



An Overview of the Employment Protections of the Americans with Disabilities Act

A Self-Advocacy Guide

3839 North Third Street
Suite 209
Phoenix, AZ 85012
602-274-6287 (voice or TTY)
800-927-2260 (toll free)
602-274-6779 (fax)

100 North Stone Avenue
Suite 305
Tucson, AZ 85701
520-327-9547 (voice)
800-922-1447 (toll free)
877-327-7754 (TTY)
520-884-0992 (fax)

www.azdisabilitylaw.org
center@azdisabilitylaw.org

Funding for this document is provided by the United States Department of Health and Human Services, Administration on Developmental Disabilities and Community Mental Health Services and the United States Department of Education, Rehabilitation Services Administration.

Federal and state law can change at any time. If there is any question about the continued validity of any information in the handbook, contact the Arizona Center for Disability Law or an attorney in your community.

The purpose of this guide is to provide general information to individuals regarding their rights and protections under the law. It is not intended as a substitute for legal advice. You may wish to contact the Arizona Center for Disability Law or consult with a lawyer in your community if you require further information.

• This guide is available in alternative formats upon request.

**AN OVERVIEW OF THE EMPLOYMENT PROTECTIONS OF THE
AMERICANS WITH DISABILITIES ACT**

TABLE OF CONTENTS

A.	<i>Introduction to the Americans with Disabilities Act (ADA) and this Guide</i>	1
1.	What does the ADA cover?	1
2.	How Does the Arizona Center for Disability Law Assist People with Disabilities?.....	1
3.	This Guide is Not a Substitute for Legal Advice.....	2
4.	Why Does the ADA Include Employment Protections?	2
B.	<i>When Do the Employment Protections of the ADA Apply?</i>	3
C.	<i>What Employers are Covered By the Employment Protections of the ADA?</i>	4
1.	The ADA applies to private employers with 15 or more employees.	4
2.	The ADA applies to state and local governments.	4
3.	The ADA does NOT apply to the federal government.....	4
4.	Title I (Employment) of the ADA does NOT apply to Indian Tribes.	5
D.	<i>Applicants or Employees With Disabilities</i>	5
1.	Definition.....	5
2.	Impairment	5
3.	Major Life Activities	6
4.	Substantial Limitation	7
5.	Effect of Medication and Corrective Devices	8
6.	Case by Case Decision	9
7.	Four ways a Person Without a Disability May be Protected by the ADA	9
8.	Conditions Excluded from the Protections of the ADA	11
E.	<i>Being Qualified Under the ADA</i>	12
1.	Skills, Experience and Education	12
2.	Ability to Perform the Job With or Without Reasonable Accommodations	14
3.	Effect of Applications for Disability Benefits on ADA Claims	15
F.	<i>Employment Discrimination on the Basis of Disability</i>	17
	SUMMARY	20

A. Introduction to the Americans with Disabilities Act (ADA) and this Guide

1. What does the ADA cover?

On July 26, 1990 the ADA was passed by Congress. The ADA provides major civil rights protections to individuals with disabilities. The intent of this federal law is to reduce barriers to persons with disabilities and provide equal opportunity in employment, public accommodations, public services, transportation, and telecommunications. The various titles of the ADA affect many aspects of the lives of people with disabilities.

- Title I makes it unlawful to discriminate against qualified individuals with disabilities in employment.
- Title II makes it unlawful for state and local governments and their agencies to discriminate in programs and services, including public transportation.
- Title III prohibits discrimination in access and enjoyment of public accommodation and commercial facilities, such as hotels, motels, restaurants, professional offices, doctors' offices, lawyers' offices, convention centers, stores, banks, museums, parks, schools, and recreation facilities.
- Title IV requires accessibility of telecommunication services to hearing impaired persons and other individuals with disabilities.
- Title V provides for recovery of legal fees and establishes a mechanism for technical assistance. Additionally, Title V includes a provision prohibiting either (a) coercing or threatening or (b) retaliating against the disabled or those attempting to aid people with disabilities in asserting their rights under the ADA.

