

FROM THE DESK OF Bobby Donelson, President



APWU

Southwest Coastal Area Local
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TO: **Grievance File**

DATE: **April 2009**

- | | |
|--|--|
| <input checked="" type="checkbox"/> Your information | <input type="checkbox"/> Acknowledge and reply |
| <input type="checkbox"/> Take action | <input type="checkbox"/> Comment |
| <input type="checkbox"/> Your files | <input type="checkbox"/> Revise |
| <input type="checkbox"/> Approve | <input type="checkbox"/> Call me |
| <input type="checkbox"/> What is status? | <input type="checkbox"/> As per your request |
| <input type="checkbox"/> Please advise | <input type="checkbox"/> Investigate and recommend |
| <input type="checkbox"/> Please return | <input type="checkbox"/> Sign |
| <input type="checkbox"/> Do you have files | <input type="checkbox"/> Other |

USPS and their National Reassessment Program changes failed to apply the ELM 546 Provisions and Article 13 of the Contract in regards to working employees.

Employees working full time had work eliminated or reduced without any justification.

USPS failed to apply the provisions of the National Rehabilitation Act.

USPS actions were Discriminatory to injured workers.

USPS actions were arbitrary and capricious.

USPS failed to address their efforts (there was not one) to locate work.

The USPS did not share their list of necessary work.

The USPS failed to define: biomechanical restrictions or limitations.

The USPS changed a long time past practice of working limited duty workers.



December 24, 2008

MANAGERS, HUMAN RESOURCES (AREA)
MANAGERS, HUMAN RESOURCES (DISTRICT)
MANAGERS, REMOTE ENCODING CENTERS
MANAGER, CORPORATE PERSONNEL MANAGEMENT

SUBJECT: Changes to the Rehabilitation Act

Effective January 1, 2009, the definition of an individual with a "disability" as defined under both the Rehabilitation Act and the Americans with Disabilities Act (ADA) will be significantly expanded. This is due to the passage of the ADA Amendments Act (ADAAA) that sets new standards for determining disability status. Managers, supervisors and the Reasonable Accommodation Committees (RACs) need to be aware of the extent of the changes in the ADAAA so they can assess requests for reasonable accommodation in accordance with these new standards.

Although the Equal Employment Opportunity Commission (EEOC) will issue regulations implementing these new provisions, the regulations will not be published by January 1. Nonetheless, employers must still comply with the law. Consequently, we are providing you with the attached synopsis of the changes in the law so that you are fully informed about the new standards and for use as a guide in making reasonable accommodation decisions.

As a part of the reasonable accommodation process, RACs first evaluate through an interactive process whether applicants or employees are persons with covered disabilities. When a RAC finds that an individual does not have a covered disability, the RAC advises the manager of its recommendation. The manager is required to decide whether he/she agrees with the RAC's findings. The manager then advises the person of his/her decision.

With the ADAAA, more individuals will have covered disabilities and the RAC will need to engage them in the interactive process that includes determination of essential functions, identifying abilities and limitations, and determining reasonableness of accommodations.

Although there is nothing in the statute or its legislative history which indicates that the ADAAA is retroactive, an individual who is currently before the RAC and ultimately files an Equal Employment Opportunity (EEO) complaint will almost certainly have his or her EEO claim heard after the ADAAA goes into effect. Therefore, cases now pending before the RACs should be evaluated under the new standards, as should any request for reasonable accommodation that arises from now on. If a RAC is unsure whether a person has a covered disability, the RAC should contact the appropriate field law office to obtain guidance in determining the person's status.

Please share this information with your RAC and others who are involved in the Reasonable Accommodation process.

Mangala P. Gandhi
Manager
Selection, Evaluation, and Recognition

Synopsis of Changes to Rehabilitation Act by ADA Amendments Act (ADAAA)

Broad Coverage Intended: A New Definition for a 'Substantially Limiting' Impairment

The primary purpose of the amended law was to broaden the universe of individuals who qualify as disabled under the Act. The Act states, for example, that it aims to eliminate disability discrimination by "reinstating a broad scope of protection to be available under the ADA." To carry out this intention, the Act specifically overturned long-standing case law defining a substantial limitation as one that "prevents or severely restricts" performance of a major life activity. That standard, says Congress, was "too high." Instead, the term 'substantially limits' must be interpreted consistently with the broad remedial purpose of the Act and the focus should now be on whether employers have complied with their obligations under the law.

