

# Representation in Mediation

Professor Leslie Salzman  
Romanian-American University  
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# What does disability mean to you?

- Why is disability discrimination different?

- Balancing Competing Interests

# Americans with Disabilities Act: 1990, 2008

## Sec. 12101: Purpose

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards
- (3) Federal role in enforcing standards;

## Sec. 12112. Discrimination in Employment

- (a) General rule. **No covered entity** shall discriminate against a **qualified individual** on the basis of 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.

# Employer

- **“Employer” 15 or more employees for each working day in each of 20 or more calendar weeks in current or previous year, and any agent of such person,**

## Sec. 12102. Definition of Disability

- "Disability" = a physical or mental impairment that substantially limits one or more major life activities of such individual;

# Major Life Activities

- (A) Major life activities *include, but are not limited to*, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- (B) Major bodily functions. A major life activity also includes the operation of a major bodily function.



## Definition: (8) Qualified individual

- An individual who, **with or without reasonable accommodation**, can perform the essential functions of the employment position.
- Can consider employer's judgment about essential job functions,... written job descriptions shall be evidence of essential job functions.

# “Reasonable accommodation” may include

- (A) making facilities accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- The Interactive Process

## Sec. 12103(1) Auxiliary aids and services includes:

- (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- (C) acquisition or modification of special equipment or devices; and
- (D) other similar services and actions.

# (10) Undue hardship means an action requiring significant difficulty or expense

- Factors to be considered.
- (i) type and cost of the accommodation needed;
- (ii) the overall financial resources of the particular facility involved-- number of employees; effect on expenses and resources, or other impact on the operation of the facility;
- (iii) the overall size and financial resources of the larger covered entity;
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the particular facility to the larger covered entity.

“Discriminate against a qualified individual on the basis of disability” includes

- not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless employer can demonstrate that accommodation would impose an **undue hardship** on the operation of the business of such covered entity; or
- denying employment opportunities to an otherwise eligible job applicant or employee, if such denial is based on the need to make reasonable accommodation to the physical or mental impairments of the employee or applicant; or
- Disability-related harassment.

# Relief

- Restore Status Quo:
  - Reinstatement
  - Back Pay- **Must Show Mitigation**
  - Incidental Damages
  - Emotional Distress, Punitive Damages- Amount based on # of employees
  
- All is taxable, unless physical injury

# ROMANIAN Ordinance On Preventing and Punishing All Forms of Discrimination

- **Chapter I – Principles and Definitions**
- **Art. 1 - (1)** In Romania, as a democratic and social state governed by the rule of law, human dignity, citizens' rights and freedoms, free development of human personality represent supreme values and shall be guaranteed.



(2) The principle of equality among citizens, the elimination of all privilege and discrimination shall be guaranteed, with regard to the exercise of the following rights:

- a) the right to equal treatment before courts and any other jurisdictional bodies;
- b) the right to personal security and to be granted state protection against violence and mistreatment perpetrated by any individual, group or institution;
- c) political rights, namely electoral rights, the right to take part in public life and the right to access to public positions;
- d) other civil rights specified;

e) economic, social and cultural rights, in particular:

- Including:
- the right to work, to choose freely one's occupation, to fair and satisfactory working conditions, to protection against unemployment, to equal pay for equal work, to fair and satisfactory wages;

# Covered Entities

- (3) Any natural or legal entity shall be under the obligation to comply with the principles of equality and non-discrimination.

- Art. 2 - (1) 'Discrimination' shall encompass any difference, exclusion, restriction or preference based on race, nationality, ethnic appurtenance, language, religion, social status, beliefs, sex or sexual orientation, **appurtenance to a disfavoured category or any other criterion**, aiming to or resulting in a **restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms** in the political, economic, social and cultural field or in any other fields of public life.
- (2) Any **active or passive behaviour** that generates effects liable to favour or disadvantage, in an unjustified manner, a person, a group of persons or a community...

## 'Disfavoured category'

- Art. 4.- ...the category of persons that is either placed in a position of inequality as opposed to the majority of citizens due to their social origin or to a handicap or is faced with rejection and marginalisation due to specific circumstances, such as a chronic non-infectious disease, HIV infection or the status of refugee or asylum-seeker.

The elimination of all forms of discrimination shall be achieved by means of:

- a) affirmative action in favour of persons and groups of persons belonging to national minorities, of the communities of national minorities, when they do not enjoy equal opportunities;
- b) sanctions instituted against the discriminatory behaviour...

## Defenses:

- -Employer is not required to hire unqualified person under general standards of the profession:
  - as long as the refusal does not constitute an act of discrimination under the ordinance herein.

