



ADA Live! EPISODE 43 ADA AND EMPLOYMENT: DISCLOSURE AND REASONABLE ACCOMMODATIONS

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VOICE-OVER ANNOUNCER: Blog Talk Radio. (Music) Welcome to WADA ADA Live! Talk radio. Brought to you by the Southeast ADA Center, your leader for information, training and guidance on the Americans with Disabilities Act. And here's your host.

PAMELA WILLIAMSON: Thank you, Donna. I am so happy to be here.

PAMELA WILLIAMSON: Good afternoon, everyone. Welcome to WADA ADA Live! On behalf of the Southeast ADA Center, the Burton Blatt Institute at Syracuse University and the ADA National Network, we are glad to have you here for the 43rd episode of ADA Live! My name is Pam Williamson and I am the assistant project director for the Southeast ADA Center.

The topic of today's show is employment, disclosure and reasonable accommodations. In this episode, we will discuss what Title I of the ADA says about disclosing a disability to an employer, what is and is not reasonable accommodation, and how to request accommodation.

A hallmark of the Americans with Disabilities Act is the provision of reasonable accommodation to ensure equality in the workplace. Before the ADA, employers were free to ask disability related questions. And this was often done to screen people out of jobs without evaluating their ability to perform the work.

When players hear the word "disability," they may become concerned with cost and legal liability. Often, employers do not understand that they have rights under ADA. Employees generally do not know that they have responsibilities in disclosing disability and the need for accommodation.

Now I would like to introduce today's speaker and my colleague, Barry Whaley. Barry is the project director of the Southeast ADA Center. And prior to becoming the center's director, Barry was the director of the supported higher education project at the University of Kentucky Human Development Institute.

At the University of Kentucky, he also provided training and consultation to employers, service providers, people with disabilities, and families on their rights and responsibilities under the ADA.

ADA Live! listening audience, you may submit your questions on ADA and employment at adalive.org. Barry, welcome to the show.

BARRY WHALEY: Thank you, Pam, thank you for having me on today.

PAMELA WILLIAMSON: We are really excited about it. And as you know, we are talking about Title I of the Americans with Disabilities Act today. Can you tell us what Title I is and what it covers and who it covers?

BARRY WHALEY: Sure, I'm glad to, thanks. Title I of the Americans with Disabilities Act of 1990, essentially what it does is prohibits private employers, state and local governments, employment agencies, labor unions from discriminating against qualified people with disabilities in all aspects of the employment process.

So when I say all aspects, that includes job application procedures, it includes hiring and firing, job advancement, compensation, job training, or any other term, condition, or privilege of employment.

Now you have to understand that the ADA only covers those employers who have 15 or more employees working for them. So, smaller, you know, 14 or less, smaller organizations would not be covered, the ADA would not apply to them

The ADA also includes state and local governments, and it also applies to employment agencies and to labor organizations.

Title I protects full time employees, part time employees, and it also covers seasonal workers and temporary workers.

PAMELA WILLIAMSON: That is quite a broad coverage. And it's good to know. So, obviously, so, with that broad coverage, there comes over issues that we need to look at. So, this question is two part: What can employers ask an applicant or an employee with a disability? And when can they ask about disability?

BARRY WHALEY: Exactly, and this is something employers need to know and oftentimes are unsure about

Under the ADA, employers may ask about a disability, but they can only do it at specified times and for specific reasons in the employment process. And the ADA considers three phases of the employment process

So, the first is pre employment. That's before an offer has been made. So, at this stage, perhaps even before you even interview for a job, an employer can't ask about any disability related questions

The second phase is post job offers. So, it's pre employment, post job offer, but before you begin work. And in this phase, after making a job offer, employers may ask disability related questions and they can conduct medical examinations. But here's the caveat: It has to be so long as that these requirements apply to everybody who is applying for the same job category

The third phase then is employment. So, after you have begun work, the third phase is employment once you're on the job. And at that point, disability inquiry can only be made by an employer if it's job related and if a business necessity, or if someone, an employee with a disability, is seeking a reasonable accommodation on the job

Employers, you asked about what they can ask. Employers may ask the following questions at any time: They can ask about somebody's wellbeing. They can ask about a non-disability related impairment. They can, and this is important to know, an employer can ask you if you can perform the essential functions of the job. And as a step further, an employer can ask you to demonstrate how you would perform the essential functions of the job.