Notably, the Act does not define exactly what "substantially limits" means. Rather, that responsibility falls upon the EEOC who is charged with rewriting the ADA regulations to define that term "to provide a broad scope of protection." Consequently, in view of the Act's clear mandate, we can expect that the inquiry whether a disability exists will be far simpler and less involved than in the past. Indeed, Congress states that the inquiry "should not demand extensive analysis."

The Act also institutes a number of other significant changes that provide guidance in how employers are to assess a disability. These changes are discussed below.

Major Life Activities

The Act now defines major life activities. They are

Caring for oneself, performing manual tasks, seeing, hearing, eating,
sleeping, walking, standing, lifting, bending, speaking, breathing, learning,
reading, concentrating, thinking, communicating, and working.

The Act specifies that this list is not meant to be exhaustive, thereby opening the door to those who wish to make the case that other activities should be included. Moreover, Congress also included "the operation of a major bodily function" as a major life activity. The Act lists functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Again, this list is nonexhaustive.

Mitigating Measures

In another notable break from the past, the Act forbids consideration of mitigating measures in assessing whether a disability exists. This means employers cannot consider the mitigating effects of medication, hearing aides, cochlear implants, prosthetics, equipment, assistive technology, or "learned behavioral or adoptive neurological modifications." The sole survivor of this sweeping edict is "ordinary eyeglasses" or contact lenses. Employers are still allowed to consider their effect on determining whether an impairment substantially limits a major life activity.

On a practical level, this modification will extend protection to employees suffering from diabetes, hypertension, cancer, amblyopia and other conditions that can be managed through treatment and medication.

Impairments that are Episodic or in Remission

The Act states that "[a]n impairment which is episodic or in remission is a disability if it would substantially limit a major life activity when active."

Like the mitigating measures provision, this too is targeted to bring a potentially large group of individuals within the protection of the law. Under ADAAA, employees with seizure disorders, allergies, bipolar disorder, depression, and other chronic conditions prone to flare-ups can seek accommodation in the workplace.

Regarded as Disabled

In a radical departure from prior law, the Act amends what it means to regard an individual as being disabled. Previously, employees had to show that their employer regarded their impairment as one that substantially limited a major life activity. This often meant that individuals had to show that the employer regarded them as incapable of performing a broad range of jobs, not just the job they held or desired. Under ADAAA, however, an individual can meet the requirements of a "regarded as" claim simply by showing that he or she was subjected to an adverse action prohibited by the Rehabilitation Act because of an actual or perceived impairment. It does not matter whether that impairment actually limits a major life activity or is perceived to limit a major life activity. Consequently, it will be far easier for individuals to assert claims under this prong of the Rehabilitation Act.

However, there are two important qualifiers to this otherwise broad revision. First, regarded as claims cannot be based upon "transitory and minor" impairments. The Act defines a transitory impairment as one with an actual or expected duration of 6 months or less. At the very least, this ensures that employees will not bring claims of discrimination based upon a broken leg or a case of the flu. Second, the Act states that no reasonable accommodation is required for an individual who is regarded as disabled, but who does not actually have a disability. While this may help offset the number of individuals who would otherwise bring such claims, it is unlikely to make a significant dent in those numbers given how broadly the term "disability" is now defined.

Other Notable Statutory Changes

Findings and Purposes: In keeping with the congressional intent that the ADA provide broad protection, the Act strikes key language from the "Findings and purpose" section of the ADA at 42 U.S.C. §12101(a). It amends paragraph (1) which states that "some 43,000,000 Americans have one or more physical or mental disabilities." In its stead, is a general statement condemning disability discrimination and this statement does not reference any numbers of individuals. A more telling change is the wholesale deletion of paragraph (7) which states that "individuals with disabilities are a discrete and insular minority." Given that this is no longer consistent with Congress' view that a disability be broadly construed, it is not surprising that it was eliminated.