2. How Does the Arizona Center for Disability Law Assist People with Disabilities?

If you believe you have been discriminated against on the basis of a disability in employment or access to public services, public accommodations, public transportation or telecommunication services, staff at the Arizona Center for Disability Law (ACDL) can provide you with information about the ADA and how to enforce your rights under the ADA. The Arizona Center for Disability Law is a non-profit, public interest law firm providing free

advocacy, information and referral services, legal research, community legal education, and, in selected cases, legal representation to individuals with disabilities throughout Arizona. The Center is the designated protection and advocacy (P&A) system providing services for Arizonans with a wide range of physical and mental disabilities. Assistance is provided for disability-related issues in established priority areas.

Information about the eligibility requirements and priorities are available from the Center upon request. Assistance is provided according to program eligibility requirements, priorities and staff availability.

3. This Guide is Not a Substitute for Legal Advice

The ACDL recommends that persons obtain professional legal advice to resolve a legal dispute regarding discrimination on the basis of a disability. This guide is not a substitute for legal assistance. This guide is meant to provide people with disabilities with information and examples about employment protections under the ADA.

4. Why Does the ADA Include Employment Protections?

Oftentimes, people with disabilities do not have an equal opportunity to work or advance in their employment. People with disabilities are often restricted in employment opportunities by many different kinds of barriers. Some face physical barriers that either make it difficult or impossible to get into and around a workplace or to use equipment at the work site. Some are excluded because they communicate differently than their co-workers. Still others are excluded because of rigid work schedules which do not permit flexibility for people with special needs arising from a disability.

In other cases, people are not denied opportunities because of actual barriers, but because of prejudice. These are the barriers in other people's minds: Fears, stereotypes, presumptions, and misconceptions about job performance, safety, absenteeism, costs, or lack of acceptance by co-workers and customers.

Congress enacted the ADA to eliminate these barriers to equal opportunity in employment. The ADA makes it unlawful for an employer covered by the ADA to discriminate against applicants and employees with disabilities. The United States Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the employment protections of the

ADA. People with disabilities also have the right to bring private lawsuits against employers who discriminate against them if they first file a charge of discrimination with the EEOC within the time limits set out by the ADA. *See* the Center's guide, ***How to Enforce Employment Rights under the ADA***, for more information about the requirements for filing a charge.

This guide will provide the reader with an overview of how the ADA applies to the employment situation. The list of guides available through the Center about employment rights under the ADA include:

- An Overview of the Employment Protections of the ADA
- The ADA and the Job Applicant
- The ADA and Reasonable Accommodations
- The ADA and Drug Testing
- How to Enforce Employment Rights Under the ADA
- The ADA and Medical Examinations
- The ADA and Confidentiality of Medical Records
- The ADA and Disability-Related Harassment
- Taking Action
- How to Ask Your Employer for An Accommodation that You Need
- Have You Been Treated Unfairly at Work?

B. When Do the Employment Protections of the ADA Apply?

The ADA does not cover every employment situation between a job applicant and an employer or an employee and an employer. For the ADA to apply to an employment arrangement, each of the following must be true:

- the employer is a “covered” employer;
- the employee or applicant has a disability as defined by the ADA;
- the employee or applicant is qualified to perform the job; and
- the employer discriminates against an applicant or employee on the basis of disability.

More information about each of these requirements follows in the next four sections (C, D, E and F).

C. What Employers are Covered By the Employment Protections of the ADA?

1. The ADA applies to private employers with 15 or more employees.

- Includes employment agencies and labor unions.
- Includes a location or facility of a business with less than 15 employees, if the total number of employees for the company in all locations and facilities equals 15 or more.

Other laws may apply to persons with disabilities who are employed by smaller businesses. For more information, contact the ACDL or a private attorney.

2. The ADA applies to state and local governments.

- Includes all state and local governmental agencies, departments, and entities, regardless of their size or number of employees. Although the ADA applies to state employers, the U.S. Supreme Court has held that employees (and applicants) cannot sue state employers in court for money damages. Individuals can still file charges of discrimination with the EEOC against their state employer and can still sue to require state employers to take action or stop discriminatory action. However, the U.S. Government can still file lawsuits for money damages against state employers under the ADA.

