

# Accessible Computing Seminar

Lecture #3 – Americans with Disabilities Act

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## What is a disability?

- The term “disability” has a three-prong definition:
  - A physical or mental impairment that substantially limits one or more major life activity (MLA) of an individual; or
  - A record of such an impairment; or
  - Being regarded as having such an impairment

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## Understanding “Substantially Limits”

- A person is substantially limited in performing a major life activity if
    - *They are unable to perform the activity; or*
    - *They are significantly restricted in the condition, manner or duration that they can perform one or more major life activities...*
- as compared to the average person in the population

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## Consideration of Mitigating Measures

- Medication, coping mechanisms, and equipment must be taken into account when deciding how substantial the impairment’s limitation is
- How much does the measure mitigate the impairment (all/most/some of the time)?

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## “Major Life Activities”

Examples of major life activities:

- Walking, lifting, performing manual tasks
- Sitting
- Breathing
- Speaking, hearing
- Learning
- Reading
- Personal care/grooming

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## Record of a Disability

- History of an impairment that substantially limited a major life activity; or
- Person was misclassified as having an impairment that substantially limited a major life activity

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## Regard as Having a Disability

- Has an impairment that does not substantially limit a major life activity, but is treated as if it substantially limits

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## Title I - Employment

“No employer shall discriminate against any **qualified person** with a disability in regard to any aspect of employment”

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## Who is a “qualified individual”?

### **A person who:**

- Satisfies the requisite skills, experience, education and other job-related requirements of the position
- Can perform the **essential functions** of the job, with or without **reasonable accommodation**

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## What is a reasonable accommodation?

Any change or adjustment to the job, the work environment or the way work is customarily done which permits a qualified applicant or employee with a disability to perform the essential functions

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## Asking for Reasonable Accommodations

- Does not have to be in writing, be formal, or use any special language
- Does not have to be requested at beginning of employment
- Case-by-case determination: Accommodation can be anything needed to allow **this** person with **this** disability to perform the essential functions of **this** job

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## Reasonable Accommodation Process

- The ADA requires that the employer and employee engage in an interactive dialogue concerning reasonable accommodations
- The employee usually initiates – the employee may inquire about the process from the supervisor, HR or the ADA Coordinator at the agency
- If you, as the supervisor, are contacted first, bring in the **ADA Coordinator** early in the process
- The supervisor does not need to know the diagnosis or particulars of the medical condition, only the **limitations** or **restrictions** on the employee's ability to perform essential tasks and potential accommodations

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## What are “essential functions” of a position?

- **Essential functions** are those that are fundamental and central to the purpose of the position
- **Marginal functions** are useful responsibilities, but are not central to the purpose of the position

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## Determining Essential Functions

### **Courts have considered:**

- Employer’s judgment
- Position description written before the job was advertised and filled
- Functions performed by others in the same or similar job classifications
- Work performed by current and past incumbents
- Consequences if this position did not perform the function
- Number of available employees who could perform the function

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## Types of Reasonable Accommodations

- A “**no-tech**” accommodation costs little or no money...just time, support and creativity (*i.e., additional preparation time for an individual, or a color-coded filing system.*)
- A “**low-tech**” accommodation is any accommodation that is technologically simple or unsophisticated, and readily available in most offices (*i.e., a door handle as opposed to a door knob, to accommodate an individual with limited mobility.*)
- A “**high-tech**” accommodation is any accommodation that uses advanced or sophisticated devices (*i.e., screen reading software with synthesized speech.*)

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## Reasonable Accommodations May Include:

- May require job restructuring
- May require time off (Does not require indefinite leave and; Not required if it imposes undue hardship on employer)
- Change in schedule
- Equipment (tape recorder, scanner, voice software, TTY)

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## Reasonable Accommodations May Include (*continued*):

- Change of workplace policy (allow food at workstation, allow service animal, allow personal items at desk)
- Adjusting methods of supervision (communicating assignments in different ways, providing additional training, more guidance...)
- May require allowing working at home
- Provision of a job coach

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## Reasonable Accommodations Do Not Involve:

- Medication monitoring
- employer not required to lower production standards
- Does not require provision of personal use items (hearing aids, wheelchairs)
- Does not require change of supervisor
- Employer cannot force Employee to accept an accommodation

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## What is “undue hardship”?

An employer may decline to provide an accommodation such accommodation is:

- Unduly expensive
- Extensive
- Substantial
- Disruptive
- Would fundamentally alter the nature or operations of the business

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## Discipline & Conduct

- Employer may discipline Employee for violating a workplace conduct standard, even if the violation results from a disability
- If the conduct standard is job-related and consistent with business necessity
- If other Employees are held to the same standard
- Employer may have to provide reasonable accommodation to help Employee to meet the standard in the future, but does not have to excuse past conduct

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## Pre-Employment Inquiries

### Pre-Offer...

- **May ask** about education, work history, and required certifications and licenses
- **May not ask** questions that are directly or indirectly intended to elicit information about a disability
- **May ask** the person to describe or to demonstrate how the essential tasks of the job would be performed if the disability is obvious or the person has disclosed a disability

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## Pre-Employment Inquiries (*continued*)

### Pre-employment inquiries:

- Drug and polygraph tests are acceptable
- No medical tests
- Employer may ask if prospective Employee needs reasonable accommodations in application process
- Employer must provide reasonable accommodations upon request

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## Post-Offer Employment Inquiries

### Post-Offer...

- **May ask** disability-related questions and have medical exams if all employees entering that job classification have the same exam/inquiry and the exam/inquiry is job-related
- **May ask** about a Workers' Compensation history
- **May ask** about prior sick leave use
- **May ask** about general health history

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## On-the-job Employment Inquiries

- **On-the-job inquiries** are acceptable if they are:
  - Job-related and consistent with business necessity; and
  - when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.

