

## 1.02 Employment

As in the federal arena, employment discrimination is the most frequently litigated state disability discrimination issue, and almost all jurisdictions have enacted their own laws barring disability discrimination in employment. Many apply to employment only, while others cover various types of discrimination, including employment. Most cover both mental and physical impairments, while some only cover physical conditions.<sup>34</sup> Washington further divides impairments into “sensory, mental or physical.”<sup>35</sup>

### (a) Scope of Coverage

Many state employment disability discrimination laws contain definitions and other provisions that are very similar or simply refer to the ADA.<sup>36</sup> While state courts are not bound by federal interpretations of parallel provisions in the ADA, a court’s analysis of an ADA claim often applies equally to state or federal claims.<sup>37</sup>

In a number of jurisdictions, the scope of coverage is significantly less than the federal legislation. For instance, a person with claustrophobia and depression did not have a “handicap,” as defined by Georgia law, because the definition of “mental impairment” was limited to any physiological disorder or condition, anatomical loss affecting certain body systems, mental retardation, or specific learning disabilities.<sup>38</sup> Also, this particular state law did not cover persons regarded as having a disability.<sup>39</sup> Similarly, the Second Circuit ruled that Connecticut law does not provide a cause of action for a perceived physical disability<sup>40</sup> and Texas does not cover employment discrimination based on an individual’s association with a person with a disability.<sup>41</sup>

On the other hand, a few jurisdictions’ definitions provide protections that exceed the federal legislation. New York’s definition of disability, for example, includes “medical” impairments, in addition to physical and mental impairments.<sup>42</sup>

Under the ADA, an impairment must be a “substantial limitation” of a major life activity.<sup>43</sup> This can be a significant obstacle for plaintiffs to overcome. However, several state laws, such as the New Jersey Law Against Discrimination, do not adopt this requirement.<sup>44</sup> Also, Minnesota and Wisconsin use less restrictive language—“materially limits” and “limits” the capacity to work, respectively.<sup>45</sup> Moreover, the Second Circuit concluded that New York and Connecticut’s discrimination laws do not make “substantial limitation” a part of their disability definitions.<sup>46</sup>

In defining the major life activity of working, the ADA—as interpreted by the Equal Employment Opportunity Commission—requires plaintiffs to be unable to perform a broad range of jobs. However, California’s disability discrimination statute, which covers employment and housing, construes working to be a major life activity

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34. Appendix 1, col. 3.

35. *Id.* See Wash. Admin. Code §162-22-020.

36. See, e.g., La. Rev. Stat. Ann. §§23.322–.323; Utah Code Ann. §34A-5-101 *et seq.*

37. Kelly v. Drexel Univ., 94 F.3d 102 (3d Cir. 1996), 20 *MPDLR* 689; Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999), 23 *MPDLR* 345; Imler v. Hollidaysburg Am. Legion Ambulance Serv., 731 A.2d 169 (Pa. Super. Ct. 1999), 23 *MPDLR* 527; Pouliot v. Town of Fairfield, 184 F. Supp. 2d 38 (D. Me. 2002), 26 *MPDLR* 474; Calvin v. Ford Motor Co. 185 F. Supp. 2d 792 (E.D. Mich. 2002), 26 *MPDLR* 531 (citing Monette v. Electronic Data Sys., 90 F.3d 1173 (6th Cir. 1996), 20 *MPDLR* 704).

38. Bowers v. Estep, 420 S.E.2d 336 (Ga. Ct. App. 1992); Ga. Code §34-6A-2(7)(A) & (B).

39. Ga. Code §34-6A-2(3).

40. Beason v. United Techs. Corp., 337 F.3d 271 (2d Cir. 2003), 27 *MPDLR* 743 (citing Conn. Gen. Stat. §46a-51 *et seq.*).

41. Spinks v. Trugreen Landcare, L.L.C., 322 F. Supp. 2d 784 (S.D. Tex. 2004), 28 *MPDLR* 770.

42. N.Y. Exec. Law §292(21). See also Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144 (2d Cir. 1998), 22 *MPDLR* 359.

