



Individuals with Autism Spectrum Disorder and Employment: Application of the Americans with Disabilities Act (ADA) Title I Standards

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Introduction

The Centers for Disease Control and Prevention (CDC) estimates 2.1% of adults in the United States have Autism Spectrum Disorder (ASD)¹ and as a group have high rates of unemployment or under employment.² The prevalence of ASD among children is increasing and the most recent estimate is that one in fifty-four children in this country will receive the diagnosis.³ Like adults with ASD, the employment rates are lower for youth with ASD compared to youth with other disabilities or without disabilities.⁴ There are many reasons that could explain this statistic for youth with ASD such as the continuation of education, not seeking employment, or not having the skills needed by employers. However, another explanation that may contribute to the high rates of unemployment is the negative response to the communication, social, and behavioral traits common among some individuals with ASD resulting in employment barriers.⁵

Research suggests that Individuals with ASD are more likely to experience stigma from employers as well as fellow employees than other individuals. Recent studies focused on stigma have found that “the general public tends to view disabilities that they perceive as controllable yet unstable (such as mental-behavioral disabilities) more negatively than they do disabilities that they perceive to be uncontrollable but stable, such as physically caused disabilities.”⁶ Other studies found that employers tend to perceive individuals with physical disabilities more favorably than individuals with mental, emotional, or neurological disabilities.⁷

Regardless of whether an individual with ASD has the necessary education, experience and skills to perform a job, the low employment rate of individuals with ASD raises the question as to whether employers are discriminating on the basis of disability—ASD in this case—in

¹ <https://www.cdc.gov/ncbddd/autism/features/adults-living-with-autism-spectrum-disorder.html>

² <https://cdc.gov/ncbddd/autism/autism-spectrum-disorder-in-teenagers-adults.html>

³ Maenner, M.J., et al. *Prevalence of autism spectrum disorder among children Aged 8 years – Autism and developmental disabilities monitoring network, 11 Sites, U.S. 2016.* *Surveillance Summaries* (March 27, 2020) 69(4);1-12.

⁴ Shattock, P.T., et al. *Postsecondary education and employment among youth with autism spectrum disorder.* *Pediatrics*, 129(6) (2012), 1042-1049.

⁵ Westbrook, J.D., et al. *Transition services for youth with autism: a systematic review.* *Research on Social Work Practice* (25)(1) (2014), 1-10.

⁶ Wieren, T., et al. *Autism spectrum disorders and intellectual disabilities: A comparison of ADA Title I workplace discrimination allegations.* *Journal of Vocational Rehabilitation* 36 (2012), 159-69 at 170 citing Corrigan, P. e al., *Stigmatizing attributions about mental illness.* *Journal of Community Psychology* 28 (2000), 91-102. Findings also supported by Weiner, B. et al. *An attributional analysis of reactions to stigma.* *Journal of Personality and Social Psychology* 55 (1988), 738-748.

⁷ Bell, B. and Klei, K.J. *Effects of disability, gender, and job level on ratings of job applicants.* *Rehabilitation Psychology* 46(3) (2001), 229-246; Gouvier, W.D. et al. *Patterns of discrimination in hiring job applicants with disabilities: The role of disability type, job complexity, and public contract.* *Rehabilitation Psychology* 48 (2003), 175-181.

violation of the American with Disabilities Act (ADA). The Equal Employment Opportunity Commission (EEOC) through their guidance, complaint investigations, and resolution settlements have recognized that aspects of ASD can result in discrimination because of disability stigma rather than the inability to perform the essential functions of the job with or without reasonable accommodations. Federal courts are also beginning to recognize the role of stigma in employment decisions as discussed below.

This article reviews the ADA Title I standards and the EEOC guidance that is relevant to the duties of employers and the rights of individuals with ASD in the workplace. A summary of recent EEOC resolution agreements and federal court decisions addressing employment discrimination of applicants or employees with ASD is provided. Best practice considerations, including policy proposals addressing employment discrimination of individuals with ASD, are included in the final section.

Americans with Disabilities Act (ADA) Title I

The two primary federal nondiscrimination statutes that address employment related issues for individuals with disability are Section 503 of the Rehabilitation Act of 1973 (Section 503)⁸ and Title I of the Americans with Disabilities Act (ADA) of 1990 (Title I), as amended in 2008.⁹ Although not the focus of this paper, Section 503 continues to play an important role in employment for individuals with disabilities. This section is one of the amendments Congress added to the reauthorized Vocational Rehabilitation Act in 1973 in an effort to address widespread discrimination against individuals with disabilities in this country. Section 503 addresses discrimination by federal contractors or subcontractors with contracts over \$10,000. Companies with such a contract are prohibited from discriminating against qualified individuals with disabilities in employment.¹⁰ The Rehabilitation Act of 1973 litigation clarified the legal standards for the following terms and phrases, among others:

- Disability,
- Qualified,
- Essential functions,

⁸ 29 U.S.C. §793 *et al.*

⁹ The *Americans with Disabilities Act* includes five major sections referred to as titles.

¹⁰ Section 503 is enforced by the Office of Federal Contract Compliance Programs (OFCCP). In 2014, OFCCP issued revisions to the obligations of contractors under Section 503. Section 503 now requires employers with a contract of more than \$50,000 to take affirmative action in hiring individuals with disabilities and to set a goal of hiring individuals with disabilities to reach the goal of 7% employees with disabilities. Section 501 of the Rehabilitation Act also requires the federal government to take affirmative action to hire individuals with employees and the federal government has set employment goals in recent administrations. There is no hiring goal mandated in ADA.

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- Reasonable accommodations, and
 - Direct threat as a defense to hiring an otherwise qualified individual.

