

EMPLOYERS' DUTY TO ACCOMMODATE

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OBJECTIVES

- Review Iowa Civil Rights Commission process
- Review disabilities and the accommodation process
- Participate in good faith
- Affirmative Defenses
- Religious Accommodations
- Accommodations for Pregnant Employees



IOWA CIVIL RIGHTS COMMISSION

- Enforces the Iowa Civil Rights Act (Iowa Code Chapter 216)
 - Prohibits discrimination in employment, housing, public accommodation, education, credit
- Complaint process set forth in IAC 161—3
 - Individuals have 180 from the date of incident to file a complaint
 - Employer/landlord/etc. notified of complaint
 - Non-housing cases are screened to determine whether they warrant further investigation; all housing cases are investigated
 - Mediation offered after screen-in decision and available later throughout process
 - Complainant may request right-to-sue 60 days after date of filing
 - If investigation results in “probable cause” finding and conciliation fails, ICRC may pursue public hearing

FEDERAL CIVIL RIGHTS ACT OF 1964

■ Protected Classes:

1. Race

2. Color

3. National Origin

4. Religion

5. Sex

IOWA CIVIL RIGHTS ACT OF 1965

■ Protected Classes:

1. Race

2. Color

3. National Origin

4. Religion

5. Creed

ADDITIONAL PROTECTED CLASSES

- **Federal Age Discrimination in Employment Act of 1967 (ADEA)**
 - **Age 40+**
- **ICRA Amended in 1970**
 - **Sex**

IOWA CIVIL RIGHTS ACT

- Amended in 1972
 - Include “Age” as a protected class
 - Include “Disability” as a protected class

