plaintiff was able to perform the essential job functions with a reasonable accommodation (the hearing aid), he was protected by the Rehabilitation Act. The employer argued that the plaintiff was not otherwise qualified because: his hearing aid might fall out, he could turn down or turn off the hearing aid, or the aid's battery may fail, and any of these situations could put school children in danger.[66] The plaintiff responded to each of the employer's contingencies: eyeglasses are not banned and they could fall off, the employer could require that a hearing aid that could not be turned down or off be purchased by the employee, and the employer could require the aid's battery be

---

57. *Id.*
58. *Id.* at 397.
59. *Id.*
60. *Arneson*, 879 F.2d at 397.
61. *Id.* at 398.
62. DiPompo v. West Point Military Academy, 770 F. Supp. 887, 888-89 (S.D.N.Y. 1991) (quoting Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983)).
63. *Treadwell*, 707 F.2d at 478.
64. 716 F.2d 227 (3d Cir. 1983).
65. *Strathie*, 716 F.2d at 228.
66. *Id.* at 232-33.

tested before each trip.[67] In light of the plaintiff's rebuttal, the court remanded the case for consideration of these additional accommodations.[68]

Reasonable accommodations are not meant to provide disabled employees with special treatment or possessions. They are merely an equalizing means of enhancing a competitive work environment. They are often small changes in the way that things are normally done and are rarely extravagant adaptations. Reasonable accommodations do not include such things as wheelchairs, guide dogs, or eyeglasses, which a disabled employee needs to get through life outside of the workplace.[69] Instead they are work-related aids, such as machines which magnify print, telephonic headsets, reserved parking, a page turner for an employee with no hands, or a travel attendant for a blind employee who occasionally must make a business trip.[70] They include flexible policies which allow an employee who cannot sit for long periods of time to work from 8:00 a.m. until 6:00 p.m., taking six ten-minute breaks throughout the day, instead of working 8:00 a.m. until 5:00 p.m. with only one lunch break. Other accommodations may permit disabled employees needing time off for medical treatments to accumulate sick or vacation time for this purpose or to take an unpaid leave.[71]

Job restructuring is also an accommodation to be considered. If there are two jobs which contain a number of marginal functions, and a disabled person can perform some of each job in addition to the essential job functions of one, the employer can restructure the job descriptions so that the disabled person is responsible for all of the marginal functions he can perform and the responsibility for the other functions is placed on the other position's holder.[72] Job restructuring is not considered reasonable, however, if it requires the employer to reorganize a substantial portion of its business.

The requirement that an employer provide a disabled employee with a reasonable accommodation is not to be read as requiring it to make the best possible accommodation. For example, in *Carter v. Bennett*,[73] a blind employee requested a voice synthesized computer and two floppy disk drives to enable her to perform the es-

67. *Id.*
68. *Id.* at 234.
69. 2 ADA MANUAL § 7:67.
70. 2 ADA MANUAL § 7:68.
71. *Id.*
72. 2 ADA MANUAL § 7:70.
73. 840 F.2d 63 (D.C. Cir. 1988).

sential job functions.[74] When the employer instead provided her with two part-time readers, the court accepted this as a reasonable accommodation.[75]

Finally, the duty of an employer to accommodate is not extinguished when an employee is willing to provide the accommodation and subsequently becomes unable or unwilling to continue to do so.[76] In such a case, the employer would be bound to provide some accommodation to enable the employee to do the job although it may not be the same accommodation which was self-provided by the employee.[77]

When is an Employer Excused from Making Reasonable Accommodations?

The duty of an employer to make reasonable accommodations to the needs of disabled applicants or employees is abdicated if making such accommodations would impose an undue hardship on its business.[78] The Act vaguely defines "undue hardship" as "an action requiring significant difficulty or expense."[79] It includes any accommodation which is "unduly costly, extensive, substantial, disruptive" or such that it would alter the nature or operation of the employer's business.[80] Factors to be considered include: the nature and cost of the needed accommodation; the financial resources of the particular facility; the number of persons employed at the particular facility; and the foreseeable impact on the resources and operation of the facility.[81] If the particular facility is one location in a multi-location business, the overall business of the employing entity can be considered, including its financial resources, number of employees, and foreseeable impact.[82] Although this section of the Act is far from clear, it basically requires an employer to take affirmative steps to accommodate a disabled applicant or employee

---

74. *Carter*, 840 F.2d at 68.
75. *Id.*
76. 29 C.F.R. § 1630.9(d) (1993).
77. *Id.*
78. 2 ADA Manual § 7:144.
79. 42 U.S.C. § 12111(10)(A) (Supp. 1993).
80. 29 C.F.R. app. § 1630.2 (1993).
81. 42 U.S.C. § 12111(10)(B) (Supp. 1993).
82. *Id.* For example, a franchise that receives monies from its parent company is obviously better able to absorb certain costs of providing accommodations than is a sole proprietor with only one business location. Furthermore, the availability of funds from governmental or charitable vocational rehabilitation agencies to offset the costs of accommodating the needs of the disabled must be taken into account, as must the availability of tax deductions or tax credits. 2 ADA Manual § 7:146.