Those terms and phrases were incorporated into the ADA when this broader nondiscrimination statute was passed in 1990 to address the continued societal discrimination on the basis of disability. Both federal laws are generally interpreted and applied consistently.¹¹

Title I of the ADA describes the duties of private employers with 15 or more employees, employment agencies, labor unions, and joint labor-management committees in addition to the rights of individuals with disabilities in their employment related interactions with those employers. Addressing the conscious and unconscious bias towards individuals with disabilities was of particular concern to Congress. The intent was to ensure that the individual's abilities and not impairments were the focus in any employment decision. The ADA states that no employer (covered by Title I) will,

discriminate against a qualified individual on the basis of a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.¹²

The regulations to implement Title I were written by the EEOC and those, in addition to EEOC guidance and enforcement efforts, have been important in understanding the broad prohibition against discrimination on the basis of disability in employment under the ADA. The issues that are relevant to workplace discrimination of individuals with disabilities, including those with ASD, under the ADA include the following:

1. Who is "disabled" under the ADA,
2. Determining whether an individual is "qualified" which requires clarification of the "essential functions" of a job,
3. Defining what is "reasonable" in terms of the obligation to accommodate an individual with disability, and
4. Determining what constitutes a "direct threat."¹³

These definitional "terms of art" when applied to individuals with ASD have raised barriers to employment and/or continued employment as discussed below.

¹¹ 42 U.S.C. §12117(b); 29 U.S.C. §793(d).

¹² 42 U.S.C. §12112(a).

¹³ 42 U.S.C. §12102(1) (A)-(C).

Who has a *Disability* under the ADA?

To be protected from disability discrimination under the ADA, an individual must meet the disability definition.¹⁴ The definition of disability under the ADA is as follows:

- 1) An individual with a physical or mental impairment that substantially limits one or more major life activities;
- 2) Has a record of such an impairment; or
- 3) Is regarded as having such an impairment.¹⁵

An individual must meet one or more of these prongs to be an individual with disability under the ADA. When the ADA was amended in 2008, Congress explicitly rejected a series of United States Supreme Court cases that had narrowly interpreted the statutory definition of disability.¹⁶ Although the 2008 amendments did not substantively change the statutory disability definition itself, they did clarify that it was the intent of Congress that the focus be on whether discrimination had occurred not on whether the person was in fact substantially limited by an impairment.

The revised EEOC regulation interpreting the definition is as follows, “an impairment is a disability . . . if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.”¹⁷ In addition, the regulations state that some impairments “will, at a minimum, substantially limit” a particular major life activity.¹⁸ Autism is included as one of the impairments listed on this list. Therefore, as a general rule, an individual with ASD, who has a record of ASD, or is regarded as having ASD, will be protected from employment discrimination under Title I of the ADA.

Prior to the 2008 amendments and new EEOC regulations, ASD was often not considered a disability under the ADA because either the impairment was not considered substantially limiting or the limitation did not impact a major life activity. The major life activity that individuals with ASD identified for purposes of ADA eligibility was often “interacting with others” which courts routinely held not to be a major life activity.¹⁹ Individuals that claimed they were substantially limited in some other major life activity such as communication failed

¹⁴ The one exception to this rule is that ADA also defines unlawful discrimination to include “excluding or otherwise denying equal jobs or benefits to a qualified individual of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” 42 U.S.C. §12112(b)(4).

¹⁵ 42 U.S.C. §12102(1)(A)-(C); 29 C.F.R. §1630.2(g)(2). Additional information on the three prongs is available at https://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm

¹⁶ See e.g., *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

¹⁷ 29 C.F.R. §1630.2(j)(1)(ii).

¹⁸ *Id.* at §1630.2(j)(3)(iii).

¹⁹ See e.g., *Jakubowski v. Christ Hosp.*, No 1:08-CV-00141, 2009 WL 2407766 at 7 (S.D. Ohio Aug 3, 2009).

to convince courts if there was any evidence that communication was possible to some extent—i.e., enough to work. As an example, one court described an employee’s communication as “inappropriate, ineffective, or unsuccessful” but not substantially limited.²⁰

The regulations issued following the 2008 ADA amendments listed exemplary activities that are considered major life activities; both “interacting with others” and “communicating” are included.²¹ The regulations also address the substantially limited component of the disability definition and clarify Congressional intent that it be “considered broadly in favor of expansive coverage.”²² Although the issue of whether an individual’s communication differences are substantially limiting will continue to be determined on a case by case basis, the regulations are clear that the court must interpret this broadly.

Who is a *Qualified Individual with a Disability*?

Employers covered under Title I are prohibited from discriminating against a qualified individual in employment related decisions.²³ The first requirement in the qualified analysis is whether the person meets the necessary qualification standards for the position desired or the job currently held. These are things such as specific education, training, job experience, skills or licenses, and in some cases the ability to work under pressure, as part of a team, and meet health or safety requirements. These required qualifications must be nondiscriminatory – meaning that they are job-related and consistent with business necessity.²⁴ If an individual cannot meet some or all of the requirements because of disability, it is the employer’s duty to show that they are job-related and consistent with business necessity. If the employer cannot demonstrate that the requirement is legitimate, the employer cannot use the requirement to take any adverse action against the applicant or employee. An individual with ASD must also meet the qualification standards that are job-related and consistent with business necessity.

If the individual meets the qualification standards, the next step in determining if the individual is qualified will depend on the ability of the person to perform the essential functions of the job with or without reasonable accommodations.²⁵

²⁰ *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 203 (2nd Cir. 2004).

²¹ 42 U.S.C. §12120(2)(A).; 29 C.F.R. §1630.2(i)(1)(i). Courts have given this EEOC clarification deference and recognize “interacting with others” as a major life activity. See e.g., *Jacobs v. N.C. Administrative Offices of the Courts, et al.*, 780 F.3d 562 (4th Cir. 2015).

²² 29 C.F.R. §1630.2(j)(1)(i).

²³ 42 U.S.C. §12112(a).

²⁴ 42 U.S.C. §12113(a).

²⁵ 29 C.F.R. §1630.2(m).

