

# Learning Disabilities in the Workplace: A Guide to ADA Compliance

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## I. INTRODUCTION

*Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability.*<sup>1</sup>

Nearly one in seven Americans has some type of disability.<sup>2</sup> Confronted with an aging population and increasing numbers of people with disabilities, Congress in 1990 passed Title I of the Americans with Disabilities Act<sup>3</sup> (ADA) to ensure equal opportunity, economic independence and full participation for the approximately 43 million Americans with disabilities. The ADA applies to (1) an individual with either a mental or a physical impairment that substantially limits

1. 29 C.F.R. app. § 1630.9 (1995) (Interpretive Guidance on Title I of the Americans with Disabilities Act).

2. Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans with Disabilities*, 43 EMORY L.J. 245, 258 (1994) (reviewing JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993)).

3. 42 U.S.C.A. § 12101(a)(1), (8) (West Supp. 1995). The Rehabilitation Act of 1973 prohibited discrimination by employers receiving federal funds. The ADA protects disabled employees in the private sector. Jamie Satcher, *Improving Quality of Work Life for Persons with Learning Disabilities: ADA Rights and Responsibilities*, 24 J. APPLIED REHABILITATION COUNSELING 16, 16 (1993).

her ability to perform one or more major life activities, (2) an individual with a record of such impairment, or (3) an individual regarded as having such an impairment.<sup>4</sup> Although the ADA covers both mental and physical disabilities, a person confined to a wheelchair typically experiences different forms of discrimination than a person with a learning disability. Employers probably understand that the applicant in a wheelchair will need her desk raised on blocks, handrails in rest rooms, and elevators or ramps to provide access. On the other hand, an employer may have difficulty determining how to accommodate an applicant with a nonobvious disability such as visual-perceptual processing problem.<sup>5</sup>

The ADA's employment provisions provide both employers and disabled persons with an opportunity to build mutually profitable and beneficial partnerships. By working together, employers and disabled employees can be productive and achieve both business and personal goals. The ADA provides learning disabled persons an opportunity to apply their energy and talents in the workforce, and to be productive and successful members of society, while not unduly burdening employers.

This Comment is a guide for both employers and employees in successfully complying with the ADA's provisions, as they relate to persons with learning disabilities. Part II of this paper examines the types of employment discrimination that individuals with learning disabilities encounter in the application, daily work, and promotion processes. Part III provides an overview of the employment discrimination provisions of the ADA and how those provisions apply to people with learning disabilities. To illustrate how different people with learning disabilities fare in the workforce, Part IV includes narratives of two learning disabled people attempting to find equal employment and opportunity. These narratives provide a starting point for developing processes to integrate such people into the workforce. Part V provides an analysis of the problems confronting people with learning disabilities and provides suggestions for successfully integrating people with learning disabilities into the workforce.

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4. 42 U.S.C.A. § 12102(2)(A)-(C) (West Supp. 1995).

5. Paul J. Gerber, *At First Glance: Employment for People with Learning Disabilities at the Beginning of the Americans-with-Disabilities-Act Era*, 15 LEARNING DISABILITY Q. 330, 331 (1992).

## II. EMPLOYMENT DISCRIMINATION AND INDIVIDUALS WITH LEARNING DISABILITIES

Individuals with disabilities are generally disadvantaged educationally, economically, vocationally, and socially.<sup>6</sup> People with disabilities usually obtain less education than those who are not disabled.<sup>7</sup> Although a learning disability is often hidden, individuals so afflicted represent a significant percentage of the United States population. For example, the Orton Dyslexia Society estimates that there are fifteen to twenty million workers with dyslexia.<sup>8</sup> Individuals with learning disabilities often have limited employment opportunities and generally work in unskilled jobs with high turnover, low wages, and diminished social status.<sup>9</sup>

A learning disability is a disorder that selectively interferes with the development, interpretation or demonstration of language or nonlanguage abilities.<sup>10</sup> The condition includes specific deficits in one or more of the following areas:<sup>11</sup>

- oral comprehension
- academic skills
- organization
- coordination
- perception
- expressive language
- sustaining attention
- nonverbal reasoning
- integration
- social judgment

People with learning disabilities may have difficulty with reading, mathematics, accurately receiving and processing visual or auditory

6. 42 U.S.C.A. § 12101(a)(6) (West Supp. 1995).

7. Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second Generation Civil Rights Statute*, 25 HARV. C.R.-C.L. L. REV. 413, 425 (1991) (citing LOUIS HARRIS AND ASSOCIATES, *THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM* 23 (1986)).

8. Diana L. Sauter & Donna McPeck, *Dyslexia in the Workplace: Implications of the Americans with Disabilities Act*, 43 ANNALS OF DYSLEXIA 271, 272 (1993). The Orton Dyslexia Society defines dyslexia as "a disorder that makes it difficult for individuals of average or above average intelligence to read, write, or spell their native language." People with dyslexia may also have difficulties with "math, memory, listening, organizational skills and attention." *Id.*

9. Satcher, *supra* note 3, at 16.

10. LEARNING DISABILITIES ASS'N OF AMERICA, *FOR EMPLOYERS . . . A LOOK AT LEARNING DISABILITIES*.

11. *Id.*

information, or motor coordination.<sup>12</sup> The public often confuses learning disabilities with mental impairments or mental illness, despite the fact that all three conditions are distinct from one another.<sup>13</sup> Typically, individuals with learning disabilities have average or above average intelligence.<sup>14</sup> Because of society's misconceptions about learning disabilities, one of the largest barriers that individuals with learning disabilities face is debunking the myths and discriminatory attitudes held by employers and coworkers.<sup>15</sup>

#### A. *Diagnosis of Learning Disabilities*

One problem facing people with learning disabilities is that they often are unaware of their disability unless they have been diagnosed while in elementary or secondary school.<sup>16</sup> They may assume either that their inability to understand is normal, or that they just are slow. If the person has above average intelligence, he may perform well in both educational and work settings, and his disability will therefore remain undetected. Many learning disabled people develop compensatory mechanisms that enable them to function effectively "until a change occurs in the job structure, such as increasing the pace of work, changing equipment, or altering the managerial style or size of the working group which causes performance problems."<sup>17</sup> When such a change occurs, many learning disabled people elect to work in positions that minimize the disability.<sup>18</sup> As a consequence, many intelligent and competent learning disabled people do not pursue advanced education or high-tech careers.