unless doing so would put a severe financial or other strain on its business. Further, if the cost of an accommodation puts undue hardship on an employer's business and no outside help is available to defray the cost, the employee "should be given the option of providing the accommodation or paying that portion of the cost which constitutes an undue hardship on the operation of the business."[83]

The Eighth Circuit held that it would be an undue hardship financially for the Army to place in Saudi Arabia a disabled engineer who required blood analysis on a regular basis.[84] The plaintiff, a manic depressive, controlled his disorder with medication.[85] In order to monitor the amount of medication in his blood, it was necessary for blood samples to be analyzed every four months.[86] Additionally, in the event of a manic depressive episode, he often required hospitalization.[87] At the location in Saudi Arabia, there were no doctors or labs to analyze the plaintiff's blood.[88] Radio communication was poor, and the nearest hospital was a thirteen-hour drive away.[89] Requiring the Army to accommodate the plaintiff by building a hospital and laboratory and staffing it with qualified doctors was held to be unreasonably expensive, and alternative accommodations did not alleviate the physical danger to the plaintiff and others.[90]

The Eleventh Circuit declared an undue hardship would be placed on an employer's business where hiring an engineer with physical limitations would result in other employees performing many of his required duties.[91] Making a reasonable accommodation does not require an employer to reallocate essential job functions.[92]

Furthermore, an employer is not required to make accommodations which would endanger other employees. In *DiPompo v. West Point Military Academy*,[93] the court held that a would-be firefighter who had dyslexia and could not read at a twelfth grade level need not be accommodated by having his father or others

83. 29 C.F.R. app. § 1630.2 (1993).
84. Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985).
85. *Gardner*, 752 F.2d at 1274.
86. *Id.*
87. *Id.* at 1276.
88. *Id.* at 1275.
89. *Id.*
90. *Gardner*, 752 F.2d at 1284.
91. Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983).
92. 29 C.F.R. app. § 1630.2(o) (1993).
93. 770 F. Supp. 887 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 326 (2d Cir. 1992).

read technical manuals to him as this would not eliminate the significant danger to himself and others in emergency situations where the reading of words, numbers, and symbols must be quickly negotiated.[94]

Referring back to the opening hypothetical, it obviously would not impose an undue hardship on the employer, a "medium-sized" firm, to provide Sally with an amplifier for her telephone or headset. Therefore, by requiring Sally to procure her own accommodation, the employer violated the Act.

What Types of Inquiries May Employers Make?

Prior to an individual being offered a job, an employer is, under the ADA, very limited in what it can ask regarding any physical or mental impairments that an applicant may have. The Act states that an employer may not question an applicant as to whether the applicant has a disability or as to the nature or severity of a disability.[95] It may not question about past workers' compensation claims or consider the rising costs of health care or workers' compensation insurance.[96] This means that employers must eliminate such inquiries both from written applications and from oral interviews.

An employer still may, of course, question a prospective employee as to her ability to perform job-related functions.[97] It may even ask a disabled applicant to describe or demonstrate how the applicant would perform, with or without reasonable accommodation, a job-related function, *if* the applicant's disability is one which would obviously interfere with the performance of such a function.[98] If the disability is not one which would interfere, the employer may not request that a disabled applicant demonstrate the work unless it routinely asks all applicants to do so.[99] Thus, where a "legally blind" librarian was asked at a job interview to read something aloud, there was no violation of the ADA because the ability to read is a skill related to a librarian's job.[100]

An employer may not require applicants to submit to any type

---

94. *DiPompo*, 770 F. Supp. at 889-92.
95. 42 U.S.C. § 12112(c)(2)(d)(2)(A) (Supp. 1993).
96. 2 ADA Manual § 7:101.
97. *Id.*
98. 2 ADA Manual § 7:116.
99. 2 ADA Manual § 7:117.
100. Norcross v. Sneed, 573 F. Supp. 533 (W.D. Ark. 1983), *aff'd*, 755 F.2d 113 (8th Cir. 1985).

of medical examination unless and until it extends a job offer to the applicant, although the offer may be conditioned on the results of the medical exam.[101] However, there are some restrictions as to the type and extent of such medical exams. First, the exam must be required of *all* new employees, regardless of disability.[102] Secondly, any exams and inquiries given post-offer, pre-employment, must be both job-related and consistent with business necessity if they tend to screen out individuals with disabilities.[103] Finally, all information obtained in the medical examinations and inquiries must be kept in files separate from other personnel records and treated as confidential information, with access to be granted on an as-needed basis.[104]

