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ADA Protection is Available to:

A **qualified individual** with a **disability** who can perform the essential functions of the position with or without reasonable accommodation.

That's a mouthful!



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What does "qualified individual" mean?

Someone who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

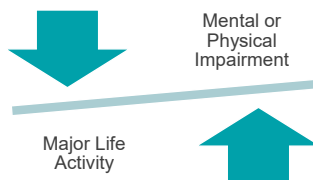
This will matter later in this presentation!



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What does "disability" mean?

A mental or physical impairment that substantially limits one or more major life activities.



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Tamara's Tip of the Day

Don't "play doctor"!

(For that matter, it's not worth "playing lawyer", either.)
(Trust me.)

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Can any employer claim
"undue hardship" anymore?

Can you prove that:

- A noticeable financial impact would result from providing the accommodation?
- There would be logistical impacts caused by providing the accommodation?

What about: "It's inconvenient"?

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If this is
established law . . .
. . .then why are we here?

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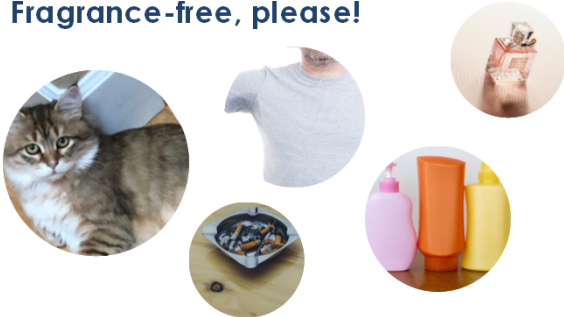
You call THAT a “Disability?”

(Spoiler alert: Probably.)

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Scenario #1:

Fragrance-free, please!



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What should the employer do?

Option 1 - Tell the employee to take some Benadryl and learn to live with it.

Option 2 - Ask for medical verification in support of her accommodation request.

Option 3 - Post a fragrance-free zone sign.

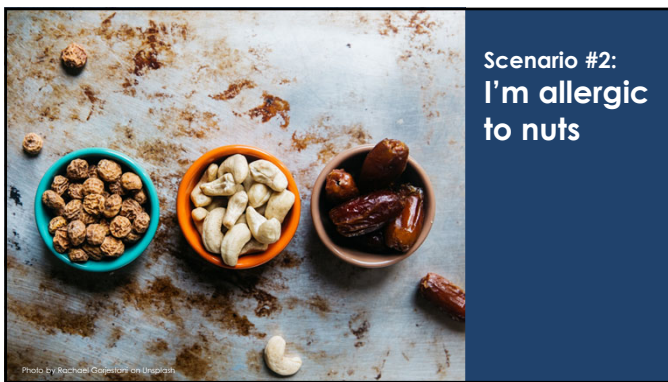
Option 4 - The next time the employee says she has an allergy to all fragrances, consider telling her, “Oh, really? Because I think you’re allergic to the truth.”

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What should the employer do?

Option 1 - Tell employees that the next person who walks through the front door with a product containing nuts will be fired.

Option 2 - Tell the employee that the City will buy her some Epi Pens to keep at her desk.

Option 3 - Engage in an interactive process discussion with the employee.

Option 4 - Announce that the City will never hire another employee with an allergy.



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So what happened?

1 Fragrance-Free Zone

1a No-Raw Onions

2 Nut Allergies

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Wrap-up: Unusual Allergy Issues

Believe it or not, some courts think these allergies are “disabilities” and the employee is protected.

Path of Least Headache: Assume the medical condition is a “disability”. That means:

1. Require medical verification/info;
2. Have the interactive process discussion; and
3. Enter into an accommodation agreement/plan.

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Wrap-up: Unusual Allergy Issues

Food/fragrance allergy accommodation requests

What about posting a sign that says, “This is a peanut- and tree nut-free workplace”?

(Or fragrance-free?)

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Really?



