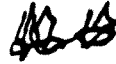



M E M O R A N D U M

TO: Deans, Directors and Department Heads

FROM: Dana Hiatt, Director 
Office of Equal Opportunity

William Liley, Jr., Director 
Human Resource Services

DATE: January 20, 1993

SUBJECT: ADA Requirements for Employment Interviews

Brian Snow recently circulated the enclosed memorandum to all General Faculty Members. The issues presented in Mr. Snow's memorandum are relevant to all members of the University Community who have responsibility for interviewing prospective employees of any type, including all student and non-student hourly staff. You are asked to share the enclosed memorandum with all members of your staff who have interviewing responsibilities.

Questions concerning the ADA may be addressed to the Office of Equal Opportunity or to Jean Wightman of the Human Resource Services Department.

xc: Administrative Officers
Department Secretaries

Enclosure

MEMORANDUM

TO: General Faculty
FROM: Brian A. Snow *Brian Snow*
General Counsel
DATE: November 24, 1992
RE: Americans With Disabilities Act - Employment Interviews

Congress passed the Americans with Disabilities Act (the "ADA" or "Act") on July 26, 1990. The ADA provides for equal opportunity for individuals with disabilities in five major areas: employment, public accommodations, state and local government services, transportation, and telecommunications. The protections provided are similar to those provided by other civil rights legislation in the areas of race, color, national origin, sex and religion.

The ADA's stated purpose is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." The provisions are broad and for the most part require the University as a public employer to accommodate individuals with disabilities so long as such an accommodation does not cause an undue burden or a fundamental alteration of the service provided.

As an employer the University may not discriminate against a qualified individual with a disability because of the disability of such individual with respect to job application procedures, hiring, advancement, or discharge, compensation, job training, and other terms, conditions, and privileges of employment. Faculty members and administrators in positions that require hiring responsibilities, need to be aware of the scope of the ADA requirements.

Who Is Disabled?

The regulations implementing the ADA describe three criteria to be used to determine if an applicant or employee is covered by the Act. A person is disabled if he or she:

•has a physical or mental condition that substantially impairs a "major life activity," such as walking, breathing, seeing, or the ability to work;

•has a history of such an impairment, such as mental illness;

or

•is regarded by others as having such an impairment (i.e., someone with facial scars or discolorations, even if he or she has no disabling condition).

Workers or applicants who pose a direct threat to their own or others' health or safety are not protected by the rules. Also, alcoholics and drug abusers are not considered disabled. However, past alcoholism and drug abuse are categorized as disabilities under the law.

What Is "Reasonable Accommodation?"

The Equal Employment Opportunity Commission ("EEOC") defines accommodation as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy employment opportunities." Examples would include job restructuring; part-time or modified work schedules; provision of readers or interpreters; acquisition or modification of equipment; assignment of marginal tasks to other workers; and reassignment of workers to vacant positions. Accommodation may also include making existing facilities accessible, specifically rest rooms.

Points To Remember When Interviewing

•An interviewer cannot question applicants about the existence, nature, or severity of a disability. An interviewer can ask applicants to demonstrate or describe how they would perform job functions, with or without accommodations.

•An interviewer cannot require applicants to disclose potentially disabling impairments on an application, nor ask disabled candidates how often they would need leave time because of their condition. However, an interviewer can state any attendance requirements and ask whether applicants can meet them.

•An interviewer can ask applicants if they need reasonable accommodations to take pre-employment tests, and may request verification of accommodations that are needed.

•An interviewer can ask applicants to self-identify disabilities to comply with Section 503 of the Rehabilitation Act.

•A potential employer cannot ask about an applicant's past workers' compensation claims.

•Pre-employment medical exams are restricted under the rules. The University can require a post-offer physical before an employee starts working--making the job contingent upon the results--only if all entering employees in the same job category have to take the exam. The results must be kept confidential and maintained separately in a medical records file. If a disability is identified, the employer may only rescind the job offer if the disability cannot be accommodated and relates to the performance of essential job functions. Departments wishing to require pre-employment physicals should consult with either the Director of the Human Resource Services Department or the Director of the Office of Equal Opportunity before initiating such a requirement.

