

Disclaimer

The webinar will begin shortly...

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July 13, 2016
2:00 – 3:00 pm EST

WEBINAR

with ROY MATHESON

What Employers Need to Know About *Direct Threat* and *Regarded As*



Reasonable Accommodation, LLC

Our Process Today



- Definition of Terms
- Case Examples
- Best Practice Suggestions
- Questions and Answers

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"Regarded As" and "Direct Threat"



What did the changes to the ADA mean to employers and work evaluator?

More employees are now qualified as disabled.

In contrast to the old, narrow interpretation, the new regulations interpret “disability” as an impairment that “substantially limits a major life activity.” Major life activities are expanded in the amended law to include “major bodily function,” including functions of the immune system, digestive function, and neurological and brain functions, among others.



*Expanded
Definition
of
“Disability”*



*Same
fundamental
three-prongs*



Prong One:

***Physical or mental impairment which substantially
limits a major life activity***

Prong Two:

“Has a record of such impairment”

Prong Three:

(1) Disability

(C) being regarded as having such an impairment (as described in paragraph (3)).



Definition of Disability - Prong Three

- (3) Regarded as having such an impairment
 - (A) An individual meets the requirement of "being regarded" as having such an impairment if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.



Definition of Disability - Prong Three

Continuing...

(3) Regarded as having such an impairment

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.



What Does “Regarded As” Look Like

Gillen v. Fallon Ambulance Service (No. 01-1642)



What Does “Regarded As” Look Like

EEOC v. Staffmark Investment LLC and Sony Electronics, Inc, 12-CV-9628, N.D. Ill.



What Does “Regarded As” Sound Like

Has a physical or mental impairment that substantially limits major life activities
only as a result of the attitudes of others toward such impairment



EEOC v. E. I. Du Pont De Nemours & Co.
(No. 03-1605)



“Direct Threat”



“Direct Threat” Defined

Sec. 12111. Definitions (3)

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.



Generalization, Fear, or Stereotype

The covered entity's determination that a employee poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability.



Assessment of Direct Threat

The determination must be based on an individualized assessment that relies on current medical evidence, or on the best available objective evidence, to assess:

1. The nature
2. The duration
3. The severity of the risk
4. The probability that the potential injury will actually occur; and,
5. Whether reasonable accommodation will mitigate or eliminate the risk.



Direct Threat = No Longer Qualified

An individual who poses a direct threat to the health or safety of others is no longer a "qualified individual."



“Direct Threat” On The Job



What Does “Direct Threat” Look Like



Observing “Direct Threat”

Watch for changes in:

1. Balance
2. Gait
3. Signs of pain or discomfort
4. Loss of mobility in limbs
5. Decrease in power
6. Decrease in endurance



Reports of Direct Threat

A verbal or written report from a:

1. Co-worker
2. Supervisor
3. Regional manager
4. Union representative
5. Shop steward
6. The ergonomic comfort or safety team
7. A health care provider
8. Significant other
9. The worker



Other Flags for “Direct Threat”

1. Increased time off work
2. Injury, accident, or disease
3. Request for reasonable accommodation
4. Report from a post-offer employment test secondary to a suggestion for reasonable accommodation to achieve “qualified individual” status



It's a Process Law!



It's a Process Law!

A process-based law encourages one to establish a step-by-step protocol to navigate the variabilities of dealing with people. In other words, manage complex interactions with uncomplicated procedures and documentation.



It's a Process Law!

A positive resolution of a potential charge of employment discrimination may hinge on how you treated the employee as documented in your records.



Claiming to know "best practices"
seems to be a little egotistical -



How about sharing some ideas...



“Regarded As” Best Practice Process

1. Review all demotions, transfers, or terminations in light of ADA Title I. Ask, “Is the ‘regarded as’ element of the law involved?”
2. If your review reveals that “regarded as” may be in play, engage in a direct, unhurried conversation with the direct supervisor about his/her concerns and observations



“Regarded As” Best Practice Process

3. Move quickly to document performance both related to and separate from the disability in question
4. If the supervisor indicates that others have concerns, interview and document the other's concerns
5. Focus on a discussion of observed functional issues, not on observed or assumed disability



“Regarded As” Best Practice Process

6. If an adverse employment action has been taken, build your defense and work to remediate the negative effect of the action
7. Consider suggesting a reasonable accommodation (modification of the work process, transfer, etc.) to keep the employee in tact
8. Contact qualified legal counsel



“Direct Threat” Best Practice Process

1. Review all reports of direct threat in light of ADA Title I
2. Begin an “reasonable accommodation-like” interactive conversation with supervisors, complaining employees, and the subject employee



“Direct Threat” Best Practice Process

3. Arrange for an individualized assessment that relies on current medical evidence or on the best available objective evidence to assess:
 - A. The nature of the threat
 - B. The duration of the threat
 - C. The severity of the risk
 - D. The probability that potential injury will actually occur
 - E. Whether reasonable accommodation will mitigate or eliminate the risk.

