



**TULLY RINCKEY** PLLC  
ATTORNEYS & COUNSELORS AT LAW

# **Asserting Your Rights in the Workplace:** Disability Discrimination, Reasonable Accommodation and Disability Retirement

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# About Your Presenter

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## *Presentation Highlights*

- The definition of disability discrimination
- How a disability is defined under the law
- How laws protecting against disability discrimination have changed and developed over time
- An agency's obligations to its disabled employees
- Discuss disability and reasonable accommodation considerations
- What constitutes a "reasonable accommodation"
- Different forms of employment discrimination
- Discuss eligibility for disability retirement
- General issues concerning disability retirement application filings and benefits



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# Disability Discrimination



## *Federal Laws Designed to Protect Federal Employees from Disability Discrimination:*

- The Rehabilitation Act of 1973
  - Protects federal employees and persons applying for jobs with the federal government from discrimination based on disability
  - Applies to:
    - Federal agencies
    - Programs receiving federal financial assistance
    - Federal contractors



## *Disability Discrimination: Legislative History and Development*

- The Rehabilitation Act of 1973 is the vehicle that provides federal employees protection from disability discrimination.
- However, we must look to the Americans with Disabilities Act of 1990 (“ADA”) for the standards to determine whether discrimination has occurred.



## *Disability Discrimination: The Development of the Americans with Disabilities Act*

- First signed into law by Congress in 1990
- Purpose:
  - To ensure that disabled individuals were not stereotyped, marginalized or prevented from participating in society and the workplace.



## ***Disability Discrimination: The ADA Amendments Act of 2008***

- The “Amendments” or the “ADAAA”
- Congress amended the ADA because a number of recent Supreme Court decisions had too narrowly construed the scope of the ADA’s protections.
  - The Amendments were intended to make the coverage of the ADA less restrictive.
- Amendments to the ADA were signed into law by Congress on September 25, 2009.
- Amendments went into effect on January 1, 2009.



## *Disability Discrimination: The ADA Amendments Act of 2008*

- In the Amendments, Congress also granted the EEOC broad rulemaking authority to interpret the term “disability” and to issue updated regulations interpreting the ADA, as needed.



## *The 1998 Amendments: A Shift in Focus*

- In the introduction to the Amendments of 2008, Congress stated that the primary focus of cases brought under the ADA should be the issue of whether covered entities [employers] had complied with their obligations.
- This represents a shift away from the former trend of analyzing the question of whether an individual's impairment qualifies as a disability under the ADA



## *The Amendments: Practical Application*

- The ADA Amendments Act is not retroactively applied.
- Incidents of discrimination that allegedly occurred prior to January 1, 2009, will be analyzed under the pre-ADAAA (ADA of 1990) standards.
- Cases based on allegations occurring after January 1, 2009, will be analyzed under the amended standards.



## ***Disability Discrimination: 2011 Final Regulations to the ADA Amendment Act***

- On March 25, 2011, the Equal Employment Opportunity Commission (“EEOC”) released its final “Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended” (the “Final Regulations”) and accompanying interpretive guidance.
- The Final Regulations went into effect on May 24, 2011.
- Designed to affirm, reinforce and aid in the proper application of the ADA and the Amendments.



## *Disability Discrimination: Who is an “Individual With a Disability” under the ADA?*

- Same definition under the ADA of 1990 and ADA Amendments Act
- 42 U.S.C. 12101
  - A disability, with regard to an individual, is:
    - (1) A physical or mental impairment that substantially limits one or more of the individual’s major life activities;
    - (2) A record of such impairment; or
    - (3) Being regarded as having such an impairment.



## *Disability Discrimination: “Individual with a Disability” Under the ADA and ADAAA:*

- Three basic ways a person may qualify as an “individual with a disability” under the ADA and Amended Act.



## ***Disability Discrimination: “Individual with a Disability” Under the ADA and ADAAA:***

The first way an individual may qualify as “disabled”:

*“When a physical or mental impairment substantially limits a major life activity.”*



## *Disability Discrimination: “Impairment” Defined*

- May be mental (psychological) or physical
- Cosmetic disfigurement
- An anatomical loss affecting one or more of the body systems
  - Neurological, musculoskeletal, sensory organs, respiratory (including speech) organs, cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine.