Discrimination: 42 U.S.C. §12112(a) sets forth the general rule that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual." That provision will now read: "no covered entity shall discriminate against a qualified individual *on the basis of disability*." A similar change was made to the term "discriminate" in subpart (b) of this same section. This brings the ADA and Rehabilitation Act in line with other civil rights laws to cover discrimination on the basis of the individual's protected status. The goal is to focus attention on the merits of the alleged discriminatory conduct, rather than on the individual's impairment.

Qualification Standards: The Act adds a new section to the "Defenses" provision of 42 U.S.C. §12113, entitled "Qualification Standards and Tests Related to Uncorrected Vision." It provides in pertinent part, that employers can not use qualification standards, employment tests, or other selection criteria "based on an individual's uncorrected vision unless the standards, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity." Essentially, this amendment serves simply to codify established case law.

ELM 546

PACIFIC AREA OFFICE
LABOR RELATIONS



December 12, 2003

MEMORANDUM FOR DISTRICT/SR. PLANT MANAGERS

Subject: Arbitration Award Case No. F901N-4F-C02201183
Reassignment of Limited Duty Employees from Carrier to Clerk Craft

The Pacific Area recently received an arbitration award concerning the permanent reassignment of a Letter Carrier to a Clerk position as a result of her limited duty status.

The Arbitrator concluded that management failed to meet its obligations to adhere to the pecking order for reassignments required by Section 546.142 of the ELM (copy attached). One of the problems in the case was the lack of documentation to support management's position that there was not adequate productive work in the carrier craft to assign the grievant.

As limited duty assignments are reviewed it may at times become necessary to consider reassignment to other crafts, particularly from carrier to clerk. We cannot reassign a full-time employee to a PTF; As such reassignments would be as full-time employee in the gaining craft, at the bottom of the seniority rolls in the gaining craft. Management must document how we are making these decisions as we go through the pecking order. When employees protest these reassignments in addition to grievances, there may be disability accommodation issues that need to be addressed; managers must discuss these issues with the District Reasonable Accommodation Committee for guidance as well.


Once the Union has established that the facts in the case are covered by ELM Section 546, arbitrators have ruled that the burden, then shifts, to management to produce evidence showing that management made a good faith effort to place the grievant at each level of the pecking order above the level which the employee was ultimately placed.

Documentation should consist, of, but is not limited to the following:

- The employees restrictions and time able to perform productive duties in his or her craft vs. time able to perform duties in the other craft.
- Employee complements for each craft in the facility, a list of all job duties and physical requirements.
- The number of limited duty and/or permanent light duty employees assigned to the office, listed by name, restriction and assignments
- Efforts made at each step of the ELM 546 pecking order and why the reassignment could not be made at that Step.
- An explanation of why it is important for the employees to be placed in the appropriate craft designation, such as the ability to adequately assess and meet staffing requirements.

PACIFIC AREA OFFICE
LABOR RELATIONS

If such reassignments are grieved it is crucial that management provide the documentation during the grievance process. Additionally, any Union arguments concerning the adverse impact to the employee should be rebutted. Please contact your labor relations office concerning any questions you have regarding documentation or grievances on this issue.


Gary A. Conely
Manager, Labor Relations

Cc: Executive Board
ALRS (All)
MHR (All)
MLR (All)

PRIORITY FOR ASSIGNMENT OF JOB OFFERS
ELM 546.142

Employee: _____
 SSN: _____

The attached job offer satisfies the attached medical restrictions.
 It has been created after careful analysis of the work available, and following the criteria specified
 in the ELM 546.142 as listed below:

**WHENEVER POSSIBLE, ASSIGN QUALIFIED EMPLOYEES TO LIMITED DUTY IN THEIR
 REGULAR CRAFT, DURING REGULAR TOUR OF DUTY, AND IN THEIR REGULAR WORK
 FACILITY.**

REGULAR CRAFT	REGULAR TOUR	REGULAR FACILITY
WITHIN	WITHIN	WITHIN

If necessary to change any of the elements to meet the employee's physical limitations
 or to provide the employee with suitable work, the elements must be changed in the
 following order:

REGULAR CRAFT	REGULAR TOUR	REGULAR FACILITY
OUTSIDE	within	within
within	OUTSIDE	within
OUTSIDE	OUTSIDE	within
within	within	OUTSIDE
OUTSIDE	OUTSIDE	OUTSIDE