# Sanctions

- Art. 21 - (1) Damages proportionate to the prejudice and return to status quo or annulment of discriminatory situation;
- (2) Damages are not subject to judicial taxes.
- (3) Government can withdraw the licence of legal entities that engage in discriminatory acts that significantly prejudice the society, or that commit repeated violations that have caused minor prejudice to society.
- Art. 22 - (1) Human rights non-governmental organisations can appear in court as parties in cases involving discriminations;



# Fines

- 1 million lei to 10 million lei if the discrimination affects a natural person;
- 2 million lei to 20 million lei, if the discrimination affects a group of persons

# UN Convention on the Rights of Persons with Disabilities; Adopted 2006; Into Force: 2008

- Recognizes Human Rights of PWD
  - 164 ratifications- Romania ratified January 2011.
- Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination.
- **Article 27 - Work and employment**
- 1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.

# Gathering Information/ Interviewing: Joint Attorney Client Task

- Objectives?

# Objectives:

- Develop Rapport
- Gather Information
  - Give client opportunity to tell story
  - Identify and understand client's interests, needs and objectives/goals
    - Including less tangible interests: reputation, relationship, feelings
  - Work with client to understand other party's interests, needs and goals;
- Demonstrate Professional Competence

# Structure

- Intro/Glad to meet you
- Client's Definition of the Problem: What brings you here today?
- Client Narrative: Tell me all about it. (Ice breaking & problem description).
- Preparatory Explanation: Time, Role Expectations, Road Map, Confidentiality
- Client's Description of Relief/Desired Outcome: How would you like to see this turn out? Means of achieving desired outcome; Legal and non-legal concerns
- Attorney Follow-Up- Let me ask some questions. T-Funnel
- Concluding Summaries/Next Steps

# Question

- You haven't had much experience interviewing have you?

# Questions

- Open ended:
  - Can you tell us what brings you here?
  - Please tell us why you decided to get divorced?
  - Who?, What?, Where?, When?, How?, Why?
- Narrow/Closed/Leading:
  - Did Mary's schoolwork decline after the separation?
  - Mary's schoolwork declined after separation?
  - Mary's still getting C's in her schoolwork?
  - You weren't able to focus on Mary's schoolwork after the separation were you?

Try to ask me about what I've eaten today?

- Open to closed—continuum.



# More on Questions:

- Clearinghouse Questions:
- So before we move on to another topic, is there anything else we haven't covered regarding the impact of your separation on Mary's school? performance?

Active or Reflective listening: Reflect, but don't parrot, the content, feelings or underlying interests of the speaker's statement.

- Dad: "Ever since the separation, I've been completely unable to concentrate at my job. He hasn't said anything yet, but I can tell that my boss has totally lost patience with me!"
- Identify: Content, Feelings and Interests

- Content: “So your separation has really been affecting your performance at work.”
- Feelings: “So this whole thing, the separation and all, has been pretty stressful for you.”
- Interests: “It sound as if you’re also worried about job security/keeping your job?”

# Summarizing Questions

- So, to summarize, you are here to discuss a, b and c?

## Productive Reframing: Prep for Negotiation/Mediation Remove “Sting” but Preserve Essential Meaning

- Dad: “I’m not going to accept any agreement that gives me less time with the kids than her!”
- Mom: “How can I trust anything he says?” For two years, he’s been a complete deadbeat about his child support obligations!
- Positively re-frame.

# Reframing

- Reframe Dad's from position to an interest: "So maintaining a strong and healthy relationship with your kids, on terms that are fair and equitable, is very important to you?"
- Reframe Mom's from past and individual focus to future and shared focus: "So any agreement we reach here has to include mechanisms to ensure that everyone meets their obligations?"

# Our Problem: Employment Discrimination by Public Hospital

- Mr. DeAngelo: 35-years old; legally blind since birth.
- Impaired vision even with corrective lenses.
- Unable to drive an automobile.
- In order to read, he must wear his eyeglasses and use a magnifying device.
- Works in IT department—administers IT network

# Discrimination

- Disability-related harassment and fail to take corrective action after his complaints of harassment;
- Refusing to assign him complex work under job title so as to adversely affect his opportunities and status at work;
- Failing to provide reasonable accommodations;
- Failing to allow him to telecommute on a part-time schedule, like non-disabled co-workers; and
- Terminating his employment in response to his request for accommodations.
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# Employer's Defenses

- DeAngelo could not perform the essential functions of his job as IT network administrator;
- Offensive conduct by the other employees did not rise to the level of harassment;
- Requested accommodations would have caused undue hardship;
- Even if had unlawfully discriminated against Mr. DeAngelo, don't owe any \$ because he failed to mitigate his damages.