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***SUMMARIES OF SELECTED DECISIONS ISSUED BY THE OFFICE
OF
EMPLOYMENT DISCRIMINATION COMPLAINT ADJUDICATION***

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final agency decision on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include the definition of "current illegal use of drugs", job interview questions about disabilities, supervising employees who have filed EEO complaints, the definition of "employee", use of interim earnings to offset back pay awards, and whether restrictions on lifting constitute a disability.

Also included in this issue is an article addressing the prevalence of diabetes in the United States and how *The Rehabilitation Act* and *The Americans with Disabilities Act* might apply to job applicants and employees with this medical condition.

The *OEDCA DIGEST* is now available on the World Wide Web at:
<http://www.va.gov/orm/newsevents.htm>.

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I

IMPROPER INTERVIEW QUESTION RESULTS IN TECHNICAL VIOLATION OF THE REHABILITATION ACT

The Equal Employment Opportunity Commission (EEOC) recently issued a decision finding that a Department official asked just one question too many during a job interview concerning the applicant's "ability to do the job." The EEOC concluded that the last question asked constituted a technical violation of the regulations governing *The Rehabilitation Act* and, hence, found the Department liable under the Act. The case provides a good lesson for anyone who may be interviewing applicants to fill a vacancy.

The complainant, who was receiving VA benefits for some service-connected medical conditions involving his back, legs, and feet, had applied for a temporary clerical position. The interviewer, who was aware of the applicant's medical conditions, asked a number of routine questions concerning the applicant's background and experience. So far, so good -- no problems.

After finishing up with the routine questions, he then explained the essential job functions of the position, including its physical requirements. He then asked the applicant if he thought he was capable of performing those essential job functions. The applicant said "yes." So far, so good --

still no problems.

Unfortunately, the interviewer thought it would be wise to conclude the interview with the following question: "What makes you think you can really do this job if you're drawing disability." Not good! The applicant turned around and filed a disability discrimination claim after learning of his nonselection.

Based on the record evidence, the Commission concluded that the facility did not discriminate against the applicant with regard to the nonselection. This finding was based on the fact that the interviewer was not the selecting official; and the selecting official did not consider the interviewer's notes about the applicant's medical condition when making his decision. Moreover, the selecting official chose a disabled individual for this position and had chosen disabled individuals for other vacancies for the same position.

Having said that, however, the Commission went on to note that the Department was in technical violation of *The Rehabilitation Act* and its implementing regulations because of the last question posed by the interviewer, *i.e.*, the one asking the applicant why he thought he could do the job if he was "drawing disability." The Commission stated that its regulations implementing the Act prohibit the asking of disability-related questions during the pre-employment stage. 29 C.F.R. § 1630.13. The Commission further



stated that the last question asked – the one directly referencing the applicant’s disability (or perceived disability) – violated this provision of the regulations. To answer the question, the applicant would have been required to discuss the nature and severity of his medical conditions.

However, the earlier question – the one that simply asked the applicant if he thought he could perform all of the essential functions of the position – is permissible under the regulations. The applicant could have answered the question without discussing his medical conditions. Employers certainly need to know if the person they are considering for a job can actually do the job. The official in this case stepped over the line, however, when he framed the question in terms of the individual’s medical conditions.

The above situation involved the “pre-offer” stage of the hiring/selecting process. Different rules apply during the “post-offer” and “employment” stages, where employers may, in certain circumstances, make disability-related inquiries and conduct medical examinations to ensure that individuals can efficiently perform the essential functions of their jobs.

While the rules governing medical inquiries and examinations might seem complex, the EEOC has published excellent guidance for employers at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>. As always, supervisors and managers should always seek

legal advice from the Office of the Regional Counsel before any such inquiries or examinations.

II

LETTER OF COUNSELING FOR DRESS CODE VIOLATION FOUND TO BE RETALIATORY

Last quarter’s edition of the *OEDCA Digest* (Winter 2004, Vol. VII, No. 1), included an article discussing the difficulty supervisors and managers have balancing their obligation to supervise their employees in an adequate manner with their obligation not to retaliate against them if they have filed EEO complaints. The following recent case illustrates some of the points raised in that article.

The complainant, a staff assistant at an outpatient clinic, reported to work one day dressed in a manner her supervisor thought inappropriate. The supervisor described her attire as “body-contouring” leggings and a short above-the-thigh jacket. That same day, the supervisor, without discussing the matter with her, presented her with a letter of counseling for violating the facility’s dress code. The complainant had never before been cited for a dress code violation.