43. 42 U.S.C. §12102(2).

44. N.J. Stat. Ann. §10:5-5(q). See also Failla v. City of Passaic, 146 F.3d 149 (3d Cir. 1998), 22 *MPDLR* 484.

Minn. Stat. §363A.03, subd. 12. See Kammüller v. Loomis, Fargo & Co., 383 F.3d 779 (8th Cir. 2004), 28 *MPDLR* 895 (polycystic kidney disease, which required frequent dialysis, materially limited major life activities). Wis. Stat. §1132(8). See Hutchinson Tech., Inc. v. Labor & Indus. Rev. Comm’n, 682 N.W.2d 343 (Wis. 2004), 28 *MPDLR* 779 (back problem limited his ability to work).

46. Treglia v. Town of Manlius, 313 F.3d 713 (2d Cir. 2002), 27 *MPDLR* 273; Beason, 337 F.3d 271.

*per se*, and other major life activities are construed broadly.<sup>47</sup> Accordingly, a California federal court found that persons with monocular vision who had been excluded from only one job with one employer were limited in the major life activity of working and, thus, were disabled or perceived as such under the state's discrimination law.<sup>48</sup>

One area where state law is consistently more expansive than the ADA Title I is the definition of "employer." While Title I only applies to employers that have 15 or more employees, most states cover employers with less than that number, and over a dozen apply their laws to all employers.<sup>49</sup> Only Louisiana's law is less expansive, limiting its coverage to employers with 20 or more employees.<sup>50</sup>

## **(b) Qualified**

Nearly half of states follow closely the ADA Title I's definition of qualified,<sup>51</sup> which requires plaintiffs to show that they can meet essential job functions. Massachusetts, for example, defines a "qualified handicapped person" as someone who is "capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap."<sup>52</sup> Under this definition, the First Circuit affirmed a \$563,700 jury award to a former employee with multiple mental illnesses who was denied her requested reasonable accommodation to limit her work schedule to no more than 40 hours a week.<sup>53</sup>

Nineteen jurisdictions have no essential job functions requirement, while a few others narrow or expand the ADA definition.<sup>54</sup> The Wisconsin Supreme Court, for instance, ruled that a company had to provide reasonable accommodations to an employee regardless of whether the employee could carry out essential functions.<sup>55</sup>

Even where the federal definition of "qualified" is used in state statutes, state courts must interpret its meaning. Normally, the state courts rely on the federal interpretations. The West Virginia Supreme Court, for example, resolved that under state law a mine foreman with vision problems, who had been terminated while on medical leave, had to prove that he was qualified to perform his old job, not merely qualified to receive disability benefits, in order to challenge the termination of his job and benefits under the state's discrimination statute.<sup>56</sup>

Also, the Washington Supreme Court affirmed an appeals court's ruling that reversed a \$2.3 million jury verdict on behalf of a former employee with hepatitis C under the state's discrimination statute. His refusal to work overtime—an essential job function of the computer systems engineer position—made him unqualified.<sup>57</sup>

Many states, like their federal counterparts, also have proscribed<sup>58</sup> or found that employees are unqualified if they pose a "direct threat" to self or others. For instance, the Montana Supreme Court found that an employer violated the state's discrimination statute<sup>59</sup> by failing to make an objective assessment as to whether a proposed accommodation for an applicant's knee joint disease would create a reasonable probability of substantial harm to the employee's health and safety through injury.<sup>60</sup>

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47. Cal. Gov't Code §12926.1.

48. *Bryan v. United Parcel Serv.*, 307 F. Supp. 2d 1108 (N.D. Cal. 2004), 28 *MPDLR* 429.

49. Appendix 1, col. 2.

50. La. Rev. Stat. §23.302(2).

51. Appendix 1, col. 5.

52. Mass. Gen. Laws ch. 151B, §1(16).

53. *Blockel v. J.C. Penny Co.*, 337 F.3d 17 (1st Cir. 2003), 27 *MPDLR* 777.