ADA



Americans With Disabilities Act

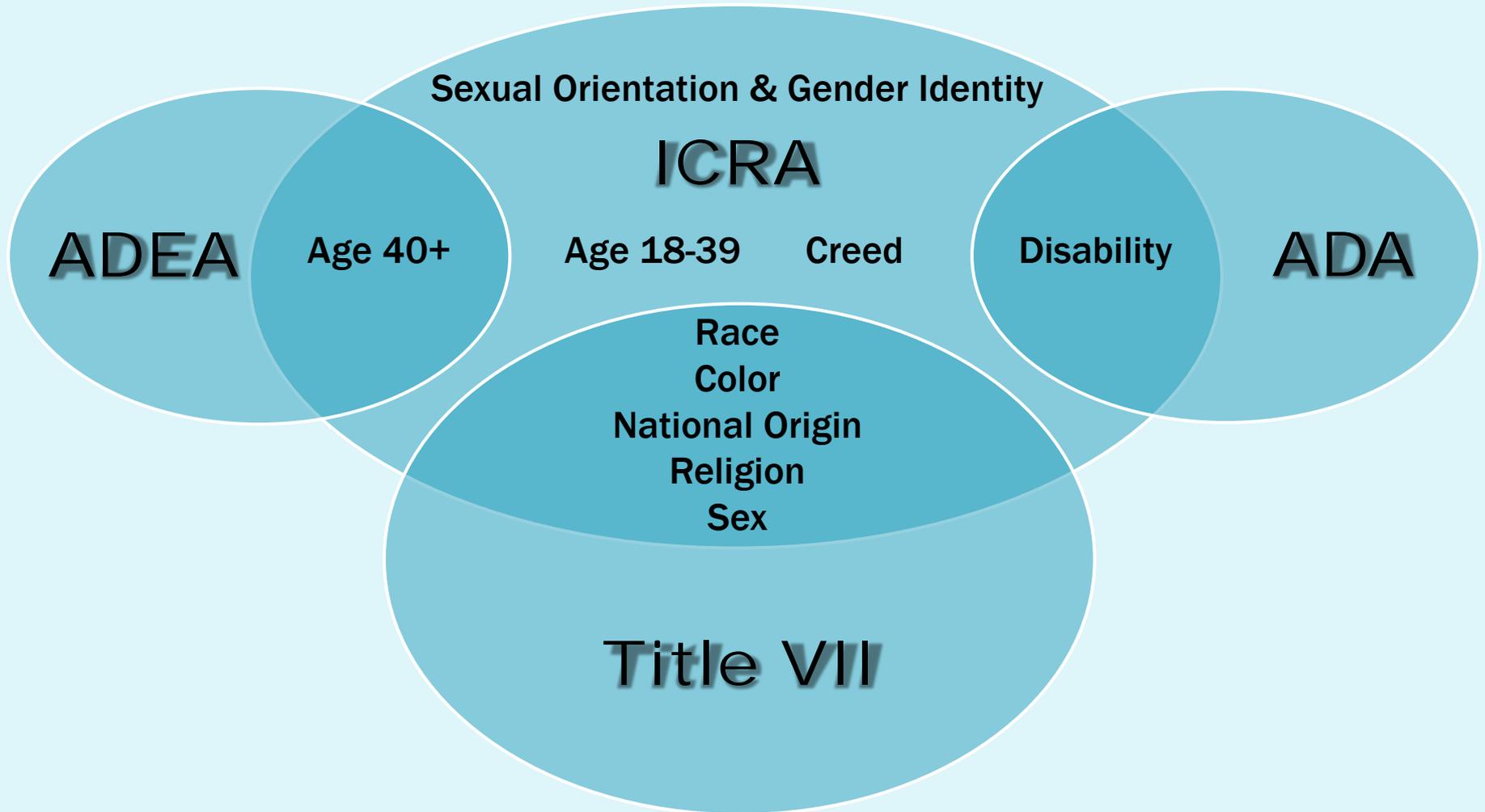


- Signed into law by President George H.W. Bush on July 26, 1990
- Took effect July 26, 1992

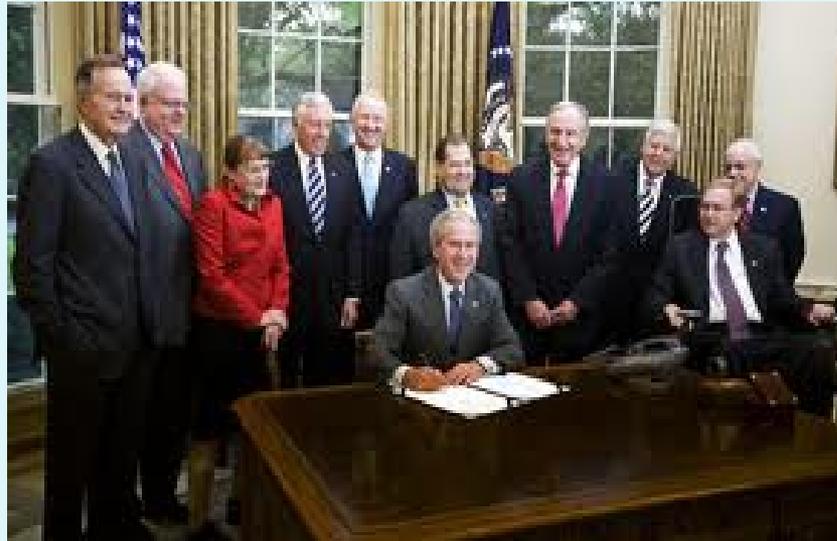
IOWA CIVIL RIGHTS ACT

- Amended in 2007
 - Include “Sexual Orientation” as a protected class
 - Include “Gender Identity” as a protected class

THE ICRA VS. THE FEDERAL PATCHWORK



ADA AMENDMENTS ACT OF 2008



- Signed into law by President George W. Bush on September 25, 2008
- Took effect January 1, 2009

Pub. L. No. 110-325 § 2(b)(3)

ADA AMENDMENTS ACT OF 2008

■ Changes to the ADA:

- Definition of disability
- Substantially limits
- Major life activity
- Mitigating measures
- Episodic/In remission
- Regarded as

**REASONABLE
ACCOMMODATION
DISABILITY**

DISABILITY

- 1. Americans with Disabilities Act of 1990, as amended (ADA)**
- 2. Iowa Civil Rights Act of 1965, as amended (ICRA)**
 - Both place an affirmative legal obligation on an employer to provide reasonable accommodation to an employee with a disability**

DISABILITY

United States Supreme Court:

The [ADA] requires preferences in the form of “reasonable accommodations” that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special “accommodation” requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.

U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002) (emphasis in original).

DISABILITY

Iowa Supreme Court:

Discrimination against the disabled differs from other types of discrimination in that other types, such as racial, religious, or sexual discrimination, usually bear no relationship to the individual's ability to perform a job. Consequently, it is necessary to provide a requirement of reasonable accommodation in order to eliminate discrimination against the disabled.

Cerro Gordo Cnty. Care Facility v. Iowa Civil Rights Comm'n, 401 N.W.2d 192, 196-97 (Iowa 1987).