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Wrap-up: Unusual Allergy Issues

Food allergy accommodation requests

- If necessary, allow the employee to eat in areas other than designated "eating zones"
- Consider whether flexible hours is an option
- Consider the location of the employee's workstation – movable? Work from home?

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Wrap-up: Unusual Allergy Issues

Food allergy accommodation requests

- Air filter?
- Accommodation Plan Essential Element: How the employee can help mitigate the risk.
- Run out of ideas? See <https://askjan.org/disabilities/Food-Allergy.cfm>

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Wrap-up: Unusual Allergy Issues

Fragrance-free accommodation requests

- The obvious: Can we eliminate the odor?
- Air filter at work station? Maybe a fan?
- Work from home?
- Accommodation plan essential element: How the employee can help mitigate the risk.
- Need ideas? <https://askjan.org/disabilities/Fragrance-Sensitivity.cfm>



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Wrap-up: Unusual Allergy Issues

Food/fragrance allergy accommodation requests

Can we (should we) talk to the employee about what the employer should do if there's an emergency?



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A Complicated Counterbalance



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Wrap-Up: Dealing with Unusual Allergy Issues

What should I do if the employee complains that you aren't doing enough?

(One answer: Vent with Pre-Loss.)



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Side Note: That's "medical information"?

Discussion Notes

Recommend patient continue with Yoda .



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Scenario #3: Obesity

*Richardson v. Chicago
Transit Authority (2019)*

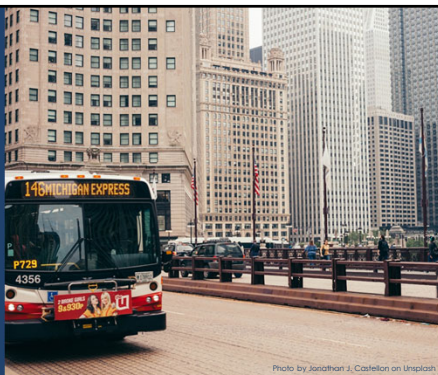


Photo by Jonathan J. Corbell on Unsplash

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But that's in the Midwest. What about other courts?

- In most courts, obesity isn't a "disability" unless:
 - the obesity is caused by an underlying physiological condition; or
 - An underlying physiological condition caused by the obesity is a "disability".
- The EEOC (and likely BOLI): Obesity is a "disability".
- In the Ninth Circuit, well, see *Valtierra v. Meditronic, Inc.* (August 2019)



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#3: Obesity as a "Disability"

Lessons Learned

- If you have an obese employee who isn't able to perform certain duties due to that obesity (or an underlying medical condition), it may be best to consider that employee "disabled" and have an interactive process discussion with him/her, like the CTA did.
- Proving that second chances were offered will matter to a jury, some of whom may be obese themselves.
- Best bet: Hold your obese employees to the same standards as every other employee, like Meditronic, Inc. did.



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Scenario #4: Transvestism & Sexual Orientation



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Scenario #4: Transvestism & Sexual Orientation

Oregon Law (eff. 5/6/19)

- Gender dysphoria could be a "disability."
- Transvestism has the potential to be a "disability."

Federal Law

- These are not "disabilities" under the ADA:
 - Homosexuality, bisexuality, transvestism, and "gender identity disorders not resulting from physical impairments"

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Scenario #4: Transvestism & Sexual Orientation

Oregon Law (eff. 5/6/19)

Sexual orientation is not a "disability"

No accommodation need be provided because of an employee's:

sexual orientation (whom they love);

gender identity (who they are); or

gender expression (how they present themselves).

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So what does an Oregon employer do?

Answer: Not much of anything.

Treat every employee who has a mental or physical disorder (or who complains about the treatment they received because of that disorder) the same way.


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Questions?
Let's play "Stump the Lawyer!"

*What is defeat?
Nothing but education;
nothing but
the first step
to something better.*

Bruce Lee



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Thank you!
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