Identifying *Essential Functions*

Essential functions are those tasks that are central to a particular job and removing them would fundamentally change the job. Although other tasks may be listed as job duties on a job application, if the employer does not consider those as important or necessary to support the primary functions of the job, they are often referred to as marginal functions.²⁶ Determining the essential functions of a particular position is an individualized determination. Two positions may have the same job title but actually require an employee to do very different tasks. However, Title I regulations clarify that “the inquiry into essential functions is not intended to second guess an employer’s business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards.”²⁷ The EEOC Technical Assistance Manual reiterates that an “employer can hold employees with disabilities to the same standards of production/performance as other similarly situated employees without disabilities for performing essential job functions.”²⁸

Prior to the ADA amendments, some courts found that even if an applicant or employee with ASD met the definition of an individual with a “disability” for purposes of Title I, he or she was not qualified because an essential function of almost all jobs is an ability to get along with others.²⁹ The stigma attached to the different ways some individuals with ASD interact with others can be perceived as the “inability to get along with others” and result in an employer’s determination that the individual is unqualified. In addition, some jobs require employees to work collaboratively as part of a team – i.e., an essential function of the position may be the ability to work as part of a team. This may be challenging for some individuals with ASD and, in some cases, may prevent an individual from being qualified for the position. Finally, the ability to handle stress without upsetting work colleagues was another “essential function” a court identified in most every employment setting.³⁰

The analysis of whether an individual is qualified for a particular job does not end with a legitimate job description outlining the essential functions and determining whether the person can do those tasks. A written job description that includes required tasks will be strong evidence of the essential functions. Nonetheless, under ADA Title I the determination as to

²⁶EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, at II (2.3) and IV (4.4), (1992), <https://www.eeoc.gov/laws/guidance/title-i-technical-assistance-manual> [hereinafter TAM] and <https://www.eeoc.gov/publications/ada-your-responsibilities-employer>. Although as noted on the website, sections of the guidance changed with the 2008 amendments; however, the specific guidance on essential functions has not changed.

²⁷ 29 C.F.R. pt. 1630 app.1630.2(n) (2007).

²⁸ See TAM, *supra* note 26, at VII (7.7).

²⁹ See Hensel, W. *People with Autism Spectrum Disorder in the Workplace: An expanding Legal Frontier*. 52 Harv. C.R.-C.L. Law Rev. 73 at 82.

³⁰ See *Calef v. Gillette Co.*, 322 F.3d 1419, 1424 (11th Cir. 1998). NOTE: the plaintiff in this case had Attention Deficit Hyperactivity Disorder (ADHD) not ASD.

whether a person is qualified will depend on whether he or she can perform the essential functions of the job with or without reasonable accommodation.

The Duty to Provide *Reasonable Accommodation*

A reasonable accommodation is any change in the work environment, or the way things are customarily done, that enables an applicant or employee with a disability to enjoy equal employment opportunities.³¹ Employees with disabilities have a right to reasonable accommodation in all employment related matters. Therefore, it is discrimination under Title I if a covered employer refuses to provide a reasonable accommodation that allows an individual with a disability to meet a qualification standard that is job-related and consistent with business necessity or to perform the essential functions of the position unless doing so results in undue hardship for the employer.³²

The EEOC describes three categories of reasonable accommodations:

(i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.³³

The EEOC enforcement guidance provides a justification for the reason behind the employer's duty to provide reasonable accommodation as follows:

The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities. Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs

³¹ 29 C.F.R. §1630.2(o)(1)(2).

³² 42 U.S.C. 12112(b)(5)(A); 29 C.F.R. §1630.10, 1630.15(b) and (c). The ADA Amendments Act of 2008 states that individuals who are covered only under the "regarded as" definition of "disability" would not be entitled to reasonable accommodation.

³³ EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, (rev. Oct. 17, 2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html>

which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed). Reasonable accommodation removes workplace barriers for individuals with disabilities.³⁴

Because only “reasonable” accommodation is required under Title I, some accommodations—even if they would allow an individual the ability to work in a particular job—are not required under the ADA. An “unreasonable” accommodation under the law is one that causes undue hardship for the employer. Undue hardship can be such things as removing an essential function of a particular job or causing significant difficulty or expense given the size of the employer.³⁵ An employer cannot require an individual with disability to perform a job in the same way those without disability would do the job unless doing so would cause the employer undue hardship. However, before that determination can be made, reasonable accommodations must be considered.

There is not a specific time that an applicant or employee must ask for a reasonable accommodation. An employee is allowed to ask even after being told of performance problems although the EEOC guidance states “ideally, employees will request reasonable accommodation before performance problems arise, or at least before they become too serious.”³⁶ The agency acknowledges that employees are not always aware or willing to ask for accommodation until the employer informs the employee that there is a performance problem. Nonetheless, the timing does have potential consequences for the employee. Although the employer must always consider a request for accommodation, if disciplinary action for a performance related issue has occurred before the employer is aware of the need for accommodation, the disciplinary sanctions do not have to be withdrawn. Sanctions can include a poor work evaluation, unpaid leave, or even termination.³⁷

Individuals with ASD, like all individuals with disabilities, may need accommodations to be able to perform essential functions of the job they want or have. There is no finite list of accommodations that are considered reasonable; therefore, each situation has to be independently evaluated. In some jobs, working independently in a private space with little or no interaction with other staff, could be accommodations to the customary work environment that would not cause undue hardship. However, those same accommodations may not be possible in another position that requires primarily teamwork and continual adjustment in tasks and timelines. In that job, the accommodations would not be reasonable because they would cause undue hardship and therefore not required under the ADA.

³⁴ *Id.*

³⁵ 42 U.S.C. §12112(b)(5)(A).