## ***Disability Discrimination: “Impairment” Defined***

- Any mental or psychological disorder, including (but not limited to):
  - An intellectual disability (formerly termed “mental retardation”);
  - Organic brain syndrome;
  - Emotional or mental illness; *and*
  - Specific learning disabilities.



## *Disability Discrimination: “Impairment” Defined*

- An impairment need only limit one of the major life activities in order to be considered a disability
- Impairments can be episodic or in remission as long as the impairment would rise to the level of a disability when active.
  - Example: Cancer



## *Disability Discrimination: “Impairment” Defined*

- What is not included within the definition of “impairment”:
  - Predisposition to illness or disease
  - Pregnancy
  - Personality traits that are not symptoms of a mental or psychological disorders
  - Environmental, cultural or economic disadvantages
  - Advanced age
    - However, medical conditions associated with age may qualify as “impairments”



## ***Disability Discrimination: “Substantially Limits” Defined***

“When a physical or mental impairment  
substantially limits a major life activity.”



## *Disability Discrimination: “Substantially Limits” as Defined Under the ADA of 1990*

- Under the ADA of 1990 (pre-amendments)
- Test:
  - Whether an individual’s impairment made him or her unable to perform a major life activity; or
  - Whether he or she was “significantly restricted” as to the condition, manner, or duration as compared to “the average person in the general population.”



## *Disability Discrimination: “Substantially Limits” as Defined Under the ADA of 1990*

- In the 1998 ADA Amendments Act, Congress directed the EEOC to change its regulations concerning the “substantially limits” test
- Congress stated that the test of whether a condition “significantly restricted” performance of major life activity was inconsistent with Congressional intent.



## ***Disability Discrimination: “Substantially Limits” as Defined Under the ADA Amendments Act***

- The present standard concerning the degree to which a person’s functional limitation must be considered “substantially limited” in order to qualify for ADA protection is lower than that followed prior to the ADA Amendments of 1998.
- In the Amendments, Congress made clear that the term “substantially limits” was to be interpreted broadly in favor of expansive coverage.



## *Disability Discrimination: “Substantially Limits” as Clarified by the Final Regulations*

- In 2011, the EEOC issued regulations for implementing the ADA Amendments Act.
- In some cases, the impairment will virtually always be “substantially limiting”
- These cases will still require individualized assessment, but analyzing these types of impairments should be a simple and straightforward process.



## *Disability Discrimination: Impairments Easily Identified as “Substantially Limiting”*

Examples of impairments that “can easily be found to be substantially limiting” include (but are not limited to):

- Deafness (substantially limits hearing)
- Blindness (substantially limits seeing)
- Partially or completely missing limbs or impairments requiring the use of a wheelchair (substantially limits musculoskeletal function)
- Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia (substantially limit brain function).



## ***Disability Discrimination: “Substantially Limits” as Defined Under the ADA Amendments Act***

- Most cases that don't involve impairments that can “easily” be found to be “substantially limiting”
  - An allergy to mold
  - Migraine disorder
- In 2011, the EEOC's final regulations to the Act provided nine factors to be considered in determining whether an individual is substantially limited in a major life activity.
- The nine factors are intended to provide for generous coverage through a predictable, consistent framework.



## *Disability Discrimination: Factors to Consider When Determining Whether an Impairment “Substantially Limits”*

### Factor 1:

- The term “substantially limits” should be interpreted broadly in favor of expansive coverage.
- Not meant to be a “demanding standard”
- 29 C.F.R. § 1630.2(l)(1)(i).



## ***Disability Discrimination: Factors to Consider When Determining Whether an Impairment “Substantially Limits”***

### Factor 2:

- Consider whether the individual’s impairment substantially limits performance of a major life activity as compared to *most people in the general population*.
  - This marks a change from the prior standard of comparing the individual to the “average person.”
  - 2011 Final Regulations also provide that “scientific, medical or statistical evidence is generally not needed to establish the abilities of “most people.”
- 29 C.F.R. § 1630.2(l)(1)(ii).