#### B. *Discrimination*

Another problem facing individuals with learning disabilities is their fear of discrimination by employers and coworkers. As such, they are reluctant to disclose their disabilities—both when seeking employment and after being hired. The fear of disclosure worsens

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12. *Id.*

13. *Id.*

14. *Id.*

15. 29 C.F.R. app. § 1630.2(1) (1995); *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).

16. Sauter & McPeck, *supra* note 8, at 272.

17. *Id.* at 272-73.

18. "For many [adults with learning disabilities], frustrations and failure become a way of life, often with little hope for meaningful change." Neil Sturmoski, *National Adult Literacy and Learning Disabilities Center*, THE L.D. LINK, Spring 1995, at 1.

when the disability is not obvious, and when it is likely that others will misunderstand the effect of the disability on work performance.<sup>19</sup>

Because many learning disabled people function effectively in their educational and work lives, nondisabled persons may be skeptical about the existence of the learning disability. Even if an employee with a learning disability performs effectively in most areas of his job, he may determine that an accommodation would help him perform better. Such an employee may hesitate in disclosing his disability because the "myths, fears and stereotypes" associated with learning disabilities may result in adverse consequences, such as less important project or client assignments, limited opportunities for promotion, and diminished recognition of accomplishments.<sup>20</sup>

Many employers may find learning disabilities perplexing because they are invisible and diverse in nature.<sup>21</sup> In situations where a learning disabled person applies to a company with a human resources department, the human resources staff may not have a thorough understanding of the nature or effects of the disability. Furthermore, they are often unaware of the reasonable accommodations necessary for enabling the employee or applicant to perform effectively.<sup>22</sup> If a company hires the learning disabled applicant, the company's managers may underestimate the employee's abilities, potential, and value.<sup>23</sup> In addition, because many learning disabled persons excel in some tasks and have difficulties in others, employers cannot use a "one-size-fits-all" approach in accommodating the needs of individual employees.

A person with a learning disability often finds that the myths about her disability are as limiting as the disability itself.<sup>24</sup> The public often confuses the term "learning disability" with mental retardation, attention-deficit hyperactivity disorder, and other such disabilities.<sup>25</sup> For example, when a person uses a magnifier to read,

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19. See generally Gerber, *supra* note 5.

20. 29 C.F.R. app. § 1630.2(l) (identifying the following common employer concerns about hiring persons with disabilities: safety, productivity, liability, insurance, attendance, costs of accommodations and accessibility, workers' compensation costs, and acceptance by customers and coworkers). See also Lawrence P. Postol & David D. Kadue, *An Employer's Guide to the ADA: From Job Qualifications to Reasonable Accommodations*, 24 J. MARSHALL L. REV. 693, 709 (emphasizing "The Need for An Individualized, Case-By-Case Approach").

21. Gerber, *supra* note 5, at 330.

22. *Id.* at 331.

23. *Id.*

24. *Arline*, 480 U.S. 273, 284.

25. Gerber, *supra* note 5, at 331. Mental retardation is defined as development at a below-average rate. Persons who are mentally retarded experience difficulty in learning, social adjustment, and economic productivity. HAL LEARY, *BOLD TRACKS* 145 (3d ed. 1994). Persons with ADHD typically are: restless; easily distracted; impulsive; impatient; disorganized; have

or requires all instructions to be written down, many people may view the person as less intelligent and question the person's competence. Most people agree with the basic proposition that everyone deserves a chance, but when a person with a *known* learning disability makes an error, some may view the error as proof that the learning disabled person is unqualified for the position. While on film *Forrest Gump* might be an admirable person and a national hero, some people may not want to work with someone who, like Forrest, may have difficulty with or perform certain functions differently.

### III. THE ADA

#### A. ADA Employment Discrimination Provisions

In enacting the ADA, Congress declared that disability discrimination costs billions of dollars and results in unnecessary dependency and nonproductivity.<sup>26</sup> The "purpose of the ADA 'is to place those with disabilities on an equal footing and not to give them an unfair advantage.'"<sup>27</sup> The ADA, like the Civil Rights Act of 1964, provides equal employment opportunities based on merit.<sup>28</sup> The ADA does not establish quotas, guarantee equal results, or require that disabled individuals be favored over the nondisabled.<sup>29</sup> The ADA differs from the Civil Rights Act of 1964, which prohibits employers from considering certain personal characteristics such as race, sex, or national origin, by requiring employers to evaluate whether reasonable accommodations can be made to remove employment barriers for a disabled applicant or employee.<sup>30</sup> Reasonable accommodations enable a disabled person to obtain equal employment by changing the customary performance of job tasks or modifying the work environ-

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difficulty focusing, concentrating and sustaining attention; have inconsistent work performance; have difficulty finishing tasks once they have been started; have difficulty planning ahead; have short tempers and frequent mood swings, and show chronic pattern of under achievement. Lawrence S. Allen, Ed.D., ATTENTION DEFICIT DISORDER ADVOCACY GROUP, ADDAG NEWSBRIEFS, ADULT ATTENTION DEFICIT DISORDER: A VALID AND TREATABLE CONDITION 2 (Jan. 1995).

26. 42 U.S.C.A. § 12101(a)(9) (West Supp. 1995).

27. Petition of Rubenstein, 637 A.2d 1131, 1137 (Del. 1994) (citing *D'Amico v. New York State Bd. of Law Examiners*, 813 F. Supp. 217, 221 (W.D.N.Y. 1993)).

28. 29 C.F.R. app. § 1630 (Background) (1995).

29. *Id.*

30. *Id.*

ment.<sup>31</sup> The ADA's concept of equal opportunity applies to job tasks, as well as to employment privileges such as training opportunities.<sup>32</sup>

The ADA does not lower the standards or quality of work to be completed by a disabled employee. Addressing this issue, the Equal Employment and Opportunity Commission (EEOC) has clearly stated that:

While the ADA focuses on eradicating barriers, the ADA does not relieve the disabled employee or applicant from the obligation to perform the *essential functions* of the job. To the contrary, the ADA is intended to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled.<sup>33</sup>

In sum, the ADA serves as a legal mechanism to provide disabled Americans with an opportunity to participate equally and independently in society.

