

CHAPTER 2

OVERVIEW: REHABILITATION ACT AND AMERICANS WITH DISABILITIES ACT

The first major federal statute prohibiting employment discrimination on the basis of disability in the federal government was the Rehabilitation Act of 1973, which applies primarily to the federal employers and certain federal contractors. In 1990, the Americans with Disabilities Act (ADA) extended the prohibition against disability-based discrimination to the private sector. Two years later, the 1992 amendments to the Rehabilitation Act broadened the base of federal sector protections by incorporating many of the ADA's standards for determining when a violation has occurred. This book focuses on the Rehabilitation Act and the incorporated provisions of the ADA as they apply to federal sector medical documentation issues. For a full discussion of these statutes as they pertain to federal sector employment discrimination, the reader is referred to *A Guide to Federal Sector Disability Discrimination Law and Practice*, by Ernest C. Hadley (Dewey Publications, Inc.).

Significantly, for purposes of this book, the 1992 amendments to the Rehabilitation Act incorporated Section 102 of the ADA, 42 USC § 12112(d), and made it applicable to the federal sector. This section covers medical exams and inquiries, a topic that is covered in depth in Chapter 6. Also relevant to the issue of medical exams and inquiries is the Rehabilitation Act's requirement that federal employers "reasonably accommodate" qualified disabled individuals unless doing so would impose an undue hardship on the agency's operations. As discussed in Chapter 6, an employee's request for reasonable accommodation may permit an agency to inquire about an employee's or applicant's disability or to request medical documentation. Because the Rehabilitation Act's amendments incorporate the provisions of the ADA relevant to medical requests, the two statutes are referenced interchangeably throughout this book.

This chapter refers to numerous EEOC Enforcement Guidance and other documents. They are cited in abbreviated format below; full citations appear in Chapter 1.

I. ENFORCEMENT

Primary responsibility for enforcement of the Rehabilitation Act and the applicable provisions of the ADA in the federal sector lies with the Equal Employment Opportunity Commission (EEOC or Commission). The Commission issues appellate decisions from its Office of Federal Operations (OFO) on federal employees' complaints of disability discrimination, including complaints involving medical requests and records. These decisions are binding in the federal sector and are included in this book where appropriate.

In addition, the federal courts render decisions on ADA-related medical inquiries and documentation in federal sector cases, those involving individuals employed in the private sector, as well as in state or local government. Although the Commission is not bound by federal court decisions, other than those rendered by the U.S. Supreme Court, these decisions are often instructive. Moreover, the Commission often looks to and cites federal court decisions to develop its caselaw. As a result, some instructive federal court cases are discussed in this book.

Finally, the Merit Systems Protection Board (MSPB or Board) has primary jurisdiction over certain personnel actions involving covered employees even when violations of the Rehabilitation Act/ADA are raised. Accordingly, the Board adjudicates many disability discrimination decisions. To the extent these cases are instructive on the issue of ADA-related medical documentation and/or are intertwined with other leave issues addressed in this book, they are also included and discussed throughout.

II. REHABILITATION ACT AND ADA EMPLOYMENT PROVISIONS

The employment provisions of the Rehabilitation Act, originally passed as Pub. L. No. 93-112, are codified at 29 USC §§ 791, *et seq.* The sections that apply in employment discrimination cases, Sections 501 and 505, are discussed below. As noted above, one unique aspect of the Rehabilitation Act as compared with other anti-discrimination laws is its requirement that federal employers "reasonably accommodate" qualified disabled individuals unless doing so would impose an "undue hardship" on the agency's operations. This requirement is highly relevant to the issue of medical inquiries because, as discussed in Chapter 6, an employee's request for reasonable accommodation may permit an agency, within some very specific and relatively narrow parameters, to request medical documentation. Overstepping these boundaries, however, can result in agency liability *per se*, regardless of the merits of the underlying accommodation request.