The complainant filed a complaint alleging that the letter of counseling was unnecessary and in retaliation for her prior EEO complaint activity. The supervisor denied any retaliatory in-



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tent, insisting that the complainant's attire was inappropriate and in violation of the dress code.

After reviewing the evidence, the EEOC agreed with the complainant that the letter of counseling was unnecessary and issued because of her prior EEO complaint activity.

According to the record, the dress code policy states that if an employee's attire is inappropriate, the employee, a union representative, and the supervisor shall make a good faith effort to place the employee in compliance by offering a garment to cover the attire or administrative leave to go home and return wearing appropriate attire. The policy goes on to state that counseling or discipline is appropriate if the employee's non-compliance is habitual or if the parties are unable to resolve the matter.

The record further indicated that the complainant had worn the same attire in the past without consequence; and other witnesses testified that they have never seen the dress code policy enforced. Moreover, both a nurse practitioner and a physician testified that the complainant's attire that day was not inappropriate, that she was not wearing "body contouring" leggings as claimed by the supervisor, and that the complainant, in their opinion, always presented a professional image in the clinic. Finally, a picture of the complainant wearing the clothing in question showed pants that appeared to be made of a stretch fabric

hanging slightly loose on a small frame, paired with a blazer.

The Commission concluded from the above facts that the supervisor's intent was retaliatory, and there was certainly more than adequate evidence in the record to justify that conclusion. Of course, it is entirely possible that the supervisor did not intend to retaliate, but had simply decided on the day in question to start enforcing the dress code. If so, she should have approached the problem as suggested in the policy – first making sure that the attire does in fact violate the policy, and then making a good faith effort to place the employee in compliance. She should also have alerted employees in her section that, henceforth, the previously unenforced dress policy would be enforced.

Supervisors must certainly be mindful of the possibility that actions taken against employees who have previously filed EEO complaints could generate additional complaints of reprisal. That possibility, however, should not deter a supervisor from carrying out his or her responsibilities to supervise in an appropriate manner. Performance or conduct problems should not be ignored. However, if action is appropriate against an employee who has previously filed an EEO complaint, the supervisor should ensure that (1) he or she is acting in accordance with applicable procedures and regulations, and (2) the action contemplated is consistent with actions taken against other employees in simi-



lar situations.

III

“WITHOUT COMPENSATION (WOC) EMPLOYEE AT VA FACILITY NOT AUTHORIZED TO FILE EEO COMPLAINT AGAINST VA

This recent case demonstrates that not all VA “employees” are employees for purposes of Title VII and other civil rights statutes that permit federal government employees or applicants to file discrimination complaints against federal agencies under the federal sector EEO complaint process.

The complainant was hired and employed as a Systems Administrator by X, a state-incorporated nonprofit research corporation. Nonprofit corporations such as X are established statutorily¹ to act as a funding mechanism for, and to facilitate, VA-approved research projects.

X, under contract to provide research support to a nearby VA medical facility, assigned the complainant to monitor and manage a computer system at the VA Cooperative Studies Program Coordinating Center (CSPCC), which is located at the VA facility.

In order to work at the VA facility and input VA patient and employee data, the VA gave the complainant a “Without Compensation” (WOC) appointment.

In July 2002, a CSPCC official reported that a government-owned (GSA) vehicle assigned to the CSPCC was missing. A formal investigation ensued. The VA police found the vehicle five days later on the facility grounds. Also found was the complainant’s passport in the glove compartment of the recovered vehicle. When confronted, the complainant readily admitted that she took and used the vehicle without authorization.

After learning of the incident, X notified the complainant that she would be terminated. In lieu of termination, X permitted her to submit a resignation, which she did. The complainant thereafter filed a discrimination complaint against the VA. She claimed that in addition to being an employee of X, she was also a VA employee by virtue of her WOC appointment, and that it was the VA, not X, that actually initiated the paperwork that later resulted in her forced resignation. Hence, she claimed that she had “standing” (*i.e.*, the legal right) to file an EEO complaint against the VA.

After reviewing the evidence, an EEOC judge found that the complainant was not a VA employee for Title VII purposes, despite her WOC appointment and, hence, dismissed her complaint on procedural grounds for failure to state a claim.