³⁶ *Id.*

³⁷ *Id.*

One of the obligations of an employer under Title I is that when an applicant or employee requests assistance with an employment related issue or specifically asks for an accommodation, the employer must engage in an “interactive dialogue” with the employee to explore the issues and possible accommodations.³⁸ If the employer is not willing to do so, courts have found the employer in violation of the ADA when taking adverse action against the employee—for example, refusing to hire an individual or firing the employee for failing to meet performance or conduct standards.³⁹

Direct Threat Defense to Hiring or Continued Employment

An employer does not have to hire—or continue to employ—an individual with a disability if the individual 1) does not have the necessary pre-requisites for the job in question; 2) cannot perform the essential functions of the job with or without reasonable accommodations, or 3) if the individual is a direct threat. The direct threat defense under Title I includes both direct threat to oneself (the individual with a disability) and direct threat to others in the workplace.

Direct threat to oneself as a defense to employment was not universally accepted as a legitimate reason for an employer to exclude an individual with disability from the workplace when the ADA became law. The concern from advocates was that it was based on society’s paternalistic belief that individuals with disabilities needed protection and were not always capable of making wise decisions on their own behalf. However, employers argued that even an individual with disability who could meet the job requirements was not qualified if their disability would be exacerbated based on legitimate medical information. Employers considered these individuals a direct threat to themselves, and because of business necessity, they were not in fact qualified for the job. The United States Supreme Court agreed that ADA Title I allowed an employer to successfully argue that if an applicant or employee’s preexisting disability would be exacerbated in the workplace, and was therefore a direct threat to him/herself (based on bona fide medical and/or scientific evidence), the individual was not qualified based on business necessity.⁴⁰

Although an employer might apply the “direct threat to oneself” defense to individuals with ASD in certain circumstances, individuals with this impairment are more likely to be considered unqualified based on the “direct threat to others” defense. The EEOC issued guidance that addresses this defense as applied to persons with intellectual disabilities in the workplace that is relevant for some individuals with ASD.⁴¹ The guidance references the federal regulation

³⁸ Examples of different types of reasonable accommodations can be found in, EEOC, [Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act](#), (rev. Oct. 17, 2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html>

³⁹ See e.g., *Humphrey v. Memorial Hosp Ass’n*, 239 F.3d. 1128 (9th Cir. 2001).

⁴⁰ *Chevron Inc. v. Echazabal*, 536 U.S. 837 (1984).

⁴¹ Questions & Answers about Persons with Intellectual Disabilities in the Workplace and the ADA at Q 15.

defining direct threat as “a significant risk of substantial harm to the individual or others that cannot be eliminated or reduced through reasonable accommodation.”⁴² In addition to providing several specific workplace examples, the EEOC clarifies that determining whether an individual presents a direct threat must be based on objective and factual evidence. The harm that is considered a “threat” must be serious, it must be likely to occur, not remote or speculative, and reasonable accommodation to address the concerns must be considered.⁴³

A case from 2009 illustrates the direct threat to others defense. In the decision the court agreed that a medical resident with Asperger’s syndrome was an unqualified resident because of his communication issues. The court held that “the very nature of the medical profession requires solid communication skills with patients; fundamental problems with such communication make likely the potential of harm to the health or safety of others.”⁴⁴ The case was upheld on appeal to the Sixth Circuit.⁴⁵

Prohibited Conduct in the Workplace and Discipline

Although the ADA protects individuals with ASD from discrimination on the basis of disability in many cases, the ADA does not protect individuals who violate an employer’s code of conduct even if the misconduct is a result of the disability. If the employee’s misconduct is not covered by the code of conduct or policies, the employer can still enforce conduct rules that,

are not found in workplace policies, employee handbooks, or similar documents so long as they are: (1) *job-related and consistent with business necessity*, and (2) applied consistently to all employees and not just to a person with a disability. Many times, the proscribed conduct is well understood by both the employer and employees as being unacceptable without being formally written, such as a prohibition on insubordination.⁴⁶

The EEOC clarified that whether the *job-related and consistent with business necessity* standard is met will depend on multiple factors. First, some behaviors are never acceptable in the workplace – e.g., stealing, violence or destruction of property. Other behaviors may be disruptive but do not clearly violate workplace conduct rules. Regarding these behaviors, the EEOC provides factors that may help determine whether the behavior is acceptable or not. The agency lists the following for consideration, 1) whether a manifestation or symptom of a

https://www.eeoc.gov/laws/types/intellectual_disabilities.cfm (hereafter (Q&A)

⁴² 29 C.F.R. §1630.2(r).

⁴³ *Supra* at 41 Q&A at Q 15.

⁴⁴ *Jakubowski v. Christ Hosp., Inc.*, 2009 U.S. Dist. (S.D. Ohio) LEXIS 66847.

⁴⁵ *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195 (6th Cir. 2010), *cert. denied* 564 U.S. 1039 (2011).

⁴⁶ EEOC [The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities](https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities) (hereafter [Conduct Standards](https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities)) at <https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities>

disability is affecting an employee’s conduct; 2) the frequency of occurrences; 3) the nature of the job; 4) the specific conduct at issue, and 5) the working environment.⁴⁷

Finally, the EEOC states that employers may “prohibit insubordination towards supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers.”⁴⁸ Employers may also prohibit inappropriate behavior between coworkers (*e.g.*, employees may not yell, curse, shove, or make obscene gestures at each other at work).⁴⁹ The EEOC guidance related to discipline of employees for violations of behavioral expectations provides numerous examples to illustrate the legal standards.⁵⁰

Additional Issues

Two additional ADA issues relevant to applicants and/or employees with ASD are mentioned here with suggested resources for more information. The first is an employer’s use of medical examinations to determine if an individual is qualified for a position. When the ADA was originally debated in Congress, concern was expressed that medical examinations, including psychological examinations, were being used to screen out individuals with disabilities from future or continued employment. Whether the examinations were intentionally used to screen out individuals with disabilities or simply had that effect, Congress set clear limitations on their use. The use of medical or psychological exams to identify and screen out individuals with ASD is a violation of ADA. For more information on this issue, see Revisiting Disability-Related-Inquiries and Medical Examinations Under Title I of the ADA.⁵¹