•Health insurance and other benefits for disabled employees must be equal to the benefits of other similarly situated employees without disabilities. An employer cannot refuse to hire a disabled person because it would increase costs.

A copy of a checklist published July 8, 1992 in Labor Law Reports that may be helpful when interviewing job applicants is attached to this memorandum for your use.

Enforcement

The general enforcement mechanisms allow for private parties to bring lawsuits in order to stop discrimination. The result of such a lawsuit may result in requiring the University to provide an auxiliary aid or service, modify its policies, practices, or procedures or make facilities readily available to individuals with disabilities. In such suits no monetary damages will be available although reasonable attorney's fees may be awarded. Individuals may also file a complaint with the U.S. Attorney General who may, in order to satisfy the public interest, award monetary damages or assess civil penalties against the offending entity.

As with all civil rights laws, it is the responsibility of all University supervisors and employment personnel to understand and comply with the requirements of the ADA. Specific questions may be directed to the Office of Equal Opportunity.

Attachment

BAS:jh

Checklist

INTERVIEWING JOB APPLICANTS UNDER THE ADA

1. Are there any functions of the job the applicant is not presently able to safely perform? YES NO

a. If so, is this an essential function of the job? YES NO

b. Am I sure it is an essential function based particularly on the fact that employees in the position are actually required to perform the function in question? YES NO

c. Would removing the function fundamentally alter the position? YES NO

d. Describe the essential function(s) that the applicant is not able to perform.

2. Why have I determined that the applicant is unable to perform the essential function(s) of the job?

a. Is there a significant risk or high probability of substantial harm to the applicant or to others if the individual performs the particular functions of the job in question? YES NO

b. In determining whether there is a significant risk or high probability of substantial harm to the applicant or to others, have I considered:

• the duration of the risk? YES NO

• the nature and severity of the potential harm? YES NO

• the likelihood that the potential harm will occur? YES NO

• the imminence of the potential harm? YES NO

c. What is the objective evidence of this substantial harm, whether from the applicant or the opinions of medical doctors, rehabilitation counselors, physical therapists, or others? (Describe)

d. If the applicant has a mental or emotional disability, what specific behavior on the part of the individual would pose a direct

threat to the health and/or safety of himself/herself or others? (Describe)

e. Are there any other reasons that are job-related and consistent with business necessity as to why the applicant cannot perform the essential function(s) of the job? (Describe)

3. Have I discussed with the applicant why his/her problem would limit his/her ability to perform the essential function(s) of the job; or create a high probability of substantial harm to himself/herself or to others? YES NO

4. Have I:

a. analyzed the particular job involved to determine its purpose and essential function(s)? YES NO

b. consulted and discussed with the individual the precise job-related limitations; and how those limitations could be overcome with a reasonable accommodation? YES NO

c. consulted with the individual to identify potential accommodations and assess the effectiveness each would have in enabling the applicant to perform the essential function(s)? YES NO

d. considered the preferences of the individual to be accommodated; and selected and implemented the accommodation most appropriate both for the individual and the company? YES NO

5. What accommodations did the applicant suggest? (Describe)

6. What accommodations did I explore with the applicant? (Describe)

7. Have I considered technical assistance in helping to determine how to accommodate the particular individual, such as from the EEOC, rehabilitation agencies, or disability organizations? YES NO

8. Would these accommodations impose an undue hardship? YES NO

a. In what way would the accommodation be disruptive or alter the nature or operation of the business? (Describe)

b. How much would the accommodation cost?

c. Why would this cost constitute an undue hardship as compared to the employer's budget, either at the facility or the company? (Discuss)

d. If the accommodation is unduly costly, have I determined that all applicable tax credits and agency services or funding have been exhausted; and the applicant has been given an opportunity to pay or provide that portion of the accommodation that is unduly costly? YES NO

9. Have I reviewed whether there is in fact an impairment that rises to the level of disability by substantially limiting one or more of the applicant's major life activities;

or whether there may be a temporary, non-chronic impairment of short duration, which are usually not considered a disability? YES NO

10. If I am relying on a DOT physical requirement or some other federal regulatory requirement, am I sure the federal mandate actually requires the action? YES NO

SOURCE: James W. Wimberly, Jr., Wimberly & Lawson, P.C., (404) 365-0900.