DISABILITY

The primary object of attention in cases brought under the ADA should be:

- whether covered entities have complied with their obligations and whether discrimination has occurred
- *not* whether an individual's impairment substantially limits a major life activity.

Accordingly, the threshold issue of whether an impairment “substantially limits” a major life activity should not demand extensive analysis.

ADA: “DISABILITY” DEFINED

■ Three prongs:

1) “Actual” Disability (“First Prong”)

➤ 42 U.S.C. § 12102(1)(A)

2) “Record of” disability (“Second Prong”)

➤ 42 U.S.C. § 12102(1)(B)

3) “Regarded as” disabled (“Third Prong”)

➤ 42 U.S.C. § 12102(1)(C)

DISABILITY

An employer is obligated to accommodate an employee's disability under two prongs of the definition of disability:

- Actual
- Record of

There is *no* obligation to provide a reasonable accommodation for perceived disabilities.

Regarded As

42 U.S.C. § 12102(1)(C)

“Third Prong”

42 U.S.C. § 12102(3)

29 C.F.R. § 1630.2(g)(3)

ADA

REGARDED AS

■ ADA Amendments Act of 2008:

■ Stated purpose:

- 1) “To **reject** the Supreme Court’s reasoning in *Sutton* . . . **with regard to coverage under the third prong of the definition of disability**”
- 2) “[T]o **reinstate** the reasoning of the Supreme Court in *School Board of Nassau County v. Arline* . . . **which set forth a broad view of the third prong of the definition**”

“REGARDED AS” STANDARDS

- “Regarded as” disabled claim:

- 1) Prohibited action

- 2) Due to an actual or perceived **impairment**

REGARDED AS STANDARDS

- Impairment:
 - Physical *—or—* Mental
 - Regardless of whether or not the impairment **substantially limits a major life activity**

REGARDED AS STANDARDS

■ Impairment:

- Does not apply to impairments that are **transitory -and- minor**

- Actual -or- expected duration of **less than 6 months**

REGARDED AS STANDARDS

Substantially ~~X~~ limits one or more major life activities

- 1) Physical or mental impairment**
- 2) Actual or Expected of 6 or more months**

REGARDED AS STANDARDS

- No failure to accommodate alleged?
- “Regarded as” disabled claim

Record of

42 U.S.C. § 12102(1)(B)

“Second Prong”

29 C.F.R. § 1630.2(k)(1)

ADA

RECORD OF DISABILITY

■ ADA Statute:

“The definition of disability . . . shall be construed **in favor of broad coverage...**”

42 U.S.C. § 12101(4)(A)

■ ADA Regulations:

■ “Broad construction.”

■ “...shall be construed **broadly to the maximum extent** permitted by the ADA...”

■ “...should **not** demand extensive analysis...”

29 C.F.R. § 1630.2(k)(2)

RECORD OF DISABILITY

- A individual will be considered to have a record of disability if the individual has:
 - a **history** of an impairment that substantially limited one or more major life activities;
 - or-*
 - Was **misclassified** as having had such an impairment

42 U.S.C. § 12101(1)(B)

29 C.F.R. § 1630.2(k)(1)

RECORD OF DISABILITY

- An individual with a record of a substantially limiting impairment **may be entitled to a reasonable accommodation**

- **Necessary**

-and-

- **Related** to the past disability

RECORD OF IMPAIRMENT – REASONABLE ACCOMMODATION

- Example of reasonable accommodation:
 - Leave *or* a schedule change
 - To permit him/her to attend a follow-up or “monitoring” appointments with a health care provider

Actual

42 U.S.C. § 12102(1)(A)

“First Prong”

29 C.F.R. § 1630.2

ADA

ACTUAL DISABILITY

1) Impairment

- Physical
- Mental

2) Substantially Limits

3) Major Life Activity

1) IMPAIRMENT

- ***Not* defined in the ADA's statutory text**
- **Defined at 29 C.F.R. § 1630.2(h)**
 - **Two parts to regulatory definition**

DEFINITION OF “IMPAIRMENT”

Part I of the Definition of “Impairment”:

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems

DEFINITION OF “IMPAIRMENT”

Part II of the Definition of “Impairment”:

- Any mental *or* physical disorder
 - An intellectual disability (formerly termed “mental retardation” in the EEOC regulations)
 - Organic brain syndrome
 - Emotional or mental illness
 - Specific learning disabilities

ACTUAL DISABILITY

2) **Substantially Limits**

“SUBSTANTIALLY LIMITS” AMENDMENT

■ Toyota v. Williams:

■ “Substantially Limited”

➤ “...interpreted to create a **demanding** standard for qualifications of disabled...”