54. Appendix 1, col. 5.

55. *Crystal Lake Cheese Factory v. Labor & Indus. Review Comm'n*, 664 N.W.2d 651 (Wis. 2003), 27 *MPDLR* 779 (citing Wis. Stat. §111.34(1)(b)).

56. *Hosaflook v. Consolidated Coal Co.*, 497 S.E.2d 174 (W. Va. 1997), 21 *MPDLR* 505.

57. *Davis v. Microsoft Corp.*, 70 P.3d 126 (Wash. 2003), 27 *MPDLR* 613 (remanding on the question of whether the employer had been entitled to a judgment as a matter of law on the employee's theory that the employer had failed to accommodate him).

58. Appendix 1, cols. 5 & 8.

59. Mont. Code Ann. §49-4-101.

60. *Haffner v. Conoco, Inc.*, 977 P.2d 330 (Mont. 1999), 23 *MPDLR* 367.

More than half the states have no specific “direct threat” reference in their statutes, but where it is mentioned, the states often generally follow the ADA.<sup>61</sup> West Virginia adds its own particular emphasis by referencing the ADA, but also providing that alcohol or drug abuse that constitutes a threat to property or safety is not covered as a disability.<sup>62</sup>

### (c) Reasonable Accommodation

A vast majority of states and the District of Columbia require employers to provide reasonable accommodations.<sup>63</sup> Like the federal model, states require employers to make such accommodations unless doing so will create an undue burden or hardship on the employer.<sup>64</sup> In fact, nearly half of the states generally follow the ADA.<sup>65</sup> Under California’s discrimination law,<sup>66</sup> for instance, a state appeals court decided that an airline, which had to ground two commercial pilots with AIDS pursuant to Federal Aviation Administration regulations, was required to consider whether job transfers for these pilots were reasonable accommodations.<sup>67</sup> Similarly, Wisconsin’s highest court concluded that an employer had to reasonably accommodate an employee with quadriplegia by modifying her job duties and the workplace and had failed to show that providing these accommodations would pose an undue burden.<sup>68</sup>

A number of other states that do not follow the ADA still require reasonable accommodation, but may define or implement the term somewhat differently. For instance, the Washington Supreme Court ruled that, in order to show that a reasonable accommodation was required for a non-apparent mental disability, an employee had to show that the proposed accommodation was medically necessary.<sup>69</sup> Also, in Massachusetts, a lower court ruled that under state law employers have no duty to engage in an interactive process with an employee to determine what accommodation is reasonable.<sup>70</sup>

### (d) Proving Discrimination

While many state statutes follow the ADA as to what types of discrimination are covered, there are plenty of differences as well. With regard to job applicants, every jurisdiction has a statutory provision.<sup>71</sup> A little less than half follow or track the ADA, although some provide additional requirements or exclusions.<sup>72</sup> More than a fifth of the jurisdictions that do not embrace the ADA use some type of formulation stating that qualified applicants have a right to be hired without discrimination.<sup>73</sup> The remainder use their own particular language, which bear few similarities with other statutes, and generally these provisions fall short of the ADA. For example, Alabama simply acknowledges that in compliance with federal law, the state operates a program to provide equal employment opportunity in the recruitment and selection for employment without regard to “handicapping” conditions.<sup>74</sup>

About four-fifths of the states and the District of Columbia specify that the failure to provide reasonable accommodations constitutes employment discrimination.<sup>75</sup> Half of those jurisdictions generally follow the ADA, while the remaining half do not mention the ADA, but still require reasonable accommodation in their statutes or case law.<sup>76</sup>

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61. Appendix 1, cols. 5 & 8.

62. W. Va. Code §5-11-3.

63. Appendix 1, col 6.

64. *Id.* at col. 7.

65. *Id.* at cols. 6 & 7.

