

Employees Who Are (or Become) Disabled: Whose Job Is Protected?

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1. Employee Disability: Elusive Definitions, Mysterious Laws

Imagine that a teacher in your district falls down the school stairs and suffers a broken leg which never fully heals. The teacher has permanent problems walking. Her ability to perform some of her job responsibilities becomes difficult, and her doctor signs paperwork asserting that she has certain disabilities. Is her job protected? If so, by what?

This paper is intended to give school board members a “big picture” perspective of the disability protections applicable to school district employees. At the end of the paper, I have included a list of practical tips for consideration.

Assuming the teacher in our “broken leg” hypothetical gives proper notice throughout this process, your human resources administrators will be interpreting and applying the Americans with Disabilities Act (ADA), which is discussed in more detail in section 2 below. Other potential employee protections merit brief mention here, as they often overlap with the ADA and with each other. These protections include the Family Medical Leave Act (FMLA), Workers Comp laws, and school board policies relating to short term and long term leave.

Under the Family Medical Leave Act (“FMLA”), school districts must grant an eligible employee up to a total of 12 work-weeks of unpaid leave during any twelve month period for: the birth and care of a newborn child of the employee; for placement with the employee of a son or daughter for adoption or foster care; to care for an immediate family member (spouse, child, or parent) with a serious health condition; or to take medical leave when the employee is unable to work because of a serious health

condition. Many school districts have a board policy GBRIG which specifically addresses FMLA issues.

Workers' compensation laws apply whenever the disability or leave results from an accident or injury arising in the course of employment. The basic rule is that the school district is responsible (through insurance or self insurance) for any such injuries.

School board policies regarding employee leave (which are often coded "GBRI") may create additional responsibilities on the part of the school district. In many situations involving a disability, the school district must also take precautions to avoid revealing confidential medical records or information.

Section 504 of the Rehabilitation Act of 1973 (which is applicable to school districts due to their receipt of federal funding) protects employees with disabilities. Section 504 and the ADA, discussed below in section 2, are largely duplicative. Because of the significant overlap, most issues which formerly were addressed under 504 now tend to be addressed in terms of ADA, which took effect in the early 1990s.

The school district, if considering termination, must first rule out disability leave protection. Issues of leave rights, with respect to teachers, are not uncommon in Fair Dismissal Act hearings. Understandably, human resources professionals report uncertainty as to how to apply employee leave under the ADA, FMLA, and school board policies for short-term and long term disability. School districts are encouraged to consult their attorney for employment law advice in these situations.

2. Background Discussion of the ADA

The ADA prohibits discrimination on the basis of disability.² The cost of ADA compliance for school districts can be significant. The cost of running afoul of the ADA is even higher. Remedies that may be required of an employer that is found to have discriminated against an applicant or employee with a disability include damages, back pay, front pay, restored benefits, attorney's fees, reasonable accommodation, reinstatement, and job offers. The employment practices regulated by the ADA are broad. They include the following: application, testing, hiring, assignments, evaluation, disciplinary actions, promotion, medical examinations, layoff/recall, termination, compensation, leave, training, and benefits. School districts, therefore, benefit greatly from having sound policies and procedures in place, as well as trained staff to administer the relevant disability and leave laws. Careful application of the law will save the school district money and ensure that employees are treated fairly.

A. **Definition of Disability.** The federal definition of “an individual with a disability” is a person who:

- has a physical or mental impairment that substantially limits one or more major life activities;
- has a record of such impairment; or
- is regarded as having such an impairment.