In dismissing the complaint, the judge noted that the WOC appointment was

¹ 38 U.S.C. §7361.



merely a required formality enabling the complainant to work at the VA facility. Despite her VA WOC appointment, she remained at all times an employee of X and was supervised by and reported directly to an employee of X. Her employment contract with X specified her salary; pay schedule, health and life insurance, retirement benefits, and vacation and sick leave entitlement. Her contract with X also stipulated that her employment was “at will”, which means that X could terminate her at any time, with or without cause, and with or without notice. At no time did the VA supervise her work or otherwise direct her activities.

Moreover, although a VA official initiated the paperwork leading to her resignation, that act was a purely ministerial requirement necessitated by X’s decision regarding the complainant. The VA had no choice but to terminate her WOC appointment in light of X’s decision to force her resignation. The VA played no role in X’s decision. X dictated the language in the resignation letter, and an employee of X accepted the resignation on behalf of X. X then processed the complainant’s resignation.

IV

INTERIM EARNINGS OFFSET BACKPAY AWARD

When complainants prevail in an EEO complaint, they may be entitled to

back pay depending on the nature of the claim. However, as the complainant in this case learned, the amount of back pay owed by the employer may be completely offset (*i.e.*, reduced) by the amount of the complainant’s interim earnings, even when the period of interim earnings is shorter than the period of back pay entitlement.

The complainant filed a number of discrimination and retaliation complaints and she eventually received a decision in her favor on some of the claims in those complaints, including a constructive discharge claim (*i.e.*, forced resignation). Part of the relief she received was “back pay from the effective date of [her] resignation until the date [she] returns to duty, the date [she] declines a nonconditional offer of reinstatement, ...or the date she otherwise in unable to return to duty.”

The complainant declined the reinstatement offer in writing in November 2001, as she had already obtained other employment in the interim. Hence, the period for which she was entitled to back pay extended from October 1996, when she resigned her employment with the VA, to November 2001, when she declined VA’s offer to reinstate her.

During that back pay period, she would have earned \$331,932.80 in gross pay from the VA had she not been forced to resign because of discrimination. However, between March 1997, when she obtained other employment, and November 2001, she



earned \$357,748.84 in gross pay. Accordingly, the Department refused to award any back pay, arguing that the complainant's interim earnings offset the entire amount of back pay owed her.

The complainant filed a "Petition for Enforcement" with the EEOC, arguing that the VA had failed to comply with the EEOC order regarding back pay. While conceding that interim earnings may reduce back pay, she argued that her interim earnings did not begin until March 1997, and that she was therefore entitled to back pay for the period between October 1996 and March 1997, when she was unemployed.

The EEOC rejected the complainant's argument, noting that the underlying purpose of back pay is to restore a victim of discrimination to the place he or she would have occupied absent the discriminatory actions of the agency. It further noted that a victim of discrimination has a legal duty to mitigate (*i.e.* lessen) losses, and an employer that discriminates is liable only for proven economic losses.

Applying the above legal principles, the EEOC concluded that the complainant suffered no economic loss, despite the fact that she had no earnings between October 1996 and March 1997. Interim earnings are subtracted from the back pay award within the applicable period for which back pay is awarded. Hence, while her period of interim earnings may have been

shorter than the period for which she was entitled to back pay, the fact remains that during that back pay period, her interim earnings exceeded the earnings she would have received from the VA absent discrimination. Hence, absent an economic loss, the complainant was not entitled to back pay.

V

TWENTY-FIVE POUND LIFTING RESTRICTION FOUND NOT TO BE A DISABILITY

It is not uncommon for employees with back problems to bring in notes from their physician indicating a lifting restriction. As the following case illustrates, such a restriction does not necessarily constitute a disability under *The Rehabilitation Act of 1973* and *The Americans with Disabilities Act of 1990*.

The employee in question [hereinafter referred to as the "complainant"] suffered an on-the-job injury to her back. She applied for and received Worker's Compensation benefits following her injury. After approximately one year of treatment, her physician imposed a permanent lifting restriction of 50 pounds or over. He also instructed her to avoid bending and rotating. The VA facility in question honored the restrictions by assigning her duties consistent with her physician's instruction.



A few years later, the complainant filed an EEO complaint alleging, among other things, disability discrimination in connection with several incidents and events, including a reassignment and a notice of proposed removal. Following a hearing, an EEOC judge ruled in favor of the VA, concluding that the complainant could not prevail on her disability claim because she failed to prove that she had a disability.

