

U.S. Fish and Wildlife Service

EEO Workshop for Managers and Supervisors
Part 2 of 4

“GINA, ADAAA and Disability Discrimination”

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New Laws and Regulations

- Genetic Information Nondiscrimination Act (GINA) and Final Regulations
- Americans with Disabilities Act Amendments Act (ADAAA) and Final Regulations

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Title II of GINA

- Prohibits – without exception – the use of genetic information in making decisions as to any terms, conditions, or privileges of employment
- Restricts the acquisition of genetic information
- Restricts the disclosure and requires the confidentiality of genetic information, and
- Prohibits retaliation

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“Genetic Information” is defined in GINA as:

A) IN GENERAL- The term `genetic information' means, with respect to any individual, information about--

(i) such individual's genetic tests,

(ii) the genetic tests of family members of such individual, and

(iii) the manifestation of a disease or disorder in family members of such individual.

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EEOC's New GINA Regulations

(Issued Nov. 10, 2010 and effective, Jan. 11, 2010)

Regulatory comments to Section 1635.11(a)(“Relationship to other laws, generally”)

“GINA does limit, however, an employer's ability to obtain genetic information as a part of a disability-related inquiry or medical examination. For example, an employer will no longer be able to obtain family medical history or conduct genetic tests of post-offer job applicants, as it currently may do under the ADA.”

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EEOC's New GINA Regulations
(Issued Nov. 10, 2010 and effective, Jan. 11, 2010)

Section 1635.8 Acquisition of genetic information.
(b) Exceptions.

(3) Where the covered entity requests family medical history to comply with the certification provisions of the Family and Medical Leave Act of 1993. . . that permits the use of leave to care for a sick family member and that requires all employees to provide information about the health condition of the family member to substantiate the need for leave.

Safe Harbor Language

1635.8

(B) If a covered entity uses language such as the following, any receipt of genetic information in response to the request for medical information will be deemed inadvertent: ``The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information.

Safe Harbor Language (Cont'd)

'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

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First Gina complaint

- Pamela worked for an energy company. She had gotten glowing evaluations. Genetic tests in 2004 showed that she and her 2 sisters carried a specific gene (i.e., BRCA2) predisposing them to breast cancer. After both sisters developed cancer as well as after several biopsies, Pamela elected a double mastectomy last year, which involved two surgeries. Because she felt comfortable in what she believed was a supportive work environment, she informed her bosses of her genetic tests and the surgery. While she was recovering from her first surgery, the company hired a consultant, who then became her boss, when she returned

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First Gina complaint (Cont'd)

- Then, when Pamela returned from her second surgery in March 2010, her job was eliminated, purportedly in a layoff.
- She believes she was discriminated against because she told her employer about the genetic tests and her medical condition.

Does she have a GINA claim?

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THE ADA AMENDMENTS ACT (ADAAA) OF 2008: Individual with a Disability

The term `disability' means, with respect to an individual—

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment

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THE ADA AMENDMENTS ACT (ADAAA) OF 2008

Major Changes:

- Rejection of the “reasoning” and “demanding standards” of Supreme Court, lower court decisions and the EEOC’s individual with a disability definition
- Reversal of Supreme Court decision such as Toyota v. Williams and Sutton v. United Airline as well as relevant EEOC regulations

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THE ADA AMENDMENTS ACT (ADAAA) OF 2008 (Cont’d)

Major Changes (Cont’d):

- Seeking to assure the broader reinterpretation of the “substantially limits” language
 - elimination (mostly) of consideration of mitigating measures (reverses Sutton) / I.e., consider the person without the mitigating measure
 - reversal of “prevents or severely restricts” (reverses Williams)
 - impairments that are episodic or in remission may be substantial / question is would they be substantial when active

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THE ADA AMENDMENTS ACT (ADAAA) OF 2008 (Cont'd)

Major Changes (Cont'd):

