

ADA and Aging Issues Relative to FFD Exams

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The Greatest Barrier for individuals with Disabilities...

- **Myths, Fears, and Stereotypes about disabilities and medical conditions.**


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Focus on Abilities Not Disabilities

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Title I of the Americans with Disabilities Act of 1990


- **Prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against *qualified individuals with disabilities* in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment.**



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Who is protected by the ADA?


- A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the **essential functions** of the job in question.



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Who is protected by the ADA?

- The ADA also protects individuals if they have a **history or record** of such a disability, or if an employer **believes or perceives** that the individual has such a disability, even if they don't.
- **NOTE: Association** with a person with a disability.



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What is considered a disability?

- A person has a disability if he/she has a physical or mental impairment that substantially limits a major life activity.



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The ADA Amendments Act

■ September 25, 2008: President Bush signs the ADA Amendments Act of 2008.

■ Effective date is January 1, 2009.



Purposes:

- To **restore** the ADA's broad protections as intended by Congress; and
- To reject the Supreme Court's view in the *Sutton* trilogy that "disability" should be determined by reference to the ameliorative effects of mitigating measures.



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Purposes:

- To reject the Supreme Court's holding in *Toyota* that the ADA requires a "demanding standard" for establishing coverage and requires that an impairment "severely restrict" major life activities.
- To express Congress's expectation that EEOC will revise its regulation defining "substantially limits" as "significantly restricted".



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Definition of "Disability":

- A physical or mental impairment that substantially limits a major life activity;
- A record of such an impairment;
- Being regarded as having such an impairment.



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Definition of "Disability" (cont.):

- Definition of "disability" construed broadly.
- Mitigating measures (other than ordinary corrective lenses) **not** considered.
- Impairment can be disability even if **episodic** or **in remission**.



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Ordinary Eyeglasses or Contact Lenses:

- Distinguished from “low vision devices,” defined as “devices that magnify, enhance, or otherwise augment a visual image”.
- Definition: “lenses that are intended to fully correct visual acuity or eliminate refractive error”.



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Aging & FFD – Hearing & Vision

- Vision
 - Average 50% reduction in global performance between age 30 and age 80
- Hearing
 - Age-related losses are due to both peripheral and central mechanisms
 - 35% of adults aged 65-75 have significant partial loss, 50% at ages 75-85, and 75% over age 85

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Case #1

- 51 yo female data entry clerk
- FFD requested because of poor work performance/increased errors
 - Has worn contacts for years, but must now hold documents at arm's length to focus
 - Progressive hearing loss; aids broken
 - No time or money for care/equipment

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Case #1

- Job description
 - 100% computer and phone work
- Problems with essential tasks
 - Can't read 12-pt type without extending arm
 - Can't hear words from behind unless yelled

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Case #2

- 54 yo male trainer of guide dog trainers
- FFD requested because of failing vision
- Progressive macular degeneration
 - Corrected vision 20/100 bilateral
- Job description
 - Observes and evaluates working guide dog trainers, while walking 50-75 feet behind them

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Major Life Activities:

- Include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, **eating, sleeping**, walking, standing, lifting, **bending**, speaking, breathing, learning, **reading, concentrating, thinking, communicating**, and working.



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Major Life Activities:

- The term “major life activities” also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.



“Regarded As” Disabled:

- Broader definition of “regarded as” disabled that would cover anyone subjected to an action “prohibited by this Act” because of a real or perceived physical or mental impairment.
- “Regarded as” would exclude impairments that are transitory (less than six months) and minor.
- Individuals “regarded as” disabled not entitled to reasonable accommodation.



Case #3

- 59 yo female psychiatric technician
- FFD requested because of concerns about ability to hear sound indicating emergency
 - Issue: Peers are all younger and play loud music at work, so she wears earplugs
 - Audiogram shows average 15 dB loss over speech frequencies bilaterally
- Job description
 - Must be able to hear patients falling or calling for help

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JOB RELATED / BUSINESS NECESSITY:

- Employer has “reasonable belief based upon **objective evidence**” that:
 - 1) employee’s ability to perform essential job functions will be impaired by medical condition; or
 - 2) employee will pose a **direct threat** due to medical condition.

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TIPS:

- **Objective evidence** related to that particular applicant is key.
- **Individualized** assessment is critical.
- Use **specialist** if needed.
- Ensure that medical provider has accurate **job description** with essential job functions.
- Explore **reasonable accommodations**.

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Aging and FFD – Some Facts

- Percentage of workforce age 50-65 will increase 25% over next 15 years
- Average 65 yo worker vs 25 yo worker
 - Muscle strength 20% less
 - Core strength >50% less
 - Aerobic capacity 10-50% less
 - Work capacity 50% less

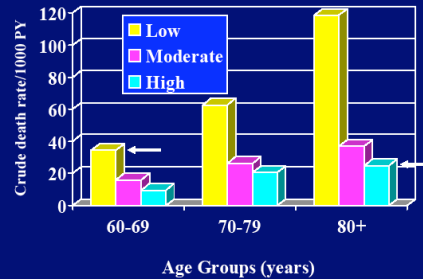
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Exercise as Medicine

Fit 80 year-olds
Have
Better Survival
Than
Sedentary 60 year-olds

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Death Rates/1000 by Fitness Level; 2135 Men Aged Grouped Men