➤ “...an individual has an impairment that **prevents or severely restricts** the individual from doing activities that are central and important to most people’s lives...”

“SUBSTANTIALLY LIMITS” AMENDMENT

■ ADA Amendments Act of 2008:

- *Williams* “...created an **inappropriately high level of limitation** necessary to obtain coverage under the ADA...”



■ ADA:

- 42 U.S.C. § 12102(4)
- 29 C.F.R. § 1630.2(j)(1)

“SUBSTANTIALLY LIMITS” AMENDMENT

ADA Statute:

The **definition of disability** in this chapter **shall be construed in favor of broad coverage** of individuals under this chapter... 42 U.S.C. § 12102(4)

ADA Regulations:

The **term “substantially limits”** shall be construed **broadly in favor of expansive coverage**, to the maximum extent permitted by the terms of the ADA. **“Substantially limits” is not meant to be a demanding standard.** 29 C.F.R. § 1630.2(j)(1)(i)

“SUBSTANTIALLY LIMITS” AMENDMENT

ADA Regulations:

- An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity **as compared to most people in the general population.**
- An impairment need **not** prevent, or significantly or severely restrict...

“SUBSTANTIALLY LIMITS” AMENDMENT

■ Sutton v. United Air Lines, Inc.:

- “Substantially limits”
- Determined **with** reference to the ameliorative effects of mitigating measures

“SUBSTANTIALLY LIMITS” AMENDMENT

ADA Statute & Regulations:

The determination of whether an impairment substantially limits a major life activity shall be made **without** regard to the ameliorative effects of mitigating measures...

42 U.S.C. § 12102(4)(E)(i)

29 C.F.R. § 1630.2(j)(1)(vi)

“SUBSTANTIALLY LIMITS” AMENDMENT

ADA Statute & Regulations:

The ameliorative effects of the mitigating measures of **ordinary eyeglasses or contact lenses shall be considered** in determining whether an impairment substantially limits a major life activity.

42 U.S.C. § 12102(4)(E)(ii)

29 C.F.R. § 1630.2(j)(1)(vi)

2) SUBSTANTIALLY LIMITS

ADA Statute & Regulations:

An impairment that is **episodic or in remission** is a disability **if it would substantially limit a major life activity when active**

42 U.S.C. § 12102(4)(D)

29 C.F.R. § 1630.2(j)(1)(vii)

2) SUBSTANTIALLY LIMITS

ADA Statute & Regulations:

An impairment that substantially limits **one** major life activity need **not** limit other major life activities in order to be considered a disability

42 U.S.C. § 12102(4)(C)

29 C.F.R. § 1630.2(j)(1)(viii)

ACTUAL DISABILITY

3) Major Life Activity

3) MAJOR LIFE ACTIVITY

■ Defined by statute & regulations:

- 42 U.S.C. § 12102(2)

- 29 C.F.R. § 1630.2(i)

3) MAJOR LIFE ACTIVITY

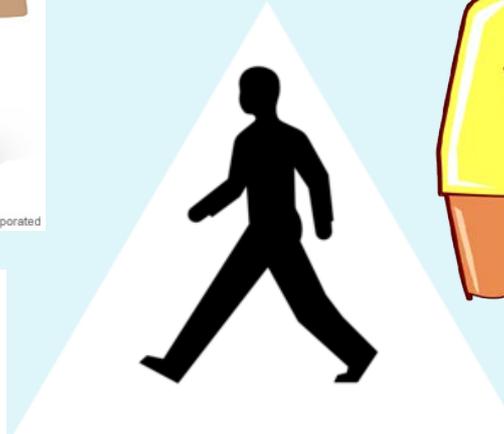
- 2 Types of Major Life Activities:
 - Life Activities
 - Bodily Functions
 - Examples, **NOT** exhaustive

42 U.S.C. § 12102(2)

29 C.F.R. § 1630.2(i)

3) MAJOR LIFE ACTIVITY

■ Life Activities:



42 U.S.C. § 12102(2)(A)
29 C.F.R. § 1630.2(i)(1)(i)

3) MAJOR LIFE ACTIVITIES

■ Life Activities:



42 U.S.C. § 12102(2)(A)
29 C.F.R. § 1630.2(i)(1)(i)

3) MAJOR LIFE ACTIVITIES

■ Bodily Functions:

- Body systems (Impairments)
- Individual organs
- List **not** exhaustive

42 U.S.C. § 12102(2)(B)
29 C.F.R. § 1630.2(i)(1)(ii)

ACCOMMODATING A QUALIFIED DISABILITY

QUALIFIED EMPLOYEE

Is the disabled employee qualified?