#### *B. Definition of a Disability and Persons Covered by the ADA*

The ADA defines a person with a disability as: (1) an individual with either a mental or physical impairment that substantially limits his or her ability to perform one or more major life activities, (2) an individual with a record of such an impairment, or (3) an individual regarded as having such an impairment.<sup>34</sup> An individual need only meet one of these three definitions to be considered disabled and, therefore, to be protected by the ADA.<sup>35</sup>

The term "mental impairment" in the first prong of this test includes a broad range of mental and psychological disorders including mental or emotional illnesses, mental retardation, organic brain syndrome, and specific learning disabilities.<sup>36</sup> The definition of "major life activities" includes the following functions: breathing, walking, speaking, seeing, hearing, learning, completing manual tasks, caring for oneself, and working.<sup>37</sup> The phrase "substantially limits" in the employment setting means that an individual is:

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31. *Id.* § 1630.2(o).

32. Arlene Mayerson, *Title I, Employment Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 499, 516 (1991) (citing S. REP. NO. 116, at 31; H.R. REP. NO. 485, pt. 3, at 29 (1990)).

33. 29 C.F.R. app. § 1630 (Background).

34. 42 U.S.C.A. § 12102(2)(A)-(C) (West Supp. 1995).

35. 29 C.F.R. app. § 1630.2(g) (1995).

36. 29 C.F.R. § 1630.2(h)(2) (1995).

37. 29 C.F.R. § 1630.2(i) (1995).



significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.<sup>38</sup>

To explain the "substantially limits" provision, the EEOC provides two illustrative examples of impairments that are not considered substantial limitations. First, a person who cannot work as a commercial airline pilot due to a minor vision impairment would not be substantially limited because she can work as a commercial airline copilot or a pilot for a courier service.<sup>39</sup> Second, a professional baseball pitcher with a bad elbow would not be considered substantially limited in the major life activity of working.<sup>40</sup> The EEOC explains that both the pilot and baseball player are not substantially limited in their ability to work because they are only unable to perform a narrow range of jobs.<sup>41</sup>

If an individual cannot perform a broad range of jobs in various classes, then he may be substantially limited. For example, an individual with a back injury that prevents him from performing work involving heavy labor could be considered substantially limited because the impairment prevents him from performing a class of jobs.<sup>42</sup>

The EEOC also makes an important distinction between conditions that are impairments and conditions that result from age, personality or physical characteristics, as well as cultural, economic, and environmental disadvantages.<sup>43</sup> The ADA applies to individuals with impairments, not to individuals with other disadvantages.<sup>44</sup> For example, an individual who was never taught to read would not be considered disabled because the lack of education is not an impairment under the ADA.<sup>45</sup> On the other hand, an individual who cannot read due to dyslexia would be covered by the ADA because dyslexia is a learning disability which impairs one's ability to read.<sup>46</sup>

The second definitional prong of the disability test applies to individuals who have a record of an impairment, but who are not

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38. 29 C.F.R. § 1630.2(j)(3) (1995).

39. 29 C.F.R. app. § 1630.2(j).

40. *Id.*

41. *Id.*

42. *Id.*

43. 29 C.F.R. § 1630.2(j) (1995).

44. *Id.*

45. *Id.*

46. *Id.*

impaired.<sup>47</sup> This provision ensures that people are not discriminated against because of a history of disability.<sup>48</sup> For example, a former cancer patient cannot be discriminated against based on his medical history.<sup>49</sup> Likewise, a person misdiagnosed as learning disabled is protected from discrimination due to the misdiagnosis.<sup>50</sup>

The final prong of the test protects individuals who are regarded by others as having a disability.<sup>51</sup> The "regarded as" prong of the test has been interpreted by the United States Supreme Court in *School Board of Nassau County v. Arline*<sup>52</sup> as a means of protecting individuals from the "myths, fears and stereotypes" of disabilities which are "as handicapping as are the physical limitations that flow from actual impairment."<sup>53</sup> Common fears, myths, and stereotypes about disabilities include concerns about attendance, productivity, liability, safety, insurance, costs of accommodation, access, and workers compensation, as well as coworker and customer acceptance.<sup>54</sup> The ADA protects individuals regarded as having a disability by providing legal recourse when adverse employment decisions stem solely from an employer's discriminatory attitudes.<sup>55</sup> For example, if a person can show that an employer made an adverse employment decision based on stereotypes, fears, or myths about a disability, then that individual will be considered disabled under the ADA.<sup>56</sup>

### C. ADA Compliance

The ADA's equal employment provisions cover businesses and industries that employ more than fifteen full- or part-time employees for twenty or more calendar weeks per year.<sup>57</sup> The ADA applies to approximately 666,000 private businesses.<sup>58</sup> For many of these

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47. *Id.* § 1630.2(k).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* § 1630.2(1). See *infra* pages 521-524 for explanation and illustration of persons who are "regarded as" being disabled.

52. 480 U.S. 273 (1987) (interpreting "regarded as" under the Rehabilitation Act of 1973). Cases decided under the Rehabilitation Act provide some insight into how courts interpreting the ADA will define disability, reasonable accommodations, and undue hardship. Analysis of the relationship between the Rehabilitation Act and the ADA is beyond the scope of this Comment.

53. *Id.* at 284.

54. 29 C.F.R. app. § 1630.2(l).

55. *Id.*

56. *Id.*

57. 42 U.S.C.A. § 12111(5)(A) (West Supp. 1995).