- Examples of state and local employers include: Public universities, police and fire departments, public libraries, museums, public parks and recreation facilities, and social welfare offices.

3. The ADA does NOT apply to the federal government.

The ADA does apply to employees of the U.S. Senate. However, generally if a person with a disability works or applies for a job with the federal government, a federal agency, or a fully owned U.S. Government corporation, then the ADA does not apply. However, such employees and applicants are protected under the Rehabilitation Act of 1973, another anti-discrimination law that offers employment protections. For more information about that law, contact the ACDL, an EEO officer of the applicable federal agency, or a private attorney.

4. Title I (Employment) of the ADA does NOT apply to Indian Tribes.

Tribes may have their own affirmative action or anti-discrimination laws which address discrimination on the basis of disability. Some tribes have adopted tribal laws or entered into agreements to abide by federal discrimination laws similar to the ADA. Contact a tribal legal office for more information about the tribal laws or agreements that may apply.

D. Applicants or Employees With Disabilities

To be protected by the ADA, a person must either: (1) have a disability; (2) have a record of having a disability; (3) be regarded as having a disability; (4) be associated with an individual with a disability; or (5) have opposed an act or practice by an employer that violates the ADA. The term "disability" has a special meaning under the ADA. Just because the applicant or employee has a disability according to some other program or benefit, such as Social Security or Workers' Compensation, does not necessarily mean s/he has a disability according to the ADA.

1. Definition

A disability under the ADA means **a physical or mental impairment that substantially limits one or more major life activities.**

2. Impairment

a. **Physical Impairment** is "Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems":

- neurological
- musculoskeletal
- special sense organs
- cardiovascular
- reproductive
- respiratory (including speech organs)
- digestive
- genito-urinary
- hematic and lymphatic
- skin
- endocrine

For example, persons with AIDS, epilepsy, diabetes, paralysis, or a substantial hearing or visual impairment have physical impairments because these conditions affect one of these major body systems under the ADA.

b. **Mental Impairment** is "Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." Includes an inability to perform functions such as "thinking, concentrating and interacting with other people."

For example, persons with mental retardation, severe depression, or dyslexia have a mental impairment because these conditions affect mental or psychological functions.

3. Major Life Activities

Major life activities are the activities that people do throughout the day. Only one major life activity has to be substantially limited. Major life activities include, but are not limited to:

- **seeing**
- **hearing**
- **speaking**
- **walking**
- **breathing**
- **lifting**
- **maintaining normal social relationships**
- **standing**
- **learning**
- **performing manual tasks**
- **caring for oneself**
- **working**
- **reproduction**

Because it is more difficult to determine whether the activity of work is substantially limited, first look to whether another major activity is limited. If another major life activity is substantially limited by the physical or mental impairment, the person has a disability. There is no need to also be substantially limited in working.

If no other major life activity except working is affected by the disability, there is a special definition about working. Generally, to be substantially limited in the ability to work

means that the individual is significantly restricted in the ability to perform a broad group or class of jobs rather than a single job. The individual with the disability is compared to an average person with similar experience, education, and skills.

4. Substantial Limitation

A substantial limitation means that an individual is unable to perform, or is significantly limited in the ability to perform, an activity compared to an average person in the general population.

- In determining whether a person's impairment **substantially limits** a major life activity, look to the following:

- the nature and severity of the impairment;
- how long the impairment will last or is expected to last; and
- the permanent or long-term impact, or expected impact of the impairment.

- Keep in mind that it is the "effect" an impairment has on the person's ability to do major life activities, not the name of a condition, that determines whether a person is protected by the ADA. For some impairments such as blindness, deafness, or mental retardation, it is obvious that the conditions are substantially limiting in one major life activity. However, many other impairments may be disabling for some individuals but not for others, depending on the factors listed above.

Joan has very mild CP (cerebral palsy). The CP only slightly interferes with her ability to speak. The CP does not have any significant impact on other major life activities such as walking and performing manual tasks. She is probably not an "individual with a disability" under the ADA definition. John also has cerebral palsy. However, he is unable to walk and uses a wheelchair because of the severity of CP. He also has great difficulty talking and uses an augmentative speech device to help him communicate. John would qualify as an individual with a disability.