➤ Two Prongs:

- 1) Requisite skill, education, experience, & training
- 2) Perform the **essential functions** of the job with or without reasonable accommodation

ESSENTIAL FUNCTIONS

Initial inquiry:

Whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential.

ESSENTIAL FUNCTIONS

If the employee is required to perform the function, the next inquiry is:

Whether removing the function would fundamentally alter that position

ESSENTIAL FUNCTIONS

What are the essential functions of a job?

➤ Factors:

- 1) Whether the reason the position exists is to perform that function;
- 2) Whether a limited number of employees available among whom the performance of that job function can be distributed; and/or
- 3) Whether the function is highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

29 C.F.R § 1630.2(n)(2) (i)-(iii)

ESSENTIAL FUNCTIONS

Evidence to consider:

- 1) the employer's judgment as to which functions are essential
- 2) written job descriptions prepared before advertising or interviewing applicants for the job
- 3) the amount of time spent on the job performing the function
- 4) the consequences of not requiring the incumbent to perform the function
- 5) the terms of a collective bargaining agreement
- 6) the work experience of past incumbents in the job
- 7) the current work experience of incumbents in similar jobs

ACCOMMODATION REQUEST

If a qualified employee is unable to perform the essential job functions without a reasonable accommodation

- 1) Employee must request a reasonable accommodation
- 2) Proper employer response: initiate interactive process

INTERACTIVE PROCESS

When an individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

- 1) Analyze the particular job involved and determine its purpose and essential functions;**

29 C.F.R. Part 1630, Appendix (under the heading “Process of Determining the Appropriate Reasonable Accommodation”).

INTERACTIVE PROCESS

When an individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

29 C.F.R. Part 1630, Appendix (under the heading “Process of Determining the Appropriate Reasonable Accommodation”)

INTERACTIVE PROCESS

This assessment will make it possible to ascertain the precise barrier to the employment opportunity which, in turn, will make it possible to determine the accommodation(s) that could alleviate or remove that barrier.

**29 C.F.R. Pt. 1630, App. (under the heading “Process of Determining the Appropriate Reasonable Accommodation”);
see also 29 C.F.R. § 1630.2(o)(3) (emphasis added).**

INTERACTIVE PROCESS

- “This provision permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job.”
- “The provision permits employers or other covered entities to make inquiries or require medical examinations necessary to the reasonable accommodation process described in this part.”

29 C.F.R. § 1630.14(c) App.

INTERACTIVE PROCESS

When an individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position

29 C.F.R. Part 1630, Appendix (under the heading “Process of Determining the Appropriate Reasonable Accommodation”).

INTERACTIVE PROCESS

When an individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

29 C.F.R. Part 1630, Appendix (under the heading “Process of Determining the Appropriate Reasonable Accommodation”).

REASONABLE ACCOMMODATION

- An employer need not agree to the reasonable accommodation preferred by an employee.
- An employee need not accept a proposed reasonable accommodation by the employer.
- An employee's rejection of a proposed reasonable accommodation may render the employee unqualified.

29 C.F.R. § 1630.9(d)

Sturgill v. United Parcel Service, Inc.
215 F.3d 1024, 1031 (8th Cir. 2008).

INTERACTIVE PROCESS

Two-Way Street:

“The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves *both* the employer and the individual with a disability.”

29 C.F.R. Pt. 1630, App. (under the heading “Process of Determining the Appropriate Reasonable Accommodation”) (emphasis added).

“Both parties, not just the employer, have an obligation to participate in the interactive process.”

Magnussen v. Casey’s Marketing, Co., 787 F.Supp.2d 929, 956-57 (N.D. Iowa 2011) (citing *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1045 (8th Cir. 2005), and *EEOC v. Convergys Customer Mgmt. Group, Inc.*, 491 F.3d 790, 796 (8th Cir. 2007)).

GOOD FAITH: EMPLOYEE

An employee's failure to participate in good faith in the interactive process may bar him or her from asserting a failure-to-accommodate claim under the ADA.

