

REPRESENTING THE CLIENT IN A DISABILITY DISCRIMINATION CASE
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The New Jersey Law Against Discrimination was initially enacted in 1945. It was not, however, until 1972 that the statute was amended to include protection for disabled or handicapped individuals. In 1978, the Court extended this protection to individuals suffering from a mental or psychological disability. The Federal government also enacted protections for disabled citizens when in 1990 Congress enacted the Americans with Disabilities Act (ADA). Both of these statutes protect disabled workers in New Jersey from unlawful discrimination within the workplace. Despite these protections, unfortunately employees with disabilities are too often the subjects of unfair and discriminatory treatment. It certainly costs more for an employer to accommodate an employee with a disability. Fortunately, however, the legislature's actions reflect our society's belief that this is an appropriate and important public policy and disabled citizens have a variety of legal rights, remedies and protections.

Despite these protections, disability discrimination still routinely takes place in the New Jersey workplace. Almost everyone who is let go believes that their company has done something wrong. The challenge for the attorney who is going to take on these types of cases is to distinguish those in which the company has done something wrong under the law. We need to fully investigate the facts, and know all of the potential legal remedies available for the employee. Since disability discrimination takes many different shapes, the New Jersey employee is provided with a variety of statutory protections.

Federal Law

The employee in New Jersey is protected from discrimination based upon a disability under Federal law by the Americans with Disabilities Act. This sweeping legislation was designed to provide a variety of benefits and opportunities to employees with disabilities. A portion of this legislation deals with employee rights within the workplace. The Americans with Disabilities Act protects handicapped employees from discrimination in the workplace. The Americans with Disabilities Act, however, only applies to employers engaged in private industry affecting commerce as specifically defined by statute. More importantly, the ADA only applies to employers with 15 or more employees working at least 20 hours per week. The ADA does not apply to the Federal Government or any wholly owned subsidiaries of the Federal government. The Rehabilitation Act of 1973, 29 U.S.C. § 791, provides protection to employees of the Federal Government. These limitations are important when evaluating a potential client's rights in the workplace. There are many instances, therefore, where an employee may not be able to bring a Federal cause of action, but can pursue a State law discrimination claim.

In addition, the ADA has a much more constrictive definition of a disability. Under Federal law, in order for a plaintiff to be a qualified individual with a disability, that disability must "limit a major life activity to be protected." *Failla v. City of Passaic*, 146 F.3d. 149 (3rd Cir. 1998) This limited definition of a disability creates a situation

where an employee may have a claim under our State's statute, but fails to have a disability that qualifies under the ADA. The federal courts have been very restrictive in their definition of the scope of a disability. There is no requirement under State law to prove that a handicap or disability limits a major life activity.

Many attorneys that represent a New Jersey employee file both State and Federal claims. As with other types of discrimination litigation, it is difficult to understand the wisdom of this. There are times, however, where an ADA claim must be brought. In today's economy, we may be called upon to represent New Jersey residents who are employed outside of the State. Many residents of New Jersey work exclusively in New York for a New York company. We also have New Jersey residents employed in Pennsylvania and even in many other states throughout the country. A disabled employee desiring to pursue a discrimination case may be able to venue his case in our Federal District Court. A New York or Pennsylvania employer, however, will not be subject to our State statutory protections. In the case of a New Jersey resident employed out-of-state, our only cause of action may be filing an ADA case in the Federal District Court. If a complaint is filed in Superior Court setting forth both the State and Federal causes of action, the employer's counsel is almost always going to remove this matter to Federal District Court. There are times when there are tactical advantages to being in Federal Court however; generally, a New Jersey resident is better protected by filing a New Jersey Law Against Discrimination (LAD) claim in our Superior Court. Adding a Federal cause of action does not help the case and will almost always land the plaintiff in federal court.