5. Effect of Medication and Corrective Devices

Sometimes medication or corrective devices, such as eye glasses and hearing aids, may actually fully correct a medical condition or impairment. The U.S. Supreme Court has held that the determination of whether a person's impairment substantially limits one or more major life activities must take into consideration the effects of the medication, corrective devices, and other mitigating measures on his/her condition.

This decision does not deny ADA protection to every person who is being treated for a mental or physical impairment. People with impairments who take medication or use corrective devices may still be protected as a person with a disability if, after using the medication or devices, substantial limitation in one or more major life activities still persists. For example, a person who uses a prosthetic leg may now be able to walk, but will still be disabled because s/he is substantially limited in the ability to walk and run. Also, people with impairments who take medication or use corrective devices may experience negative side effects. The negative impact of medication or other measures should be taken into consideration when deciding whether an individual has an impairment that is substantially limiting. For example, if medications cause adverse side effects, such as difficulty with concentration, seizures, sleep disorders or damage to internal organs, there must be a case-by-case evaluation of whether these side effects cause a substantial limitation of a major life activity.

Example: Jordan has epilepsy and has about 10 seizures each month which have not been successfully controlled by medication. His physician recently prescribed a new medication which has reduced his seizure activity from 10 seizures per month to 2 -3 seizures per month. The seizures are grand mal seizures that result in a loss of consciousness. As a result he is unable to obtain a driver's license. The medication also causes Jordan to have difficulty with concentration and makes him feel lethargic. The Supreme Court's rule means that a case-by-case decision must be made whether Jordan's treated condition of epilepsy substantially limits one or more major life activities, and the decision will take into account the fact that he has 2 - 3 seizures per month rather than 10. The decision must also take into consideration the negative effects caused by the medication. Given these facts, courts should find that Jordan has a disability.

In *Sutton v. United Air Lines, Inc.* (U.S. Supreme Court, June 1999) twin sisters who had uncorrected visual acuity of 20/200 and 20/400 applied to work as global airline pilots for United Air Lines. The sisters wore corrective lenses which corrected their vision to 20/20. However, United Air Lines imposed a physical requirement that its global airline pilots have uncorrected visual acuity of at least 20/100. During the application process when it was discovered that the sisters did not meet this standard, they were rejected from further consideration for this position. The sisters sued under the ADA claiming, in part, that they had an actual disability because of their near sightedness. The Supreme Court held that Congress did not intend to cover people whose conditions were not substantially limiting when treated with devices such as eyeglasses or medication.

Keep in mind that an individual who does not have a substantially limiting impairment may still be protected under the ADA because of discrimination related to a history of a disability or a misperception that s/he is disabled. See [Section 7-Four Ways a Person Without an Actual Disability May be Protected by the ADA.](#)

6. Case by Case Decision

The determination of whether a person meets the ADA definition of "disability" is made in each situation by looking at the entire facts and circumstances surrounding an impairment and how the impairment limits the person.

Evaluating whether a person with high blood pressure was covered would require a case-by-case evaluation taking into consideration, among other things, how well the blood pressure was controlled, any negative side effects caused by the medication, restrictions on lifestyle caused by the condition, and the effect of the condition on the individual's body, such as the heart.

7. Four ways a Person Without a Disability May be Protected by the ADA

Sometimes a person does not have a physical or mental impairment that substantially limits a major life activity but is still protected by the ADA. There are four other ways that a person might be protected from discrimination in employment on the basis of disability. A person is also protected if s/he is:

- **A qualified individual who has a record of a disability or substantially limiting impairment.** A person who has a history of a disability might be discriminated against even though the condition no longer causes a substantial limitation.

Philip works for a computer software company providing training to people who buy software. Philip's supervisor overhears Philip tell a co-worker that he was once hospitalized for depression. Philip's supervisor demotes him because he is afraid Philip can't handle the pressure of his job due to the depression. Philip is protected by the ADA even though he does not currently have a disability.

- **A qualified individual who is regarded as having such an impairment.**

A person might not actually have a disability, although the employer mistakenly thinks s/he does have the disability. It is not enough to regard a person as having an impairment.