Signed into law by President George H.W. Bush in 1990, the ADA prohibits disability discrimination in employment as well as in the areas of housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. 42 USC § 12101(a)(3). Titles I and V of the ADA are the pertinent provisions for employment discrimination based on disability. The nonaffirmative action provisions of the ADA, explained below, were incorporated into the Rehabilitation Act and are binding in the federal sector. As originally passed, the ADA specifically excluded the federal government from coverage. 42 USC § 12111(5)(B)(i). As noted above, Title I and certain provisions of Title V of the ADA were subsequently made applicable to the federal government in 1992 by an amendment to the Rehabilitation Act. 29 USC § 791(g).

A. SECTION 501—REHABILITATION ACT

Section 501 of the Rehabilitation Act, 29 USC § 791, has two distinct requirements: (1) It prohibits agencies from discriminating on the basis of disability; and (2) It requires agencies to develop and implement affirmative action plans to promote the hiring, advancement, and placement of individuals with disabilities. The prohibition on discrimination in the Rehabilitation Act is also referred to as its non-affirmative action requirement. Most Rehabilitation Act cases concern the anti-discrimination, non-affirmative action provisions.

1. Prohibition on Discrimination

The Rehabilitation Act does not contain any provisions that explicitly prohibit discrimination. Since its 1992 amendments, at 29 USC § 791(g), however, the prohibitions on discrimination set forth in certain sections of the ADA have been incorporated:

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 and the provisions of sections 501 and 504, and 510 of the Americans with Disabilities Act, as such sections relate to employment.

The relevant sections of the ADA, codified at § 42 USC 12111, *et seq.*, 42 USC §§ 12201–204, and 42 USC § 12210, are discussed below.

2. Affirmative Action

The Affirmative Action requirements of the Rehabilitation Act are only relevant for purposes of this book inasmuch as they permit an agency to ask applicants for employment to voluntarily disclose disability status for purposes of required affirmative action reporting. Any disclosure of disability may only be used for statistical purposes. The hiring officials may not consider, or even see, any applicant's voluntarily disclosed disability status. The agency's obligations with respect to affirmative action disclosures are discussed in Chapter 6.

3. Prohibition on Retaliation

The Rehabilitation Act incorporates the ADA prohibition against retaliation for activity protected under the Act. The ADA specifically prohibits retaliation for participating in the EEO process or for opposing a practice that is discriminatory under the statute. This prohibition, set forth at 42 USC § 12203, provides:

(a) *Retaliation.* No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) *Interference, coercion, or intimidation.* It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

See also 29 CFR § 1630.12; 29 CFR § 1614.101(b). The remedies and procedures referred to in Section 503(c) are those remedies and procedures available in cases brought under Title VII of the Civil Rights Act of 1964, discussed below.

The theory of discrimination based on reprisal or retaliation does not depend on whether the complainant is a qualified individual with a disability, an individual with a disability, or an individual who has no disability. Instead, coverage under the statute is based on two broad categories of "protected activity": (1) Participation in some manner in the EEO process; or (2) Opposition to an employment practice that is unlawful under the ADA or the Rehabilitation Act. The retaliation provisions of the Rehabilitation Act are relevant to this book because, in some instances, an agency's request for medical documentation on the heels of an employee's protected activity may be construed as retaliation. The caselaw on medical document requests as retaliation is discussed in Chapter 6.

Moreover, the Commission has held that requesting reasonable accommodation is protected activity. See *Keller v. Postmaster General*, 01A03119 (2003). An employee asserting a claim of reprisal based on requesting an accommodation as protected activity, however, must prove that he or she is a qualified individual with a disability.

B. SECTION 505—REHABILITATION ACT

Section 505 of the Rehabilitation Act prescribes the procedures and remedies under the Act. In disability discrimination cases, the remedies and procedures are the same as those set forth in Title VII of the Civil Rights Act of 1964. In relevant part, 29 USC § 794a provides:

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefore or other appropriate relief in order to achieve an equitable and appropriate remedy.

...

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This provision means that employees or applicants for employment bringing cases of discrimination based on disability must comply with the procedures of the EEOC set forth at 29 CFR Part 1614. For a comprehensive discussion of this process, the reader is referred to Hadley's *Guide to Federal Sector Equal Employment Law & Practice*, (Dewey Publications, Inc.).

