

## **Disability Discrimination in the Workplace**

**By: Nathan Davidovich  
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Despite increased sensitivity to physical and mental disabilities, many of America's workers find themselves to be victims of employment discrimination due to their disability. The Americans With Disabilities Act (ADA) is a federal law which prohibits employers from discriminating on the basis of a "qualified" disability. Employees living with a physical disability have the protection of federal law, not to give them preferential treatment, but to level the playing field. With the protection of the ADA, a worker who, despite a disability, is able to perform the essential functions of his job, is entitled to reasonable accommodation from the employer, if needed. If you feel that you have been a victim of disability discrimination, it is important that you know your legal rights, and the actions you must take to prevent loss of your right to a remedy. **This article is not designed to provide legal advice or render legal opinions for specific situations. The law in other states may vary from Colorado on these issues. For specific legal questions, contact the attorney of your choice. If you wish to consult with the author on any matter relating to Colorado employment issues, you will be advised of the fee basis for such consultation.**

### ***WHAT IS DISABILITY DISCRIMINATION?***

Disability discrimination is the process of making decisions affecting an employee based wholly, or partly, upon the real or perceived disability of the employee, in those cases where the employee is a "qualified" individual under the ADA. The ADA prohibits employment discrimination against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. A "qualified individual" is an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." "Disability" is defined as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment

The United States Supreme Court held, that in order to show a "substantial limitation" on one or more major life activities, a person claiming a disability must show an interference, to a large degree, of a major life activity. The Court further held that a major life activity refers to those activities that are of central importance to daily life. That includes such basic abilities as walking, seeing, and hearing. the Court held that, in order to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term. The ADA requires those claiming to be a "qualified individual" to prove their disability by offering evidence that the extent of the limitation caused by their impairment, in terms of their own experience, is substantial. It is not enough for individuals attempting to prove disability to merely submit evidence of a medical diagnosis of an impairment. The determination of whether an individual has a disability, substantially limiting a major life activity, is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual, and such determination is be made on a case-by-case basis.

### ***HOW TO DETERMINE IF YOU HAVE BEEN A VICTIM OF DISABILITY DISCRIMINATION***

Litigation pursuant to the Federal discrimination statutes are very fact intensive. Thus, there is no black and white rule by which you can decide if you have been the victim of disability discrimination. It will be dependent upon the particular facts of your case. The fact that you are a

"qualified individual" with a recognized disability and have had an adverse employment experience does not necessarily mean that you have been the victim of discrimination. Employers have the right to discipline and fire employees with disabilities, as long as the decision is not based upon discriminatory or other impermissible factors. I recommend that, if you in any way suspect that you have been a victim of disability discrimination, you should immediately arrange for a consultation with a knowledgeable employment attorney. After reviewing the facts of your case, a seasoned attorney will be able to give you an opinion as to whether any adverse employment action was the likely result of discrimination. Prompt consultation with an attorney is extremely important due to various laws that require you to take certain action within a certain period of time after the occurrence of discrimination. Failure to act in a timely manner may result in loss of your rights to recover, even if you can prove the existence of discrimination. Also, with the passage of time, valuable evidence can be lost and the memories of witnesses may fade.

Disability discrimination can take many different forms. It can consist of comments about the disability, made by managers or executives, accompanied by some type of adverse employment action or decision. Such action might include a failure to promote, less favorable employment conditions, disciplinary proceedings, layoff or termination. It may consist of situations in which the worker is able to perform the "essential functions" of the job, with reasonable accommodation, and the employer refuses to accommodate. One of the keys in determining whether you have a claim under the ADA is whether the comments about the disability, the failure to make reasonable accommodation, or other discriminatory actions, in fact were the reason, or part of the reason, for the adverse employment action.

#### ***WHAT IS "REASONABLE ACCOMMODATION"?***

An employer is not required to guess that an employee has a disability requiring accommodation. The employee must first advise the employer of his disability and make a request for a reasonable accommodation. Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. Thus, an employer is not solely responsible for identifying a reasonable accommodation.

Where an employee is unable to perform the essential functions of his present job, "reasonable accommodation" may include reassignment of the employee to a vacant position. The United States Supreme Court held that an employer is "not required to find another job for an employee who is not qualified for the job" he is doing. However, an employer cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.

#### ***PROCEDURAL STEPS TO PRESERVE YOUR TITLE VII CLAIM***

In order to obtain the right to sue in federal or state court you must first file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). That charge must be filed within 180 days of the alleged act of discrimination. Many states, such as Colorado, have a law which prohibits disability discrimination in employment and authorizes a state agency to grant relief. In such cases, the charge must be filed, with the EEOC, within 300 days of the last act of discrimination, or sooner in certain instances. If you do not file an EEOC charge within the required time period, you will probably be prevented from further pursuing your rights. A lawsuit claiming discrimination under the ADA must be filed within ninety days of receipt of a Right to Sue Letter from the EEOC. Failure to follow the required time periods may cause you to lose your rights to seek a remedy for disability discrimination under Title VII.

Because of the intricacies of the various time barriers, it is most important to consult with an experienced employment lawyer, who will be able to guide you through this maze. I make this recommendation despite the fact that you do not need a lawyer to file a charge with the EEOC. However, my experience has taught me that it may be a serious mistake to try to proceed on your own, even as to the initial filing of a charge. If you fail to include certain allegations, you may be prevented from bringing them up in a later lawsuit.

### ***AMOUNT OF RECOVERY***

Under Title VII, an employee who has been a victim of disability discrimination may recover the economic losses that would have been earned, but for the discrimination, compensatory damages for emotional trauma, and attendant physical suffering, punitive damages, attorney fees and court costs. Depending on your individual circumstances, you may be entitled to additional recoveries under state, rather than Federal, law.

### ***CONCLUSION***

The fight against disability discrimination in the workplace involves analysis of multiple factors, specific to your case. Many of these factors have not been discussed in this article. Learn more about protecting your rights by selecting a competent lawyer to represent you.

Nathan Davidovich practices employment law in the state of Colorado, and either he, or one of his associates, are available for consultation on any matters arising in the state of Colorado. Please contact Nathan Davidovich by email at [ndavidovich@kennedy-christopher.com](mailto:ndavidovich@kennedy-christopher.com) , by telephone at (303) TALKLAW(303)825-5529, or by fax at 303-825-0434.

Nathan Davidovich, Attorney at Law  
Independence Plaza  
1050 17th Street, Suite 2500  
Denver, Colorado 80265-2080  
Phone: 303-825-5529/(303) TALK-LAW  
Fax: 303-825-0434  
<http://www.talk-law.com>