Under the ADA, a “physical impairment” is any “physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body

² See Titles I and V of the Americans with Disabilities Act of 1990 (Pub. L. 101-336), 42 U.S.C. § 12101, et seq.; 29 C.F.R. 1630 et seq. See also “Disability Discrimination: Employment Discrimination Prohibited by the Americans with Disabilities Act of 1990,” The U.S. E.E.O.C. Technical Assistance Program, which the writer has relied upon for this section. Note: No legal advice is intended to be given in this paper.

systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.” A “mental impairment” is any “mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”

A “qualified” person with a disability is a person who “satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. The analysis which should be performed here is a) determine if the individual meets the necessary prerequisites for the job, such as education, work experience, training, skills, licenses, certificates (this is known as the “otherwise qualified” test); and b) determine if the individual can perform the essential functions of the job, with or without reasonable accommodation.

“Major life activities” are activities that an average person can perform with little or no difficulty, such as walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for oneself, and working. For an impairment to “substantially limit” a major life activity, the individual must be unable to perform, or be significantly limited in the ability to perform, an activity compared to an average person in the general population. There are three factors to consider regarding the limitation: 1) its nature and severity; 2) how long it will last or is expected to last; 3) its permanent or long term impact, or expected impact.

Returning to the teacher with an un-healed broken leg, she may very well qualify for ADA protection if she is substantially limited from walking long distances, a major life activity, to the extent that it is an essential function of the job. In such a case, the school district would be advised to enter into an interactive process to see if a reasonable accommodation can be made.

Over-simplification is a common peril in interpreting the ADA. Judges and appellate courts make their own decisions based on their interpretation of each of the fact-intensive considerations involved. The body of case law is rapidly evolving and even conflicting. The legal decisions are made on a case-by-case basis. The trial and appellate courts will likely come to their own conclusions about how to define “disability” and “major life activity.”

We are, nevertheless, able to glean some general information from the case law. The situation where a back injury results in inability to lift over 25 pounds has been subject to conflicting court rulings. (!) One emerging area of difficulty involves emotional problems and psychological disability. Though there can be disability involved with psychological conditions, school districts should be skeptical of claims for disabilities which relate solely to problems with specified co-workers. (In other words, “Principal Jones” is not a disability.) Current alcohol or drug use is not a disability, though addiction and alcoholism are disabilities, in the context of treatment being sought. Obesity would not be a disability in most circumstances, though there are conceivable exceptions. Whether cancer is a disability depends on whether a major life activity is substantially limited. Nicotine addiction is not a disability, though school districts could

face difficulty if they tried to exclude smokers from being hired. Insulin-dependent diabetes might not be a disability if insulin shots regulate and control the effects of the disease, but would be a disability if it substantially limits a major life activity. Specific exclusions to the definition of disability under the ADA include homosexuality, bisexuality, compulsive gambling, kleptomania, pyromania, and the following sexual and behavioral disorders: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorder not resulting from physical impairments, or other sexual behavior disorders.

For some time, it was unclear how to interpret the ADA in instances where a disabled employee who, if properly medicated, was not substantially limited in a major life activity. As merely one example, is an insulin-dependent diabetic to be considered disabled if the condition can be completely stabilized with proper treatment? As the EEOC guidance reveals:

... [T]he Supreme Court held in Sutton³ and Murphy⁴ that the determination of whether a person has an ADA "disability" **must take into consideration whether the person is substantially limited in a major life activity when using a mitigating measure**, such as medication, a prosthesis, or a hearing aid. A person who experiences no substantial limitation in any major life activity when using a mitigating measure does not meet the ADA's first definition of "disability" (a physical or mental impairment that substantially limits a major life activity). In Albertsons,⁵ the Court extended this analysis to individuals who specifically develop compensating behaviors to mitigate the effects of an impairment. In so ruling, the Supreme Court rejected the Commission's position that the beneficial effects of mitigating measures should not be considered when determining whether a person meets the first definition of "disability."

³ Sutton v. United Airlines, Inc., 527 U.S. ___, 67 U.S.L.W. 4537 (June 22, 1999).

⁴ Murphy v. United Parcel Service, Inc., 527 U.S. ___ (1999).

⁵ Albertsons, Inc. v. Kirkingburg, 527 U.S. ___ (1999).