58. Stephen B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV.

businesses, the ADA's accommodation requirements present new challenges and concerns about the duties, responsibilities, and potential areas of liability imposed by the ADA.<sup>59</sup>

### 1. Employer Knowledge Requirement and Permissible Inquiries

The ADA applies when the employer becomes aware of an applicant or employee's disability.<sup>60</sup> If an employer is unaware of an applicant or employee's disability, he is not expected to accommodate the disability.<sup>61</sup> The applicant or employee has the responsibility of informing the employer of the disability unless the disability is obvious.<sup>62</sup> If she chooses not to disclose, then she is not protected by the ADA.<sup>63</sup> For employers, the process of determining whether an applicant or employee is disabled requires caution, and careful attention to the permissible "medical examinations and inquiries" set forth in 42 U.S.C.A. § 12112(d) and the EEOC Regulations.<sup>64</sup>

In general, the ADA prohibits employers from asking job applicants if they have a disability during the pre-offer stage of the selection process.<sup>65</sup> However, if an employer administers tests to job applicants, the employer can ask applicants to inform the employer of the reasonable accommodations necessary for taking the test.<sup>66</sup> During the pre-employment stage, employers can ask narrowly-tailored questions to determine whether an applicant can perform job-related functions.<sup>67</sup>

*Example of a prohibited inquiry:* A hospital application requests that applicants review a checklist of various impairments or limitations, and place a check mark by the impairments or limitations which apply to them.<sup>68</sup>

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391, 395 n.15 (1995) (citing EEOC News Release, *Disabilities Act Expands to Cover Employers with Fifteen or More Workers*, 1994 WL 376729 at \*1).

59. *Id.*

60. 29 C.F.R. app. § 1630.9. "Employers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability that is known to the employer. Thus, an employer would not be expected to accommodate disabilities of which it is unaware." *Id.*

61. *Id.*

62. *Id.* See also Paul F. Mickey & Maryelena Pardo, *Dealing with Mental Disabilities under the ADA*, 9 LAB. LAW. 531, 533-534 (1993) (citing 29 C.F.R. app. § 1630.9).

63. § 1630.9.

64. 29 C.F.R. §§ 1630.13, 1630.14; 29 C.F.R. app. § 1630.13.

65. 29 C.F.R. app. § 1630.13(a).

66. *Id.* § 1630.14(a).

67. *Id.*

68. *Id.* "An employer may not use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may

*Example of a permitted inquiry:* The human resources representative for a publishing company seeking to hire an editor may explain that the job requires proofreading documents with small print and asks if the applicant is able to perform that function with or without reasonable accommodations.<sup>69</sup>

Because learning disabilities are not obvious, and employers cannot inquire about the existence of disabilities, employers are likely to be unaware that an applicant is learning disabled.<sup>70</sup> Employers should note that unless they are aware of the disability, they cannot be held accountable under the ADA.<sup>71</sup> Likewise, persons with nonobvious disabilities must keep in mind that unless they disclose, they are not protected by the ADA.<sup>72</sup>

## 2. Qualified Individual with a Disability and Essential Functions of a Job

Once the employer knows of the applicant or employee's disability, the ADA sets forth a two-part process by which an employer can determine whether a disabled applicant or employee is an "otherwise qualified" individual with a disability<sup>73</sup> and can perform the essential functions<sup>74</sup> of the job. First, the employer should compare the applicant's credentials with the prerequisites for the position (e.g., appropriate education, background, employment experience, skills, licenses, etc.).<sup>75</sup> For example, if a law firm requires that all first-year associates have degrees from accredited law schools and be admitted to the state bar, a disabled applicant who satisfies these requirements will be considered a qualified individual with a

have." *Id.*

69. *Id.*

70. Mickey & Pardo, *supra* note 62, at 533-534.

71. 29 C.F.R. app. § 1630.9.

72. Mickey & Pardo, *supra* note 62, at 533-534.

73. 29 C.F.R. app. § 1630.2(m).

The term 'otherwise qualified' is intended to make clear that the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of § 1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection criteria. An individual with a disability is 'otherwise qualified,' in other words, if he or she is qualified for a job, except that, because of the disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

*Id.* § 1630.9.

74. Essential functions "are those functions that the individual who holds the position must be able to perform unaided or with the assistance of reasonable accommodations." 29 C.F.R. app. § 1630.2(n).

75. *Id.* § 1630.2(m).

disability.<sup>76</sup> However, if an applicant has not satisfied these criteria, he is not "otherwise qualified" for the position.<sup>77</sup>

Second, the employer should determine if the employee or applicant can perform the essential functions of the job with or without reasonable accommodation.<sup>78</sup> The purpose of this inquiry is to ensure that qualified individuals with disabilities are not denied employment because they cannot perform the marginal functions of the position.<sup>79</sup> A job function may be considered essential if: (1) the position exists to perform that function, (2) there are a limited number of employees who can perform the function, and (3) the function is so highly specialized that the employer only hires persons with the expertise or skills necessary to perform that function.<sup>80</sup> For example, if an attorney who is dyslexic has difficulty proofreading documents, but can perform the legal research and analysis required to be an attorney, then a reasonable accommodation might be to assign the marginal functions of proofreading to another person in the firm.<sup>81</sup> However, if a dyslexic applies for a proofreading position, an employer would not be required to shift the proofreading functions to another employee because the position exists to ensure that documents contain no typographical errors.<sup>82</sup>

Under the ADA, employers must evaluate whether each applicant or employee satisfies the requirements for a particular position on a case-by-case basis.<sup>83</sup> Once this is done, the employer must tailor an accommodation to the needs of the disabled individual to enable him to perform the job's essential functions.<sup>84</sup>

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76. *Id.* § 1630.9.

77. *Id.*

78. *Id.* § 1630.2(m).

79. *Id.*

80. *Id.* § 1630.2(n).

The [EEOC] regulations . . . identify seven . . . categories of evidence that may help determine whether a particular function is essential: (i) the employer's judgment, (ii) written job descriptions prepared before job advertising or interviews, (iii) the amount of time spent on the job performing the function, (iv) the consequence of not requiring the incumbent to perform the function, (v) the collective bargaining agreement, (vi) the work experience of past incumbents in the job, and (vii) the current work experience of incumbents in similar jobs.

Postol & Kadue, *supra* note 20, at 704 (citing 29 C.F.R. 1630.2(n)(3)(i)-(vii) (1991)).

81. Mickey & Pardo, *supra* note 62, at 541-542. See *Bolstein v. Dep't of Labor*, 55 M.S.P.R. 459, 463 (1992) (finding that the essential functions of an attorney's job include being independent and resourceful, exercising initiative, analyzing legal problems and policies, and preparing written legal memoranda).

82. Mickey & Pardo, *supra* note 62, at 541.

83. 29 C.F.R. app. § 1630 (Background).