Second, the ADA protects individuals from retaliation, interference or harassment in the workplace. Individuals with ASD are increasingly making these types of complaints to address discriminatory actions by employers. Retaliation, interference and harassment against individuals with ASD can all be barriers to initial or continued employment. They are violations of the rights of individuals with disabilities under ADA Title I. For more information on this issue, see Protection from Retaliation and Interference in Employment under the ADA Title I.⁵²

⁴⁷ *Id.* at III.B Conduct Standards at Q 9.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Revisiting Disability-Related-Inquiries and Medical Examinations Under Title I of the ADA
<https://adata.org/publication/revisiting-disability-related-inquiries>

⁵² Protection from Retaliation and Interference in Employment Under the ADA Title I
https://adata.org/legal_brief/legal-brief-protection-retaliation

Equal Employment Opportunity Commission (EEOC) Guidance

The EEOC is responsible for enforcing employment rights under numerous federal nondiscrimination statutes including the ADA. As stated earlier, the EEOC regulations implementing the ADA were updated after the amendments made to the original statute in 2008. In agency has also issued guidance for employers on their duties and responsibilities to ensure that applicants and employees with intellectual disability are protected from discrimination in the workplace. The guidance, Questions & Answers about People with Intellectual Disability in the Workplace and the ADA,⁵³ includes examples of numerous accommodations, some of which may be applicable for individuals with ASD. These include accommodations to the application process and to the performance of job tasks, including the use of a job coach. The guidance addresses the duty of the employer to initiate a conversation around the need for accommodation if it becomes obvious that one may be necessary regardless of whether the employee specifically requests one. It also discusses safety issues and the direct threat defense to employing an individual with disability.

The Q&A document reviews the various terms that are often used interchangeably or together within the broader term intellectual/developmental disability (IDD). ASD is generally considered an impairment that falls under the developmental disabilities umbrella. However, individuals with cognitive impairment as a component of ASD, would also be considered persons with an intellectual disability. Each accommodation under the ADA must be individually determined and therefore the examples given in this EEOC document can be useful for both those with intellectual disability and those with ASD with or without intellectual disability.

Other EEOC documents referenced earlier in this paper are also valuable resources for employment related issues for individuals with ASD. The following have been updated where appropriate to reflect the ADA amendments made in 2008:

- Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, (rev. Oct. 17, 2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html>
- The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, available at <https://www.eeoc.gov/facts/performance-conduct.html>

⁵³ https://www.eeoc.gov/laws/types/intellectual_disabilities.cfm

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- A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, at II (2.3) and IV (4.4), (1992), available at www.adainformation.org/Employment.aspx

In addition to investigating complaints and developing various guidance documents for employers, the EEOC periodically issues “informal discussion letters” in response to a request for specific guidance. One published in 2014 addressed potential ADA issues “connected with a program being created by two firms specializing in education, assessments and job training for individuals”⁵⁴ with ASD. The EEOC discussed ADA employment related implications for this stand-alone, segregated vocational program including issues regarding confidentiality and disclosure, assisting an individual with interviewing, and the duty to provide reasonable accommodations. Although the informal guidance provided was specific to a segregated employment program, it has relevance for individuals applying for competitive employment.⁵⁵

The EEOC Settlements and Court Case Summaries

If an individual with ASD believes their rights under Title I of the ADA have been denied, the first step should be to engage directly with the employer and attempt to resolve the issue(s). If that effort is not satisfactory, the individual can file a federal complaint. The individual cannot file a Title I complaint initially to the federal courts, but first must file with the EEOC. Generally, the agency will attempt to settle complaints through mediation between the employee and employer. If both parties do not agree to mediate or the issue is not resolved, the EEOC will investigate to determine if there is “reasonable cause” to believe discrimination has occurred. If so, the agency attempts to resolve the issue with the employer. If that is also unsuccessful, the EEOC may file a court action. If the agency decides not to file a court action, it will issue “a right to sue” letter which allows the employee 90 days to file a court action.⁵⁶

The EEOC Integrated Mission System (IMS) dataset includes all allegations to the EEOC made by individuals with disabilities from July 27, 1992 (the date the ADA took effect). Only allegations that have been closed by the EEOC are included in the dataset; closed either “With Merit” or “Without Merit.” The National EEOC ADA Research Project based at the Virginia Commonwealth University has conducted numerous studies investigating EEOC complaints from individuals with various impairments.⁵⁷ One study published in 2008 analyzed the number

⁵⁴ See ADA: Confidentiality; Pre-Offer Inquiries; Reasonable Accommodation at <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-282>

⁵⁵ *Id.*

⁵⁶ EEOC [Resources on Disability Discrimination](https://www.eeoc.gov/laws/types/disability.cfm) at <https://www.eeoc.gov/laws/types/disability.cfm>

⁵⁷ Van Wieren, T.A. *Workplace discrimination and autism spectrum disorders: The National EEOC Americans with*

of complaints filed by individuals with ASD from 1992-2003 and found only 98 out of a total 328,738 complaints or 0.03% of the total number of complaints in the IMS dataset.⁵⁸ This is an extremely low number as the authors note in their publication which also includes a discussion of possible reasons to explain that number.⁵⁹ These explanations are reviewed in the final section of this document.

Although the National EEOC ADA Research Project published several studies regarding complainants with ASD through 2012,⁶⁰ the dataset does not include most of the activity since the 2008 ADA amendments. As mentioned earlier, those amendments clarified that ASD is almost always a disability for purposes of ADA protection which may have increased the numbers of individuals with ASD claiming discrimination under the ADA after 2008. Because the ADA Research Project has not published a current study that includes complaints from individuals with ASD, the existing reports may have limited value in understanding the current EEOC employment complaint activity for individuals with ASD.