Magnussen, 787 F.Supp.2d at 956-57 (citing *Kratzer*, 398 F.3d at 1045, and *Convergys Customer Mgmt. Group, Inc.*, 491 F.3d at 796).



GOOD FAITH: EMPLOYEE

One way an employee might fail to meet his or her obligation to participate in the interactive process is by refusing to provide the employer information necessary for the fashioning of a reasonable accommodation.

Magnussen, 787 F.Supp.2d at 956-57(citing *Kratzer*, 398 F.3d at 1045, and *Convergys Customer Mgmt. Group, Inc.*, 491 F.3d at 796).

GOOD FAITH

“...[F]or purposes of summary judgment, the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith.”

Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999).

GOOD FAITH

To establish liability for failure to engage in the interactive process, Complainant must show:

1. The employer knew about the disability
2. The employee requested accommodations for the disability
3. The employer did not make a good faith effort
4. The employee could have been accommodated but for the employer's lack of good faith

JOB ACCOMMODATION NETWORK



Contact Information:

800-526-7234

Askjan.org

AFFIRMATIVE DEFENSES

UNDUE HARDSHIP

Factors to be considered:

- The cost of the accommodation
- The resources the employer has available
- The size of the employer
- The impact the accommodation will have on the employer's resources and ability to conduct business
- 42 U.S.C. § 12111(10)(A) (2000).



UNDUE HARDSHIP

Examples of some things that HAVE been found to be an undue hardship:

- Reassignment of essential functions

Dropinski v. Douglas Cnty., 298 F.3d 704, 709-10, 13 AD 676 (8th Cir. 2002)

- Unlimited absenteeism

Pickens v. Soo Line R.R. Co., 264 F.3d 733, 777-78 (8th Cir. 2001)

- Conflicts with bargaining agreement

U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 398, 12 AD 1729 (2002)

UNDUE HARDSHIP

Examples of some things that have NOT been found to be an undue hardship:

- Providing assistive devices like TTY, reader, or an interpreter

EEOC. Federal Express Corp., 513 F.3d 360, 20 AD 204 (4th Cir. 2008)

- Complaints from coworkers if accommodated

Talley v. Family Dollar Stores of Ohio, Inc. 542 F.3d 1099, 20 AD 1697 (6th Cir. 2008)

DIRECT THREAT

- A significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.
- Individualized assessment based on a reasonable medical judgment
- The Assessment must rely on current medical knowledge and/or the best objective evidence.

DIRECT THREAT

Factors to consider:

- Duration of the risk
- The nature and severity of the potential harm
- The likelihood that the potential harm will occur
- The imminence of the potential harm

29 C.F.R. § 1630.2(r)

DIRECT THREAT

“We now hold that the employer bears the burden of proof, as the direct threat defense is an affirmative defense.”

EEOC v. Walmart Stores, Inc., 477 F.3d 561, 570 18 AD 1697 (8th Cir. 2007)

DIRECT THREAT

Examples:

- *Burroughs v. City of Springfield*, 163 F.3d 505, 508 (8th Cir. 1998)
 - Patrol officer unable to function in emergency situations. Police officer with diabetes had two hypoglycemic episodes while on duty and failed to control his episodes with meals.

- *Wood v. Omaha Sch. Dist.*, 25 F.3d 667 (8th Cir. 1994)
 - Insulin dependent diabetic was not qualified to drive a school bus.

- *EEOC v. Walmart Stores, Inc.*, 477 F.3d 561, 571-2 (8th Cir. 2007)
 - Employee on crutches was not a direct threat because the threat could be eliminated by allowing him to use a wheelchair.

SAFE HARBOR

- **The ADA does not protect employees who are currently engaging in the illegal use of drugs.**
- **This does not include people who have completed rehabilitation**
- **The employee can be held to the same standard as any other employee**

42 U.S.C. § 12114(a-c)

SAFE HARBOR

Examples:

- *Dovenmuehler v. St Cloud Hosp.*, 509 F.3d 435, 440-41, 19 AD 1701 (8th Cir. 2007)
 - Chemical dependent nurse stealing drugs was discharged. Nurse discharged for stealing drugs and not for her dependency.
- *Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 824, 6 AD 1229 (8th Cir. 1997)
 - Employee violated company policy against driving vehicle after drinking. Employee rejected offer to enter treatment program and was discharged.

RELIGIOUS EXEMPTION

Religious corporations, associations, and educational institutions are exempt from providing religious accommodations.