The employer must believe the impairment substantially limits one or more major life activities.

Joe applies as an electrician with a repair company. The employer mistakenly believes that Joe has AIDS. The applicant does not have AIDS, but the employer does not hire him even though he is the most qualified. The ADA protects Joe because his employer regards him as disabled, even though he does not have an actual disability.

Lydia has high blood pressure which is controlled by medication, exercise and diet. She applies for a job delivering flowers. She uses the shop's minivan and does not require a commercial driver's license to perform the job. She is hired and is required as a condition of hire to get a physical. During the exam she tells the doctor about her condition. The company withdraws her job offer for fear that she may have a stroke or heart attack while driving the van. The company refused to reconsider its decision even after Lydia provided a letter from her doctor that her condition was controlled and she had suffered no adverse effects to her heart or circulatory system because of the history of high blood pressure. Lydia probably does not have an actual disability according to the Supreme Court ruling. However, Lydia may be protected because her employer mistakenly believes that her impairment is substantially limiting in one or more major life activities or as a person with a history of a disability.

- **An individual who has a known relationship or association with an individual with a disability.**

Sometimes ADA protections are given to persons who are discriminated against in employment because of their relationship with a family member, friend or business associate who is an individual with a disability recognized under the ADA.

Sarah is an applicant for a teaching job. She is denied the job solely because her son has cancer. The principal fears the insurance rates will increase if her son is covered during open enrollment. The school district violated the ADA.

- **An individual who has**
 - **opposed an act or practice of an employer that violates the ADA**
 - **made a charge of discrimination under the ADA**
 - **testified, assisted or participated in an investigation, proceeding or hearing about discrimination under the ADA.**

Carol is a co-worker who is not disabled. She works with Elena who is deaf. Elena was not sent to a necessary training located out of town because the company did not want to pay for a sign language interpreter. Elena files a charge of discrimination with the EEOC. Elena lists Carol as a witness to the discrimination. The investigator from EEOC interviews Carol as part of the investigation. Their employer fires Carol for cooperating with the investigation. Carol is protected by the ADA.

8. Conditions Excluded from the Protections of the ADA

Although generally whether an individual is protected by the ADA depends on the facts of that case, Congress specifically excluded certain conditions or factors from protections under the ADA. Examples of exclusions follow.

- **A person who currently illegally uses drugs is NOT protected by the ADA.**

A person who uses illegal drugs is excluded from protection as a qualified individual with a disability when the employer takes action against the applicant or employee on the basis of drug use. This includes illegal use of controlled substances, such as marijuana and cocaine, as well as abuse of prescription drugs. However, people who are taking prescription medication under the supervision of a licensed physician are included as qualified individuals with a disability.

Persons who formerly suffered from drug addiction but who do not currently illegally use drugs or who are currently in a drug rehabilitation program **are** protected as having a history of a disability.

- **The ADA does not prohibit discrimination in employment on the basis of sexual preference.**

- **The ADA does not include sexual conditions or disorders as disabilities.**

- **A person is not protected by the ADA because of certain behavioral disorders.**

Includes compulsive gambling, kleptomania or pyromania.

- **A person is not disabled under the ADA because of differences in personality traits and environmental, cultural, or economic disadvantages.**

Includes lack of education or a prison record. These societal conditions are not "disabilities" under the ADA. They receive no protection.

- **A person with a temporary impairment is not disabled.**

A minor or nonchronic condition of short duration is not included in the ADA.

Examples of conditions that are not disabilities under the ADA include pregnancy, a broken limb, strained or pulled muscle, sprained ligament, concussion, common colds, infection, short temper, and poor judgment. Keep in mind there are other laws that provide protections to pregnant women and to people injured on the job.

- **The ADA only prohibits discrimination on the basis of disability and not other factors, such as race, gender, national origin, religion or sexual preference.** Other federal, state, and local laws do provide protections against discrimination on the basis of most of these factors.

E. Being Qualified Under the ADA

1. Skills, Experience and Education

A person with a disability must meet the minimum qualifications for the job. Job qualifications include but are not limited to the skill, experience, education, medical, safety, physical and other requirements a covered employer sets as requirements for a job.

