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## *ADA Issues & Offenders with Disabilities*

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## *Prevalence of Disability in WI Prison Population*

- 31% of Wisconsin's total prison population, have a significant mental health condition (Clinical Depression, Alcoholism, Drug Addiction, Schizophrenia, Bi-Polar disorder, etc).
  - People with the most serious and persistent mental illnesses make up 10% of the prison population
- WI does not track the #'s of people with developmental disabilities in the prison population (mental retardation, traumatic brain injury, autism spectrum disorders and fetal alcohol spectrum disorders)



## Prevalence of Disability in WI Prison Population

- 25% of the prison population has some form of learning disability (dyslexia, etc.)
- 18% of the prison population has some form of major medical condition (diabetes, asthma, heart disease, etc.)



## ADA Intersects with Other Laws

- Civil Rights Act of 1964
  - 1991 Amendments
    - Disability as protected class
    - Punitive and Compensatory Damages
  - 2009 Amendments
    - Hate Crime
- Family and Medical Leave Act
  - Provides “leave” for qualifying circumstances
    - Medical treatment for self
    - Care of family member
    - Adoption and/or birth of a child



## ADA Intersects with Other Laws (con't)

- Worker's Compensation
  - State by State
  - Provides "income replacement" and "medical services" for individuals who incur injury due to work related incident
- Mental Health Parity and Substance Abuse Equity Act of 2009
  - Requires employers of 50 or more employees to provide "equivalent" mental health benefits



## ADA Intersects with Other Laws (con't)

- Genetic Information Non-Discrimination Act (GINA)
  - Prohibits use of genetic information by employers
- State Fair Employment Laws
  - WI Fair Employment Act
    - Covers employers with 1 or more employees



## Who is a Person with a Disability under the ADA?

- Definition was clarified effective January 1, 2009 by implementation of the ADA Amendments Act of 2008
  - Anyone who has a physical or mental impairment that substantially limits them in one or more major life activities;
  - Anyone who has a record of having such an impairment;
  - Anyone who is regarded as having such an impairment



## “Association” with someone who has a disability

- Individuals who are associated with someone who has a disability are protected against discrimination due to that association
  - i.e. Employer does not want to hire someone who has a child/spouse with a disability because of fears that person will use additional time off and/or increase health insurance costs
- Reasonable Accommodation does not apply to individuals who are “associated”



## Alcoholism vs Drug Addiction

- Current use/abuse of alcohol may be covered under the ADA (if substantially limited)
  - Use of alcohol is not illegal
    - Illegal to drive while intoxicated
    - Illegal to purchase alcohol under the age of 21
    - Certain behaviors resulting from use of alcohol may be illegal
- Current use of Illegal substances (including addiction) is not covered
  - Controlled substance laws prevail



## Use of “past history”

- Employers cannot discriminate against individuals who have a “history “ of an impairment (i.e. drug addiction)
  - Can enforce “neutral” policies
    - i.e. individual was fired for use of illegal drugs (not necessarily “addicted”)
    - i.e. individual was fired for violating workplace policy regarding “use of alcohol in the workplace”
- Employers may preclude individuals with a “past history” from being qualified for some positions based on business necessity
  - i.e. Law Enforcement



## What does this mean?

- No longer look at “mitigating measures” when determining if someone has a disability
- Less emphasis on the “severity” of the limitation
- Clarifies what is meant by “major life activity”
- Clear language that includes conditions that are episodic or intermittent in nature



## Conditions Presumptively Considered “substantially limiting”

- Deafness
- Blindness
- Intellectual disability (formerly known as mental retardation)
- Partially or completely missing limbs
- Mobility impairments requiring use of a wheelchair (a mitigating measure)
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV/AIDS
- Multiple Sclerosis
- Muscular Dystrophy
- Major Depression
- Bipolar Disorder
- Post-Traumatic Stress Disorder
- Obsessive-compulsive Disorder
- Schizophrenia.



Impairments that may be substantially limiting for some individuals but not for others

- Asthma
- Back and Leg Impairments
- Learning Disabilities
  
- These conditions require case by case analysis but the level of analysis should not be extensive



## Major Life Activities Revisited

- **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
  - Working
  - Interacting with Others
  - Sitting
- **Major life activity also includes the operation of a major bodily function, including but not limited to:**
  - Functions of the immune system
  - Normal cell growth
  - Digestive system
  - Bowel function
  - Bladder function
  - Neurological system
  - Brain function
  - Respiratory system
  - Circulatory system
  - Endocrine system
  - Reproductive functions



## Temporary or Non-Chronic Impairments/Limitations not covered

- Common cold
- Seasonal or common influenza
- A sprained joint
- Minor and non-chronic gastrointestinal disorders
- A broken bone that is expected to heal completely
- Seasonal Allergies that do not substantially limit a major life activity
- Appendicitis



## Exclusions Remain Intact

- Transvestism
- Transsexualism
- Pedophilia
- Exhibitionism
- Gender identity disorders not resulting from physical impairments
- Other sexual behaviour disorders
- Compulsive gambling
- Kleptomania
- Pyromania
- Psychoactive substance use disorders resulting from current illegal use of drugs.