They can also ask you, for instance, about emergency contact information.

PAMELA WILLIAMSON: Excellent. That is great information to know. So, we know what an employer can ask. Are there questions that they cannot ask during any of these phases of employment?

BARRY WHALEY: That's an excellent question. Yeah, employers can't ask, and this would be true in any of the three phases of employment that we just discussed, you can't ask if somebody has ever had a disability

You also, you can't ask for medical documentation, for instance, of a specific condition that someone has.

You can't ask about someone's genetic information. And obviously, this is in the news right now, you know, there's pending legislation in the House of Representatives of Preserving Employees Wellness Programs Act that may take away these protections regarding this act found in the ADA.

Additionally, you can't ask if someone has filed previous workers' comp claims.

And finally, you can't ask about prescription drug use, either current or past prescription drug use.

And I want to bring this up before we move on. I want to mention some best practices that employers really should be thinking about when they are looking for job candidates.

Employers should have information about job openings and they should be placed in a location that would be accessible for someone who is a wheelchair rider or someone who has mobility impairment.

Employers should, if a job is advertised, for instance, and you've included a phone number to call for information, you should include alternate contact information, a TTY or TTD relay number or email should also be available for people who may be deaf or have difficulty hearing.

Also, printed job information. If an employment office or an employee bulletin board should be used, this posting should be made available in alternate formats. So I'm talking about large print or Braille, perhaps, or even audio recording. Whatever is needed, so that someone with a visual or other reading impairment could access that information.

Employers should prepare this information in advance. For instance, large print should be available to someone with a visual impairment. And this should be thought out even before a job is posted.

And then finally, and this is important, that, you know, so much of our hiring now is done online. Online applications should be accessible in order for people to apply for jobs.

So, employers need to be aware of the accessibility of their online application process.

PAMELA WILLIAMSON: Barry, I really appreciate that thorough explanation. Both of the questions that employers are unable to ask at any point and also those best practices.

I think it's important that employers understand how they can best recruit individuals with disabilities as employees

So, once the employer has recruited this employee and it either may be in an application process or they're going on the job, they may, the person may need a reasonable accommodation.

So, what is a reasonable accommodation?

BARRY WHALEY: And this is the crux, this is the central component of Title I of the ADA and it's very critical.

Any time that we change a job environment, any time we change the way a job is done in order to provide an equal opportunity for somebody with a disability to do that job, that would be considered a reasonable accommodation or an accommodation.

Before we go on, it's important to remember that employers are only making reasonable accommodation to essential functions to a job. So, when I say "essential functions," what do I mean? Essential functions is the reason why the job exists. And it could be that only a few employees can perform this particular job or this function.

The job requires or the essential function requires some sort of specialized skill in order to do that job.

For instance, I spend a lot of time traveling for my job, so a pilot of an airplane, for instance, the essential function of his or her job is to fly the airplane, right?

There may be marginal functions; there may be a myriad of other things that a pilot would have to do as part of his or her job, but the essential function of that job is to fly the airplane.

So, if we're looking at reasonable accommodation, we are looking at reasonable accommodation specifically for those essential functions, not the marginal or the tertiary functions of what that job looks like.

PAMELA WILLIAMSON: So if I understand you correctly, the take away from this is reasonable accommodations is about equal opportunity and accommodating the essential functions of the job, the key components of why that job exists, is that correct?

BARRY WHALEY: That's correct

Remember, that the ADA is Civil Rights law. It provides an equal playing field, it provides equal opportunity.

It doesn't provide preferential treatment for somebody, but it equals the playing field so somebody can do their job and do it well.

You know, we all want to see our employees succeed and be the most they can be and to be as productive as possible.

And so when we look at accommodation, we are looking at the essential functions of the job; why that job is there.

PAMELA WILLIAMSON: So, if someone needs an accommodation and they want to pursue getting one while on the job, what do they need to do?

BARRY WHALEY: Well, that's a good question. You know, I know a lot of employers and I can tell you that very few of them are mind readers; in fact, probably none of them are mind readers.

So, an employer can only grant an accommodation or can make accommodation to a known physical or mental limitation that someone with a disability has.

So, in order to get the accommodation, and in order for the employer to know that there's a need for accommodation, it's essential that an employee disclose his or her disability. In disclosure, that's where we identify as having a disability and I'm having a difficulty and I have a need for an accommodation on the job.