The judge prefaced his analysis by noting that the *Rehabilitation Act* and its implementing regulations define an individual with a disability as someone with a physical or mental impairment that substantially limits one or more of the individual's major life activities; or someone who has a record of such an impairment; or someone who is perceived as having such an impairment. "Major life activities" include, but are not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, learning, and working. Lifting has also been considered to be a major life activity. "Substantially limits" means the inability to perform a major life activity that the average person in the general population can perform.

The complainant argued that she is an "individual with a disability" because of the 50-pound lifting restriction imposed by her physician. The EEOC judge and OEDCA disagreed. The judge correctly noted that the complainant's major life activity of lifting is not substantially limited by the 50-

pound restriction.² The EEOC has held that a lifting restriction of 25 pounds or more is not substantially limiting.³ Some courts have reached the same conclusion.⁴

Thus, although the complainant has an impairment that limits to some degree her ability to lift, the limitation on that activity is not substantial – hence the impairment does not constitute a disability.

Moreover, in light of the U.S. Supreme Court's decision in *Toyota Motors, Mfg., Ky., Inc. v. Williams*, 122 S.Ct. 681 (2002), there is some question as to whether lifting, in itself, constitutes a major life activity; or whether it is merely an aspect of the major life activity of performing manual tasks.

VI

EMPLOYEE FOUND TO BE "CURRENTLY ENGAGING IN ILLEGAL USE OF DRUGS" DESPITE BEING DRUG-FREE ON THE DATE OF HIS REMOVAL

The following case is a good example of how words and phrases sometimes have a legal meaning that is quite different from their everyday meaning.

² The judge also found that the complainant was not perceived as disabled and had no record of a disability.

³ *Sandberg v. USPS*, EEOC No. 01952301 (5/23/97)

⁴ *Thompson v. Holy Family Hospital*, 121 F.3d 537 (9th Cir. 1997)



The complainant, an RN, was employed as a staff nurse. Over a period of time, he had been engaged in “drug diversion”, which means that he was stealing controlled pain medication (Oxycodone) from the ward and ingesting it due to an addiction problem. His supervisors eventually discovered the drug diversion, and law enforcement authorities eventually became involved, as did his state Board of Nursing.

In proceedings before the Board of Nursing, the complainant signed a voluntary agreement to enter a rehab program for chemically dependent nurses. As part of that agreement, he had to surrender his nursing license and not practice nursing until such time as the Board deemed it fit to reinstate his license.

When VA officials learned of the license surrender, they terminated his employment pursuant to VA regulations that require separation from employment for lack of full and unrestricted licensure. The complainant was still in the rehab program and no longer using drugs on the effective date of his removal.

The complainant challenged his removal by filing a disability discrimination complaint. He argued that the VA failed to accommodate his disability by not allowing him to complete his rehab program and by not assigning him to non-nursing duties in the interim until the state Board restored his license.

After reviewing the record, an EEOC administrative judge concluded that the complainant was not discriminated against, as he had failed to prove that his drug addiction constituted a disability. The judge explained that when Congress passed *The Americans With Disabilities Act of 1990*, it included a provision that specifically excluded from the definition of “individual with disabilities” an individual who is *currently engaging in the illegal use of drugs* when a covered entity acts on the basis of such use.

The judge went on to note, however, that this provision has some exceptions. An individual will enjoy protections afforded by the Act if such person: (i) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (ii) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (iii) is erroneously regarded as engaging in such use, but is not engaging in such use.

The complainant argued that his situation was covered by the second exception – *i.e.*, that he was in rehab and no longer engaging in the illegal use of drugs on the day he was fired. The judge correctly rejected that argument. The EEOC and the courts have consistently held that an employee who is using drugs illegally in the weeks and months prior to discharge is, by definition, “currently en-



gaging in the illegal use of drugs”, even if the employee is participating in a drug rehab program and is drug-free on the date he or she is fired.

The judge further explained that employing a narrow definition of the word “currently” would produce absurd results at odds with the intent of Congress. Policy concerns dictate that individuals who are disciplined for current drug use not be permitted to invoke the Act's protection simply by showing "after-the-fact" (*i.e.*, after they get caught) that they have entered a rehab program and are no longer using drugs on the date discipline is imposed. The second exception was intended to protect employees who, “before-the fact”, accept that they need help and enter a rehab program on a truly voluntary basis.