Chris has diabetes. He applies for a nursing position that requires that all applicants have an RN degree. He has an LPN and not an RN degree. Therefore, he is not qualified for this position.

Natalie uses a wheelchair because of paraplegia. She applies for a position as a science teacher at a high school. She has a bachelor's degree in education, a current AZ teaching certificate and experience teaching in another school district. She would be a qualified applicant.

Although employers have latitude about setting job requirements, employers may not legally require qualifications that screen or tend to screen out or otherwise deny a job or benefit to an individual with a disability unless those job requirements are:

- job-related
- consistent with business necessity, and
- performance cannot be accomplished by reasonable accommodation.

Generally, employer job qualifications based on federal standards do not violate the ADA even if they tend to screen out people with disabilities. In *Albertsons v. Kirkenburg* (U.S. Supreme Court, June 1999), Mr. Kirkenburg was hired as a driver for the grocery store chain. His job required him to obtain a Department of Transportation health certificate that his visual acuity for vision with both eyes was at least 20/40. Mr. Kirkenburg had an uncorrectable impairment that left him with 20/200 visual acuity in one eye. He was mistakenly approved for the Department of Transportation certificate and several years later, during another vision exam the error was discovered. Albertsons fired Mr. Kirkenburg because he did not pass the vision standard set out by the Department of Transportation. He was fired despite the fact that he did get approved for a waiver to the DOT standard for visual acuity with both eyes. Albertsons decided not to approve hiring drivers under the waiver program. In this case, the Court agreed that the waiver program was an experimental program from DOT to learn about driver safety of people driving with less visual acuity. The Court added that Albertsons did not have to use the waiver program but could insist that their drivers meet the DOT basic standard.

This case does not address discriminatory standards based on state or local laws and regulations. Employer job qualifications based on state standards may be subject to challenge by employees under the ADA. If you have questions about a job standard, you should seek legal advice.

2. Ability to Perform the Job With or Without Reasonable Accommodations

Not only must an individual meet the minimum qualifications, s/he must also be able to perform the essential functions of the job with or without reasonable accommodation(s).

- Essential functions are important and necessary job duties of the position.

Look to the following to determine what the essential functions of a job are:

- written job descriptions;
- employer's opinion;
- duties other people in the same position perform;
- duties other people performed who held the same position;
- duties other people perform in similar positions; and
- the terms of a collective bargaining agreement.

● Marginal functions are tasks that are NOT essential to the position. Often times, they are the duties that are included in a job description as "other duties as assigned."

Linda applies for a position as an office assistant. She can type, file, and perform receptionist duties. She has the necessary education, experience, and skills required for the job. However, occasionally the office assistant must deliver a report. Linda is unable to drive because of a seizure disorder. Driving, in this case, is probably a marginal job duty and Linda would be qualified because she can perform the essential functions of the job and has the necessary qualifications.

● A person does not have to be able to perform the essential functions without accommodation. If a person can perform the essential functions with an accommodation, s/he is still qualified.

● A reasonable accommodation is any adjustment to a job, the workplace, or the way things usually are done that allows a qualified individual with a disability to enjoy an equal employment opportunity.

Examples of reasonable accommodations include, but are not limited to:

- making facilities accessible to and usable by people with disabilities;
- restructuring a job by changing marginal job duties with co-workers;
- changing when or how an essential job function is performed;

- offering a part-time or modified work schedule;
- obtaining adaptive equipment or devices;
- modifying office policies;
- allowing use of accrued paid leave or unpaid leave for treatment; and
- reassignment to a vacant position, if the employee is unable to perform the essential functions of his or her position with or without reasonable accommodation, or if providing the needed accommodation would pose an undue hardship on the employer.

There may be other reasonable accommodations. This list is as long as the imagination of the worker, the employer, and outside resources. For more information about reasonable accommodations, request the Center's guide on the ADA and Reasonable Accommodations.