Now, this can happen at any time. And let's think back to our three phases of employment that we discussed a few minutes ago. So, for instance, pre employment phase, a person might need an accommodation in order to fully participate in the job interview, for instance. And reasonable accommodations can take many forms in the application and interview process and a few of those examples would be, you know, that written material might have to be presented in an accessible format, you know, such as large print or Braille or audio recording. Someone who might have a hearing difficulty or may be deaf, then we may be looking at an accommodation of a sign language interpreter or we may be looking at readers for somebody as an accommodation.

You know, as we mentioned, that we are ensuring that our recruitment, our interviewing, our tests that the other components of the application process, that they can be held in an accessible location so people can get there and have the opportunity to interview. Also providing or modifying equipment or devices. Or perhaps we need to adjust or modify our application policies and procedures.

You know, I've done a lot of work over the years, for instance, in providing supported employment services for folks. So, for instance, if I'm a supported employment provider and I'm taking someone looking you know, a job seeker to an interview and I may sit in on that interview or I may assist with the application, then my presence there, I am a reasonable accommodation myself, and so I'm essential to this young lady or young man having the opportunity to complete an application or to interview.

Since I mentioned supported employment, just for a shameless commercial, next month on WADA Live, we will have Allison Wohl of APSE and she will be with us for supported employment.

And I also mentioned testing before, so if all applicants for position are required to take a test for the job, so now we're talking about pre employment, either, you know, post job offer phase, a person with a disability may need an accommodation for testing as well, you know, and so some examples of accommodation include the ones that we just discussed a few minutes ago

Maybe after somebody begins work, so now we're talking about the third phase of employment, when somebody is on the job, then there may be a need for accommodation in this phase.

And so disclosure and an accommodation request can be made at any time. You know, it's important to remember that, you know, not to wait too long, because you don't want your job to be placed in jeopardy because you're unable to perform the essential functions of the job and you need an accommodation.

Pam, I need to stress that in granting reasonable accommodation, that the employer has the final say in what accommodation you will receive.

So, the only stipulation is that accommodation selected by the employer needs to be effective, it needs to allow you to perform the essential functions of the job.

PAMELA WILLIAMSON: So, Barry, it sounds like to me, first of all, I'm glad to know as an employer I don't have to be a mind reader, that is a comfort to me because I'm not very good at it, let me just tell you.

BARRY WHALEY: [Chuckles].

PAMELA WILLIAMSON: My husband will agree. And also that employees with disabilities need to really know how to disclose that disability and to ask for a reasonable accommodation. So can you talk to us just a little bit more about what it means to disclose a disability?

BARRY WHALEY: Disclosure, Pam, is a very personal decision that someone needs to make for themselves and they need to weigh that decision very carefully.

In talking with people you know, I usually begin the discussion of what are the benefits of disclosing a disability? What good things could come out of your decision to disclose?

Additionally, and I'm not so Pollyanna that I don't realize that bad things can happen to people, so what are the risks in disclosing a disability?

And some of that goes to language. You know, for instance, if in disclosing my disability I say I have a mental illness, for instance, without really talking about functionally how my mental illness would affect my ability to perform the essential functions of the job and I just stick that label of "mental illness" out there, then there are all those stereotypes that accompany that, you know. And we know what they are; you know, that people are scary, that they're dangerous, they're not to be trusted. You know, things that simply aren't true!

But, you know, people tend to stereotype, they tend to shorthand and so those stereotypes come up and so that could be a big risk in disclosing disability. So we need to be careful of the language that we use and how we present ourselves to an employer and how much information we should share with an employer. That's very important

Sometimes we feel that we just want to put our whole self out there, and in doing so, we may disclose far more than we need and certainly far more than we need in order to address my need for accommodation.

So, but this is important, and this is the key point here, that you are never, never required to disclose your disability to an employer unless you're seeking a reasonable accommodation from the employer

You know, so, if you don't need an accommodation, if you're able to perform the essential functions of the job, then there's no need to disclose.

You know, some people, they may work for years without ever disclosing a disability and then perhaps something changes.

For instance, the number one disability that affects a major life area and interplays with work in this country is arthritis. So, you may be able for years to perform the essential functions of the job, but then things change. We know that arthritis is progressive. So then maybe years later I've been on the job, now I need an accommodation because my arthritis has reached the point where I can no longer perform the essential function.