- Expansion of the definition of “major life activities”
 - Reverses Williams which had held activity must be of “central importance to most people’s lives (reverses Williams)
 - Provides non-exhaustive list of “major life activities” as well as adding and identifying “major bodily functions” such as immune and endocrine systems and normal cell growth
- Changes to the “regarded as” prong

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ADAAA / Effective Date

- ADAAA applies to discriminatory acts that occurred on or after January 1, 2009
- ADAAA won’t be applied retroactively

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EEOC's Final ADA Regs – March 25, 2011

- The final regulations mostly follow, and explain, the ADA Amendments Act of 2008 that made it much easier for an individual to prove that he or she is an “individual with a disability” covered, and protected by the ADA.
- The Final ADA Regs were effective on March 25, 2011.
- They include an Appendix with binding interpretive guidance. The Appendix has illustrative examples.

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ADAAA

- Summary of ADAAA changes: It will now be easier to prove “disabled” status and the focus will be on whether the employee is qualified to do the job, with or without accommodation; and whether any request is reasonable or whether it would be an undue hardship to accommodate the employee.

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Disability Discrimination / Elements

Employee:

- is a disabled person
- articulated (expressed) a “reasonable accommodation”
- agency has knowledge of the disabling condition
- is a “qualified individual with a disability” (QID) :

Agency:

- accommodation would “impose an undue hardship upon the operation of its program.”

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Disability / What do you need to know?

- Complainant, a former claims representative, alleged discrimination on the basis of his disability (Asperger’s Syndrome, stress, sleep apnea) when the agency failed to accommodate his request, made through his doctor, for a reduced workload and limited duties. **Flagg v. SSA, 0120073631 (July 7, 2010).**

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What do you need to know?

- Complainant, a former bartender at an agency club facility, was discriminated against on the basis of her disability (paralyzed right arm) when a supervisor took away an accommodation that she used for 17 years in pouring drinks, which ultimately led to her removal. *Estate of Mary L. Chase v. Dept. of Navy*, 0120082106 (January 6, 2010).

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What do you need to know?

- In February 2003, complainant was assigned as the agency's internet communications gatekeeper, which required responding "to messages from the public received through the Agency's website and email system." In April 2003, after a diagnosis of asthma/heart disease, she submitted a written request to either be transferred to Corpus Christi, Texas or to work full-time at home as a reasonable accommodation. *Sutter v. OSHA*, 0120080937 (October 22, 2010).

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Reasonable Accommodation

- Jane has a severe case of asthma, with extreme reactions to corn products. This posed a problem when employees in the office popped popcorn during lunch. On one occasion, Jane suffered a severe allergic reaction to the popcorn fumes (she experienced a choking feeling, wheezing and chest pains and was forced to use a rescue inhaler to breath) and informed management of her medical condition and asked for an accommodation. (Cont'd)

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Reasonable Accommodation (Cont'd)

Management advised employees of the problem, asked them to be respectful, directed them to notify Jane's supervisor when they would be popping popcorn and gave Jane permission to leave work during those times. Employees though didn't pay much attention to these suggestions, continued to pop popcorn without any kind of notification and Jane suffered an even more significant reaction.

Jane has now complained to management, alleging that this is disability harassment. Is it? What, if anything, should management do?

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Reasonable accommodation

- A park ranger alleged disability discrimination in his reassignment, among other actions, to a non-law enforcement position. He had type 1 diabetes and the agency believed that he was a threat to himself or others in the law enforcement position.

How are these cases viewed?

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Disability Discrimination / Direct Threat

29 CFR 1630.2 (r): In determining whether an individual would pose a direct threat, the factors to be considered include

- The duration of the risk;
- The nature and severity of the potential harm;
- The likelihood that the potential harm will occur;and
- The imminence of the potential harm.

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Disability Discrimination

- A Customs Inspector with degenerative disc disease requested reassignment to an Administrative position. While he was ultimately accommodated, he claimed disability on the basis that the Agency unreasonably delayed 6 months in responding to his request

What do you want to know? How are these cases viewed?