Bettina has a hearing impairment. She works as a cashier at a hardware store. She applies for a promotion as a bookkeeper. She possesses the minimum qualifications and can perform all of the duties in the job description, except answering the phone. The bookkeeper must also answer the phones in the office as part of the duties. Bettina would be able to answer the telephone with an amplification device. The device costs about \$70. She is qualified because she can perform all of the duties with a reasonable accommodation.

3. Effect of Applications for Disability Benefits on ADA Claims

Sometimes an employee with a disability is either terminated, laid off, or placed on unpaid medical leave because of his/her disability. The employee may believe the action violated the ADA. The employee also may decide to apply for disability payments through the Social Security Administration or a disability insurance program to assist him/her financially. These programs usually require that an individual be too disabled to perform his/her previous job or any other gainful work to qualify for the program. To be protected by the ADA, however, an individual must be a *qualified* individual. This means that s/he must be able to perform the essential functions of his/her job with or without reasonable accommodations.

Pursuing and receiving Social Security disability benefits does not automatically prevent a recipient from suing an employer for employment discrimination under the ADA. Further, pursuing and receiving disability benefits does not create a strong presumption that the SSDI recipient was unqualified. This is because under the ADA, reasonable accommodations are considered, but under disability programs, such as Social Security, reasonable accommodations are not considered. However, the person who applied for SSDI can not ignore the statements s/he made to apply for the benefits and must explain how these statements are consistent with the ADA claim that s/he can perform the essential functions of the job with or without accommodations.

What this means is that a person who applies for Social Security disability benefits and files a claim under the ADA must be able to explain how the two claims are consistent. Such an explanation may be that if the employer had accommodated him/her, the person could have continued to work. Without an accommodation, s/he cannot work. Keep in mind that, in some cases, there may not be a reasonable explanation and the ADA claim will fail. Employers may try to use the employee's or the treating physician's statements on benefits applications against the employee as evidence in court to prove that s/he is not qualified for the work. If you are applying for any type of disability benefits, and if you believe that you have been discriminated against by your employer on the basis of disability, you should contact the Center or a private attorney specializing in employment law before completing your application for disability benefits.

Elena is trained as a receptionist. She is blind. She worked for a medium-size architectural firm who had purchased a special phone system that allowed her to use a probe to detect which line was ringing. The company closed when the partners retired. Elena applied to several other companies which refused to hire her because they would not provide the necessary accommodations. She filed for Social Security Disability Insurance. She also filed an ADA claim against one employer who refused to hire her because the company did not want to provide the accommodation. Under the Supreme Court's ruling, Elena's ADA claim should not be dismissed because although she admitted in her application that she could not find substantial gainful work with accommodations, Elena could work with accommodations and, thus, is a *qualified* applicant under the ADA.

Terry worked at a retail store. He developed a serious heart condition and became unable to do his job even with reasonable accommodation. His cardiologist and physician also refused to release him to work indefinitely. His employer fired him. He applied for Social Security benefits and filed an ADA discrimination claim against his employer for his termination. It is unlikely Terry can offer an explanation that he is qualified under the ADA in light of the statements made by him, his physician, and his cardiologist. His ADA claim is likely to fail because he will find it difficult to prove he is *qualified* under the ADA.

F. Employment Discrimination on the Basis of Disability

If a person is a qualified individual with a disability and works for a covered employer, the ADA prohibits the employer from discriminating on the basis of disability. The ADA makes job discrimination practices unlawful against qualified individuals with disabilities in the following areas:

- application procedures
- advertising
- evaluation
- promotion
- examinations
- layoff/recall
- other terms, conditions and privileges of employment.
- recruitment
- assignments
- disciplinary actions
- medical examinations
- benefits
- termination
- hiring
- testing
- tenure
- leave
- training
- compensation

The ADA requires employers to act upon the needs of an individual rather than acting upon generalizations made about the capabilities of persons with disabilities. Some types of actions which are unlawful under the ADA include:

(1) Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects employment opportunities for the applicant or employee because of his or her disability.

John is a sales clerk with depression. He is consistently passed over for an assistant manager position by the owner because of the perception that his depression might limit his ability to perform the job, despite that John is interested in the position, is fully qualified for the job, and has performed well in his present job. This action is unlawful since the sales clerk is interested and qualified in the job. Speculating that his disability might affect his job performance is discriminatory.