Now, it's important in this discussion to realize that an employer can't retaliate against you if you ask for accommodation; they can't, for instance, say, "Well, you know, you've deceived me all these years, you've kept this disability from me and so, you know, you're not to be trusted," for instance. No, they can't do that. And as a result, they can't retaliate against you when you do then go to them and ask for accommodation.

Now, I'm going to contradict myself for a second and I'm going to stop for a minute and I want to discuss that there is a distinct difference in disclosing a disability which, as I

said, is a personal decision that somebody makes, and self-identifying as having a disability.

So, in self-identification, for instance, this is an invitation from an employer to identify as having a disability. So now you're asking, you know, why would I do that?

You know, there are some situations where maybe an employer has an affirmative action plan in place or maybe they have a preferential hiring program that would give preferential hiring to somebody with a disability. Then it would be to your advantage to self-identify as having a disability.

Now, here is another situation. Section 503 of the Rehabilitation Act requires that federal contractors work towards what's called a 7% utilization goal. That means that Section 503 is saying if you have contracts with the Federal Government and you are working towards 7% of your workforce being people with disabilities, so under that circumstance, you may want to self-identify, because you obviously would have preferential hiring.

PAMELA WILLIAMSON: Barry, that's a lot of great information. And thank you for clarifying both how to disclose a disability and the difference between disclosing a disability and self-identifying as an individual with a disability for a specific reason.

So, obviously, we've discussed the employee's responsibilities for disclosing a disability. So, what are now the employer's responsibilities when someone discloses a disability and a need for an accommodation?

BARRY WHALEY: Right. And this is one of the misunderstandings that employers have. What they need to understand is they have rights and they have responsibilities as well under the ADA.

So, their first and foremost responsibility, and it seems kind of obvious to say, but if someone has disclosed and requesting a need for accommodation, the first step is that employer needs to recognize and acknowledge that a request for accommodation has been made by that employee.

And then once that has been done, the ADA refers to what's called the interactive process, which is kind of a fancy way of saying you're going to sit down and you're going to have a conversation with that employee about their disability and what difficulties they are having in performing the essential functions of the job, and also, you know, a discussion of what accommodations someone might need or perhaps accommodations that have worked in the past.

So, it's a conversation. And this is an important part of the responsibility that an employer has, is to work with an employee in good faith to seek a reasonable accommodation for somebody

Employers also have a responsibility to confirm the existence of the disability. So, they might ask for some sort of documentation. Now, as a word to employers, sometimes in our zeal or in our concern that we have crossed all our T's and dotted all our I's, that we're going to ask for, you know, a copious amount of documentation, and that isn't necessary. The only documentation you need specific to that disability and the need for accommodation, so, you know, I urge employers to think about, you know, well, what do you need to make this decision without, you know, overloading the file cabinet, so to speak

The other thing an employer needs to be aware of is going back to this idea of essential function. We are only accommodating the essential functions of the job, not the marginal function. So, we need to determine if the need for accommodation, the request that's been made by that employee, if it addresses the need to accommodate an essential function.

Employers are required to investigate solutions. This is part of this interactive process. They're required to implement the accommodation, to document the accommodation. Then employers need to be proactive in making sure, I believe, in making sure that this accommodation is still effective

I've worked with a number of people over the years and, you know, employers can go back and say, you know, I want to review this accommodation. Do you still need it? And most importantly, is it still working for you? Or do we need to look at something else? That's simply being a good employer, right?

Now, I want to make clear that employers generally have to honor any request for an accommodation, but there are some situations where an employer has the right not to grant an accommodation.

So, the ADA talks about undue hardship for the business. So, if an accommodation is too extensive, if it's disruptive, too costly, if it fundamentally changes the essential function of the job, then, you know, we don't have to make that accommodation.

If in changing you know, in granting this accommodation, the job no longer looks like its intent and is no longer functioning the way it should, then we wouldn't have to grant that accommodation. Also, keep in mind that you shouldn't, obviously, grant an accommodation that might be dangerous or illegal. You know, employers have a duty of care to make sure that the general public and that other employees are safe at their job.

PAMELA WILLIAMSON: Barry, I really appreciate that very detailed outline for employers and what they really need to look at in implementing an accommodation from the time it's requested until the follow through. It's always very important.

I do have a question, though. You mentioned the medical documentation and request for accommodation. How are employers required to keep this file? Is it confidential? If I'm an employee with a disability, I don't want my information out there for just anybody to see. So, what are their requirements on that?