84. *Id.*

### 3. Reasonable Accommodations

Reasonable accommodations provide a disabled person with equal employment and opportunity by requiring employers to change the customary performance of job tasks or modify the work environment.<sup>85</sup> Reasonable accommodations generally fit within three categories: (1) accommodations that ensure equal opportunity in the application process, (2) accommodations that enable a disabled employee to perform the essential functions of the position, and (3) accommodations that enable a disabled employee to enjoy equal benefits and privileges.<sup>86</sup>

The ADA's reasonable accommodation provision requires that employers individually assess the job at issue (e.g., duties and purpose) and the specific limitations of the disabled employee or applicant.<sup>87</sup> Although many business owners prefer to develop objective and uniform employment criteria, the ADA requires employers to conduct an individualized assessment of the employee's limitations vis-à-vis the job functions.<sup>88</sup> By mandating an individualized assessment, the ADA seeks to ensure that generalizations and stereotypes about persons with disabilities do not limit, segregate, or classify a disabled person so as to adversely affect employment.<sup>89</sup> For example, an employer violates the ADA if she limits the duties of a dyslexic employee based on a presumption that the employee would suffer unnecessary stress in a position that had reading requirements, or assumes that the employee is unable to perform a job which involves reading.<sup>90</sup> An employer also violates the ADA if she adopts a "separate track of job promotion or progression"<sup>91</sup> for a disabled employee based on the presumption that a dyslexic employee is uninterested in, or incapable of, performing certain jobs.<sup>92</sup>

For employers who hire large numbers of employees, implementing an individualized approach may be difficult.<sup>93</sup> One solution may be to develop an applicant screening process which consists of both an objective and an individualized assessment.<sup>94</sup> For instance, large

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85. *Id.* § 1630.2(o).

86. *Id.*

87. *Id.* § 1630.9.

88. Postol & Kadue, *supra* note 20, at 709.

89. 29 C.F.R. app. § 1630.5.

90. *Id.*

91. *Id.*

92. *Id.*

93. Postol & Kadue, *supra* note 20, at 710.

94. *Id.*

employers could institute a system similar to typical drug testing procedures and require that all applicants undergo a standardized evaluation process.<sup>95</sup> Before denying a disabled applicant the position, the employer's ADA compliance officer would conduct an individualized assessment of both the applicant's limitations and job requirements.<sup>96</sup> By combining standardized and individualized evaluation systems, employers can ensure both efficiency and ADA compliance.<sup>97</sup>

When an employer receives a request for accommodation from an employee with a nonobvious disability, such as a learning disability, the employer may request that the individual provide documentation of the need for accommodations.<sup>98</sup> In situations where the disabled person is unfamiliar with the job and the employer is unfamiliar with the disability, the employer may use the following procedure to evaluate and select reasonable accommodations:

1. *Identify barriers to equal opportunity.*<sup>99</sup> The employer should identify the essential and nonessential tasks of the position, as well as the employee's abilities and limitations.<sup>100</sup> The goal is to determine which tasks the employee can perform effectively.<sup>101</sup>
2. *Identify possible accommodations.*<sup>102</sup> The employer should first discuss possible accommodations with the employee, and then consult with employment agencies<sup>103</sup> and vocational rehabilitation counselors<sup>104</sup> who are familiar with the needs of disabled workers.<sup>105</sup>
3. *Assess the reasonableness of the identified accommodations.*<sup>106</sup> The time required for obtaining an accommodation and its reliability are two important factors in determining whether an accommodation is appropriate and effective.<sup>107</sup> The employer should consider whether the accommodation provides the disabled employee with an equal opportunity to perform with the

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95. *Id.*

96. *Id.*

97. *Id.*

98. 29 C.F.R. app. § 1630.9.

99. *Id.*; Mayerson, *supra* note 32, at 516.

100. Mayerson, *supra* note 32, at 516.

101. *Id.*

102. 29 C.F.R. app. § 1630.9; Mayerson, *supra* note 32, at 516.

103. Mayerson, *supra* note 32, at 516.

104. Satcher, *supra* note 3, at 17.

105. Mayerson, *supra* note 32, at 516.

106. 29 C.F.R. app. § 1630.9; Mayerson, *supra* note 32, at 516.

107. Mayerson, *supra* note 32, at 516.

same level of skill as a nondisabled employee.<sup>108</sup> The employer should also evaluate the cost of providing different types of accommodation, and select the option that accommodates the employee while not posing an undue hardship.<sup>109</sup>

4. *Implement the most appropriate accommodation.*<sup>110</sup> Through collaboration with the disabled employee, the employer can provide reasonable accommodations to enable the employee to perform the essential functions of a job.

As a practical note, because learning disabilities are "heterogeneous in nature,"<sup>111</sup> employers need to guard against drawing overbroad conclusions about a learning disabled person's abilities and limitations when evaluating possible accommodations. For example, one person who is easily distracted and therefore has difficulty completing her assignments in a noisy workspace may require a private work area. In contrast, another person with similar limitations may be able to perform effectively at a workstation equipped with sound reduction panels.<sup>112</sup> Determining the reasonableness of an accommodation can only be accomplished by evaluating, on an individualized basis, the disabled person's unique limitations and the requirements of a given job.<sup>113</sup>

The ADA prohibits an employer from requiring a qualified person with a disability to accept an accommodation when the accommodation is neither requested nor needed by the person.<sup>114</sup> If, however, an accommodation is necessary, and a disabled person refuses to accept it, then the disabled individual may be deemed unqualified for the position.<sup>115</sup> For example, if reading is an essential function of a job, and a disabled employee who cannot read refuses to accept a reader as an accommodation, then the employer can discharge the employee because she cannot perform the job.<sup>116</sup>

Under the ADA, it is unlawful for an employer to select a qualified person without a disability over an equally qualified individual with a disability simply because the disabled person will need accommodations.<sup>117</sup> Unless the employer can show undue

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108. *Id.*

109. *Id.*

110. 29 C.F.R. app. § 1630.9; Mayerson, *supra* note 32, at 516.

111. Gerber, *supra* note 5, at 330.

112. See Arneson v. Sullivan, 946 F.2d 90 (8th Cir. 1991).

113. 29 C.F.R. app. § 1630.9.

