

Americans with Disabilities Act: Protection for People Diagnosed with Chronic Hepatitis B or C

BY SEAN GUILLEMETTE

Slamming the car door behind him he slouched into the seat and glared at the glass door to the office marked "Dentist." It was the second dentist in a week who refused to treat him, but this time he was referred to someone who 'specializes' in treating people with hepatitis C (HCV). This situation is not uncommon, but it is unlawful.

According to the 1991- 92 U.S. Bureau of the Census statistics, nearly 49 million, or close to 20 percent of the American population suffers from some sort of physical or mental disability.

While not every person with a disability qualifies for its protection, the Americans with Disabilities Act of 1990 (ADA) was designed to protect the millions of people whose disabilities constitute a major impairment to one or more of their major life functions from discrimination in employment, public services, transportation, and other areas.

This protection can extend to sufferers of chronic hepatitis B (HBV) or hepatitis C, but the ADA is enforced on a case- by- case basis. So it is important to understand the three ways the ADA defines a disability and what kind of discrimination it can protect you from.

"The courts have not said 'XYZ disorders' are disabilities; you have to take a look and see how it affects individuals," says Mark Rothstein, Distinguished Professor of Law at the University of Houston and member of the national board of the American Liver Foundation. It is in individual cases that the ADA applies its three definitions of disability.

According to the ADA text, the first definition of disability is, "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."

Last year the Supreme Court determined that mitigating measures must be taken into consideration when determining whether an individual is substantially limited in a major life activity. This means that asymptomatic HCV sufferers would not be considered as having an impairment that is limiting a major life activity; however, if that same patient decided to undergo combination or monotherapy treatment for the disease and suffered side effects so debilitating as to limit one or more major life activities, they would then be covered.

"There are many kinds of treatments that incapacitate people and that's part of their disability, the treatments," says Rothstein.

The idea of a major life activity is another term defined on a case- by-case basis as it applies to the individual. However, prior cases have argued that reproduction, mobility, and working, for example, are major life activities for particular individuals.

The second definition of disability under the ADA is if you have a past record of an impairment that severely limits one or more major life activities, whether or not you still suffer from it. An individual can be using some sort of mitigating measure, such as medication, that controls their disability, but if before this measure they have a record of a substantial limitation in performing a major life activity, then they will meet the ADA's definition of disability.

The third way the ADA considers disability for purposes of protection is when someone is regarded as

having a disability, whether they do or not. So the ADA would likely protect someone who was denied a job because their spouse has HCV, and it was suspected they did as well.

The Americans with Disabilities Act provides several areas of protection for those it defines as disabled, but the two areas of most importance for sufferers of HBV and HCV are Title I and Title III, employment and the equal use of public services operated by private entities, respectively.

Title I

According to the Department of Justice, "the ADA prohibits discrimination in all employment practices," which includes wages, benefits, application procedures, job assignments, promotions, etc. Therefore, an employer cannot fire an individual after learning they have HBV or HCV, nor can they refuse to hire someone because of it.

In addition to this protection, the ADA requires employers with 15 or more employees to provide reasonable accommodations for disabled employees who request them, as long as they do not cause undue hardship.

Once again, reasonable accommodations and undue hardship are decided on a case-by-case basis so that a company is not required to pay outrageous costs or disrupt its operations to provide accommodations, Rothstein says.

Some generally accepted reasonable accommodations include allowing a flexible schedule for doctor's appointments, providing additional unpaid leave, or job restructuring. But it is important to remember that a small company would likely be required to do less than a larger company.

If you require a reasonable accommodation, the Equal Employment Opportunities Commission (EEOC) has some tips to follow. First, start an informal, plain English dialogue with your supervisor requesting an accommodation. Then discuss what your needs are. If your disability is not obvious, the employer has the right to request medical documentation, and they are required to keep this documentation confidential. Your employer is not required to follow any specific requests you make; they can opt for something else.

If you are not pleased with your job accommodation, revisit it with your employer. Your employer is required to keep a continual commitment to the process. If you still are not pleased, consider EEOC-backed mediation (see below).

