

EEOC ISSUES FACT SHEET ON INTELLECTUAL DISABILITIES

As part of a series of fact sheets covering particular disabilities, the Equal Employment Opportunity Commission (“EEOC”) recently issued Questions & Answers About Persons with Intellectual Disabilities in the Workplace and the Americans With Disabilities Act (“ADA”). Two previous guidances have already been issued, one covering diabetes in the workplace (Vol. XI, Issue 1) and the other covering epilepsy in the workplace (Vol. XI, Issue 5). Following is a synopsis of some of the highlights of the new fact sheet.

DEFINITION OF INTELLECTUAL DISABILITY

According to the EEOC, an individual is considered to have an intellectual disability when:

- ♦ the person’s intellectual functioning level (IQ) is below 70-75;
- ♦ the person has significant limitations in “adaptive skill areas” as expressed in “conceptual, social, and practical adaptive skills;” and
- ♦ the disability originated before the age of 18.

“Adaptive skill areas” refers to basic skills needed for everyday life. These basic skills include communication, self-care, home living, social skills, leisure, health and safety, self-direction, functional academics (reading, writing, basic math), and work.

The EEOC estimates that 31 percent of individuals with intellectual disabilities are employed, but that many more want to work.

COVERED INTELLECTUAL DISABILITIES

The fact sheet notes that not every person with an intellectual disability is covered by the ADA. The EEOC describes the following types of individuals as being protected by the ADA:

- ♦ a person who has an impairment that substantially limits one or more major life activities (e.g., an individual who lives alone, but frequently gets assistance with cleaning, grocery shopping, getting to doctor’s appointments, cooking, reading mail and paying bills is substantially limited in caring for himself, and has an ADA-covered disability);
- ♦ a person who has a record or history of a substantially limiting intellectual disability (e.g., a person who was erroneously diagnosed as having an intellectual disability in high school); or
- ♦ a person who does not have a substantially limiting intellectual disability, but is treated by an employer as if they do

(e.g., an applicant with a facial deformity that affects speech and who is denied a position as a secretary because the employer believes that she has an intellectual disability and will be unable to communicate with clients effectively).

QUESTIONS ABOUT JOB PERFORMANCE

While employers can ask questions relating to the ability to perform a job (e.g., can you lift 45 lbs? alphabetize files? put items in numerical order), the fact sheet cautions against asking the following:

- ♦ 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.

REQUESTS FOR MEDICAL INFORMATION

The EEOC cautions employers not to routinely ask for medical information from an employee who has an intellectual disability just because the employee has performance problems. Performance problems may be unrelated to the employee’s intellectual disability, and the EEOC indicates that the employer can request medical information only when it “has a reasonable belief, based on objective evidence, that a medical condition may be the cause of the employee’s performance problems.”

CONFIDENTIALITY OF MEDICAL INFORMATION

An employer may disclose the fact that an employee has an intellectual disability in limited circumstances, e.g.:

- ♦ to supervisors and managers where necessary to provide a reasonable accommodation or to meet an employee’s work restrictions;
- ♦ to first aid and safety personnel if the employee would need emergency treatment or other assistance in an emergency;
- ♦ to individuals investigating compliance with ADA and similar state and local laws; and
- ♦ as required for workers’ compensation or insurance purposes, e.g. for claims processing.

Disclosures about an employee’s intellectual disability must be made on a “need to know” basis. The fact sheet states that

employers cannot tell employees that they are making a reasonable accommodation to a worker with an intellectual disability, even if co-workers complain that he or she appears to be receiving special treatment. The EEOC advises that, “Rather than disclosing that the employee is receiving a reasonable accommodation, the employer should focus on the importance of maintaining employee privacy.”

REASONABLE ACCOMMODATION

As with all covered disabilities, employers must “reasonably accommodate” the known physical and mental limitations of persons with intellectual disabilities. They should respond to requests for accommodations from employees and third parties (e.g. relatives, friends and co-workers) who make the request on behalf of a person with a disability. The request may be informal, and need not state the need for “reasonable accommodation.” It can be made at any time during the application process or when the need arises after the individual has been hired. According to the EEOC, even if an accommodation has not been requested, the 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, 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.”

Once an employer receives a request for accommodation, it should engage in “an informal and interactive discussion with the person and/or his representative to determine suitable accommodation.” Employers must accommodate individuals with intellectual disabilities in the application process and at work. Examples of accommodations that may be required include the following:

- ♦ providing someone to read or interpret application materials; demonstrating rather than describing job duties; modifying tests, training materials or policy manuals; or replacing a written test with an “expanded interview;”
- ♦ job restructuring (e.g., exchanging non-essential functions between employees);
- ♦ training modifications, such as giving instructions at a slower pace, giving the employee additional time to finish the training, breaking tasks into sequential steps, and using charts, pictures or colors, and providing detailed schedules;
- ♦ providing a job coach;
- ♦ modifying work schedules;
- ♦ help in understanding job evaluations or disciplinary proceedings;
- ♦ acquisition or modification of equipment or devices; and

- ♦ modifications to the placement of work stations.

An employer need not grant every request for accommodation. “The decision will depend on the individual situation and whether the request may cause undue hardship” (e.g. requires significant difficulty or expense when considered in light of the employer’s size, financial resources and nature and structure of its operation). An employer is not required to reassign an essential job function, lower its production standards, excuse violations of conduct rules that are job-related and consistent with business necessity, or provide personal items to employees (such as eyeglasses, hearing aids or wheelchairs). An employer does not have to make the specific accommodation requested by the employee if an alternative accommodation would also be effective.

An employer may ask for reasonable documentation about an employee’s disability if it is not obvious, to confirm that a reasonable accommodation is needed. An employer cannot request documentation unrelated to the disability at issue or the accommodation requested. In appropriate circumstances, it can request information about an employee’s functional limitations from a physician, appropriate professional or even friends and family members.

SAFETY ISSUES

While some employers may believe that hiring persons with intellectual disabilities creates increased safety risks, the EEOC maintains that an employer can only refuse to hire an employee with an intellectual disability based on safety concerns if that individual poses a “direct threat” to his or her own safety or the safety of others in the workplace. A direct threat is “a significant risk to the health or safety of the individual with a disability or others that cannot be eliminated by reasonable accommodation.”

HARASSMENT AND RETALIATION

Employees with intellectual disabilities are protected from harassment on the basis of their disabilities. Persons who oppose discriminatory employment practices, file charges of discrimination, testify or participate in any way in an investigation, proceeding or litigation are protected from retaliation.

The EEOC fact sheet regarding individuals with intellectual disabilities (as well as the other fact sheets) can be found on the EEOC’s web site, www.eeoc.gov.

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