114. 29 C.F.R. app. § 1630.9(d).

115. *Id.*

116. *Id.*

117. *Id.*



hardship (discussed below), the employer cannot take into consideration a disabled person's need for accommodations when making hiring, compensation, promotion, discharge, or other employment decisions.<sup>118</sup>

#### 4. Undue Hardship

An employer must provide reasonable accommodations to disabled employees unless the accommodations impose an undue hardship upon the employer's business.<sup>119</sup> "Undue hardship" means significant expense or difficulty in providing accommodations.<sup>120</sup> The undue hardship analysis requires an evaluation of the financial as well as structural and operational realities of the employer compared to the cost of providing the accommodation.<sup>121</sup> Specifically, the factors to be considered in determining whether an accommodation imposes an undue hardship include:

- the cost and nature of the accommodation;<sup>122</sup>
- the employer's financial resources and expenses, the number of employees, the type and number of physical facilities requiring modification (e.g., the geographic separateness, administrative or fiscal concerns), or the effect of the accommodation on business operations (e.g., the structure and composition of the workforce); and<sup>123</sup>
- the impact of the accommodation on the employer, on other employees and on the ability to conduct business.<sup>124</sup>

Accommodations that assist a disabled person in performing her job must be sufficient to enable the employee to complete the essential functions of the position.<sup>125</sup> An employer is not obligated to provide "state-of-the-art" accommodations;<sup>126</sup> as long as the accommodation satisfies the employee's job-related needs, the employer will be deemed in compliance with the ADA's reasonable accommodation provision.<sup>127</sup>

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118. *Id.*

119. *Id.* § 1630.2(p).

120. *Id.*

121. *Id.*

122. 42 U.S.C.A. § 12111(10)(B)(i) (West Supp. 1995).

123. 42 U.S.C.A. § 12111(10)(B)(ii)-(iv) (West Supp. 1995).

124. 29 C.F.R. § 1630.2(p)(2)(v) (1995).

125. 29 C.F.R. app. § 1630.9.

126. *Id.*

127. *Id.*

Any accommodation that is unduly costly, substantial, extensive, disruptive or that would fundamentally change the nature or operation of the business may be deemed an undue hardship.<sup>128</sup> For example, suppose a small business owner hires an employee who has difficulty writing reports due to dyslexia. The employee has the required education, skills and experience for the position. Shortly after she is hired, she requests that the employer accommodate her disability with a computer equipped with voice-recognition software. To demonstrate that the cost of a computer with voice-recognition software poses an undue burden, the employer would have to show that the cost presents an unreasonable demand on the employer's budget.<sup>129</sup> However, the EEOC has explicitly stated that "[s]imply comparing the cost of the accommodation to the salary of the individual with a disability in need of the accommodation will not suffice."<sup>130</sup>

Under the undue hardship analysis, large employers will have difficulty showing undue hardship unless the accommodation is extreme.<sup>131</sup> Small employers may have an easier time proving that providing accommodations creates an undue hardship. However, in situations where the employer can prove undue hardship, the disabled individual still must be given the opportunity to provide the accommodation herself.<sup>132</sup> In the above example, if the employer shows that the cost of accommodation poses an undue burden, then the employee must be permitted to provide a computer with the appropriate software. In effect, an employer cannot easily prevail on an "undue hardship" defense.<sup>133</sup>

Undue hardship may also be found when an accommodation would disrupt business operations.<sup>134</sup> An accommodation that simply affects employee morale is not sufficient to meet the undue hardship test.<sup>135</sup> For example, imagine a person has a visual impairment that impairs his ability to see in dim lighting. He applies for a job as a waiter in a dimly lit restaurant. Realizing that his visual impairment affects his ability to perform his job, the employee requests that his employer provide bright lighting as an accommodation. The employer-restaurant could easily demonstrate that although the

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128. 29 C.F.R. app. § 1630.2(p) (1995).

129. 29 C.F.R. app. § 1630.15(d).

130. *Id.*

131. Postol and Kadue, *supra* note 20, at 722-24.

132. *Id.* at 723.

133. *Id.* at 724.

134. 29 C.F.R. § 1630.3(p)(2)(v) (1995).

135. 29 C.F.R. app. § 1630.15(d).

accommodation is inexpensive, it imposes an undue hardship because it is disruptive and destroys the atmosphere of the restaurant.<sup>136</sup>

In general, accommodations for learning disabilities are inexpensive and seldom involve work-place redesign or overhaul of worker tasks.<sup>137</sup> The President's Committee on Employment of People with Disabilities Job Accommodation Network (JAN) 1994 survey of accommodations for all types of disabilities reported that eighteen percent of accommodations cost nothing and that sixty-eight percent cost under \$500.<sup>138</sup> For example, ordinary office tools such as desk organizers, colored file folders, and labels may assist learning disabled employees as well as increase overall employee efficiency.<sup>139</sup> As such, a business owner will often find that employing learning disabled individuals poses few financial disincentives.

### 5. Job-Related Examinations

For people with learning disabilities, job-related examinations present a major obstacle to hiring and advancement.<sup>140</sup> Because many employers administer periodic exams, and require continuing education courses to ensure and update employee skills, employees with learning disabilities may be discharged or denied promotions due to low test scores.<sup>141</sup> For example, employees with dyslexia may perform poorly on written tests taken within traditional time constraints, yet exhibit competence on the job.<sup>142</sup> The ADA prohibits the use of employment tests which "screen out or tend to screen out an individual with a disability . . . unless the standard, test or other selection criteria . . . is shown to be job-related for the position in

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136. *Id.*

137. Sauter & McPeck, *supra* note 8, at 273.

138. Epstein, *supra* note 58, at n.11.

The Annenberg Washington Foundation reported that the average cost of accommodation at Sears, Roebuck and Co. is \$121. This figure is based on 436 ADA-related accommodations made between 1978 and 1992. The company found that 69% of the accommodations cost nothing, 28% cost less than \$1000, and only 3% cost more than \$1000. The total cost to Sears for making the 436 accommodations during the 14-year period was only \$52,939.

*The Myths Live On: What People Believe About Services for Persons with Disabilities (Legislative Services Committee)*, LEARNING DISABILITIES ASS'N NEWSBRIEFS, May/June 1995, at 8.