## ***Disability Discrimination: Factors to Consider When Determining Whether an Impairment “Substantially Limits”***

### Factor 3:

- The primary concern with respect to claims under the ADA should be whether the employer complied with their obligations or engaged in discrimination.
- Thus, the threshold issue of whether the employee’s impairment “substantially limits” should *not* demand extensive analysis.
- 29 C.F.R. § 1630.2(l)(1)(iii).



## *Disability Discrimination: Factors to Consider When Determining Whether an Impairment “Substantially Limits”*

### Factor 4:

- Consider that the determination of whether an impairment substantially limits a major life activity requires an individualized, case-by-case assessment.
- The current degree of functional limitation required to meet the “substantially limits” standard is lower than the standard applied prior to the ADAAA.
- 29 C.F.R. § 1630.2(l)(1)(iv).



## *Disability Discrimination: Factors to Consider When Determining Whether an Impairment “Substantially Limits”*

### Factor 5:

- Consider that the determination of whether a person’s performance of a major life activity is substantially limited “as compared to most people in the general population” usually will not require scientific, medical or statistical analysis.
- However, presentation and consideration of such technical evidence to make a comparison will be allowed, if appropriate.
- 29 C.F.R. § 1630.2(l)(1)(v).



## ***Disability Discrimination: Factors to Consider When Determining Whether an Impairment “Substantially Limits”***

### Factor 6:

- Aside from ordinary eyeglasses or contact lenses, the positive effects of “mitigating measures” (i.e. measures that eliminate or reduce the symptoms of an impairment, including medication) are not to be considered in determining whether a person is “substantially limited” in a major life activity.
- 29 C.F.R. § 1630.2(l)(1)(vi).



## **Disability Discrimination: *Explanation of Factor 6: Effects of Mitigating Measures***

- Even when a medication removes or reduces the symptoms of an impairment or its impact, the “substantial limitation” analysis must be conducted as if the medication or mitigating measure was not being used.
- However, any negative side effect of the medication (or other mitigating measure) can be considered in determining whether an employee is “substantially limited.”
  - Summary: Medications / other mitigating measures cannot be considered in order to push a person further away from finding a disability; however, they can be used to bring a person closer.



## **Disability Discrimination: *Explanation of Factor 6: Effects of Mitigating Measures, Cont.***

- The rule about mitigating measures differs with respect to “non-coverage” issues like:
  - Whether the person is a “qualified” individual
  - Whether the person is entitled to a reasonable accommodation; and
  - Whether the person is a “direct threat”
- In order to answer these questions, the Agency may consider both the positive and negative effects of mitigating measures (including medications).
- The Final Regulations don’t require that a person utilize or take advantage of the mitigating measures that may be available.
  - However, an employee’s failure to do might impact whether the employee is a “qualified individual” or whether he or she is a “direct threat”
    - Example: An employee with a seizure condition whose position requires that he operate heavy machinery isn’t required to take anti-seizure medication. However, his failure to do so may be considered in determining whether he is a direct threat.



## ***Disability Discrimination: Factors to Consider When Determining Whether an Impairment “Substantially Limits”***

### Factor 7:

- An impairment that is episodic (“comes and goes”) or in remission is a disability if it would substantially limit a major life activity when active.
- Example: cancer, multiple sclerosis.
- 29 C.F.R. § 1630.2(l)(1)(vii).



## *Disability Discrimination: Factors to Consider When Determining Whether an Impairment “Substantially Limits”*

### Factor 8:

- An impairment only needs to limit *one* major life activity to be considered a “substantially limiting” impairment
- 29 C.F.R. § 1630.2(l)(1)(viii).



## ***Disability Discrimination: Factors to Consider When Determining Whether an Impairment “Substantially Limits”***

### Factor 9:

- Impairments that last or are expected to last 6 months or less are only considered transitory under the “regarded as” definition of a disability.
- Can still be “substantially limiting” under the actually “substantially limiting impairment” and the “record of such impairment” definitions.
- 29 C.F.R. § 1630.2(l)(1)(ix).



## ***Disability Discrimination: “Major Life Activity” Defined***

“When a physical or mental impairment substantially limits a major life activity.”