- The organization can require all employees conform to the religious tenets of the organization

42 U.S.C. § 12114(d)

INFECTIOUS AND COMMUNICABLE DISEASES

Employers may refuse to assign an employee to a job handling food if the employee has a communicable disease on the Secretary of Health and Human Services list of infectious and communicable diseases

unless the threat of transmission can be eliminated by reasonable accommodation

42 U.S.C. § 12113(e)



BUSINESS NECESSITY

- Alleged application of qualification standards, tests, or selection criteria
- That screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability
- Has been shown to be
 - Job-related and consistent with business necessity, and
 - Such performance cannot be accomplished with reasonable accommodation, as required in this part.

**REASONABLE
ACCOMMODATION
RELIGION**

ELEMENTS

Elements of a religious failure-to-accommodate claim:

- 1) The employee had a bona fide belief that compliance with an employment requirement would be contrary to his or her religious belief or practice;
- 2) The employee informed the employer about the conflict; and
- 3) The employer discharged or penalized the employee for failing to comply with the conflicting employment requirement.

King v. Iowa Civil Rights Comm'n, 334 N.W.2d 598, 601 (Iowa 1983) (citing federal cases).

UNDUE HARDSHIP

- A refusal to accommodate is justified only when:
 - 1) **Undue hardship** would **in fact** result from
 - 2) **Each** available alternative method of accommodation

UNDUE HARDSHIP

A **mere assumption** that many more people, with the same religious practices as the person being accommodated, may also need accommodation **is not evidence** of undue hardship.

ALTERNATIVES

Alternatives must be considered.

29 C.F.R. § 1630.2(c)(2)(i)

Some alternatives for accommodating religious practices might **disadvantage** the individual with respect to his or her **employment opportunities**, such as compensation, terms, conditions, or privileges of employment.

29 C.F.R. § 1630.2(c)(2)(ii)

ALTERNATIVES

When there is **more than one means of accommodation which would not cause undue hardship**, the employer or labor organization **must** offer the alternative which **least disadvantages** the individual with respect to his or her employment opportunities.

29 C.F.R. § 1630.2(c)(2)(ii)

RELIGIOUS ACCOMMODATION

A common type of accommodation for an employee's religious benefits is a **modified work schedule**

EEOC has set forth suggested methods for providing a modified work schedule accommodation

➤ 29 C.F.R. § 1605.2(d)

VOLUNTARY SUBSTITUTES /SWAPS

- Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available.
- One means of substitution is the voluntary swap.
- In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation.

29 C.F.R. § 1605.2(d)(1)(i)

VOLUNTARY SUBSTITUTES/SWAPS

Some means of doing this which employers and labor organizations should consider are:

- to **publicize policies** regarding accommodation and voluntary substitution;
- to **promote an atmosphere** in which such substitutions are favorably regarded;
- to **provide** a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

FLEXIBLE SCHEDULING

Areas in which flexibility might be introduced:

- flexible arrival and departure times;
- floating or optional holidays;
- flexible work breaks;
- use of lunch time in exchange for early departure;
- staggered work hours; and
- permitting an employee to make up time lost due to the observance of religious practices

29 C.F.R. § 1605.2(d)(1)(ii)

UNDUE HARDSHIP

The **duty** to accommodate in an alleged religious discrimination employment case **requires** the employer to **explore and implement alternatives** which are compatible with the employee's religious beliefs **without**:

- 1) compromising the employment entitlements of other employees or
- 2) requiring the employer to incur more than de minimis costs.

King, 334 N.W.2d at 601. (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 83-84 (1977)).

COST

- An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require “more than a *de minimis* cost”.
- The EEOC will determine what constitutes “more than a *de minimis* cost” with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation.

DE MINIMIS COST

EEOC interprets this phrase as it was used in the *Hardison* decision

- Costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*, would constitute undue hardship

However, EEOC will presume that:

- The **infrequent** payment of premium wages for a substitute or the payment of premium wages **while a more permanent accommodation is being sought** are costs which an employer can be required to bear as a means of providing a reasonable accommodation
- Generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a *de minimis* cost
 - EX: Costs involved in rearranging schedules and recording substitutions for payroll purposes

UNITED STATES SUPREME COURT

E.E.O.C. v. Abercrombie & Fitch Stores, Inc.

135 S.Ct. 2028 (Jun. 1, 2015)

■ Issue:

- “Whether an employer can be liable under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant or discharging an employee based on a ‘religious observance and practice’ only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.”