139. LEARNING DISABILITIES ASS'N OF COLORADO, NETMA NEWS 2 (Spring 1996) (on file with the *Seattle University Law Review*).

140. Sauter & McPeck, *supra* note 8, at 274.

141. *Id.*

142. *Id.*

question and is consistent with business necessity."<sup>143</sup> Employers can be held liable for discrimination under the ADA for:

failing to select and administer tests concerning employment in the most effective manner to ensure that . . . [the] test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).<sup>144</sup>

As an example, if an employer requires that all employees be able to read at a tenth grade level, the jobs in the workplace must reflect a need for this ability, otherwise the tenth grade reading requirement may be deemed discriminatory.<sup>145</sup> Likewise, if an employer administers a test of reading comprehension to an employee with a known learning disability affecting reading rate without providing a time extension, the employer may be held liable for discrimination.<sup>146</sup>

To ensure ADA compliance, as well as to enable applicants or employees with learning disabilities to demonstrate their knowledge and skills on job-related examinations, the employer should consider providing the following modifications:

- alternative location or time;
- distraction-free space (i.e., spaces free from visual and/or auditory distractions);
- extended time, or an adjusted break schedule;
- modified exam presentation formats (e.g., large print, reader or taped version);
- use of adaptive equipment (e.g., talking computer or calculator, large print screen); and
- modified testing procedures (e.g., allow applicant to prepare a work sample instead of written product, provide oral test, allow use of computer).<sup>147</sup>

By modifying the exam format, the employer can more accurately determine whether a learning disabled applicant has the knowledge, skill, and ability to perform the essential functions of the position. The ADA's testing requirements ensure that qualified disabled

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143. 42 U.S.C.A. § 12112 (b)(6) (West Supp. 1995).

144. 42 U.S.C.A. § 12112 (b)(7) (West Supp. 1995).

145. Satcher, *supra* note 3, at 16-17.

146. *Id.* at 17.

147. Sauter & McPeck, *supra* note 8, at 275-76.

individuals are given opportunities not only to obtain employment, but to advance in their jobs.<sup>148</sup>

As a general rule, in working with learning disabled applicants or employees, employers should evaluate whether the testing accommodations provide a disabled individual in the workplace with an opportunity to achieve equal to that enjoyed by those who are not disabled.<sup>149</sup>

#### IV. NARRATIVES: "HEATHER" AND "BOB"

To demonstrate how learning disabled people perform in educational employment settings, the following narratives of Heather and Bob describe typical problems and concerns confronting people with learning disabilities.

Heather completed high school with high grades but scored poorly on her Scholastic Aptitude Test (SAT), which prevented her from being admitted to a prestigious East Coast university. Heather instead attended a small, midwestern liberal arts college because it offered one course at a time, allowed students to design their own curriculum, and had a small student to faculty ratio. Heather excelled in college, graduating with a high grade point average (GPA). She applied for and was a finalist in the Rhodes Scholarship Competition.

After several years of working in business, Heather decided to apply to law school. Because of her history of performing poorly on tests—especially standardized exams—Heather underwent testing to explain the disparity between her grades and test scores. The test results indicated that Heather had a visual-perceptual processing problem that affects her reading, as well as her ability to process written materials. Due to this visual processing problem, Heather tends to add letters to words, transposes letters, and skips lines when reading. The meanings of the words, sentences, or paragraphs are changed, or the context is obscured, because she has misread and subsequently misinterpreted the information. In law school, Heather received average to slightly below average grades despite the accommodations she received during exams (large print test, computer with adjustable font size to type answers, and extra time). In classes involving client and trial skills, and legal writing, Heather excelled. Heather recently graduated from law school and had to take the bar exam twice in order to pass. Now admitted to the state Bar, Heather is looking for a job in an over-saturated employment market. At this

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148. 29 C.F.R. app. § 1630.11.

149. Mayerson, *supra* note 32, at 516.

point, her concern is whether or not to disclose her learning disability to employers.

Bob, a forty-year-old undiagnosed dyslexic, never attended school because at the time he was a child, students with learning disabilities were considered mentally retarded, and therefore not teachable. Bob's mother, a former school teacher, tutored him at home and taught him basic reading and arithmetic skills. When he was fourteen, his mother died. Shortly thereafter, Bob started working on a Texas oil rig performing unskilled labor to help support his family. Despite his limited reading and mathematical abilities (fourth grade reading level and sixth grade arithmetic ability), Bob gradually developed technical skills, and his employer promoted him into jobs requiring higher levels of expertise and responsibility.

Seven years later, the oil company that he worked for offered him a job off the coast of Norway to drill offshore. Bob accepted the position, and during the next twenty years he became known as one of the most experienced and capable offshore drillers. He received top performance ratings in management and drilling expertise. An international oil company recruited Bob for the position of drilling manager based on his experience, knowledge, and reputation as a competent offshore driller. Bob accepted the company's offer, and when he reported to work, the company informed him that he had to take a written test to qualify for the drilling manager position. Because of Bob's dyslexia, he could not pass the written test and the oil company refused to employ him in the drilling manager position, and instead hired him as an assistant. Following his failure of the written test, Bob sought assistance to improve his test-taking skills, at which time he was diagnosed with dyslexia. After completing six months of extensive remedial tutoring, Bob requested that his employer provide an oral examination or extra time to complete the written exam. His employer denied his request, and Bob quit. He ultimately secured another drilling manager position, one that did not require a written test and he performed successfully.

Heather and Bob represent intelligent and professionally capable people who are learning disabled. In almost every way, Heather and Bob can function without people knowing that they are disabled. Because of their hidden limitations, they can often go unnoticed in an able-bodied world until they are confronted with a task that forces them to address their disabilities.

The remainder of this Comment provides suggestions for successfully integrating people with learning disabilities into the

workforce, and presents job strategies for both Heather and Bob in applying for and maintaining employment.