## ***Disability Discrimination: “Major Life Activity” Defined***

- The question of whether an activity is a “major life activity” is not determined by “whether [the activity] it is of central importance to daily life.”
- The EEOC expects that the Courts will recognize and identify additional major life activities other than those listed in the regulations.
- “Major life activities” include, but are not limited to:
  - Caring for oneself
  - Performing manual tasks
  - Seeing, hearing, eating
  - Sleeping
  - Walking, standing, lifting, bending, sitting or reaching
  - Interacting with others
  - Learning, reading, concentrating, thinking or communicating
  - Working



## ***Disability Discrimination: “Major Life Activity” Defined***

- Major life activities also include “the operation of a major bodily function”
- Including, but not limited to:
  - Functions of the immune system
  - Normal cell growth
  - Digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions
  - Functions of the special organs and skin



## ***Disability Discrimination: “Record of” a Substantially Limiting Impairment***

Second way a person may qualify as disabled under the Amended ADA:

- “Where there *is a record of* an individual having an impairment that substantially limits one or more of the individual’s major life activities.”



## ***Disability Discrimination: “Record of” a Substantially Limiting Impairment***

- A person has a “record of” a disability where he or she either:
  - (1) *Has a history* of a mental or physical impairment that substantially limits one or more major life activities; or
  - (2) *Has been misclassified* as having a mental or physical impairment that substantially limits one or more major life activities.
- 29 C.F.R. § 1630.2(k)



## *Disability Discrimination: “Record of” a Substantially Limiting Impairment*

How to determine whether someone “has a record” of a substantially limiting impairment:

- Broadly construed in favor of the individual claiming disability under the ADA
- This questions “should not demand extensive analysis”
  - Theme: the Amended Act calls for the employer to examine whether it has met its obligations under the ADA; not for an analysis of the employee’s ability to meet the ADA’s definitions.



## ***Disability Discrimination: “Record of” a Substantially Limiting Impairment***

- An individual with a record of having a disability may be entitled to reasonable accommodation related to the past disability, absent undue hardship.
- 29 C.F.R. 1630.2(k)
  - In 2011, the EEOC’s Regulations to the Final Rule helped explain this rule with the following example:
    - If an employee has an impairment that previously limited, but does not currently substantially limit, a major life activity, the employee may require leave or a schedule change to permit him or her to attend follow-up or “monitoring” appointments with a health care provider.



## *Disability Discrimination: “Regarded As” Having a Disability*

The third way a person may qualify as disabled under the Amended ADA:

*“Where an individual is regarded as having [an impairment] that substantially limits one or more of his or her major life activities.”*



## ***Disability Discrimination: “Regarded As” Having a Disabling Impairment***

- In order to meet the “regarded as” definition under the Amendments Act, the employee must show that he or she has been subjected to an action prohibited by the Act (i.e. termination, refusal to hire, demotion or harassment) because of an actual or perceived disability, *regardless of whether the impairment limits or was perceived to limit a major life activity.*
- 42 U.S.C. 12102(3)(A).



## ***Disability Discrimination: “Regarded As” Having a Disabling Impairment***

How is the “regarded as” definition of disabled different from the other two (i.e. “actual impairment” and “regarded as” definitions)?

- Under the “regarded as” definition, the employee’s condition does not actually have to be an impairment that “substantially limits a major life activity” in order to qualify for ADA protections.
- The employer must only have thought or understood that the employee was disabled; regardless of whether this belief was justified or not.



## ***Disability Discrimination: “Regarded As” Having a Disabling Impairment***

- The “regarded as” definition does not apply to transitory and minor impairments.
  - A “transitory” or temporary impairment is one with an actual or expected duration of six months or less.
    - Examples: Common cold, influenza, broken bones or sprains.



## *Disability Discrimination: “Regarded As” Having a Disabling Impairment*

- Also different in that the Agency is not required to “reasonably accommodate” an individual who only achieves ADA protection ONLY under the “regarded as” definition.
  - Reasoning: If the employee does not currently (or did not previously) have an actual impairment that substantially limited their performance of a major life activity, then there is no need to provide them with an accommodation to help them perform the duties of their job.
    - Theory: an employer’s belief that an employee is disabled can give rise to discrimination; but that discrimination does not make the disability real.



