Americans with Disabilities Act and Reasonable Accommodations in the Workplace

GUAM LEGAL SERVICES CORPORATION – DISABILITY LAW CENTER
“The Protection and Advocacy System for Guam.”

March 2010
About GLSC-DLC

Guam Legal Services Corporation – Disability Law Center

- Chartered and began servicing the low income community of Guam in 1979

- Currently provides legal representation to individuals with low income, individuals with disabilities, and victims of family violence.
About the ADA

Americans with Disabilities Act

- A Federal Law passed in 1990 that requires that public and private entities have accessible facilities and that these organizations do not discriminate against people with disabilities.
Title I of the ADA

Applies to…

- Employers with 15 or more employees, working at least 20 calendar weeks a year;
- Employment agencies; and
- Labor organizations.
About Disabilities

- How does the ADA define a person with a disability?
- What types of disabilities are there?
Who is a Person with a Disability?

An Individual with a Disability is defined in the Americans with Disabilities Act (ADA) as being any person who...

• Has a physical or mental impairment which substantially limits one or major life activities such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; or
• Has a record of such an impairment; or
• Is regarded as having such an impairment.
Types of Disabilities

- Physical Disabilities
- Mental Illness
- Developmental Disabilities
- Traumatic Brain Injury (TBI)
- Sensory Disabilities
Physical Disabilities

- Can affect the person’s ability to walk or to move about freely;

- May require the use of a mobility aid; and

- Can be developmental or acquired.

Examples include heart conditions, muscular dystrophy, and amputation.
Mental Illness

- A significant mental illness or emotional impairment; and
- Is determined by a mental health professional qualified under the laws and regulations of the State.

Examples include schizophrenia and other psychotic disorders, major depressive disorders or mood disorders, and anxiety disorders.
Developmental Disabilities

- A cognitive or physical disability, or both, that manifests before the age of 22 years;

- Is likely to continue indefinitely; and

- Results in substantial functional limitations in self-care, receptive or expressive language, learning, mobility, and so on.

Examples include autism, cerebral palsy, mental retardation, Down Syndrome, and ADHD.
Traumatic Brain Injury (TBI)

- A head injury that results in damage to the brain;
- Caused by an external physical force; and
- May lead to an impairment of cognitive abilities or physical functioning.

There are two types of head injuries that can lead to damage within the brain: penetrating/open and closed head injuries.
Sensory Disabilities

- Disabilities that can affect or be affected by…
  - Touch
  - Taste
  - Smell
  - Sight
  - Hearing

Most common disabilities involve loss of hearing or sight.
ADA - Responsibility

- What are employer responsibilities?

- What are employee responsibilities?
ADA - Responsibility

- In the employment setting, it is not the employer's responsibility to offer accommodation to persons with disabilities.

- It is the employee’s responsibility to inform the employer of the need for accommodation and the basis for the request of the accommodation.
ADA - Responsibility

- Once a verified request is made, it is both the employee’s and the employer’s responsibility to discuss and determine reasonable accommodation.

- If they do not request accommodation, it is each employee’s responsibility to perform all job functions.

- If they do request and receive accommodation, the employee must be able to perform the requirements of their position.
Reasonable Accommodations in the workplace: What are they? Whose responsibility is it?
Reasonable Accommodations

- Modifications or adjustments to job functions, work environments, or “the way things usually are done” so that a qualified individual with a disability gets an equal employment opportunity

- Failure to provide a reasonable accommodation to a qualified individual is a form of discrimination based on disability, which is prohibited under the ADA.

See 42 U.S.C. § 12112(b)(5)(A)
Reasonable Accommodations

Include…

- Making existing facilities accessible
- Restructuring the job
- Modifying the work schedule
- Modifying/installing equipment and devices
- Providing qualified readers and interpreters
Reasonable Accommodations

Do not include…

- Providing personal use items
- Allowing anything that would be considered an undue hardship
- Excusing a violation of a uniformly applied conduct rule
- Eliminating a primary job responsibility
- Lowering production standards that are applied to all employees
Reasonable Accommodations

Are any changes or adjustments to the job or work environment to allow a person with disabilities to…

- Participate in the job application process;
- Perform “Essential Functions” of the job; and
- Enjoy the benefits and privileges of employment.