An employer may require medical examinations or medical inquiries during the course of employment if the exams and inquiries are job-related and consistent with business necessity.[105] In *Leckelt v. Board of Commissioners of Hospital District No. 1*,[106] HIV tests were required of hospital employees who may have been exposed to the virus.[107] When the plaintiff's roommate was diagnosed with AIDS, the plaintiff was asked to have an HIV test and submit the results to the hospital.[108] Upon refusal to do so, the plaintiff was discharged.[109] The court found that no violation of the Rehabilitation Act occurred.[110] The plaintiff was not fired because of his disability (that is, being perceived as having AIDS or HIV infection), but because he failed to follow hospital policy. His refusal to submit his test results, the court reasoned, stripped him of the Act's protection as he was no longer "otherwise qualified."[111]

How did the employer violate the Act at Sally's interview? First, the application called for information on physical impairments.

---

101. 42 U.S.C. § 12112(d)(3) (Supp. 1993). For purposes of the ADA, testing for illegal use of drugs is not considered a medical examination. 42 U.S.C. § 12114(d)(1) (Supp. 1993).

102. 42 U.S.C. § 12112(d)(3)(A) (Supp. 1993).

103. 42 U.S.C. § 12112(d)(4)(A) (Supp. 1993). *See also* 2 ADA MANUAL § 7:121.

104. 42 U.S.C. § 12112(d)(3)(B) (Supp. 1993). If any work restrictions or accommodations are necessary, supervisors and managers may be informed. Additionally, first aid personnel may be informed if necessity dictates, and government officials may be informed if investigating the employer's compliance with the Act. *Id.*

105. 29 C.F.R. § 1630.14(c) (1993).

106. 714 F. Supp. 1377 (E.D. La. 1989), *aff'd*, 909 F.2d 820 (5th Cir. 1990).

107. *Leckelt*, 714 F. Supp. at 1379.

108. *Id.* at 1384.

109. *Id.*

110. *Id.* at 1386.

111. *Id.* The hospital did not have a policy of firing those who tested positive for HIV, but merely required the test so that it could determine what reasonable accommodations, if any, might be needed. *Id.* at 1388.

Even though the application provided that only job-related disabilities be listed, the ADA was violated. Applications may not ask questions about *any* disabilities. Period. Second, the interviewer asked Sally about the extent of her hearing loss. This was also improper. The employer could have, however, specifically inquired as to whether Sally could hear sufficiently by telephone. Third, the employer may have violated the Act by requiring Sally to take a hearing test. It would not have been a violation if the employer made all new employees take such a test because hearing is obviously job-related to a telemarketing position. As stated above, it also was a violation of the Act for the employer to inform Sally that she must provide her own accommodation.

Conclusion

The Americans with Disabilities Act is not unduly burdensome to employers. The benefits that the Act provides to the disabled and to this country must be weighed against the inconvenience imposed on some employers. The benefits result in desegregation of a minority group, permitting such individuals to live independently and self-sufficiently.[112] They also include giving the right to compete for equal job opportunities to the disabled, and the alleviation of billion-dollar expenses in aid from the federal government.[113] What does this cost employers? Not much in comparison. The employer may have to modify a rigid work schedule, add a part-time assistant to the payroll, or install a device for amplified hearing on a telephone. An accommodation requiring substantially more expense or disruption of business will not be imposed. For now, all that must be undertaken by employers is a sound, common-sense policy toward the hiring and advancement of disabled individuals. An employer should begin by designating one or more employees with the responsibility of ensuring ADA compliance and provide those employees with the necessary education. It should review employment applications and remove those inquiries which relate to disabilities or past workers' compensation claims. Additionally, it should study the selection criteria and employment tests used in the hiring process and educate its hiring personnel with regard to improper questions. It is imperative that the employer revise written job descriptions, if necessary, so that they accurately portray the duties and responsibilities of each position, as well as outline

112. 42 U.S.C. § 12101(a)(8) (Supp. 1993).
113. 42 U.S.C. § 12101(a)(9) (Supp. 1993).

the required skills necessary to perform the essential job functions. An employer should develop a flexible policy toward making reasonable accommodations, and it should train its staff to maintain confidential records. Finally, it should keep itself informed of changes in the law and the availability of funds from governmental and private organizations which benefit the disabled.[114]

Rebecca Mastrangelo

114. The foregoing list of suggestions was adopted from M.J. Neuberger, and J.N. Cerilli, The Americans With Disabilities Act of 1990: An Overview and Discussion of Workers' Compensation Issues (paper presented at Allegheny County Workers' Compensation Information Exchange meeting, October, 1992). Mr. Neuberger and Mr. Cerilli are attorneys at the law firm of Buchanan Ingersoll in Pittsburgh, Pennsylvania.