BARRY WHALEY: Yes, an employer in collecting this documentation that would be related to reasonable accommodation that would fall under this umbrella of ADA Title I, they cannot just put all of this stuff in the general file cabinet with your personnel file and with other folks' records. The ADA is pretty clear that this information needs to be kept separate and it needs to be a separate, you know, file cabinet or somehow protected in a computer system separate from your general personnel files, you know, meant it's locked away and kept confidential.

PAMELA WILLIAMSON: Well, that's great to know. And I know that provides a level of extra assurance both for the employee and the employer, so...

Well, talking about confidentiality, you know, that kind of segues into the next question I wanted to ask. You know, almost everyone I know is involved in social media some way, it might be Facebook, Twitter, Snapchat, you name it, you know, there's something out there that almost everyone is involved with. That kind of impacts that confidentiality piece, so how does that work? How do this impact disclosure and disability in the workplace?

BARRY WHALEY: Well, you sounded pretty hip and cool there, Pam, because you knew all of the different social media platforms. And I don't know that many [chuckles] so, in some ways you're a step ahead of me.

But in all seriousness, you know, we live in a digital age and information is out there, whether it's Snapchat or Instagram or Facebook, although they need to be very careful and employers may use social media in order to seek out information about a job candidate.

I have a very dear friend of mine who has a foundation, for instance, and my role with her and they give money away, I should say, to students with neurologic disabilities to go to college. And so my role in this organization is I'm kind of the final guy that looks at these applications to decide who should get this scholarship money.

You know, what's the first thing I do? You know, the first thing I do is look at social media. You know, is this kid who he or she says they are? Is what they wrote in the

application, does this line up with what I'm seeing on social media? So, you know if I'm doing it, employers are doing it.

So, we need to be aware that what we post on social media may unintentionally disclose a disability. You know, the pictures that we post, the comments that we make, are there things that could be misinterpreted? You know, we need to be thoughtful and respectful in our posts.

I have, you know, five kids, and at least three or four of them are on social media, and so every once in a while, you know, I look at it and I have to go back to my kid and say really? Did you mean to post that? You may want to think about that, you know, because sometimes we just put stuff out there that we shouldn't, right?

And so, you know, we need to know that the information that we put out online may be out there forever and it may never go away. So just a word to the wise: Be careful what we post on social media, because it could inadvertently disclose a disability and it could result in us perhaps not getting a job.

PAMELA WILLIAMSON: Barry, you have given us a wealth of information to think about, to digest, to review. Oh my goodness! I don't even know where to begin.

So, here's and I'm sure our listeners feel the same way today. So, where can our employers or employees go for more guidance on these issues of reasonable accommodation and disclosure?

BARRY WHALEY: Right, well, first of all, we've put together a resource fact sheet for this episode and that could be found under resources at adalive.org so you may want to take a look at that, download it, take a look at it if you are an employer or an employee.

But if nothing else, if you don't remember anything else from this presentation, please remember 800 949 4232, that is the number for the ADA National Network, so wherever you are in the United States, if you have a question, if you feel your rights have been violated, if you are unsure how to disclose your disability, if you're unsure if perhaps you've been discriminated against, you can always call that number and be in touch with a technical assistant who can talk through these issues with you.

So, again, 800 949 4232 will get you to a technical advisor with the ADA National Network. If you're uncomfortable or cannot speak to somebody on the phone, you can always go to the National Network website which is www.adataorg; so adata.org.

And you can post a question there for a technical advisor.

Then finally, if you're an employer and you're working on accommodation and you're trying to figure it out for somebody, the Job Accommodation Network, askjan.org is the go to site for ideas and examples of reasonable accommodation that have worked and are successful for others.

Now, keep in mind, every accommodation is different and every accommodation is specific to that person and that person's disability and how that disability affects their ability to do the essential functions of a job.

So, it's not a cookie cutter, but it gives you an idea that might spark another idea as far as what might work for somebody.

PAMELA WILLIAMSON: Well, Barry, we thank you very much for joining us today on this episode of WADA ADA Live! For all of the information you've given us about ADA Title I employment, reasonable accommodation, and disclosure.

So, we look forward to next month when we have Allison Wohl with us to talk about supported employment. ADA Live! listeners, if you have follow up questions, please remember to join us and go to www.adalive.org.

BARRY WHALEY: Thank you very much, Pam. Have a great afternoon, everybody.

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