See 29 C.F.R § 1630.2(o)
Reasonable Accommodations

- The reasonable accommodation provided does not need to be the “best” or “ideal” accommodation.
- It only needs to be “effective”.
Reasonable Accommodations

Must be provided unless…

- It results in an **undue hardship** to the employer;
- Poses a **direct threat** to the health or safety of the employee or others; or
- It results in a **fundamental alteration** of the position.
Reasonable Accommodations

Employers do not have to provide:

- Adjustments or modifications that are primarily for the personal benefit of the employee; or
- Personal use items need in accomplishing daily activities both on and off the job.

Reasonable Accommodations

Exceptions:

- Items specifically designed or required to meet job-related duties are NOT for personal needs.
- Personal attendant services may be required for work-related (not personal) services.

Application/Interview

Reasonable Accommodations during the Application / Interview Phase
Application/Interview

Reasonable accommodations at the Application/Interview Phase include…

- **Providing a person** to read or interpret application materials;
- **Demonstrating** what the job requires;
- **Modifying** tests, training materials, testing time, and/or policy manuals;
- **Replacing a written test** with a more extensive interview which allows the individual to demonstrate their knowledge/skills at the work site; and
- **Allowing a support person** during the interview.
Application/Interview

Do not ask an applicant…

- What physical disabilities do you have?
- Have you ever been treated for a mental disorder?
- Did you miss any work for any illness and for how many days?
- Have you ever undergone treatment for any of these diseases (conditions)?
- For what have you ever been hospitalized?
Application/Interview

Do not ask an applicant…

• What physical or mental impairments do you have that might affect your work performance?
• What medications do you take?
• Have you received any treatment for alcohol or drug addiction?
• Have you ever filed any complaints or worker’s compensation?
Application/Interview

Preparing for the interview…

- Application and procedures should follow the ADA
- Employment offices and buildings where interviews take place should be ADA accessible
- Upon request, make appropriate and reasonable accommodations to allow the applicant to present themselves at their best
- Do not have a social worker or rehabilitation counselor present, unless requested
- Keep all questions strictly job-related, with no discussion on accommodations unless there is a known disability
Application/Interview

Conducting the interview…

- The applicant should feel relaxed and the interviewer should not be afraid to make an error.
- Both the interviewer and applicant are equally responsible for their interactions.
- Do not speculate as to how the applicant would do their work if they had a specific disability. If their disability is known and may affect an essential job function, the interviewer may then ask the applicant how they would do their work.
Application/Interview

Conducting the interview…

- Focus on the applicant’s knowledge and skills.
- Do not ask questions on disabilities or medical exams.
- Test to show ability to perform actual or simulated job tasks.
Hostile Work Environment

Preventing a Hostile Work Environment
Hostile Work Environment

Prevention:

- Treat each other with dignity and respect
- Respect each other’s contributions
- Participate fully in training and developmental activities by applying what was learned to the workplace
- Do not tolerate those who create, foster, or condone an intimidating, hostile, offensive or abuse work environment
Hostile Work Environment

Prevention:

- Discover how others wish to be treated and afford them that courtesy
- Seek productive and efficient solutions to everyday problems that do not compromise the integrity of co-workers
- Help and support co-workers so team members share success
- Be responsible for your own actions
Employee & Employer

- Be reasonable
- Communicate openly and honestly
- Create and maintain a positive and supportive work environment
- Identify, eliminate, and prevent discrimination and harassment
- Serve as a role model for appropriate behavior
Adjusting / Modifying

Reasonable Accommodations by restructuring the job, making modifications to schedules, policies, processes, and so on.
Job Restructuring

Reasonable accommodations through Job Restructuring include…

- Shifting non-essential job functions to other employees.
- Changing the manner that tasks are performed.
- Modifying the job requirements unless a fundamental alteration results.
  - *Employers do not have to change “essential functions” or lower quality or quantity standards*
- Reassignment to a vacant position.
Modified Work Schedule

Reasonable accommodations through work schedule modification include…

- Allowing flexibility in schedule based on effects of disability.
  - Altering arrival/departure times
  - Different break periods or more frequent breaks for rest/taking medications, etc.