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Disability Discrimination /Delay in Accommodating Claims

- The Commission relies on the ADA guidance standards for judging the unreasonableness of a delay, which include: “(1) the reason(s) for delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide.”

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Disability Discrimination

Two pitfalls for Supervisors and managers:

- Improper disability-related inquiries
- Improper disclosure of confidential medical condition information

Note the broad coverage for these kinds of claims.

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29 CFR 1630.14 Medical examinations and inquiries specifically permitted.

As interpreted by the Commission: Disability inquiries and medical exams are acceptable when:

- The agency has a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition, or
- The agency believes an employee will pose a direct threat to himself or others due to a medical condition.

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Disability Discrimination / Inquiries

- The employee worked as an Electrician for the Agency and applied for another Electrician position at a different location. After interviews, the Selecting Official requested, received and reviewed copies of the injury records for electricians, including the applicant employee

The employee was not selected; she had a record of 12 work-related injuries over the past 10 years

Are there problems here and if so what are they?

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Disability Discrimination / Inquiries

- Complainant, a security assistant and applicant for a federal air marshal position, was subjected to unlawful disability discrimination when the agency required him to undergo a medical examination prior to giving him an employment offer. **Hoskins v. DHS, 0120091046 (June 11, 2010), recons. den. 0520100500 (September 21, 2010).**

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29 CFR 1630.14(c) (1) / Confidentiality of Information

“(c)(1) Information obtained . . . regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that: (i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;”

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Improper disclosure / Disability Discrimination

- On “August 24, 2009, a Facility Manager (FM) announced during an open forum with Complainant’s coworkers that he had been disqualified from his duties as an air traffic controller due to ‘psychological problems.’”

Problem?

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Improper disclosure / Disability Discrimination

“With limited exceptions, the Rehabilitation Act requires that an Agency keep confidential any medical information it learns about any applicant or employee—whether or not he is an individual with a disability—and it continues to apply even after an employee leaves the Agency. The Commission’s view is that this restriction applies to all medical information, even if the information is disclosed by an applicant or employee voluntarily, and even if it is not generated by a health care professional. It includes past, present, and expected future diagnoses and treatment, as well as the fact that an applicant or employee has requested or received accommodation.”

Meadows v. Dept. of Army, 0120101541
(August 17, 2010).

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Improper disclosure / Disability Discrimination

How about these:

- Complainant contends that his second level supervisor improperly disclosed his medical information to a personnel official and the agency physician / In this case, the supervisor consulted with a personnel official and an agency physician so that he could ascertain how to accommodate complainant’s medical condition. *Skarica v. Coast Guard*, 0120073399 (March 5, 2010).
- The agency’s occupational health nurse administrator (OHNA) released information to managers, in 3 e-mails, mentioning certain restrictions , the functions of the complainant’s job as an equipment operator and the need for accommodations and the need to be evaluated by another doctor. (Cont’d)

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Disability Discrimination / Improper Disclosure

The E-mails did not disclose “confidential medical information” / ...of information about complainant’s restrictions on her work or duties, and about necessary accommodations, all of which may be disclosed without violating the Rehabilitation Act. There is no indication in the record that information about complainant’s symptoms, diagnosis or prognosis was disclosed in these particular e-mails.” *New v. USPS, Eastern Area, 0120080269 (May 28, 2010).*

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Obligation of Complainant in Asserting Right to Reassignment

“The petitioner has an evidentiary burden in such reassignment cases to establish that it is more likely than not (preponderance of the evidence) that there were vacancies during the relevant time period into which petitioner could have been reassigned. Petitioner can establish this by producing evidence of particular vacancies. However, this is not the only way of meeting petitioner's evidentiary burden. In the alternative, petitioner need only show that: (1) he or she was qualified to perform a job or jobs which existed at the Agency, and (2) there were trends or patterns of turnover in the relevant jobs so as to make a vacancy likely during the time period.”

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