

Board Processes in a Changing World: Navigating through ADA Waters



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Evolution of Protections for the Disabled



Evolution of Protections for the Disabled

- **Rehabilitation Act of 1973**
- **Americans with Disabilities Act (1990)**
- **ADA Amendments Act of 2008**

Americans with Disabilities Act

- **Most comprehensive civil rights law aimed at eliminating discrimination against persons with physical and mental impairments.**
- **Coverage**
 - **Title I: employment, transportation, and telecommunications**
 - **Title II: state and local governments**
 - **Title III: public accommodations**

Disability

An "individual with a disability" is a person who:

- 1. Has a physical or mental impairment that substantially limits a "major life activity," or**
- 2. Has a record of such an impairment, or**
- 3. Is regarded as having such an impairment.**

Definitions and Terms

- Definition and terms are critical
- Key terms
 - “physical or mental impairment”
 - “substantially limits”
 - “major life activity”
- There are some limits
 - For example, substance abuse disorders resulting from current and unlawful use of controlled substances are not impairments under the ADA

ADA Amendments Act of 2008

- **Application of ADA by the courts; disability narrowly interpreted**
- **Intent of Amendments Act**
- **Interpretation of disability more expansive**
- **Basis for disability determination revised**

Professional Licensing

- Regulation as discrimination
- Entry into profession (application)
- Maintaining membership (discipline)
- Title II of ADA
 - “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits, services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”

Qualified Individual with a Disability

- **Key term for regulators**
- **A person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation.**

Navigating the Waters

Evaluating Applicants

- State licensing entities prohibited from imposing eligibility criteria that screens out an individual with a disability unless can be shown as necessary
- Prohibits policies that unnecessarily impose requirements or burdens on individual with disabilities that are not placed on others

Navigating the Waters

Evaluating Applicants

- **Requiring the applicant to disclose diagnosis of, or treatment for, a disability when that information is not being disclosed to explain the applicant's conduct**
- **Consider only an applicant's conduct, not the mental health diagnosis or treatment in evaluating fitness to practice**
- **Review what you ask on the application and the purpose**

Navigating the Waters

Evaluating applicants

- **Further investigation or conditions for admission**
- **Avoid**
 - **Using disability as a basis for determining which applicants need further investigation**
 - **Recommending conditions for admission except when responses to conduct-related questions indicate a history of prohibited conduct**
 - **Individually tailor any conditions of admission to address conduct concerns**

Navigating the Waters Discipline

- Prohibit any hint of stereotyping at all decision junctures in the disciplinary process
- Focus on behavior or activity as applied to the Standard of Care or Practice
- Directly related to the state's interest in protecting the public from a practitioner whose behavior has fallen below an acceptable standard of conduct

Case Points

- Flynn v. State Medical Board of Ohio, 62 N.E.3d 212.(2016)
- Lamberson v. Pennsylvania, 963 F.Supp.2d 400 (2013)
- James v. Nebraska Board of Medicine & Surgery, 2012 U.S. Dist. LEXIS 132772

Flynn v. State Medical Bd. of Ohio

- **Licensed to practice for 20 years**
- **After several incidents of “erratic” behavior the Board indicated that it had reason to believe nurse was impaired due to mental illness**
- **Ordered to submit to a psychiatric examination**

Flynn

- Examination found physician unable to continue practicing safely; cited
 - impaired concentration
 - difficulty multitasking
 - history of giving incorrect orders
- Board Finding: unable to practice “according to acceptable and prevailing standards of care as a result of her mental illness”
 - license placed on probation for three years
 - required to submit to Board-monitored psychiatric treatment

Flynn - Argument on Appeal

- **Board violated the state anti-discrimination law and the ADA**
- **Board could not take action against her for a mental illness**
- **No evidence that the disability posed a danger to the public**
- **Insufficient evidence that she was impaired; the list of incidents prompting the psychiatric evaluation was unreliable.**

Flynn - Decision

- **The ADA does not prevent the discipline of licensees with disabilities**
- **Appellant's mental illness renders her unable to practice medicine according to acceptable and prevailing standards**
- **Flynn did not meet the essential eligibility requirements for practicing medicine in the state and therefore was not qualified for protection under the ADA**

Lamberson

- LPN and RN in Pennsylvania for over fifteen years
- Suffered from substance abuse problems, including opioids
- Beginning in 1997, began receiving methadone maintenance treatment for the opioid addiction
- Complaint filed with BON; employer citing erratic behavior and positive test for benzodiazepines

Lamberson

- Extensive factual history following the nurse's interaction with the BON and approved drug treatment provider
- ADA issue- BON policy requiring impaired nurse to be completely weaned off methadone before reinstatement to practice
- Consent Order; agreed to enter inpatient methadone detox program; failed to comply

Lamberson v. Pennsylvania

- **Hearing; noncompliance with consent order for failure to**
 - (1) enroll in the random drug-screening program;**
 - (2) submit support-group meeting verification; and**
 - (3) enter inpatient methadone detox program**
- **License suspended for three years**
- **Asserted that the BON's policy of excluding nurses who are in a methadone maintenance program from licensing violates the ADA**

Lamberson - Decision

- Drug addiction is included within the meaning of disability where the impairment is not due to the current illegal
- Must show that disability was a determining factor
- Failure to be weaned off of methadone was one of three violations of the Consent Order
- Plaintiff unable to show that it was the BON's methadone policy and not her own inaction that prevented her from regaining the license.

James v. NE Board of Medicine

- Diagnosed as having bipolar disorder and neurocardiac syncope
- Applied for a temporary permit
- Granted a probationary permit but decision labeled as a “disciplinary action”
- Appealed

James v. NE Board of Medicine

- **Application made for full license**
- **Again offered a license on disciplinary probationary basis**
- **Files suit alleging, among other things violations of the ADA, right to due process, and equal protection of the law**

James - Decision

- **Persons with disabilities are generally entitled to protection under the ADA**
- **A person poses significant risks to others will not be qualified if reasonable modifications will not eliminate that risk**
- **The decision that a person poses a threat to others may not be based on generalizations or stereotypes**

James - Decision

- The Board claims James is not a qualified individual under the ADA because she posed a significant risk to others
- The Board failed to make an individual assessment of James to determine what risk she posed or whether reasonable modifications would eliminate the risk

QUESTIONS



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