

## AMERICAN WITH DISABILITIES ACT/ADAA CONTINUES TO BROADEN

### *CAN REQUIRING A HIGH SCHOOL DIPLOMA BE A VIOLATION?*

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On May 24, 2011 the EEOC's Final Rules and Regulations on the Americans with Disabilities Amendments Act ("ADAA") became effective. Effectuating one of the stated purposes of the ADAA, these regulations require employers to shift their focus from determining whether or not an employee is "disabled" to whether the employer can provide "reasonable accommodations." The new regulations, together with recent EEOC informal communications and court decisions, continue to broaden the scope of what qualifies as a "disability" under the ADAA to the point where employers are better served by investing time in exploring reasonable accommodations than in conducting detailed medical histories to challenge "disability" status.

#### **High School Diploma's and other Job Qualification Standards**

Last month the EEOC issued an "informal discussion letter" in which it stated that requiring a high school diploma as a qualification for a job may violate the ADA unless having a high school diploma, as opposed to computation, reasoning and language skills, is "job related and consistent with business necessity." Even where an employer can evidence that an actual high school diploma is job related and consistent with business necessity, failure to waive this requirement for an individual with learning disabilities may be considered an ADA violation, unless it can also show that the person is unable to perform the essential functions of the job with or without reasonable accommodation(s).

#### **Severe Obesity**

While individuals who are merely overweight are not yet protected by the ADA (i.e. the legions of people currently flooding local gyms after the holidays) "severely obese" people may be entitled to the Act's protections. The EEOC's regulations state that "normal deviations in height, weight, or strength that are not the result of a physiological disorder are not impairments" entitled to protection under the ADA. But, "[a]t the extremes... such deviations may constitute impairments" that are covered by the Act, as well as individuals

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who “have underlying physical disorders that affect their health, weight, or strength.” The EEOC’s regulations define “severe obesity” as body weight more than 100 percent over the norm,” referencing Merck’s Manual. Some courts require that an individual’s obesity be caused by an underlying physiological condition in order to qualify as a disability protected by the ADA. However, other courts, adopting the EEOC’s approach, have held that an individual whose body weight is more than 100 percent of the norm is disabled even if there is no evidence a physiological disorder caused the obesity.

In a recent case an employee who supervised a day care program weighed 400 pounds when she was hired, and during her employment her weight increased to 500 pounds. She worked for the employer for eight years and throughout her employment she received excellent performance evaluations. However, she was terminated because of her “limited mobility” and concern that she would have difficulty administering CPR. She responded by filing a charge with the EEOC claiming that her termination violated the ADA. While the case was pending the employee died due to complications from morbid obesity, but the EEOC continued the claim filing suit against the employer on behalf of the employee’s estate. The court ruled that regardless of the cause of her obesity since the employee’s body weight was more than 100 percent over the norm she was “disabled” under the ADA.

### **Inflexible Absence Policies**

Employers that have “neutral” absence policies that provide for progressive discipline, up to termination, for an employee being out of work regardless of the reason should take notice that in the case of a “disabled” employee the policy may violate the ADA. Verizon had such a policy and recently paid \$20 million to settle claims that its refusal to make exceptions to its “no fault” absence policy violated its duty to make reasonable accommodations for absences caused by disabilities.

### **What’s an Employer to Do?**

1. When screening out, disciplining, or terminating an individual with a disability, give careful consideration to whether the disability itself is a contributing factor in the decision making process. .
2. Consider and discuss with disabled individuals reasonable accommodations, if any, which will allow the person to perform the duties of a job position.
3. Be flexible in applying workplace policies to disabled individuals to the extent the person can perform the work duties of a job position with reasonable accommodation(s) to the policy.

Please contact any member of our Labor and Employment Practice Group if you have any questions or need any help with any ADA issue.

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