VII

QUESTIONS AND ANSWERS – DIABETES IN THE WORKPLACE⁵

The Americans with Disabilities Act (ADA) is a federal law that prohibits discrimination against individuals with disabilities. Title I of the ADA covers employment by private employers with 15 or more employees as well as state and local government employers. The Rehabilitation Act provides similar protections related to federal employment. In addition, most states have their own laws prohibiting employment discrimination on the basis

⁵ This guidance appears on EEOC's web site at <http://www.eeoc.gov/facts/diabetes.html>

of disability. Some of these state laws may apply to smaller employers and provide protections in addition to those available under the ADA.

The U.S. Equal Employment Opportunity Commission (EEOC) enforces the employment provisions of the ADA. This guide explains how the ADA might apply to job applicants and employees with diabetes. In particular, this guide explains:

- when diabetes is a disability under the ADA;
- when an employer may ask an applicant or employee questions about her diabetes;
- what types of reasonable accommodations employees with diabetes may need; and,
- how an employer should handle safety concerns about applicants and employees with diabetes.

General Information About Diabetes

Diabetes is becoming more common in the United States, with approximately one million new cases diagnosed each year.⁶ Today, nearly 17 million Americans age 20 years or older have diabetes, including individuals of nearly every race and ethnicity.⁷ Diabetes occurs when the pancreas does

⁶ National Diabetes Fact Sheet from the Centers for Disease Control, <http://www.cdc.gov/diabetes/pubs/estimates.html>.

⁷ *Id.*



not produce any insulin or produces very little insulin, or when the body does not respond appropriately to insulin. Insulin is a hormone that is needed to convert sugar, starches, and other food into energy. The process of turning food into energy is crucial because the body depends on this energy for every action, from pumping blood and thinking to running and jumping. Although diabetes cannot be cured, it can be managed. Some people control their diabetes by eating a balanced diet, maintaining a healthy body weight, and exercising regularly. Many individuals, however, must take oral medication and/or insulin to manage their diabetes.⁸

Individuals with diabetes successfully perform all types of jobs from heading major corporations to protecting public safety. Yet, many employers still automatically exclude them from certain positions based on myths, fears, or stereotypes. For example, some employers wrongly assume that anyone with diabetes will be unable to perform a particular job (e.g., one that requires driving) or will need to use a lot of sick leave. The reality is that, because many individuals with diabetes work with few or no restrictions, their employers do not know that they have diabetes. Some employees, however, tell their employers that they

have diabetes because they need a "reasonable accommodation" a change or adjustment in the workplace to better manage and control their condition. Most of the accommodations requested by employees with diabetes such as regular work schedules, meal breaks, a place to test their blood sugar levels, or a rest area do not cost employers anything to provide.

1. When is diabetes a disability under the ADA?

Diabetes is a disability when it substantially limits one or more of a person's major life activities. Major life activities are basic activities that an average person can perform with little or no difficulty, such as eating or caring for oneself. Diabetes also is a disability when it causes side effects or complications that substantially limit a major life activity. Even if diabetes is not currently substantially limiting because it is controlled by diet, exercise, oral medication, and/or insulin, and there are no serious side effects, the condition may be a disability because it was substantially limiting in the past (*i.e.*, before it was diagnosed and adequately treated). Finally, diabetes is a disability when it does not significantly affect a person's everyday activities, but the employer treats the individual as if it does. For example, an employer may assume that a person is totally unable to work because he has diabetes. Under the ADA, the determination of whether an individual has a disability is made on a case-by-case basis.

⁸ There are two basic types of diabetes: type 1 and type 2. Individuals with type 1 diabetes must take insulin. Some persons with type 2 diabetes control the disease with weight control, appropriate diet, and exercise. Many, but not all, individuals with type 2 diabetes take insulin and/or oral medication.



Obtaining and Using Medical Information

Applicants

The ADA limits the medical information that an employer can seek from a job applicant. During the application stage, an employer may not ask questions about an applicant's medical condition or require an applicant to take a medical examination before it makes a conditional job offer. This means that an employer cannot ask:

- questions about whether an applicant has diabetes, or
- questions about an applicant's use of insulin or other prescription drugs.

After making a job offer, an employer may ask questions about an applicant's health (including asking whether the applicant has diabetes) and may require a medical examination as long as it treats all applicants the same.

2. May an employer ask any follow-up questions if an applicant reveals that she has diabetes?

If an applicant voluntarily tells an employer that she has diabetes, an employer only may ask two questions: whether she needs a reasonable accommodation and what type of accommodation.