The remedies adopted under the Rehabilitation Act are the traditional "make whole" remedies of Title VII. The object of such remedies is to put the victim of disability discrimination where he or she would have been but for the prohibited discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed.2d 280 (1975). The traditional remedies under Title VII include measures such as reinstatement or appointment to a position, back pay awards, and retroactive entitlement to other benefits and privileges of employment. Of course, one of the major make whole remedies under the Rehabilitation Act is to order reasonable accommodation of the employee. The Rehabilitation Act also provides for awards of attorneys' fees for prevailing complainants. 29 USC § 794a(b). Importantly, an employee or applicant who wins an ADA claim involving an unlawful medical request or unlawful dissemination of medical documents is a prevailing party and is entitled to these remedies if proven.

1. Civil Rights Act of 1991

The Rehabilitation Act incorporates the remedies of Title VII, and accordingly Section 505 of the Act was amended by the Civil Rights Act of 1991, Pub. L. No. 102-166 (Nov. 21, 1991). Among other things, the 1991 Civil Rights Act provides for compensatory damages in claims involving intentional discrimination on the basis of disability. 42 USC §§ 1981a(b)(2)-(3). Because any violation of the medical request and documentation provisions of the Act is a form of intentional discrimination, compensatory damages, where proven, are available. Compensatory damages include any out of pocket expenses the complainant incurred because of the discrimination, as well as harm for any emotional distress.

C. ADA—FINDINGS AND PURPOSE

While the findings and purposes sections of legislation are often ignored, these sections of the ADA have proved to be extremely important. This is because the ADA was amended significantly in 2008, and Congress specifically relied on the findings and purposes provisions to determine that the Supreme Court had erred in some of its decisions, and had issued precedent that thwarted much of the legislation's purpose. The 2008 amendments are discussed below. The ADA's Findings and Purposes, at 42 USC § 120101, state:

(a) Findings.—The Congress finds that-

- (1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;
- (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
- (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
- (4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
- (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
- (6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;
- (7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
- (8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose.—It is the purpose of this chapter-

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities.

This is the current statement of findings and purposes, incorporating the 2008 amendments.

D. TITLE I—ADA

Title I of the ADA contains most of the provisions related to employment discrimination on the basis of disability. The Rehabilitation Act, at 29 USC § 791(g), specifically incorporates Title I of the ADA, codified at 42 USC §§ 12111, *et seq.*, in cases of non-affirmative action disability discrimination. Title I contains numerous provisions on medical documentation and inquiries, which are discussed separately in the section entitled "Medical Documentation and Inquiries" below.

1. Non-Affirmative Action Requirements

Section 102 of the ADA, codified at 42 USC § 12112, addresses employment discrimination. It prohibits discrimination against qualified individuals with disabilities with regard to "job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." As with the Rehabilitation Act, these anti-discrimination provisions are sometimes referred to as the non-affirmative action requirements of the ADA.

The ADA more specifically defines the types of discrimination from which an employer must abstain. 42 USC § 12112(b), which makes unlawful the following actions:

- (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
- (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);
- (3) utilizing standards, criteria, or methods of administration—
 - (A) that have the effect of discrimination on the basis of disability; or
 - (B) that perpetuate the discrimination of others who are subject to common administrative control;
- (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
- (5)
 - (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
 - (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;
- (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
- (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

These provisions do not specifically address leave or medical inquiries. Many of them, however, implicate documentation issues and may trigger an agency's duty to adhere to the medical request and documentation provisions of the ADA, as discussed below.

2. Title I Defenses

An agency can defend itself against a claim of failure to reasonably accommodate a disability by showing that either: (1) there is no accommodation available to permit the employee or applicant to perform the essential functions of the position at issue and/or enjoy equal benefits or privileges of employment; or (2) any accommodation would impose an undue hardship on the agency's operations.

The agency must provide reasonable accommodation unless doing so would "impose an undue hardship on the operation of the business" of the agency. 42 USC § 12111(b)(5)(A). The ADA defines reasonable accommodation at 42 USC § 12111(9):

The term "reasonable accommodation" may include—

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Undue hardship is defined at 42 USC § 12111(10):

- (A) *In general.*—The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
- (B) *Factors to be considered.*—In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—
 - (i) the nature and cost of the accommodation needed under this Act;
 - (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
 - (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
 - (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.