- Allowing time off or adjustment in schedule.
- Part Time versus Full Time if reasonable.
- Family Medical Leave Act might be applicable.
Equipment or Devices

Reasonable accommodations through acquisition or modification of equipment or devices include…

- Tape recorder to record instructions.
- Large button telephone.
- Use of video to demonstrate tasks that can be retrieved by employee when needed during the work day.
- Use of color to mark files/bins/controls.
- Simplified instructions using diagrams, etc. for operating machinery.
- Software or hardware for computer access.
Learning & Doing the Job

Reasonable accommodations through changing “the way things usually are done” can include…

- Providing Auxiliary Aids or Services.
- Breaking job tasks into sequential steps.
- Providing information in alternative formats or manners.
  - *E.g. large print, written instructions instead of oral, etc.*
- Modifying exams, training, or policies.
Learning & Doing the Job

Reasonable accommodations through changing “the way things usually are done” can include…

- Using pictures, charts, colors, etc. as cues.
- Using visual and verbal prompting.
- Providing extra tutoring or training.
- Making the workplace accessible.
Learning & Doing the Job

Allowing (or Providing) a Job Coach...

- An employer is typically not required to provide a job coach throughout the employment process but would need to consider as part of learning the job.
- Policies may need to be modified.
  - I.e. Allowing non-employee in restricted areas with a background check, etc.
- Use of internal supports for employee.
  - Assign staff to work one-on-one when learning new tasks and to serve as support to the staff person.
Modified Supervision

Reasonable accommodations through modifying the supervisory process can also include...

- Reviewing tasks to be completed on a daily basis.
- Providing instructions in writing instead of orally.
- Providing a demonstration of tasks instead of oral descriptions.
- More frequent feedback regarding performance.
- Allowing the employee to bring someone for support during important personnel-related meetings.
Modified Supervision

- Assigning a new supervisor is generally NOT a reasonable accommodation.

- The 2nd Circuit Court of Appeals says that a change in supervisor is presumed unreasonable.

Modified Policies/Procedures

Reasonable accommodations through modification of policies and procedures can include...

- Allowing service animals, personal assistants, etc.
- Modifying Emergency Evacuation Procedures.
- Modifying workplace conduct rules that are no job-related and consistent with business necessity.
  - *Employers are never required to tolerate violence or abuse behaviors that are inconsistent with uniformly applied conduct rules.*
  - *However, if reasonable accommodations will help an employee comply with conduct rules, they must be provided.*
The Interactive Process

- The employer should “initiate an informal, interactive process with the individual with a disability in need of the accommodation.”

- “The process should identify the precise limitation resulting from the disability and the potential reasonable accommodations that could overcome those limitations.”

See 29 C.F.R § 1630.2(o)(3)
The Interactive Process

- Both the employee and the employer must act and communicate in good faith.

- According to federal courts, the failure to engage in the interactive process is not in itself a violation of the ADA, but failure to engage in the interactive process is relevant when it results in the failure to identify a reasonable accommodation with exists.

Job Accommodation Process

Steps and considerations when making accommodations for a job.
Job Accommodation Process

1. Worker Assessment
2. Worksite/Job Analysis

Comparison

Acceptable

Mismatch

3. Select/Provide Accommodations

4. Placement/Follow-up

Job Accommodation Process

Begins with a Qualified Person

Steps:

1. Worker Assessment
2. Worksite/Job Analysis
3. Select/Provide Accommodations
4. Placement/Follow Up

What is a Qualified Person?

“A person who meets legitimate skill, experience, education, or other requirements of an employment position that s/he holds or seeks, and who can perform the essential functions of the position with or without reasonable accommodations.”

ADA (1991)

Step 1: Worker Assessment

- Physical Capacities
- Cognitive Abilities
- Psycho-social Factors
- Psychiatric/Mental Issues
- General Medical Factors

Step 1: Worker Assessment

Characterizing Worker’s Limitations

- Difficulty interpreting information
- Limitation of sight
- Limitation of hearing
- Limitation of speech
- Susceptibility to fainting, dizziness, or seizures
- Incoordination
- Difficulty in moving head
- Limitation of stamina

Step 1: Worker Assessment

Characterizing Worker’s Limitations (continued)

- Difficulty in lifting and reaching with arms
- Difficulty in handling and fingering
- Inability to use upper extremities
- Difficulty in sitting
- Difficulty in using lower extremities
- Poor balance

Step 2: Worksite/Job Analysis

- WHAT an employee does.
- HOW is the work done?
- WHY is the work done?
- HOW OFTEN is the work done?
- HOW MUCH TIME is spent doing the tasks?
- WHAT ABILITIES or skills are required?