Example: An individual applying at a

grocery store for a cashier's position voluntarily discloses that she has diabetes and will need periodic breaks to take medication. The employer may ask the applicant questions about the reasonable accommodation, such as how often she will need breaks and how long the breaks need to be. Of course, the employer may not ask any questions about the condition itself, such as how long the applicant has had diabetes, whether she takes any medication, or whether anyone else in her family has diabetes.

3. What should an employer do when it learns that an applicant has diabetes after he has been offered a job?

The fact that an applicant has diabetes may not be used to withdraw a job offer if the applicant is able to perform the fundamental duties ("essential functions") of a job, with or without reasonable accommodation, without posing a direct threat to safety. ("Reasonable accommodation" is discussed at Questions 8 through 11. "Direct threat" is discussed at Questions 12 through 14.) The employer, therefore, should evaluate the applicant's present ability to perform the job effectively and safely. After an offer has been made, an employer also may ask the applicant additional questions about his condition. For example, following an offer, an employer could ask the applicant how long he has had diabetes, whether he takes any medication, and whether the condition is under control. The employer also



could send the applicant for a follow-up medical examination. An employer may withdraw an offer from an applicant with diabetes only if it becomes clear that he cannot do the essential functions of the job or would pose a direct threat (i.e., a significant risk of substantial harm) to the health or safety of himself or others.

Example: A qualified candidate for a police officer's position is required to have a medical exam after he has been extended a job offer. During the exam, he reveals that he has had diabetes for five years. He also tells the doctor that since he started using an insulin pump two years ago, his blood sugar levels have been under control. The candidate also mentions that in his six years as a police officer for another department, he never had an incident related to his diabetes. Because there appears to be no reason why the candidate could not safely perform the duties of a police officer, it would be unlawful for the employer to withdraw the job offer.

Employees

The ADA strictly limits the circumstances under which an employer may ask questions about an employee's medical condition or require the employee to have a medical examination. Generally, to obtain medical information from an employee, an employer must have a reason to believe that there is a medical explanation for changes in the employee's job performance or must believe that the em-

ployee may pose a direct threat to safety because of a medical condition. (See Question 6 for other instances when an employer may obtain medical information.)

4. When may an employer ask an employee if diabetes, or some other medical condition, may be causing her performance problems?

If an employer has a legitimate reason to believe that diabetes, or some other medical condition, may be affecting an employee's ability to do her job, the employer may ask questions or require the employee to have a medical examination.

Example: Several times a day for the past month, a receptionist has missed numerous phone calls and has not been at her desk to greet clients. The supervisor overhears the receptionist tell a co-worker that she feels tired much of the time, is always thirsty, and constantly has to go to the bathroom. The supervisor may ask the receptionist whether she has diabetes or send her for a medical examination because he has a reason to believe that diabetes may be affecting the receptionist's ability to perform one of her essential duties -- sitting at the front desk for long periods of time.

5. May an employer obtain medical information from an employee known to have diabetes whenever he has performance problems?

No. Poor job performance often is un-



related to a medical condition and should be handled in accordance with an employer's existing policies concerning performance. Medical information can be sought only where an employer has a reasonable belief, based on objective evidence, that a medical condition may be the cause of the employee's performance problems.

Example: A normally reliable secretary with diabetes has been coming to work late and missing deadlines. The supervisor observed these changes soon after the secretary started going to law school in the evenings. The supervisor can ask the secretary why his performance has declined but may not ask him about his diabetes unless there is objective evidence that his poor performance is related to his medical condition.

6. Are there any other instances when an employer may ask an employee about diabetes?

An employer also may ask an employee about diabetes when an employee:

- has asked for a reasonable accommodation because of his diabetes;
- is participating in a voluntary wellness program that focuses on early detection, screening, and management of diseases such as diabetes.⁹

⁹ Employers must keep any medical records acquired as part of a wellness program confidential and separate from personnel

In addition, an employer may require an employee with diabetes to provide a doctor's note or other explanation to justify his use of sick leave, as long as it has a policy or practice of requiring all employees who use sick leave to do so.

Disclosure

With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee. An employer, however, may disclose that an employee has diabetes under the following circumstances:

- to supervisors and managers in order to provide a reasonable accommodation or to meet an employee's work restrictions;
- to first aid and safety personnel if an employee would need emergency treatment or require some other assistance because, for example, her blood sugar levels are too low;¹⁰
- to individuals investigating compliance with the ADA and similar state and local laws; and,
- where needed for workers' compensation or insurance purposes (for example, to process a claim).

records. Employers also may not use any information obtained from a voluntary wellness program to limit health insurance eligibility.