## What does this mean in “lay” terms?

- More people will find that they are covered by the ADA
- Less focus on proving how “severely” limited an individual is before they are considered covered by the law
- Complaints and lawsuits claiming discrimination will have a better chance of actually having the merits of the case heard versus dismissed based on “definition”



## Disclosure of a Disability

- Individuals are not required to disclose a disability unless they are requesting an accommodation
  - Documentation of the disability may be required
    - Individuals are responsible for providing the documentation
      - Lack of documentation by offenders (never part of the formal systems or lacked options to get correct diagnosis or documentation)
      - Documentation must be from a qualified medical professional
        - Document condition, verify treatment and duration (Many ex-offenders may not have received treatment and/or able to obtain medical documentation)
- Employers are not required to second guess whether or not a disability is present
- “My disability made me do it” is not a defense under the ADA



## Qualified Individual with a Disability

- Has the needed knowledge, skills and experience sought by the employer
- Able to perform the essential functions of a job with or without a reasonable accommodation
- Note: It is a separate analysis to determine whether or not someone is a “qualified” individual and the employers ability to provide the reasonable accommodation



## Qualified Individual with a Disability(con't)

- Individuals with disabilities may be precluded from being “qualified” based on other issues associated with criminal history:
  - Sex Offender
  - Pedophile
  - Various Felony Convictions
  - DUI History
  - Etc.



## Pre-Employment

### ■ Recruitment

- Screening out for disability
  - Use of head hunters or recruitment agencies to screen
  - Statements in advertisements, job announcements that may have the effect of “screening”
  - Avoidance of organizations/groups that place people with disabilities
- Accessibility of Job Fairs, etc.
  - Look to those that may specialize/target ex-offenders, etc.
- Accessibility of On-Line processes used to recruit (job postings, etc.)



## Pre-Employment (con't)

### ■ Application Process

- No medical questions or questions that are likely to elicit medical information
  - i.e. How many sick days did you take off in the past 12 months?
  - i.e. Are you being treated for any of the following medical conditions:
    - Diabetes
    - High Blood Pressure
    - Mental Illness
  - i.e. Have you ever applied for or received Worker's Compensation?
  - i.e. Do you need a reasonable accommodation to do any aspects of the job for which you are applying?



## Pre-Employment (con't)

- Interview
  - No medical questions or questions that are likely to elicit medical information
    - The focus should be on:
      - Job qualifications
      - Ability to perform job duties
    - Employer may discuss the potential need for a reasonable accommodation as long as it is focused on the job task
      - i.e. This job requires that you be able to read information displayed on a computer screen. How would you do that?
        - Follow-up: Do you know if your screen reader software is compatible with a Lynx Operating System?
    - Discussion of offender status is not protected by the ADA – Background checks are permitted as long as done for all similarly situated individuals



## Conditional Offer of Employment

- Employer identifies the employee as meeting the qualifications and desires to hire but places conditions on the hire:
  - Completion of a medical examination and/or questionnaire
    - No limit to the type of questions that can be asked or examinations that can be conducted
    - All applicants for similar positions must be subject to the same scope of questions and/or exams



## Conditional Offer of Employment (con't)

- Determination of whether or not an accommodation is reasonable
  - Initiates the reasonable accommodation process
    - Documentation of the need for the accommodation
    - Determine various types/forms of accommodation that may work
    - Determine if the accommodation is “reasonable”



## Post Employment

- Voluntary participation in Employer sponsored health fairs, blood pressure screening, etc.
- Medical inquiry associated with request for a reasonable accommodation
- Medical inquiry consistent with business necessity (i.e. to maintain license required to do the job (CDL, etc.)
- Fitness for Duty Exams- May be condition for returning to work following illness, etc.
- Drug testing – consistent with business necessity (random drug testing or as part of an agreement related to participation in an employee assistance program or conditional offer of employment for individuals with extensive “history” (voluntary to participate))
- Drug/Alcohol Testing following accident or other safety related incident – consistent with business necessity



## Major Differences between the WI Fair Employment Law and the ADA

- Definition of Disability – Much closer to the ADA after the passage of the ADA Amendments Act.
  - Differences in Definition:
    - WI- an employee may show either a substantial limitation of a major life activity OR a limitation in the ability to do the particular job in question
    - Discrimination based on association is not covered under WI law



## Major Differences between the WI Fair Employment Law and the ADA (con't)

- Essential Functions
  - WI law requires the employer to show that the disability prevents the employee from adequately undertaking the job-related responsibilities
    - Not required to show that they can perform the essential functions of the job
- Reasonable Accommodations
  - WI law has been interpreted to require that a job-related responsibility be restructured or removed as a reasonable accommodation\*

\*unless a undue hardship



## Request For Accommodation

- Employee must initiate request
  - May not know “how” to do this
- May use “plain English”
  - Offenders likely do not know the formal terminology or that they have a right to ask for an accommodation
- Family member, friend, health professional, advocate or others may request on behalf of someone (Parole Officer, Advocate, etc.)