■ Holding:

- An applicant need only show that her need for an accommodation was a *motivating factor* in the employer’s decision, not that the employer actually knew of her need.

**REASONABLE
ACCOMMODATION
PREGNANCY**

IOWA CIVIL RIGHTS ACT (ICRA)

Disabilities caused or contributed to by the employee's pregnancy, miscarriage, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.

Iowa Code § 216.6(2)(b)

ICRA

Written and unwritten employment policies and practices involving matters such as:

- the commencement and duration of leave,
- the availability of extensions,
- the accrual of seniority, and other benefits and privileges,
- reinstatement, and
- payment under any health or temporary disability insurance or sick leave plan, formal or informal

Shall be applied to a disability due to the employee's pregnancy or giving birth, **on the same terms and conditions as they are applied to other temporary disabilities.**

Iowa Code § 216.6(2)(b)

ICRA FAILURE-TO-ACCOMMODATE PREGNANCY CLAIM

Elements of an ICRA failure-to-accommodate-pregnancy claim:

- 1) She is an otherwise qualified individual who is pregnant;
- 2) She notified the respondent of her pregnancy and the need for accommodation;
- 3) There is an accommodation which would allow her to perform the essential job functions or otherwise enjoy equal benefits and privileges of her employment; and
- 4) The respondent failed to provide an effective accommodation.

Order of the Iowa Civil Rights Commission Rejecting Summary Judgment, DIA
No. 12ICRC002, p. 2, January 24, 2013.

ICRA FAILURE-TO-ACCOMMODATE PREGNANCY CLAIM

“If the employee shows an accommodation is possible on its face, the employer can rebut the need to accommodate by showing the accommodation would impose an ‘undue hardship.’”

**Order of the Iowa Civil Rights Commission Rejecting Summary Judgment, DIA
No. 12ICRC002, p. 2, January 24, 2013.**

- ICRC uses the undue hardship standard used in disability claims to evaluate pregnancy accommodation claims**

TITLE VII - PDA

After enactment of the Pregnancy Discrimination Act (“PDA”), Title VII states:

- The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions
- *[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.*
- This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e(k) (2014) (emphasis added).

TITLE VII INTERPRETATION

Does Title VII require an employer to accommodate the work restrictions of pregnant women like they do, for example, employees with restrictions stemming from a work-related injury?

- The majority of the federal circuit courts of appeals to address the question have held that employers have no obligation to accommodate the work restrictions of pregnant employees, even if they do so for employees who have suffered a work-related injury:
 - *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011).
 - *Reeves v. Swift Transp. Co., Inc.*, 446 F.3d 637 (6th Cir. 2006); *but see Ensley-Gains v. Runyon*, 100 F.3d 1220 (6th Cir. 1996).
 - *Spivey v. Beverly Enters, Inc.*, 196 F.3d 1309 (11th Cir. 1999).
 - *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998).
- The court to have held that Title VII requires accommodation of pregnancy-related disabilities the same as other disabilities are:
 - *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000).

TITLE VII INTERPRETATION

EEOC:

In the absence of pregnancy-related statements evidencing animus, a pregnant worker may still establish a violation of the PDA by showing that she was **denied light duty or other accommodations that were granted to other employees who are similar in their ability or inability to work.**

- The PDA provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."
- Accordingly, an employer's failure to treat pregnant employees the same as non-pregnant employees similar in their ability or inability to work is a violation of the PDA.

Enforcement Guidance on Pregnancy Discrimination and Related Issues, § C(1)(b).
Available online at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last visited September 12, 2014).

UNITED STATES SUPREME COURT

Young v. United Parcel Service, Inc.

135 S.Ct. 1338 (Mar. 25, 2015)

■ Question Presented:

- “Whether, and in what circumstances the PDA, requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are “similar in their ability or inability to work.”

■ Holding:

- The court applied the burden-shifting framework first set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668.

■ Note:

- The court hinted that cases interpreting the EEOC’s interpretation of the 2008 ADA amendments bring pregnancy within the ADA’s purview and may render this PDA interpretation irrelevant

IOWA SUPREME COURT

- ***McQuiston v. City of Clinton, et. al.***
 - Oral argument heard March 11, 2015
 - Issue:
 - Whether a pregnant firefighter should have been permitted to work a light duty assignment as a reasonable accommodation relative to her pregnancy-related restriction
 - Decision coming any day now...

QUESTIONS