Another source that documents the EEOC complaint activity is the EEOC national website which posts summaries of complaints that have been resolved or filed in federal court resulting in a settlement or judicial decision following trial.⁶¹ This website was reviewed for complaints involving individuals with ASD and/or related disabilities and, as reported by the ADA Research Project, there are not many. The EEOC complaints from individuals with ASD since 2000 that resulted in either resolution or litigation are summarized below. Several complaints that identify the plaintiff as having intellectual, developmental or cognitive impairment, not specifically ASD, are also included because a job coach as a reasonable accommodation was addressed. Some individuals with ASD will require such an accommodation to be successful as illustrated below.

EEOC v. Northwest Petroleum, LP and Burger King Franchisee Travis County Investments, LP, (No.18-cv-703-PRW) (W.D. Oklahoma, August 21, 2019)

A Burger King franchise offered a job as a dining room and bathroom attendant to an applicant with intellectual disabilities after an interview attended by a representative from Community Access Inc. which provides services to individuals with intellectual or developmental disabilities in Oklahoma. When the Community Access support person asked that a job coach provide onsite support to the individual (at no cost to the employer), the offer of employment was withdrawn. The individual filed a complaint with EEOC but when no settlement was reached with the franchise, the EEOC filed a lawsuit in federal court arguing that failing to hire an individual based on the disability or the need for a reasonable accommodation—such as a job

Disabilities Act Research Project. Work 31 (2008) 299-308.

⁵⁸ *Id.* at 302.

⁵⁹ *Id.* at 305-07.

⁶⁰ Van Wieren, T.A. *Autism spectrum disorders and intellectual disabilities: A comparison of ADA Title I workplace discrimination allegations. Journal of Vocational Rehabilitation* 36 (2012) 159-169.

⁶¹ <https://www.eeoc.gov/statistics/americans-disabilities-act-1990-ada-charges>; <https://eeoc.gov/newsroom>

coach—was discrimination under ADA. Burger King agreed to pay the applicant \$30,000 and implement ADA training for all employees.

EEOC v. Goodwill Industries of New York & New Jersey, (No.1:19-CV-01674) (E.D. New York, March 25, 2019)

An employee with cognitive impairments had difficulties understanding the rules and expectations while participating in a Goodwill Industries janitorial program for individuals with disabilities. When he requested additional training or job coaching to improve his performance, he was instead given written warnings which he was unable to read or understand and was eventually fired. The EEOC sued Goodwill Industries of New York and New Jersey on behalf of the employee after initial attempts to reach a settlement failed. The complaint charged Goodwill Industries of discriminating on the basis of disability by failing to provide a reasonable accommodation that would allow the individual to perform the essential functions of the job without resulting in undue hardship. Such accommodations in this case could have been job coaching, additional training, and/or modifications to the employer’s standard operating procedures. In addition, the EEOC stated that Goodwill Industries was required to engage in an interactive process to determine if there is a way to accommodate the individual. The case was settled a few months after the court filing and Goodwill agreed to pay \$65,000 in back pay to the former employee and institute new procedures in the janitorial program to ensure that others receive the supports that they need to continue their employment.

EEOC v. Party City, Corp., (No. 1:18-cv-838) (D. New Hampshire, September 19, 2018)

An individual with autism applied to Party City for a sales associate job requiring skills and qualifications that he had. However, when the hiring manager learned that the applicant required a job coach, he informed the applicant that past experiences with a job coach had not gone well and the individual was not offered the job. When the applicant complained to the EEOC and no settlement was reached with the company, the EEOC sued Party City for a violation of ADA Title I. The federal district court in New Hampshire ruled that a job coach can be a reasonable accommodation in employment and in favor of the individual with autism. A settlement was reached including an award of \$155,000, changes to Party City’s reasonable accommodation policy, training of staff on the new policy, and reports to EEOC on all denials of employment to applicants requiring a job coach.

EEOC v. Jax, LLC d/b/a Golden Corral, (No. 3:17-cv-535) (W. D. North Carolina, July 13, 2018)

The EEOC sued Jax, LLC, which operates the Golden Corral Restaurant, on behalf of an employee with ASD who argued that he was subject to a hostile work environment based on his disability.⁶² Although the employee filed an internal complaint, the company did not

⁶² In addition to suing on the basis of disability under ADA, the EEOC also sued on the basis of sex under Title VII.

investigate, the harassment did not stop, and the employee ultimately resigned. An investigation by the EEOC found that the employee, who had limitations in communication and interaction with others, was repeatedly called “retard” and “stupid” by the assistant manager of the restaurant. After failing to resolve the issue, the EEOC filed a federal court complaint. The employer settled and agreed to pay the employee \$85,000 and implement training of all managers and employees.

EEOC v. PJ Utah LLC, PJ Cheese, Inc., PJ United, Inc., (No. 2:14-cv-695-BCW) (D. Utah, September 29, 2014)

A complaint was filed with the EEOC that a Papa John’s Pizza store had fired an employee with Down syndrome after an operating partner visiting the store observed the employee working with a job coach. After an investigation, the EEOC found that Papa John’s Pizza had violated the ADA by failing to provide reasonable accommodations, which includes the assistance of a job coach if necessary, to an employee with an intellectual disability. When the attempt to resolve the issue through pre-litigation settlement failed, the EEOC filed a complaint with the district court of Utah. The case was ultimately settled, and Papa John’s Pizza agreed to pay the employee \$125,000, review its equal employment opportunity policies, conduct training for management and human resources employees in restaurants in Utah, and establish a new recruitment program for individuals with disabilities.