## ***Disability Discrimination: Changes to the “Regarded As” Provision Under the 2011 Final Regulations to the Act***

In 2011, the EEOC’s Final Regulations to the Act changed the application of the “regarded as” provision in three ways:

- (1) It no longer matters whether an employer believes that the actual or perceived disability substantially limits the performance of a major life activity.
  - Instead, the employee will be protected under the “regarded as” provision whenever it takes a prohibited personnel action against the employee based on the real or perceived impairment.



## ***Disability Discrimination: Changes to the “Regarded As” Provision Under the 2011 Final Regulations to the Act***

- (2) An employee is “regarded as” having a disability as soon as the employer takes a prohibited action against an employee based on an actual or perceived impairment, *even if the employer has a reason (defense) for its action*
- (e.g. the employee was not rendering successful performance or was not fired because of lacking qualifications.)



## ***Disability Discrimination: Changes to the “Regarded As” Provision Under the 2011 Final Regulations to the Act***

- (3) The Agency may cite the fact that an impairment is transitory (lasting or expected to last less six months or less) and minor as an affirmative defense against an employee’s claim of discrimination.
- However, this is only a valid defense for the Agency when the impairment is objectively transitory.
    - i.e., the impairment must be something that is generally understood to only be temporary (ex. the flu, a broken ankle)



## ***Disability Discrimination: “Reasonable Accommodation”***

- An employing agency must reasonably accommodate the known physical or mental limitations of an employee or applicant who is otherwise qualified to perform the job.
  - Unless the Agency can show that providing the accommodation would result cause an undue hardship on the agency’s operations.
- This means modifying or adjusting the job application process and/or the work environment to allow disabled individuals to enjoy the same benefits as non-disabled, similarly situated employees



## *Disability Discrimination: “Reasonable Accommodation”*

- The Rehabilitation Act requires an agency to reasonably accommodate “qualified” individuals with disabilities.



## *Disability Discrimination: “Reasonable Accommodation”*

- Under the Final Regulations, “qualified” with respect to a disabled individual, means:
  - The individual satisfies the requisite skill, experience, education and other job-related requirements of the position held or sought; and
  - The individual can, with or without reasonable accommodation, perform the essential functions of the position.



## ***Disability Discrimination: Who is a “Qualified Individual?”***

In order to be deemed “qualified” under the ADA, an employee or applicant must:

- (1) Have a disability;
- (2) Meet the minimal qualifications for the job he or she holds or is seeking; *and*
- (3) Be able to perform the necessary requirements of the job with or without reasonable accommodations.



## *Disability Discrimination: Who Is Not a “Qualified Individual?”*

- The individual is not deemed “qualified” if he or she poses a “direct threat.”
- “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.



## *Disability Discrimination: “Direct Threat”*

How to determine whether a disabled individual poses a “direct threat”:

- Agency must conduct an individualized assessment of the person’s current ability to safely perform the essential functions of the job.
- Must apply “reasonable medical judgment”
- Must rely on current medical knowledge and/or the best objective evidence available



## ***Disability Discrimination: How to Request a Reasonable Accommodation***

- There is no exact “right way” to make the request; no “magic words”
- Employee’s actions are sufficient if he or she makes the employer aware that an adjustment is needed at work because of a medical or mental condition.
- A representative or family member may request a reasonable accommodation on behalf of an individual.
- The agency won’t be liable for failing to provide a reasonable accommodation where an employee does not request it and where the agency did not have any reason to know that the employee needed such an accommodation.



## *Disability Discrimination: The Employer's Obligations to Reasonably Accommodate*

- An agency must reasonably accommodate a qualified individual with a disability unless it can show that accommodation would impose an undue hardship.
- Agency is required to engaged in an informal and flexible “interactive process” to identify the qualified, disabled person’s precise limitations and how they can be overcome.
- The EEOC has found that “some delay” by the agency in implementing a reasonable accommodation is reasonable
  - But a significant delay won’t be tolerated, especially where the agency has no good reason for its failure to implement the accommodation in a timely fashion.