¹⁰ See footnote 6.



7. May an employer explain to other employees that their co-worker is allowed to do something that generally is not permitted (such as eat at his desk or take more breaks) because he has diabetes?

No. An employer may not disclose that an employee has diabetes. However, an employer certainly may respond to a question about why a co-worker is receiving what is perceived as "different" or "special" treatment by emphasizing that it tries to assist any employee who experiences difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal and, that in these circumstances, it is the employer's policy to respect employee privacy. An employer may be able to make this point effectively by reassuring the employee asking the question that her privacy similarly would be respected if she ever had to ask the employer for some kind of workplace change for personal reasons.

An employer will benefit from providing information about reasonable accommodations to all of its employees. This can be done in a number of ways, such as through written reasonable accommodation procedures, employee handbooks, staff meetings, and periodic training. This kind of proactive approach may lead to fewer questions from employees who misperceive co-worker accommodations as "special treatment."

Accommodating Employees with Diabetes

The ADA requires employers to provide adjustments or modifications to enable people with disabilities to enjoy equal employment opportunities unless doing so would be an undue hardship (*i.e.*, a significant difficulty or expense). Accommodations vary depending on the needs of the individual with a disability. Not all employees with diabetes will need an accommodation or require the same accommodation.

8. What types of reasonable accommodations may employees with diabetes need?

Some employees may need one or more of the following accommodations:

- a private area to test blood sugar levels or to take insulin
- a place to rest until blood sugar levels become normal¹¹
- breaks to eat or drink, take medication, or test blood sugar levels

¹¹ Insulin and some oral medications can sometimes cause blood sugar levels to go too low. A person experiencing hypoglycemia (low blood sugar) may feel weak, shaky, confused, or faint. Most people with diabetes, however, recognize these symptoms and will immediately drink or eat something sweet. Many individuals with diabetes also carry a blood glucose monitoring kit with them at all times and test their blood sugar levels as soon as they feel minor symptoms such as shaking or sweating. It usually takes only a few minutes for a person's blood sugar to return to normal.



Example: A manufacturing plant requires employees to work an eight-hour shift with just a one-hour break for lunch. An employee with diabetes needs to eat something several times a day to keep his blood sugar levels from dropping too low. Absent undue hardship, the employer could accommodate the employee by allowing him to take two 15-minute breaks each day and letting him make up the time by coming to work 15 minutes earlier and staying 15 minutes later.

- leave for treatment, recuperation, or training on managing diabetes¹²
- modified work schedule or shift change

Example: A nurse with insulin-treated diabetes rotated from working the 6 a.m. to 2 p.m. shift to the midnight to 8 a.m. shift. Her doctor wrote a note indicating that interferences in the nurse's sleep, eating routine, and schedule of insulin shots were making it difficult for her to manage her diabetes. Her employer eliminated her midnight rotation.

- allowing a person with diabetic neuropathy (a nerve disorder caused by diabetes) to use a stool.

¹² An employee with diabetes also may be entitled to leave under the Family and Medical Leave Act (FMLA), which provides for up to 12 weeks of unpaid leave for a serious health condition. The U.S. Department of Labor enforces the FMLA. For more information, go to www.dol.gov/esa/whd/fmla/.

Although these are some examples of the types of accommodations commonly requested by employees with diabetes, other employees may need different changes or adjustments. Employers should ask the particular employee requesting an accommodation because of his diabetes what he needs that will help him do his job. There also are extensive public and private resources to help employers identify reasonable accommodations. For example, the website for the Job Accommodation Network (<http://janweb.icdi.wvu.edu/media/diabetes.html>) provides information about many types of accommodations for employees with diabetes.

9. How does an employee with diabetes request a reasonable accommodation?

There are no "magic words" that a person has to use when requesting a reasonable accommodation. A person simply has to tell the employer that she needs an adjustment or change at work because of her diabetes.

Example: A custodian tells his supervisor that he recently has been diagnosed with diabetes and needs three days off to attend a class on how to manage the condition. This is a request for reasonable accommodation.

A request for a reasonable accommodation also can come from a family member, friend, health professional, or other representative on behalf of a



person with diabetes. If the employer does not already know that an employee has diabetes, the employer can ask the employee for verification from a health care professional.