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## Confidentiality

- Medical information must be kept confidential in files separate from personnel files
- Can't tell other Employees about medical condition or about reasonable accommodations.

Exceptions to the rule:

- Can tell supervisors who need to know of the necessary accommodations.
- Can tell safety personnel if Employee may need emergency treatment

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## ADA's Relationship with Family and Medical Leave Act (FMLA)

FMLA applies to "serious health condition", regardless of whether it substantially limits a major life activity, including the following:

- Inpatient care in hospital;
- Continuing treatment (with incapacity of > 3 consecutive days & continuing treatment);
- Pregnancy;
- Chronic health condition that requires periodic visits to doctor, continues over extended period, and is episodic; and
- Permanent or long-term incapacity

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## ADA's Relationship with FMLA

- ADA requires as much leave as is necessary as a reasonable accommodation – may be more than 12 weeks
- IF Employee requests time off:
  - Treat as covered under ADA for the Employee unless s/he specifies FMLA leave
  - Employer must grant whichever leave (ADA or FMLA) provides greatest right to Employee
  - Employer can offer another reasonable accommodations under ADA, but under FMLA, Employee is entitled to 12 weeks leave
  - ADA does not require leave for Employee to care for a relative with a disability

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## “Direct Threat”

- A direct threat is:
  - Current
  - Significant risk of substantial harm to the health and safety of the person with the disability or others
  - Supported by objective medical or other factual evidence
  - Cannot be eliminated by any reasonable accommodation

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## ADA Title II State and Local Government

“No qualified individual with a disability shall, by reason of the disability, be excluded from participating in or be denied the benefits of the services, programs or activities provided by a public entity.”

*Providing services and programs is the business of State agencies*

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## Factors for Title II Coverage

- Is the organization/agency operated with public funds?
- Are its Employees considered government employees?
- Does the organization/agency receive significant assistance from the government?
- Is it governed by an independent board from a private organization or by an elected or appointed board?

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## Title II – State and Local Governments

- All programs, services, and activities are covered
- Government Services provided by Contractors
- Public Transportation
- Legislation
- Regulations
- Judicial Activities
- Everything the government entity does

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## Title II – State and Local Governments

### Requirements:

- Inclusion
- Equal Benefit
- Integrated Benefit
- Non-discriminatory Eligibility Criteria
- Reasonable Modifications
- Effective Communication
- Program Access
- Administrative Requirements

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## Reasonable Modification of Policy

- Agency must reasonably modify any policy, practice or procedure when necessary to enable people with disabilities to participate
- A reasonable modification can be anything that makes it possible for this person with this disability to participate in this function

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## Examples of Reasonable Modifications

- Allowing a person with a disability to eat in a facility if they have diabetes
- Allowing a service animal in a building in spite of a no pets policy
- Providing someone to assist a person with a disability to fill out an application
- Must prioritize reasonable modifications that provide the most integration (people with disabilities going through same processes/same places as people without disabilities)

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## Title II – Effective Communication

### Effective Communication

- Must provide auxiliary aids and services to make communication with people with disabilities as effective as communication with non-disabled people
  - **Examples:** *sign language interpreter, TTY, taped text, Braille, reader, note taker...*
- Individualized standard –communication must be effective for *this* person in *this* situation
- Cannot surcharge for cost of compliance

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## Title II – Existing Buildings

### Physical Access

- Programs, Services & Activities in Existing
- Buildings...
  - *Must be accessible when viewed in their entirety*
  - *Does not necessarily require each facility to be accessible*
  - *May use alternate means to make programs accessible*
- **Examples:** *curb service, home service, move meetings to accessible space on request*

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## Title II – Existing Buildings (*continued*)

### **Alterations (after 1/26/92)**

- Altered area must be fully accessible (ADA Standards of
- Accessible Design –ADAAG) 28 C.F.R. Pt. 36, App. A
- Path of Travel. *If alteration affects a Primary Function Area - must spend additional 20% on accessibility of path of travel to the area (including restrooms, phones, drinking fountains, etc.)*

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## Title II – New Buildings

### **New Construction (after /26/1992)**

- Must be fully accessible according to ADA Standards of Accessible Design/ ADAAG
- Unless structurally impracticable

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## Title II – Transportation

### Transportation

#### Buses...

- Newly purchased or leased buses must be accessible
- Para-transit service must be provided to all eligible individuals (cannot navigate public transport system, needs accessible bus, or has a specific impairment related condition)
- Comparable to public transport system in all service criteria (e.g. service area, response time, fare, service times, capacity constraints)

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## Title II – Defenses

### Defenses

- Fundamental Alteration of program or service
- Undue Burden (significant expense/difficulty)
- Direct Threat (threat to health/safety of others)

### Remedies

- Internal (not mandatory)
- Administrative (not mandatory)
  - *Federal agencies (Dept. of Justice)*
- Judicial

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