## *Disability Discrimination: The Employer's Obligations to Reasonably Accommodate*

What constitutes an “undue hardship” on the Agency’s part?:

- The resources of the agency as a whole, not just those of a particular office, must be examined.
- The following factors should be considered in determining whether an undue hardship exists:
  - The overall size of the program, by number of employees
  - The type and number of facilities
  - Size of the budget
  - Nature of agency’s operations
  - Composition and structure of the agency’s workforce
  - Nature and cost of the accommodation requested



## ***Disability Discrimination: The Interactive Process***

- The employing agency should engage in an informal but meaningful discussion about how best to address a disabled employee's limitations
- Failure to do so will not automatically constitute disability discrimination
  - However, if it is later determined that a reasonable accommodation could have been achieved if the parties had engaged in the interactive process, this could lead to liability for discrimination.



## ***Disability Discrimination: Examples of Reasonable Accommodations***

### **General rule:**

- The agency is free to choose the accommodation it gives the qualified employee with a disability, as long as the accommodation is effective.

### ***Some examples of possible reasonable accommodations include:***

- Part-time or adjusted work schedules (including telework)
- Providing the employee with special/modified devices or work equipment
- Providing the employee with readers or interpreters
- Reorganizing the employee's job
- Approving the use of accrued leave or providing unpaid leave for necessary treatment
- Providing a reserved parking space



## ***Disability Discrimination: What Constitutes Discrimination***

- The Four Ways Disability Discrimination Occurs:
  1. Agency may have a rule or policy in place that is not obviously discriminatory (i.e. “discriminatory on its face”) but that results in a negative impact on disabled employees.
    - “Disparate impact discrimination”
    - Difficult to prove
    - But does not require the employee to prove that the agency intended to discriminate against him or her specifically; just against the group of people to which he or she belongs.
  2. Agency may treat a disabled employee less favorably than a non-disabled employee
    - “Disparate treatment discrimination”



## ***Disability Discrimination: What Constitutes Discrimination, cont.***

- The Four Ways Disability Discrimination Occurs, cont.:
  3. Agency may fail to accommodate an employee who is a “qualified individual with a disability”
    - Remember the person has to be “qualified”
    - Employee cannot pose a “direct threat”
    - Employee cannot place an undue burden on the agency
    - Agency must know or have reason to know of this disability
  4. Agency may create (or allow to exist) a workplace that is permeated with hostility and animosity towards disabled employees.
    - Most commonly experienced, but arguably most difficult to prove because it is somewhat “intangible”



## ***Disability Discrimination: Examples***

- Less favorable treatment of an employee because of their connection to someone with a disability (“discrimination by association”)
  - Example: Agency cannot refuse to promote you because your sister (also an agency employee), requested a reasonable accommodation because she is deaf.
- Improperly denying an employee leave needed to tend to a disabling condition, recover from surgery associated with a disability, or go to follow-up, “monitoring” appointments with a medical provider.
- Creating or maintaining a workplace that poses substantial physical difficulties to the disabled employee (e.g. failure to make the workplace accessible for wheelchair users.)
- Harassment based on a disability:
  - Employee cannot be subjected to harassing conduct based on his or her disability.
  - Includes negative or offensive remarks or jokes about a disability,
  - Agency may also be liable for discrimination if it knows of the discrimination, but does not take sufficient action end it.
    - Example: Employee with multiple sclerosis was found disabled because her condition had substantially limited her ability to walk. Agency failed to take proper action to stop multiple coworkers who were hostile towards her, especially after she received reasonable accommodations. *Staib v. Social Security Administration* (EEOC 2003).