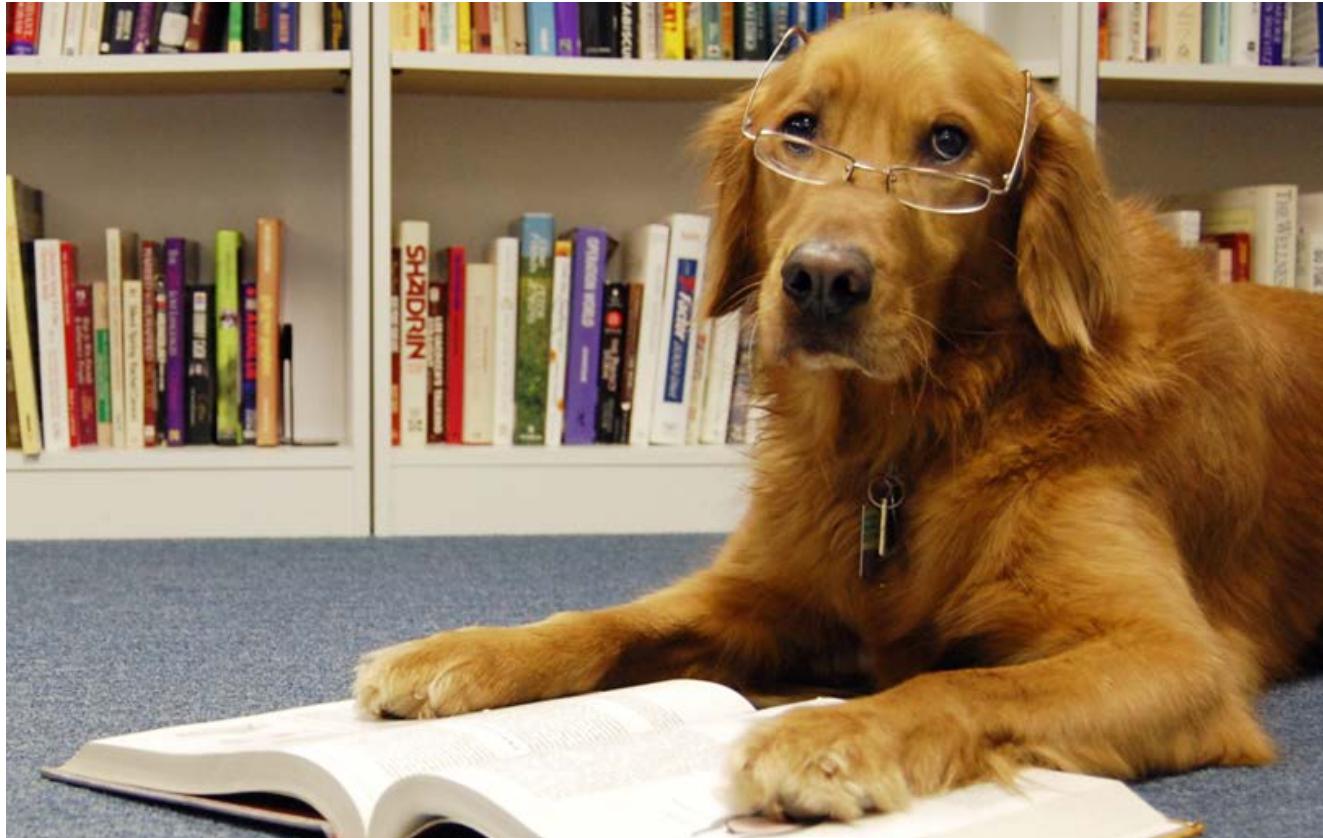


“Direct Threat” Best Practice Process

4. Arrange for temporary alternative duty to maintain employment if the risk is not immediate
5. Document the date, time, people involved, and the content of discussions and inquiries



Relevant Reading



Relevant Reading

- Paul James v. The Goodyear Tire and Rubber Company (No. 08-6332)
- Gillen v. Fallon Ambulance Service (No. 01-1642)
- EEOC v. E. I. Du Pont De Nemours & Co. (No. 03-1605)



Relevant Reading

- Louis HOLIDAY, Plaintiff-Appellant, v. CITY OF CHATTANOOGA, Defendant-Appellee. (No. 98-5619)
- CONCORDE CAREER INSTITUTE. (DJ# 202-12C-149)
- ANGELA HIGGINS, Plaintiff, and THE UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. WARRIOR INSURANCE GROUP, a/k/a d/b/a GALLANT INSURANCE COMPANY, a/k/a d/b/a VALOR INSURANCE COMPANY, Defendant. Civil No. 99-114-DRH



Questions

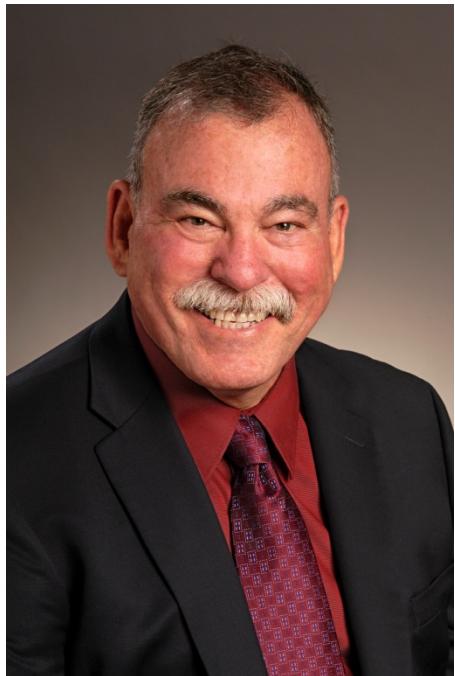


August Webinar

Tips for Accommodating Applicants and
Temporary Employees

August 10, 2016 - 2:00 p.m. EST





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