New Jersey Law Against Discrimination

The New Jersey Law Against Discrimination (LAD) aggressively protects handicapped employees from discrimination in the workplace. This New Jersey statute has a very broad definition of a physical disability. Our Courts have recognized protected disabilities such as, any physical handicap or infirmity caused by bodily injury, birth defects, serious illnesses, visual impairments, hearing impairments, speech impediments, difficulties or limitations in walking or lifting items, and any other objective disability that may result in discrimination in the workplace. Our Courts have even determined being HIV-positive is protected under LAD. Behringer v. Medical Center of Princeton 249 N.J. Super. 597 (Law Div. 1991). Alcoholism may also be recognized as a handicap under LAD. Clowes v. Terminix International, Inc. 190 N.J. 575 (1988). In certain circumstances, medical obesity has been ruled to be a disability under LAD. Gimello v. Agency Rent A Car Systems, Inc. 250 N.J. Super. 338 (App.Div. 1991).

In summary, if an employee has a medical problem or physical disability that is real and objectively proven, they probably will be protected by the statute.

Perhaps most importantly, even employees who may not be truly disabled can be protected under this portion of the statute. It is unlawful for an employer to discriminate against an employee based upon a perception, or perhaps better defined, misperception,

regarding an employee's disability. N.J.A.C. 13:13-1.3 (1); Rogers v. Campbell Foundry Co. 185 N.J. Super. 109 (App. Div. 1982)

These are often the best and most prevalent cases. The typical facts are fairly straightforward. An employee is discharged, demoted or suffers some adverse employment action due to an employers concerns or perceptions about their disability.

For example:

An employee suffers a Heart attack and goes out of work for several weeks on approved leave, and sometime either during or after that leave they are discharged. The cause of action lies in proving that the discharge was related to concerns the employer had about the future health or disabilities of the employee. I have met with many potential clients who where let go after a period of disability leave. The key is determining if there is sufficient evidence to prove that the disability and the termination are related.

This evidence can often be difficult to come by since most sophisticated employers are not likely to create a paper trail or honestly tell an employee why they are being let go. Many times these cases are built entirely on circumstantial evidence. Another way to prove this type of case is by collected data on prior discharges. How many people that were let go in a layoff were recently on disability? Defendants will always resist providing this information on privacy grounds, but in my experience a court will order its production as long as there are proper confidentiality orders in place.

Employees right to take leave

Both Federal and State law may protect an employee who needs to take a period of disability leave. The Federal Family and Medical Leave Act differs from our State Family Leave Act in that it protects the disabled worker who needs leave. Our State statute only protects a worker who needs leave to care for a relative that is ill, but not the disabled employee. It is unlawful to discharge an employee while on approved leave or to discriminate against an employee who takes leave. If the discharge is related to the leave the employee is protected.

There is no absolute protection from being let go while on leave however, and an employee can be discharge while on approved leave if an employer can demonstrate that they would have been let go regardless of their leave. For example if an employee is part of a wider layoff, the fact that they are out on leave may not protect their job. This also applies to an employee who is out on workers compensation leave. An employee is specifically protected from any adverse action taken against them for seeking benefits under the Workers Compensation Act (N.J.S.A. 34: 15-39.1) The key question under any of these statutes is why the client was let go? Can we prove there was discriminatory intent in determining who would be let go? It is also important to review the client's

employee handbook or leave policies to determine what benefits and protections are provided by the company. This type of cases are obviously very factually challenging.

The lawyer representing the potential client who was discharged while on leave may also pursue a cause of action under both the Americans with Disabilities Act, and The New Jersey Law Against Discrimination. Under both statutes the key is demonstrating that our client was let go as a “result of their disability.”

There are real challenges and rewards in handling these types of cases. We are almost always dealing with a client who has lost their source of income and in many cases their self worth. It is very difficult for an individual who has physical or psychological challenges to pick up the pieces and move forward. The lawyer handling their case must not only know the law and the facts but be committed to the client’s case and personal situation.