## Behavior and Discipline

- Employees with disabilities are held to the same standards as employees without disabilities
  - “My disability made me do it” is not a defense
- If employee identifies a disability during the disciplinary process the employer must engage in the reasonable accommodation process



## Behavior and Discipline (con't)

- If a disability is established and an accommodation is identified the employer should allow a period for implementation of accommodation to determine if it addresses/reduces/eliminates the matter which set off the disciplinary process
- Employer is not required to “excuse” the issue which originally caused the disciplinary action



## Behavior and Discipline (con't)

- If the behavior/poor performance persists even when an accommodation is in place then the employer can resume the disciplinary process
  - Individual is not qualified “with” or “without” a reasonable accommodation





## Tips for Individuals Seeking Employment

- Know your abilities and how to discuss them with an employer during an interview, etc.
  - How would you respond to questions on an application about your disability (even if it is an illegal question)?
- Understand your limitations
  - How you would describe them to an employer in terms of what types of accommodations you may need?
  - How you would describe/explain a lapse in work history?



## Tips for Individuals Seeking Employment (con't)

- Turn negatives into positives with your responses. Talk about what you CAN do versus what you can't do.
- Do your research – know something about the employer and their hiring practices before you apply
  - Do they have an on-line application process? If so, would you need assistance to complete that process?
  - Am I going to have to take a test? What types of assistance would I need to do that?



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## Tips for Individuals Seeking Employment (con't)

- Be prepared with a response to questions regarding your disability and/or accommodations that you may need during an interview.
- Be prepared with a response to questions that may be illegal under the ADA. How would you answer them on an application? How would you respond during an interview?



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## Tips for Individuals Seeking Employment (con't)

- Have a good understanding of the disability and potential limitations that you may have in terms of the type of position desired.
  - i.e. How does the need for extra time to read and process a document translate to the workplace?
  - i.e. How does taking 1 hour breaks between activities due to fatigue translate to the workplace?



## Access to Goods and Services

- Local and State Governments –
  - Non-discrimination on the basis of disability
    - Barriers for Offenders –
      - Lack of accessible transportation
      - Lack of accessible housing
      - Low income/wage earning or subsistence on public aid
      - Lack of support services in some geographic areas
- Eligibility criteria may prevent participation
  - No Drugs or Alcohol use history
  - Policy excluding felony convictions
  - Excluded from being around children



## Resources for Information/Assistance

- Job Accommodation Network
  - 800-526-7234 (V/TTY)
  - <http://askjan.org>
- Equal Employment Opportunity Commission (EEOC)
  - 800-669-4000
  - 800-669-6820 (TTY)
  - [www.eeoc.gov](http://www.eeoc.gov)



## Resources for Information/Assistance

(con't)

- Center for Psychiatric Rehabilitation – Boston University
  - Fact Sheets on Employment
    - [www.bu.edu/cpr/](http://www.bu.edu/cpr/)
- Office Disability Employment Policy (ODEP), US Department of Labor
  - [www.dol.gov/odep/](http://www.dol.gov/odep/)



## WI Specific Resources

- **Disability Rights Wisconsin**
  - 800-928-8778
  - 888-758-6049 (TTY)
  - [www.disabilityrightswi.org](http://www.disabilityrightswi.org)
- **Centers for Independent Living (find the CIL near you)**
  - 608-444-3842
  - [www.ilcw.org/wcilc.htm](http://www.ilcw.org/wcilc.htm)
- **Wisconsin Job Centers – Disability Resource Coordinators**



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## WI Specific Resources (con't)

- **Disabled Offenders Economic Security (DOES) Project**

- [http://www.legalaction.org/content/?cm\\_id=80](http://www.legalaction.org/content/?cm_id=80)

- **Department of Corrections: Opportunities and Options Resource Guide**

- [www.wi-doc.com/Opportunities%20&%20Options%20Handbook.pdf](http://www.wi-doc.com/Opportunities%20&%20Options%20Handbook.pdf)



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## WI Specific Resources (con't)

- **WI Employer Resource:**

- Worksource Wisconsin

- 866-460-9602

- [www.worksourcewi.com](http://www.worksourcewi.com)



## Still Have Questions?

### Great Lakes ADA Center



**By telephone**

800-949-4232 (v/tty)

**By e-mail**

[adata@adagreatlakes.org](mailto:adata@adagreatlakes.org)

**By internet**

[www.adagreatlakes.org](http://www.adagreatlakes.org)