66. Cal. Gov’t Code §12940 *et seq.*

67. Prilliman v. United Air Lines, Inc., 62 Cal. Rptr. 2d 142 (Ct. App. 1997), 21 *MPDLR* 367.

68. Crystal Lake Cheese Factory v. Labor & Indus. Review Comm’n, 664 N.W.2d 651 (Wis. 2003), 27 *MPDLR* 779.

69. Riehl v. Foodmaker, Inc., 94 P.3d 930 (Wash. 2004), 28 *MPDLR* 781.

70. Kimball, Bennett, Brooslin & Pava v. McGahan, , 2003 WL 22049173 (Mass. Super. Ct. June 17, 2003), 27 *MPDLR* 915 (citing Mass Gen. Laws ch. 151B).

71. Appendix 1, col. 9.

72. *Id.*

73. *Id.*

74. Ala. Admin. Code §660-1-1-.04.

75. Appendix 1, col. 9.

76. *Id.*

Every state, except Indiana, has employment discrimination provisions that apply to termination.<sup>77</sup> Four-fifths of the jurisdictions have statutes that are generally consistent with the ADA's provisions. A small handful of states cover termination, but do not reference the ADA specifically, including Alabama, which—as mentioned earlier—has a program to provide equal opportunity in compliance with federal law.<sup>78</sup>

Nearly 85 percent of the states have retaliation provisions dealing with disability employment discrimination that follow the ADA.<sup>79</sup> Colorado and Oregon have their own provisions barring retaliation, and the five remaining states have none.<sup>80</sup>

Generally, the burden of proof in state discrimination cases is similar to that required in federal cases. After the plaintiff makes a *prima facie* case, a presumption of discrimination arises, and the burden shifts to the employer. If the employer satisfies this burden of persuasion, the presumption of discrimination disappears, and the burden shifts back to the employee to show that the employer's proffered reason is pretextual.<sup>81</sup> There are, however, certain exceptions.

Typically, if the plaintiff already has presented direct evidence that the employer based its "material adverse action" on disability, the burden remains with the employer.<sup>82</sup> Therefore, the Montana Supreme Court—using a "mixed motive" analysis—concluded that, under that state's statute, a plaintiff did not have to show that the employer's reasons for not hiring him were a pretext once he had provided direct evidence that the employer's decision was motivated, in part, by the fact that the plaintiff had liver disease.<sup>83</sup>

The Connecticut Supreme Court used a similar analysis, but with a different result, in a case involving an ESPN truck driver with a hearing impairment who was reassigned at the same salary to a different position. While the lower court had erred in failing to use the "mixed motive" analysis, the mistake was harmless because the record clearly showed that ESPN would have reassigned him anyway based on his bad driving record.<sup>84</sup>

Also, Tennessee's high court reinstated a jury verdict under state law in favor of an employee with Bell's Palsy because material evidence of intentional discrimination supported the jury's finding that the decision to lay him off was not motivated by a workforce reduction, but rather the employer's perception that the employee had a disability.<sup>85</sup>

#### **(e) Enforcement; Attorneys' Fees**

Generally, states diverge from the federal government in the enforcement of employment discrimination claims. Every jurisdiction has an enforcement mechanism of some kind, but none explicitly follows the ADA model.<sup>86</sup> About four-fifths of the states have an independent Commission or Department in charge of enforcing these laws administratively.<sup>87</sup> Over a dozen provide a private right of action after the administrative proceedings, and several more have a private right of action with no administrative proceedings required. Twelve jurisdictions provide some sort of limited judicial review after the administrative decision is made. Eleven other states allow plaintiffs to file civil actions, but only at the conclusion of the administrative proceedings. Eight jurisdictions have enforcement schemes that are implemented administratively. Seven states and the District of Columbia authorize the state attorney general or corporation counsel to bring a civil action on behalf of the jurisdiction he or she represents. Alabama limits its enforcement to allowing judges to find violators guilty of a misdemeanor if they interfere with the employment rights of a person with a disability.<sup>88</sup>

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77. *Id.* at col. 10.

78. *Id.*

79. *Id.* at col. 11.

80. *Id.*

81. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

82. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

83. *Laudert v. Richland County Sheriff's Dep't*, 7 P.3d 386 (Mont. 2000), 24 *MPDLR* 807.