10. Does an employer have to grant every request for a reasonable accommodation?

No. An employer does not have to provide a reasonable accommodation if doing so will be an undue hardship. Undue hardship means that providing the reasonable accommodation would result in significant difficulty or expense. If a requested accommodation is too difficult or expensive, an employer still would be required to determine whether there is another easier or less costly accommodation that would meet the employee's needs.

11. Is it a reasonable accommodation for an employer to make sure that an employee regularly checks her blood sugar levels and eats or takes insulin as prescribed?

No. Employers have no obligation to monitor an employee to make sure that she is keeping her diabetes under control. It may be a form of reasonable accommodation, however, to allow an employee sufficient breaks to check her blood sugar levels, eat a snack, or take medication.

Dealing with Safety Concerns on the Job

When it comes to safety concerns, an

employer should be careful not to act on the basis of myths, fears, or stereotypes about diabetes. Instead, the employer should evaluate each individual on her skills, knowledge, experience and how having diabetes affects her. In other words, an employer should determine whether a specific applicant or employee would pose a "direct threat" or significant risk of substantial harm to himself or others that cannot be reduced or eliminated through reasonable accommodation. This assessment must be based on objective, factual evidence, including the best recent medical evidence and advances to treat and control diabetes.

12. May an employer ask an employee questions about his diabetes or send him for a medical exam if it has safety concerns?

An employer may ask an employee about his diabetes when it has a reason to believe that the employee may pose a "direct threat" to himself or others. An employer should make sure that its safety concerns are based on objective evidence and not general assumptions.

Example: An ironworker works at construction sites hoisting iron beams weighing several tons. A rigger on the ground helps him load the beams, and several other workers help him to position them. During a break, the supervisor becomes concerned because the ironworker is sweating and shaking. The employee explains that he has diabetes and that his blood sugar



has dropped too low. The supervisor may require the ironworker to have a medical exam or submit documentation from his doctor indicating that he can safely perform his job.

Example: The owner of a daycare center knows that one of her teachers has diabetes. She becomes concerned that the teacher might lapse into a coma when she sees the teacher eat a piece of cake at a child's birthday party. Although many people believe that individuals with diabetes should never eat sugar or sweets, this is a myth. The owner, therefore, cannot ask the teacher any questions about her diabetes because she does not have a reasonable belief, based on objective evidence, that the teacher is posing a direct threat to the safety of herself or others.

13. May an employer require an employee who has been on leave because of diabetes to submit to a medical exam or provide medical documentation before allowing him to return to work?

Yes, but only if the employer has a reasonable belief that the employee may be unable to perform his job or may pose a direct threat to himself or others. Any inquiries or examination must be limited to obtaining only the information needed to make an assessment of the employee's present ability to safely perform his job.

Example: A telephone repairman had a hypoglycemic episode right before

climbing a pole and was unable to do his job. When the repairman explained that he recently had begun a different insulin regime and that his blood sugar levels occasionally dropped too low, his supervisor sent him home. Given the safety risks associated with the repairman's job, his change in medication, and his hypoglycemic reaction, the employer may ask him to submit to a medical exam or provide medical documentation indicating that he can safely perform his job without posing a direct threat before allowing him to return to work.

Example: A filing clerk, who was recently diagnosed with type 2 diabetes, took a week of approved leave to attend a class on diabetes management. Under these circumstances, the employer may not require the clerk to have a medical exam or provide medical documentation before allowing her to return to work because there is no indication that the employee's diabetes will prevent her from doing her job or will pose a direct threat.

14. What should an employer do when another federal law prohibits it from hiring anyone who takes insulin?

If a federal law prohibits an employer from hiring a person who takes insulin, the employer would not be liable under the ADA. The employer should be certain, however, that compliance with the law actually is required, not voluntary. The employer also should be sure that the law does not contain



any exceptions or waivers. For example, the Department of Transportation has issued exemptions to certain insulin-treated diabetic drivers of commercial motor vehicles.

Conclusion

Although not everyone who has diabetes has a disability as defined by the ADA, it is in the employer's best interest to try to work with employees who have diabetes, or are at risk for the disease, to help improve productivity, decrease absenteeism, and generally promote healthier lifestyles. Employers also should avoid policies or practices that categorically exclude people with diabetes from certain jobs and, instead, should assess each applicant's and employee's ability to perform a particular job with or without reasonable accommodation.