Blair & Wei. *Am J Health Prom* 2000; 15:1-8

Case #4

- 57 yo female motor inn manager
- FFD requested because still on modified work 2 years after hit by car
 - Off work 18 months s/p bilateral tib-fib fractures and multiple pelvic fractures
 - RTW modified 6 months ago
 - Alternates sitting/standing every 30 minutes
 - Walking limited to 2 blocks, lifting to 10 pounds
 - Occasional bending, no squatting/kneeling

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Case #4

- Job description
 - Co-manages with her husband
 - Usual job duties include
 - Reservations, check-in, accounting
 - Breakfast preparation, housekeeper supervision
 - Shopping, landscape maintenance
 - He still does some of her former tasks
 - Some tasks are going undone

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Case #4

- Problems with essential tasks
 - FCE states “unable to perform any work”
 - Lacks stamina for breakfast preparation and shopping
 - Can’t squat to do landscaping
 - Not doing rehabilitative exercises prescribed by PT; not willing to resume

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Just because an employee has a physical or mental impairment that substantially limits one or more major life activities doesn't automatically mean he or she is covered under the act. One more test must be met.

The employee must be “qualified”.

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What is Reasonable Accommodation?

- **Reasonable accommodation** is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.

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Process Should Be Cooperative:

- An employer has a right to ask for information about the impairment and its limitations. And, it does not have to provide the accommodation if doing so will create an undue hardship.
- An employee has a right to a quick process. And, the employer will not request medical information beyond the scope of the impairment in question.

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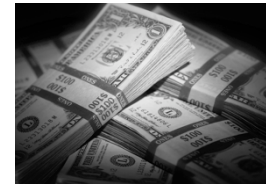
Not Accommodations

- Eliminate essential job functions.
- Lower productivity or quality standards.
- Provide new supervisor.
- Excuse bad behavior.
- Monitor medications.
- Most indefinite leaves of absence.

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Undue Hardship:

- Excessively costly
- Extensive
- Substantial
- Disruptive
- Fundamentally alter the nature or appreciation of the business



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Health or Safety Defense

- If an individual appears to pose a **direct threat** because of a disability, the employer must first try to eliminate or reduce the risk to an acceptable level with **reasonable accommodation**.
- If an effective accommodation cannot be found, the employer may refuse to hire an applicant or discharge an employee who poses a **direct threat**.

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Case #5A

- 64 yo female office manager
- FFD requested because of falls at work
- Job description
 - Up and down 18 stairs several times daily
 - Works alone last 1-2 hours of day
 - General parking is 3 blocks away

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Case #5A

- Slowly progressive neurodegenerative disease past 3 years
 - Dysarthria, dysphagia, weakness, DOE
- Some essential tasks pose DTSH
 - Needs handrail to ascend 18 stairs
 - Needs assistant to descend
 - Cannot arise from bare floor without support
 - Unsteady walking without support

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Case #5B

- 65 yo female office manager
- FFD requested because of concern for safety; falling even with cane
- Job description
 - Up and down 18 stairs occasionally with assistant
 - Moves about office intermittently with 4-prong cane

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Case #5B

- Slowly progressive neurodegenerative disease, with clear worsening past 1.5 years
 - Dysarthria, dysphagia, weakness, DOE
- Some essential tasks pose DTSH
 - Needs handrail/assistant to ascend/descend stairs
 - Needs assistant to descend
 - Cannot arise from floor; cannot protect self in fall
 - Unsteady walking with support

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MEDICAL CONFIDENTIALITY IMPLICATIONS FOR THE WORKPLACE

- Employees are not entitled to information about a co-worker's medical condition and disability even when reasonable accommodations that affect them are involved.
- It is a violation of the ADA.



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Not Protected by ADA



- Persons who currently abuse drugs:
 - Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations.
 - Employers may hold illegal drug users and alcoholics to the same performance standards as other employees.
 - Recovering illegal drug users and alcoholics are covered.

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Enforcement & Remedies

- An individual with a disability who believes that he/she has been discriminated against in employment can file a charge with the EEOC.
- See www.eeoc.gov



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ADA and Aging Issues Relative to FFD Exams

ADA Tips

- Focus on finding a reasonable accommodation. Consider reassignment to a vacant position as a reasonable accommodation.
- Do not have a 100% or “full duty” return to work policy.
- Make case by case decisions.
- Don't make assumptions.
- Do individualized analysis.

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ADA Tips:

- Consider more than 12 weeks of unpaid leave.
- Consider an ADA Coordinator.
- Do not contract out discrimination.
- **Employer is responsible.**
- Assure individuals conducting interviews, answering phones and greeting applicants have had training in the ADA.

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Cognitive Changes: Normal Aging

- Declines in
 - Delayed recall
 - Verbal fluency and semantic knowledge
 - Mental processing speeds
- Preserved
 - Vocabulary
 - Past knowledge/Previously acquired skills
 - Ability to sustain attention
 - Crystallized intelligence (“wisdom”)

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Evaluation of Cognitive Change

- Wechsler Adult Intelligence Scale (WAIS)
 - Trail-Making Test, Part B (norms in seconds)
 - Age 25: 69=50th pctile, 129=10th pctile
 - Age 65: 119=50th pctile, 282=10th pctile
 - Digit Symbol Substitution Test
 - Score is number correct in 90 seconds
- Clock Drawing Test

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Case #6

- 61 yo male middle manager
- FFD requested because of poor decision-making when acting without supervision
- Refuses to provide records and fails initial appointment
- Company begins disciplinary proceedings
- Employee returns with outside records of recent neuropsychiatric evaluation

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90% of education is knowing where to find the information when you need it.

visit our web site
www.eeoc.gov



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Questions?

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