84. *Levy v. Commission on Human Rights & Opportunities*, 671 A.2d 349 (Conn. 1996), 20 *MPDLR* 374.

85. *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698 (Tenn. 2000), 24 *MPDLR* 623.

86. Appendix 1, col. 12.

87. *Id.*

88. *Id.*

There also are a wide variety of remedial schemes that jurisdictions use to enforce administrative or judicial orders, none of which are specifically modeled on the ADA.<sup>89</sup> Jurisdictions generally have several remedies available to them. Only Alabama does not list any remedies beyond the issuance of a misdemeanor citation. Over 85 percent of the states and the District of Columbia provide that some type of affirmative action may be mandated. Nearly three-fifths use cease and desist orders, and the same number allow damages, but only about a quarter specify that back pay may be awarded. Two-fifths of the jurisdictions permit temporary injunctions; more than one-fourth authorize permanent injunctions; and almost a third use both temporary and permanent injunctions. Another fifth issue fines or penalties.<sup>90</sup>

Three-quarters of jurisdictions specify that attorneys' fees may be awarded, but none follow the ADA directly.<sup>91</sup> Nevertheless, certain similarities with the ADA scheme exist in a number of states. One-third of states with fee statutes award them to the prevailing party. Ten jurisdictions have fee awards, but only make them available to successful plaintiffs. Eight states award fees to either party. And four—Pennsylvania, North Dakota, Utah, and Washington—only provide fees to the party being sued.<sup>92</sup> In 2004, New York's highest court held that its courts should follow a 1992 Supreme Court case<sup>93</sup> in deciding whether in obtaining only nominal damages under the state's human rights law, plaintiffs were entitled to attorneys' fees. Here such fees were justified because a significant public purpose had been served, based on the fact that this was the first public accommodation discrimination suit under this state law that vindicated the rights of transsexuals.<sup>94</sup>

#### (f) Arbitration

Increasingly, employers are using arbitration to avoid going to court to resolve employment issues. The U.S. Supreme Court in *Circuit City Stores v. Adams*<sup>95</sup> affirmed that the Federal Arbitration Act (FAA) applies to all federal employment disputes, except for those involving transportation workers, which are covered separately. Yet, there also is a state role in arbitration matters. On remand of the *Adams* decision, for instance, the Ninth Circuit concluded that, despite the FAA, this particular arbitration agreement was an unconscionable contract of adhesion because under California law it unilaterally forced employees to arbitrate their claims, but did not require the company to do so.<sup>96</sup> Also, a divided Ninth Circuit concluded that an arbitration agreement that an employee was compelled to sign, which allowed the employer to change the document almost at will, was unconscionable and thus unenforceable under state law as a means to preclude an employee from pursuing a disability discrimination claim brought under state and federal statutes.<sup>97</sup> Similarly, the Washington supreme court determined that an arbitration agreement that bars disability discrimination suits may be challenged if it is either procedurally or substantively unconscionable, but suits may proceed based on those sections of the arbitration agreement that are struck down rather than under the entire agreement.<sup>98</sup>

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89. *Id.* at col. 14.

90. *Id.*

91. Appendix 1, col. 15.

92. *Id.*

93. *Farrar v. Hobby*, 506 U.S. 103 (1992).

94. *McGrath v. Toys "R" Us, Inc.*, 2004 WL 2720092 (N.Y. Ct. App. Nov. 23, 2004), 29 MPDLR .

95. 532 U.S. 105 (2001), 25 MPDLR 421.

96. *Circuit City Stores v. Adams*, 279 F.3d 889 (9th Cir. 2001), 26 MPDLR 296. *See also* *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), 27 MPDLR 606.

97. *Al-Safin v. Circuit City Stores*, 394 F.3d 1254 (9th Cir. 2005), 29 MPDLR .

98. *Zuver v. Airtouch Communications, Inc.*, 103 P.3d 753 (Wash. Sup. Ct. 2004), 29 MPDLR .