Step 2: Worksite/Job Analysis

Comprehensive Job Analysis

- Job Descriptions
  - *Overall description and skill requirements*
- Physical Demands Analysis
  - *Physical/Mental requirements*
- Task Analysis
  - *Detailed description of identifiable time related tasks*
- Ergonomic Task Analysis
  - *Task analysis by physical/cognitive requirements*

Step 2: Worksite/Job Analysis

Critical Components of Job Analysis

- Purpose of Job
- Essential Functions of Job
- Job Setting
- Worker Qualifications

Step 2: Worksite/Job Analysis

Conducting Job Analysis

- Fully understand work processes and terminology
- Observe entire work cycle
- Conduct interviews
- Take photographs or videotapes
- Describe work tasks
- Describe workplace
- Consider environmental factors

Step 2: Worksite/Job Analysis

Conduct Interviews

- Take responsibility for getting information
- Respect worker, supervisor or other personnel as authorities on the job
- Clarify and interpret comments of worker and supervisor

Step 2: Worksite/Job Analysis

Describe Work Tasks

- Use a terse, direct style
- Use present tense
- Have each sentence reflect an objective
- Make sure all words impart necessary information
- Use words with only one connotation
- Make sure the description of tasks reflect the assigned work performed

Step 2: Worksite/Job Analysis

Consider Environmental Factors

- Heat, humidity
- Ventilation, air contamination
- Chemical exposures
- Noise, vibration
- Lighting, contrasts, glare, etc.
- Other: Radiation, biological agents

Step 3: Accommodate Worker

- Person/Job Matching
- Job Restructuring
- Job Modification

Step 3: Accommodate Worker

Job Restructuring
- Duties
- Schedule

Job Modification
- Accessibility
- Ergonomics
- Assistive Technology

Source: "Job Accommodations Process: Steps and Considerations", Tech Connections
Step 3: Accommodate Worker

Job Modification Hierarchy

- Modify or revise the job or task
- Use commercially available assistive technology
- Creative use of commercially available consumer and industrial goods
- Combine technologies not typically used together
- Modify existing commercial devices
- Design and fabricate custom devices

Step 3: Accommodate Worker

Basic Design Principles

- Keep it simple
- Universal design
- Eliminate grasp when possible
- Use holding fixtures when possible
- Use power or power assist when possible
- Select table / machinery for seated operation
- Reduce materials handling to a minimum

Step 3: Accommodate Worker

Ergonomics

- Use basic ergonomic principles
- Create “ergonomically correct” workplaces
- Re-evaluate existing situation

Step 3: Accommodate Worker

Process Should Be Team Oriented

- Person with disability most important
- Immediate supervisor/co-workers
- Personnel/Human Resources
- Union Representatives
- Specialists: Rehabilitation Engineers, OT, PT, SLP
- Vocational Rehabilitation Counselor / Case Manager

Step 4: Placement/Follow Up

Job Placement Formula for Success

- Consumer centered
- Appropriate counselor intervention
- Integral part of initial rehab planning

Sources: Rehabilitation Counseling, Parker and Szymanski (1998) and Total Rehabilitation, George Wright (1980)

Step 4: Placement/Follow Up

Job Placement Formula for Success (continued)

- Job readiness/work adjustment
- On-going support from rehab team
- Knowledge of accommodations, products and services
Step 4: Placement/Follow Up

Consumer Responsibilities

- Knowledge of accommodations
- Clear job goals: know skills/assets
- Update resume
- Be computer literate

Step 4: Placement/Follow Up

Consumer Responsibilities (continued)

- Be organized/focused
- Expand network
- Research job trends and companies
- Disclose disability only as needed

Step 4: Placement/Follow Up

Placement Follow-up

- Is the job performed to expectations?
- Are accommodations working?
- Is output acceptable?
- Do accommodations affect other operations?
- Are personal relationships developing?
- Have emergency procedures been tried?

Thank you!

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