EEOC v. Randstad US, LP (CA-1:11-cv-01303-WDQ) (D. Maryland, May 10, 2012)

Randstad US is a national employment referral and placement company. The company refused to hire an applicant for a lab technician position because of his Asperger’s syndrome. Initially, the applicant had been “fast tracked through the application process” but once he disclosed his ASD, he was told the position was “on hold” and he was not hired although the company continued to recruit for the job. The EEOC attempted to reach an agreement with the company after receiving a complaint from the applicant but when that was unsuccessful, filed in federal court. The consent decree that resulted required that Randstad pay the applicant \$60,000 as well as take several remedial steps to comply with the ADA.

EEOC v. Tarsadia Hotels dba Comfort Suites (10-CV-1921-DMS-BGS) (S.D. California, September 16, 2010)

Comfort Suites refused to provide a requested reasonable accommodation to a front desk clerk with ASD. He had a good work history in a similar job with a different employer but requested the assistance of a job coach to learn his new responsibilities with Comfort Suites. Following the denial of the job coach request, he was disciplined and eventually fired from the job. The individual then filed a complaint with the EEOC. The EEOC investigated and failing to reach an agreement with the company, filed suit in federal district court. Comfort Suites agreed to settle the case and paid \$125,000 to the front desk clerk, \$7,500 to a supported employment vendor that supports individuals with disabilities in employment settings, and implemented multiple internal changes including staff training regarding ADA compliance.

EEOC v. CEC Entertainment, Inc., 2000 U.S. Dist. LEXIS 13934, (W. D. Wisconsin, March 14, 2000)

A Chuck E. Cheese restaurant hired an individual with intellectual disability and Autism as a janitor. The employee was nonverbal and used picture cards to communicate and had a job coach who worked with him on task completion. When the district manager learned that a janitor with intellectual disability and Autism had been hired, the employee was fired as it “was the ... policy not to hire ‘those kinds of people.’” After failing to resolve the issue, the EEOC filed a federal district court case. The jury awarded the employee \$70,000 in compensatory damages and \$13 million in punitive damages (reduced in accordance with the ADA’s statutory damages cap of \$300,000).

Best Practice Considerations

Many individuals with ASD entering the workforce will have the necessary education and skills to be productive employees. However, some individuals will also demonstrate social, communication, and/or behavioral differences that do not meet the expectations of employers. Whether individuals with ASD get the job they want, or keep the job they have, may depend on whether employers recognize and address unconscious or conscious bias against individuals who act differently. To help eliminate barriers for individuals with ASD in the workplace, the following suggestions are offered for consideration.

Legal and Advocacy Education for Individuals with ASD

One explanation for both the low employment rate for individuals with ASD and the low number of individuals with ASD filing complaints with the EEOC may be that they are not aware of their rights including the administrative complaint process under the ADA Title I. Primary and secondary public education recognizes the need to educate students on the basic rights and responsibilities of adults in this country as well as prepare them for higher education and employment. However, schools have not been as focused on ensuring that students with disabilities also understand their rights and responsibilities in adulthood. While all students need to know their Constitutional rights, students with disabilities, and arguably all students, also need to understand rights to nondiscrimination on the basis of disability. There is a role for the public schools, in particular the secondary transition programs, to educate individuals with ASD on their rights under the ADA, the complaint processes available, and how to advocate for themselves when they leave secondary school.

Supported Employment and Vocational Rehabilitation Services

Supported employment programs serve individuals with disabilities who require more support in getting and keeping jobs than other individuals with disabilities who are served by the traditional federal/state funded vocational rehabilitation programs. Federal funding was first appropriated in 1986 in an amendment to the Rehabilitation Act that authorized funding to

states for supported employment.⁶³ The *Developmental Disabilities and Bill of Rights Act* defines the purpose of supported employment as follows:

(30) SUPPORTED EMPLOYMENT SERVICES—The term “supported employment services” means services that enable individuals with developmental disabilities to perform competitive work in integrated work settings, in the case of individuals with developmental disabilities—

(A) (i) for whom competitive employment has not traditionally occurred; or

(ii) for whom competitive employment has been interrupted or intermittent as a result of significant disabilities; and

(B) who, because of the nature and severity of their disabilities, need intensive supported employment services or extended services in order to perform such work.⁶⁴

The supported employment focus is on placement of adults with disabilities in inclusive work settings rather than the more traditional workshop or enclave models. These models, which still exist, provide separate work opportunities for groups of individuals with disabilities that often pay less than minimum wage. Supported employment services help individuals find jobs in competitive employment in the community with or above minimum wage. In addition, individuals in supported employment programs receive ongoing support by a job coach or other support staff as needed.

The job coach role varies depending on the needs and desires of the specific client but typically includes identifying job interests, identifying possible jobs, helping develop interview skills, matching a job to an individual, and working with a potential or actual employer and the work environment broadly. For some individuals with ASD, this will include identifying and implementing positive behavioral supports so that the individual can be successful in the workplace. The job coach can be invaluable in helping an individual understand the expectations regarding social and behavioral skills that may present challenges in the workplace. The EEOC and the courts have been clear that a job coach can be considered a reasonable accommodation. That general rule can be rebutted if the employer can show that a job coach creates undue hardship or presents a direct threat, but otherwise, an employer will have difficulty preventing a job coach from accompanying an employee on the job.

In their role as advocates for their clients, supported employment and state vocational rehabilitation staff should have adequate training on the ADA rights of individuals with disabilities and the responsibilities of employers. This includes knowledge of the appropriate supports available for individuals with ASD in employment and the importance of job matching.

⁶³ For details see <https://www.federalregister.gov/documents/2016/08/19/2016-15980/state-vocational-rehabilitation-services-program-state-supported-employment-services-program>

⁶⁴ Developmental Disabilities Assistance and Bill of Rights Act of 2000 §102(30); 45 C.F.R. §1325.3.

They also need to be aware of any concerning attitudes of employees in the workplace so that any identified bias can be addressed early.