## ***Disability Discrimination: Examples***

- Improperly denying an employee a reasonable accommodation:
  - Example: An employee's disability significantly impaired his ability to sit or stand for a long period of time, making his commute to work very difficult. The agency improperly denied the employee's request to telework as a reasonable accommodation. Employee established that the denial was improper by showing that he had successfully worked from home in the past and the various ways and that he could successfully perform his job duties with this accommodation. *Spence v. Nuclear Commission*, (EEOC 2007).
- Drug addiction (current and going use of illegal drugs) is not a covered disability under the Act.
  - The employer does not discriminate when it discharges an employee or denies employment on the basis of drug use to someone who is currently illegally using drugs.
  - An employer is not obligated to provide reasonable accommodation for a person based on the person's current illegal use of drugs. Under the ADA the term "disability" does not include current illegal use of drugs. An employer may discharge or deny employment on the basis of drug use to someone who is currently illegally using drugs, without fear of being held liable for disability discrimination. An employer is not obligated to provide reasonable accommodation for a person based on the person's current illegal use of drugs.
  - However, people who have been successfully rehabilitated from a former drug addiction may be entitled to protection under the Act.



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# Disability Retirement



## *What is Disability Retirement?*

- When a federal employee suffers from a permanently disabling condition during his or her federal employment he or she may elect to retire based on their disability, before reaching the statutory retirement age
- Disability retirement benefits differ between the two federal retirement systems: the Civil Service Retirement System (“CSRS”) and the Federal Employees’ Retirement System (“FERS”).



## *Disability Retirement: Eligibility*

- Can be based on a physical or mental condition, disease or injury
- Applications filed with the Office of Personnel Management (OPM)
- OPM renders a decision
- Employee must be unable, because of disease or injury, to render useful and efficient service in his or her position.
  - Relevant position for determining disability retirement eligibility: position to which the employee was last officially assigned before filing her application.



## *Disability Retirement: Eligibility*

- The employee does not have to be disabled from *any* job within the agency to be eligible for disability retirement
  - Employee need only be unable to perform the job to which he or she was assigned or a job at the same pay in the same commuting area.



## *Disability Retirement: Requirements*

- 18 months of creditable service under FERS
  - CSRS distinction: Must have completed at least five years of civilian federal service
- Must have become disabled during the service period
  - Timing is of critical importance
- Unlike OWCP claims, the disabling condition does not need to be caused by something that happened at work
  - Just needs to surface while employed by the Agency
- Disability must cause employee's deficient performance, conduct or attendance, OR must be incompatible with continued useful and efficient service in the position.



## ***Disability Retirement: Filing Requirements***

- The disability must be expected to continue for at least one year after the date of application filing.
- Accommodation in the position must be unreasonable.
- Employee must not have declined a reasonable reassignment.
- Employee must file for Social Security disability benefits prior to submitting application for disability retirement to OPM.



## ***Disability Retirement: Benefits***

- Benefits calculated based on percentage of average highest three consecutive years of salary (i.e. “high-three”)
- 1<sup>st</sup> year: 60% of high-three salary
- 2<sup>nd</sup> year and forward: 40% of high-three salary
- Disability retirement benefits are taxed
- Employee receiving disability retirement benefits can also have a job in the private sector as long as total earnings do not exceed 80% of the current pay of the former position.



## *Disability Retirement*

- *Deadline:*
  - MUST file application with OPM within one year of separation from service, or else your right to file a claim for eligibility is likely lost forever.
  - Do not wait until you have gathered all medical records to file; it is better to file with OPM as soon as possible and supplement the remaining medical documentation later.



## *Disability Retirement: The Application*

- Available from OPM or from employing agency
- Essential that applicant have their physician's support; this will make or break the case
- In addition to medical evidence, applicant may also submit objective evidence of his or her disability
  - Personal narrative regarding the impact the disability has had on your ability to provide successful service in your job, your level of pain and how the disability has affected your life outside of work.
    - May also submit sworn statements from family members, friends and/or coworkers, that speak to these matters as well.
    - i.e. “subjective evidence”



## *Disability Retirement: The Application*

- Other types of evidence that support a disability retirement claim:
  - OWCP records
  - A second (or third) doctor's opinion
    - In narrative statement format
    - Previously filed OWCP "CA" forms related to same condition or injury upon which disability retirement application is based.
  - VA disability rating records
  - Records/ correspondence from the employing agency demonstrating any of the following:
    - That there is no way the Agency can reasonably accommodate the employee' condition
    - That the agency has previously taken issue with the employee's attendance, conduct or performance and that any such deficiencies arose out of the employee's disabling conduction
- Remember:
  - OPM will evaluate the record of evidence submitted as a whole
  - This record will not only include your medical records but also your supervisor's statement and performance evaluations.
    - Conflicting evidence may either result in having to submit further documentation or denial of benefits.