(2) Participating in a contractual or other arrangement or relationship that subjects an employer's qualified applicant or employee with a disability to discrimination.

A telemarketing firm hires its executives from a personnel agency. The firm has a verbal agreement with the agency to not refer people with disabilities. Jim, a qualified person who is visually impaired, applies for one of the supervisor positions. Jim is not referred because the company knows the computer adaptive equipment Jim would need would increase operating expenses. This action is unlawful since Jim is not hired because of the agreement between the two businesses.

(3) Denying an employment opportunity to a qualified individual because s/he has a relationship or association with a person with a disability.

Dean is a construction worker who applies for an open foreman position with a construction company. Dean is qualified for the position but is not hired by the owners for fear of negative reaction from other workers if it was discovered that his partner was recently diagnosed with AIDS. It is unlawful to refuse to hire Dean solely because of his relationship with a person with a disability. Instead, the construction company could provide awareness and sensitivity training for its employees regarding a variety of disabilities and its employment requirements under the ADA.

(4) Refusing to make reasonable accommodations to the known physical or mental limitations of a qualified applicant or employee with a disability, unless the accommodation would pose an undue hardship on the business.

Teresa is a waitress who is diagnosed with cancer. She undergoes radiation and chemotherapy treatments. She asks her employer for three weeks of unpaid leave beyond the sick leave she has used. Even though other workers have offered to work the extra hours temporarily, the restaurant owner decides not to modify its leave policy to allow the waitress to have time-off without pay and keep her job while receiving treatment. After the waitress uses up all of her paid leave for her treatments, she is terminated for excessive absenteeism. Not modifying the leave policy probably violates the ADA and may also violate the Family Medical Leave Act.

(5) Using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability unless they are job-related and necessary for the business.

Alex uses a wheelchair because he has muscular dystrophy. He applies for a position as an aide in a classroom for children with learning disabilities to provide tutoring in basic skills. The school district requires all aides and tutors to be able to lift 75 pounds. This lifting requirements tends to screen out people with certain disabilities. Although it may be a legitimate job function in classes where children are not ambulatory and may need physical assistance, it is not required of aides in classes where the children do not need to be lifted. The criteria uniformly applied to all aide positions probably violates the ADA.

(6) Failing to use employment tests in the most effective manner to measure actual abilities. Tests must accurately reflect the skills, aptitude, or other factors being measured, and not the impaired sensory, manual, or speaking skills of an employee or applicant with a disability (unless those are the skills the test is designed to measure).

Michelle has a mental illness that affects her concentration. She is required to take a pre-employment test in a room with many other people. Because applicants come and go during the test period, she is unable to concentrate. She requests being able to take the test in a quiet room because of her disability, but the company refuses. Michelle does poorly on this test not because of her work skills but because of how the disruptions affected her test-taking ability. Allowing her to take the test in a quiet room with a proctor would have been a better test of her abilities.

(7) Discriminating against an individual because s/he has opposed an employment practice of the employer or filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing to enforce provisions of the ADA.

Joseph is a supervisor of the custodians at his company. He applies for an available electrician position with his company. Although he is a licensed electrician and fully qualified, he is not hired because he filed a grievance complaint with the personnel department on behalf of a co-worker with a disability who did not receive an accommodation after requesting one. The action of not promoting Joseph solely based on his past opposition to the company's failure to accommodate a fellow worker is unlawful.

SUMMARY

For the ADA to apply to an individual, s/he must:

- (1) work for a covered employer;
 - a private employer with 15 or more employees or a public employer regardless of number of employees
 - most federal applicants and employees are covered by a different civil rights law, the Rehabilitation Act of 1973
- (2) have a disability;
 - a physical or mental impairment that substantially limits one or more major life activities
 - a history of a disability
 - regarded as having a disability
- (3) be otherwise qualified for the desired position; and
 - have the skills, education, experiences, and licenses necessary for the job; and
 - be able to perform the essential functions of the job with or without reasonable accommodations
- (4) have been discriminated against on the basis of disability.