In all of these cases, the Supreme Court emphasized that, consistent with EEOC's position, the determination of whether a person has a "disability" **must be made on a case-by-case basis**. The Court stated that it could not be assumed that everyone with a particular type of impairment who uses a particular mitigating measure automatically was included -- or excluded -- from the ADA's definition of "disability." Nor does the definition of "disability" depend on general information about the limitations of an impairment. Rather, one must assess the specific limitations, or lack of limitations, experienced by a Charging Party (CP) who uses a mitigating measure or compensating behavior to lessen or eliminate the limitations caused by an impairment. [Emphasis supplied.]

B. Reasonable Accommodation. "Reasonable accommodation" may include, but is not limited to:

- making existing facilities used by employees readily accessible to and usable by persons with disabilities.
- job restructuring, modifying work schedules, reassignment to a vacant position;
- acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

Determining what is and is not a reasonable accommodation can be difficult, but a fair process of communicating with the employee about potential disabilities can itself reduce the legal exposure of the school district to future litigation and adverse results. Where a disability exists, the objective is to provide an accommodation that is effective for the individual. This should be accomplished through an "interactive process" between the employee and school district. This process should be carefully engaged, documented in writing, and conducted in a timely manner. The school district can also ask the employee for written documentation from a physician (or other applicable person) documenting a disability, if that information has not already been provided. Though

there is no specific legal standard, the trend has been for judges to scrutinize the extent of the good faith efforts on the part of employers.

Generally, it is the responsibility of the employee to let the school district know of any disability. In addition, the school district can request documentation of an individual's functional limitations supporting the individual's ADA request.

C. Miscellaneous Issues.

The ADA carves out some exceptions which protect employers. For instance, an employer is not required to provide an accommodation if it will impose an "undue hardship" on the operation of the school district. "Undue hardship" is defined as an action that is "excessively costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business." It is difficult to win an early dismissal from court on the issue of undue hardship, since judges tend to allow juries to decide the question. As another example of an ADA exception to coverage, the school district may require that an employee not pose a direct threat to the health or safety of herself or others. The school district's determination that such a threat exists should be based on medical or other objective evidence.

The Equal Employment Opportunity Commission ("EEOC") is charged with enforcing the ADA, usually in response to a complaint lodged by an employee or former employee. An employee may also sue in a private lawsuit to enforce the ADA, but may only do so after receiving a right-to-sue letter from the EEOC. The employee has 90 days to sue from the date the letter is issued. Similar to other federal employment laws, the ADA contains a requirement that notice of the law must be posted in the workplace.

Retaliation is prohibited under the ADA, and can itself become the basis for a cause of action against a school district. The ADA also protects persons who are associates of the employee with a disability.

3. Practical Compliance Tips for Board Members

In closing, here are practical tips for school board members to consider as they strive to ensure school district compliance with federal employment laws relating to employees who are disabled or may become disabled.

- School District Human Resources departments should maintain detailed, accurate, updated job descriptions, particularly in respect to the essential functions of each job. This will greatly benefit the school district in connection with the ADA required “interactive process” to determine reasonable accommodation.
- Employees who become disabled are not necessarily entitled to the accommodation they request, the “best” accommodation, or even the accommodation requested by their physician. They are entitled only to reasonable accommodation.
- School district decisions respecting reasonable accommodation or other change in employment status should be reviewed by senior HR staff and legal counsel.
- Board policies regarding employee leave should be reviewed or audited regularly to ensure compliance with revised laws and to address problems which may have occurred in the school district or other districts.
- School principals and assistant principals (the “front line”) must be trained and educated so they know when issues should be referred to the human resources department.
- As part of a long term strategy, providing for a highly professional, efficient human resources and personnel department is an important function for a Superintendent and Board. An effective HR department helps ensure that the school-children will have the best teachers and other staff as they pursue their education. Also, legal troubles and expenses will be prevented.