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Intellectual Disabilities, the ADA, and the Employment Application Process

By Mary Pat Gallagher

Employers generally know about accommodating physical disabilities on the job, but perhaps lesser known is that the Americans with Disabilities Act ("ADA") also applies to job applicants with intellectual disabilities. With the amended ADA and its commensurate expansion of the category of persons considered "disabled," accommodating persons with intellectual disabilities is an area of litigation that has not received much focus thus far, but may be something that will become more prevalent in the years ahead. The Equal Employment Opportunity Commission ("EEOC") estimates that 2.5 million people in the United States (approximately 1% of the population) have an intellectual disability.

Under EEOC regulations, an individual is considered to have an intellectual disability when: (1) the person's intellectual functioning level (IQ) is below 70 to 75; (2) the person has significant limitations in adaptive skill areas as expressed in conceptual, social, and practical adaptive skills; and (3) the disability originated before the age of 18. Adaptive skills refers to basic skills needed for everyday life and include communication, self-care, home living, social skills, leisure, health and safety, self-direction, functional academics (reading, writing, basic math), and work. Thus, the EEOC would consider an individual with an intellectual disability to include someone who, although perhaps capable of living on his or her own, requires the assistance of family and friends when it comes to some of the basic skills needed for everyday living, such as reading and understanding the mail, sticking to a household budget, and paying the bills. Often, an intellectual disability may not be obvious from a person's physical appearance, nor will it be

accompanied by a physical disability.

High School Diploma and GED Requirements

Although accommodating persons with intellectual disabilities is not as prevalent as accommodating persons with physical disabilities, employers should be aware that some commonplace job requirements may in fact run afoul of the ADA in regards to persons with intellectual disabilities. Assume, for instance, that a residential health care facility requires its nursing assistants to have a high school diploma or its equivalent. An applicant for the position of nursing assistant advises the health care facility that he has attempted to obtain his GED but has failed to do so because of a learning disability. The applicant also provides the facility with a reference from his prior employer indicating that the applicant had worked successfully as a nursing assistant for a period of four years. Despite this, the facility informs the applicant that without a high school diploma, he does not meet the minimum qualifications for the position. The facility then rejects his application. In this case, the hypothetical prospective employer may have run afoul of the ADA, at least as interpreted by the EEOC.

This is not to say that it is illegal for an employer to require candidates and employees to have a high school diploma or to have passed a GED test. However, problems may arise when such a requirement screens out an individual who is capable of performing the job but who, due to the intellectual disability, cannot obtain a diploma or pass a GED test. An employer who adopts a high school diploma or equivalency requirement for a job should be prepared to demonstrate that the requirement is job-related for the position in question and consistent with business necessity, typically by showing that the education requirement accurately measures the ability to perform the job's fundamental duties. The employer will not be able to make this showing in circumstances where, for example, the fundamental duties in question can easily be performed by someone who is unable to obtain a high school diploma. If, as in the hypothetical, a minimum educational requirement automatically "screens out" an otherwise qualified applicant with an intellectual disability, as the term is defined under the ADA and interpreted by the EEOC, then the employer runs the risk of possibly violating the ADA.

If an employer does require a high school diploma, the employer may have to allow individuals who were unable to obtain a diploma due to an intellectual disability to demonstrate that they are qualified for the job in some other way, such as by considering relevant work history and/or by allowing the applicant to show an ability to do the job's essential functions during the application process, such as by performing a demonstration. Importantly, the foregoing situation generally arises when the applicant volunteers information that might lead an employer to believe that the person has an intellectual disability. An employer may not (and indeed should not) ask an

applicant whether or to what extent the applicant has or may have an intellectual disability. However, the employer can ask an applicant questions about his/her ability to perform job-related functions, as long as the questions are not phrased in terms of a disability.

If the individual can perform the job's essential functions, with or without a reasonable accommodation, despite the inability to meet the high school diploma standard, the employer may not use the high school diploma requirement to exclude the applicant. Ultimately, the question that the employer needs to ask is this: Does an applicant's possession of a high school diploma or its equivalency, in and of itself, mean that that applicant is more qualified and more able to perform the essential job functions than an applicant without those qualifications? If the answer is no, then the employer may be best served by not basing the hiring decision on the possession of a high school diploma or equivalency.

The intellectual disability accommodation issues facing employers will undoubtedly be both complex and challenging. Litigation involving a claim of intellectual disability are now winding their way through the court system, making this an area of employment law that employers may want to monitor for future developments. Further, employers may want to examine, and possibly seek legal counsel on, any job descriptions they believe may be vulnerable to a challenge.

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