Workforce Training on ADA and Autism Spectrum Disorder

Just as many businesses now routinely receive training on gender and race discrimination, management and staff should also receive training on disability discrimination and the ADA on a regular basis. Like gender and race discrimination training, a discussion of prejudice and unconscious bias towards individuals with disabilities can help nondisabled individuals begin to understand systemic discrimination on the basis of disability. The social science research has shown better decision-making with input from, and involvement of, diverse individuals.⁶⁵ Learning about this research may help employers understand the potential improvements in outcomes when people with disability, including those with ASD, are part of the workforce.

Vocational rehabilitation agencies or supported employment vendors working with some individuals with ASD may need to consider an assessment of the culture and climate of any potential workplace. If disability nondiscrimination training has not occurred recently at a workplace, it may be important to arrange something in advance of any hire of a person with disability so that all employees are aware of the rights of individuals with disabilities and before potential concerns arise. If the new employee is a person with ASD, specific training on aspects of that disability may be important. In many settlement agreements between the EEOC and businesses, ADA training has been identified as a reasonable accommodation.

Interviewing Skills and Disclosure Pros and Cons

Interviewing for a job is stressful and for some individuals with ASD full of potential barriers to an employer's further consideration. Some individuals with disabilities choose not to disclose that they have a disability until after they receive a job offer or the employer directly asks if he/she needs a reasonable accommodation. Individuals do not legally have to disclose unless they request a reasonable accommodation and it is understandable that individuals would rather not identify themselves due to societal discrimination. However, if an employer is unaware that the person being interviewed has a disability – specifically ASD – he or she may make erroneous assumptions about the person and/or simply screen out the individual because they are acting differently. There is no right answer to whether to disclose early or not; but the low employment rate of individuals with ASD suggests that some may not make it through an initial in-person interview due to social skill differences. It has been suggested that disclosure up front can help explain unusual communication skills, potential employment gaps, or otherwise questionable work history that may raise hiring concerns.⁶⁶ Once an employer is informed, the applicant may be more likely to get a genuine consideration of whether he or she

⁶⁵ See Carle, S. *Acting Differently: How Science on the Social Brain Can Inform Antidiscrimination Law* 73 U. Miami L. Rev. 655 (Spring 2019) citing Surowiecki, J. *The Wisdom of Crowds* (2004); Berns, G. *Iconoclast: A Neuroscientist Reveals How to Think Differently* (2008).

⁶⁶ See Hensel, W. *People with Autism Spectrum Disorder in the Workplace: An Expanding Legal Frontier*. *52 Harv. C.R.-C.L. L.R.* 73 (winter 2017) at 13.

is qualified for the job. The issue of disclosure is also relevant to an employee with ASD when it is clear that the job is at risk, but the employee has not requested a reasonable accommodation.

Reasonable Accommodations

An employer covered under Title I of the ADA is required to provide reasonable accommodation to a qualified applicant or employee with disability if the accommodation is necessary to provide an equal employment opportunity. The employer is not obligated to provide an accommodation if it causes undue hardship or the individual is a direct threat. For individuals with ASD who require an accommodation, the determination of what accommodation is necessary to allow the individual to either access the application process, complete the interview or perform the essential functions of the job, must be individually determined. There is no finite list of “acceptable” accommodations for individuals with disabilities of any kind.

An individual with disability should ideally start the conversation with an employer about the need for an accommodation, including suggestions about what accommodations would be useful. However, this is not always required.⁶⁷ Courts have held employers liable for taking adverse action against an employee with a disability when it was obvious the individual was struggling and therefore, the employer “reasonably should have known” that he/she had a disability even though the employee had not requested an accommodation. ADA requires an interactive dialogue between applicant/employee and some individuals with ASD may want the vocational rehabilitation counselor or supported employment job coach to be part of this dialogue.

Numerous research studies on addressing the needs of some individuals with ASD have identified modifications to the environment that can help minimize barriers to communication and social interactions. Although not a finite list, these things have included addressing sensory overload by making small changes in the environment with headphones, providing different lighting or allowing an individual to work in a private space, or having access to a private area when needed. For some individuals, working from home for part or all of a day or having a flex work schedule to address difficulty in commuting during peak hours can eliminate distractions that prevent focus and concentration.

Vocational rehabilitation professionals have developed tips for successful interviews for individuals with ASD that may be useful for high school transition staff when working on pre-

⁶⁷ Not all individuals with ASD accept interventions concerning their social, communication or behavioral styles. Their argument is that they do not want to change or be changed; instead, society should adjust to individuals with these differences and modify expectations.

employment skills as students exit from public education.⁶⁸ Special education researchers have been utilizing positive behavioral supports for many years with children with ASD and there is data that indicates the success in using these interventions to address social, behavioral and communication barriers during the transition services provided and the supported employment process.⁶⁹

Although the ADA mandates that employment decisions be based on the ability of an individual with disability to perform the essential functions of a job, with or without reasonable accommodation, the decision is often made on the basis of disability instead. In an attempt to minimize this bias, the law requires that employers justify their decisions at multiple stages of the employment process. First, essential functions of the job must be job-related and consistent with business necessity, and employment practices including application processes cannot screen out individuals based on impairment (or disability). Second, employers must engage in an interactive dialogue to determine if a reasonable accommodation exists that would allow the applicant or employee to perform the essential functions. If so, the accommodation must be provided unless it creates an undue hardship for the employer. Finally, the defense to hiring an otherwise qualified individual – direct threat – must be a current, legitimate threat that cannot be eliminated by reasonable accommodation. However, the power imbalance between a job applicant or an employee and the employer may require that the individual with ASD have support from either a supported job coach, vocational counselor, or legal advocate to ensure that any employment decision is made on the basis of job qualifications not disability.

⁶⁸ Whetzel, M. *Interviewing tips for applicants with autism spectrum disorder (ASD)*. Journal of Vocational Rehabilitation, vol. 40, no.2, pp. 155-159 (2014).

⁶⁹ George, A. *Reducing interfering behaviors for adults with Autism Spectrum Disorders* (2019). ProQuest Dissertations. University of Washington Libraries.

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