## ***Disability Retirement: Appealing an Unfavorable Decision***

- OPM will receive the application, review the merits of the claim and issue a decision regarding entitlement to benefits (*i.e.* the “initial stage”)
- If OPM denies your claim at the initial stage it will issue you a letter stating specific reasons why it believes you have failed to demonstrate that your entitlement to disability retirement.
  - At this point, applicant employee may proceed to the “reconsideration stage”
  - Opportunity to submit additional evidence and argument to OPM, disproving its reasons for denial.



## **Disability Retirement: *Appealing an Unfavorable Decision: The Reconsideration Stage***

- **Example:** OPM's initial decision letter denies the disability retirement claim stating that the applicant has failed to prove how his medical condition (fibromyalgia) prevents the performance of his job duties as a law enforcement officer.
- In the reconsideration stage, the applicant submits a written report from his treating physician stating that the physician has reviewed the applicant's position description and that, in her medical opinion, the applicant's disability prevents him from providing useful and efficient service because:
  - (1) he cannot run due to chronic pain and necessary pain medications;
  - (2) he cannot discharge a firearm while under the influence of necessary pain medication;
  - (3) he cannot wear his bullet-proof vest/other gear because of the strain to his back, neck and shoulders.



## *Disability Retirement: Appealing an Unfavorable Decision Before the MSPB*

- If OPM issues a second denial letter after the “reconsideration stage,” this is OPM’s “final decision”
- Unfavorable final decisions from OPM can be appealed to Merit Systems Protection Board
- Applicant challenges OPM’s decision before an Administrative Judge.



## *Disability Retirement: Appealing an Unfavorable Decision Before the MSPB*

- Applicant must demonstrate to the Administrative Judge that he/she is entitled to disability retirement benefits because he/she is unable to provide useful and efficient service in one or more critical elements of his/her job.
  - Applicant may prove this through:
    - Documentary Evidence
      - Medical Records
    - Witness testimony
      - Physician
      - Supervisor/Coworkers
      - Family members



## ***Disability Retirement: The Bruner Presumption***

- An agency's removal of an employee for medical inability to perform is *prima facie* evidence of a disability for purposes of a disability retirement application.
- The burden shifts to the agency to prove that the employee is not entitled to disability retirement benefits.
- *Bruner v. Office of Personnel Management*, 996 F.2d 290 (Fed. Cir. 1993).



## *Disability Retirement vs. Other Types of Benefits*

- vs. Workers Compensation Benefits (“OWCP”)
  - OWCP benefits are non-taxable
  - Disability retirement benefits are taxed
  - Can file for disability retirement while on OWCP, but cannot collect from both at the same time
    - Option: once disability retirement application is approved, tell OPM to hold benefits in abeyance or “inactive status”
    - When OWCP benefits are terminated, can activate disability retirement benefits



## *Disability Retirement vs. Other Types of Benefits*

- vs. Social Security Disability Benefits
  - Different standards of proof:
    - Disability retirement: applicant need only show he/she is disabled from performing one or more of his/her essential job duties
    - Social security disability: applicant must demonstrate “total disability”
      - Much higher standard and more difficult to prove
        - Remember: You must apply for social security benefits before submitting a disability retirement application. OPM requires that you submit a receipt of Social Security benefit application with your disability retirement application.
      - If you are awarded social security benefits your disability retirement benefits will be offset accordingly.



## *What We Have Discussed Today*

- The definition of disability discrimination
- How a disability is defined under the law
- How laws protecting against disability discrimination have changed and developed over time
- An agency's obligations to its disabled employees
- Discuss disability and reasonable accommodation considerations
- What constitutes a "reasonable accommodation"
- Different forms of employment discrimination
- Discuss eligibility for disability retirement
- General issues concerning disability retirement application filings and benefits



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# Q & A



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# Asserting Your Rights in the Workplace:

Disability Discrimination, Reasonable  
Accommodation and Disability Retirement

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