Title I protection is not without provisions. There are obligations to meet by the employee as well as the employer. Primarily, a disabled employee must be able to perform the core duties that define a job position with or without reasonable accommodations.

In short, an employee must be qualified for the position, because an employer is "still allowed to require that all of their employees meet certain standards," Rotherstein says.

Another exception to Title I protection is the ability of an employer to establish qualification standards that exclude individuals who may be a significant risk to the health or safety of themselves or others.

This risk must be assessed on current medical fact and not on fear or ignorance. This would likely affect HBV and HCV sufferers very little as the viruses are transmitted through infected blood or sexual contact, providing a negligible possibility of transmission in the workplace. A teacher, for example, could not be fired for having HBV, as there is very little chance of exchanging body fluids with his students.

If you feel you are the victim of this type of discrimination while on the job or during the hiring process, you are encouraged to discuss with the employer that the ADA requires of them. If this does not solve the problem, then the employee has the option to file a claim with the EEOC within 180 days of when the discrimination occurred. (See below)

The EEOC will investigate the claim and either correct the situation or issue a right-to-sue letter. This will give the employee the ability to sue directly for back pay, benefits, compensatory and punitive damages.

Title III

According to the Department of Justice, Title III of the ADA protects individuals with disabilities from discrimination by any, "private entity that owns, operates, leases, or leases to a place of public accommodation." Places of public accommodation can include grocery stores, museums, theaters, restaurants, hotels, and any other place of public gathering. Places run by religious organizations and private clubs are not included.

Discrimination under Title III is defined as the failure to give an individual with a disability the equal opportunity to use or enjoy a public accommodation's services, facilities, or goods.

Examples of this type of discrimination include a dentist refusing to work on HCV patients, any business limiting specific hours solely for HCV patients to use their facilities, or being refused service at a restaurant.

Additionally, public accommodations are obligated to provide the same treatment to the disabled as those free of disabilities, even if it requires extra expense to provide it. A business charging a markup to individuals or a group of individuals to cover the costs of providing nondiscriminatory service is not allowed.

If you are the victim of Title III discrimination, you have the option to file a complaint to the Department of Justice (see below). Be sure to send your complete name, address, and the name of the party discriminated against. Include the name of the organization that you believe discriminated and a detailed description of what took place. Don't forget to include any copies (no originals) of helpful documentation as well.

The Department of Justice will evaluate your claim and inform you of what they will do. If the case is appropriate, they may elect to attempt a settlement or sue outright. Either way they are not acting as your representatives. They are representatives of the government. However, you do have the option of filing your own lawsuit in the U.S. District Court.

As in Title I, there are similar exceptions to the discrimination protections Title III grants. Public accommodations are only required to provide the goods or services that are in their area of expertise. A dentist can deny treatment that is out of the scope of dentistry, but he cannot deny someone dental work. Referring the HCV patient to a different dentist solely because he has HCV is discrimination and in violation of the ADA.

In addition, public accommodations can refuse services or goods to individuals they feel pose a significant risk to the health or safety of themselves or others. As in Title I this is unlikely to affect HBV and HCV patients, as this determination must be based on current fact and not stereotypes or fears.

Conclusion

Ultimately the ADA provides protection for only those who seek it. Its benefactors are also its enforcers. "An employer cannot be accused of discrimination if the employer did not know that the individual had a disability, and if the individual did not request any accommodation. So it's up to the individual," say Rothstein.

Helpful Contact Information

ADA Information Line
800-514-0301 (voice)
800-514-0383 (TDD)

Disability Rights Section
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20035-6738
www.usdoj.gov

Equal Employment Opportunity Commission
www.eeoc.gov

Questions:

800-669-4000 (voice)

800-669-6820 (TDD)

Documents:

800-669-3362 (voice)

800-800-3302 (TDD)

Mediation – Why it's a good Idea

- conducted by a trained, neutral third party
- saves the EEOC money by preventing a full investigation
- completely confidential
- an attorney is not required
- no cost to either party
- the agreement is enforceable in court
- the claim is still investigated if the mediation falls through
- high satisfaction rate

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