## V. THE ADA: A MEANS TO INTEGRATE PEOPLE WITH LEARNING DISABILITIES

### A. *A Guide for Employers*

#### 1. Job Descriptions and Reasonable Accommodations

To comply with the ADA, an employer should develop an accurate description of each position. For each position, employers should detail the essential duties, describe the required mental functions, outline the methods for completing the task, and describe the working conditions and the necessary materials, equipment and tools to be used on the job.<sup>150</sup>

1. *Essential duties.* The employer should describe the tasks to be completed, rather than detailing the method for completion. A disabled person may need to perform the job differently, but would be able to complete the task nonetheless.
2. *Mental functions.* The employer should create a list of all required elements of a given job so that the employer and the applicant or employee can determine the mental abilities required.
3. *Methods.* The employer should list the procedures *required* for completing the job (e.g., degree of manual dexterity required).
4. *Working conditions.* The employer should describe the physical work environment (e.g., temperature, noise, and space restrictions).
5. *Materials, equipment, and tools.* Finally, the employer should describe the materials, equipment and tools normally used to complete the job.

From this information, a disabled individual can assess and determine with the employer what accommodations, if any, can be made so that the applicant or employee can perform the job.<sup>151</sup> The following checklist can be used to determine what accommodations are required.<sup>152</sup>

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150. LEARNING DISABILITIES ASS'N OF COLORADO, YOU CAN OPEN A DOOR . . . (on file with the *Seattle University Law Review*).

151. *Id.*

152. The employment phase of the checklist should be viewed in conjunction with the next section of this paper, "Connection Between Learning Disabilities and Poor Job Performance." That section suggests ways for employers to assist employees in identifying and mastering problems in job performance.

In summary, an employer can determine appropriate and reasonable accommodations to be provided to the disabled individual based on a dialogue between the employer and disabled individual, as well as through outside services that provide assistance with integrating learning disabled people into the workforce (see Appendix 2). Tables 1, 2, and 3 contain examples of reasonable accommodations that may be made for learning disabled applicants or employees.

### Checklist: Compliance with the ADA's Reasonable Accommodation Provisions

#### *Hiring Phase*

1. Determine the essential functions of the position.
2. Wait for a request for accommodation.
3. Request medical documentation explaining disability and necessary accommodations.
4. Determine if applicant can perform the essential functions of the position.
  - a. Does the applicant meet the pre-requisites for the position? (e.g., education, experience, skills, licenses, etc.)
  - b. Can the applicant perform the essential functions of the position:
    - i. without accommodations? Go to "6."
    - ii. with accommodations? If yes, complete the inquiries under "5" to determine reasonable accommodations.
5. If the applicant meets the pre-requisites but cannot perform the essential functions without reasonable accommodations, determine reasonable accommodations by:
  - a. discussing with applicant changes in the job that will enable him to perform effectively.
  - b. contacting support services that provide assistance in integrating disabled individuals into the workplace (see Appendix 2).
  - c. assessing the reasonableness of the identified accommodations including:
    - i. whether the accommodation provides the individual with equal opportunity,
    - ii. the cost of accommodation,
    - iii. the effect of accommodation on business operations and structure,
  - d. selecting and implementing the most appropriate accommodation.
6. Make employment decision based on the best qualified candidate for the position without considering the disabled individual's need for accommodations.



*Employment Phase*

1. Before the issue of accommodations arises, determine the essential functions of each position.
2. Disclosure:
  - a. Wait for the employee to request accommodation.
  - b. Request medical documentation explaining disability and necessary accommodations.
  - c. Determine reasonable accommodations (see "5" above).
  - d. Develop performance improvement plans.
3. Undisclosed or undiagnosed employees with learning disabilities:
  - a. Train supervisors and managers to be aware of the connection between poor job performance and a possible learning disability.
  - b. If a supervisor suspects that an employee's poor job performance may be caused by a learning disability, he should supervise, monitor and assess the employee's performance without reference to disability.
  - c. Develop a performance improvement plan that does not reference disability.

Table 1  
General Accommodations

Possible Accommodations	Description
Supported employment <sup>a</sup>	<ul style="list-style-type: none"> <li>· Provide a temporary "job coach" to assist in training.</li> <li>· Modify training materials.</li> <li>· Restructure essential functions of the job.</li> </ul>
Removal of employment barriers <sup>b</sup>	<ul style="list-style-type: none"> <li>· Modify rigid work schedules that permit no flexibility as to when work is performed or when breaks may be taken.</li> <li>· Modify inflexible job procedures that unduly limit the modes of communication that are used on the job.</li> <li>· Modify the way in which particular tasks are accomplished.</li> </ul>
Specific accommodations for learning disabilities <sup>c</sup>	<ul style="list-style-type: none"> <li>· Provide reviews and additional training when introducing new procedures or equipment.</li> <li>· Develop modified procedures to complete tasks. Example: allow employee to dictate rather than write reports.</li> <li>· Use a team approach to capitalize on the talents and strengths of team members, which may increase overall productivity and prevent worker under-utilization.</li> </ul>

a. See 29 C.F.R. app. § 1630.9 (1995).

b. *Id.*

c. Sauter & McPeck, *supra* note 8, at 274.

Table 2  
 Problem-Specific Accommodations<sup>a</sup>

Problem	Accommodation
Reading slowly	<ul style="list-style-type: none"> <li>· Highlight important information</li> <li>· Provide oral summaries or condense materials</li> <li>· Allow extra time</li> <li>· Provide tape player with variable speeds for oral materials</li> </ul>
Low reading level	<ul style="list-style-type: none"> <li>· Evaluate literacy level</li> <li>· Rewrite materials to reading level</li> <li>· Offer training program to improve skills</li> </ul>
Physical discomfort while reading	<ul style="list-style-type: none"> <li>· Allow employee to read for short periods of time</li> <li>· Provide oral alternatives</li> <li>· Alternate reading with listening</li> </ul>
Errors when computing numbers	<ul style="list-style-type: none"> <li>· Allow use of calculator or talking calculator</li> <li>· Provide gridded paper for worksheet</li> <li>· Implement a double-check of calculations by coworker</li> </ul>
Frequent spelling, grammar and punctuation errors in writing	<ul style="list-style-type: none"> <li>· Provide spell check and grammar check software</li> <li>· Allow extra time for use of dictionary</li> <li>· Have coworkers proofread work regularly</li> </ul>
Distraction by noise, movement or interruptions	<ul style="list-style-type: none"> <li>· Provide alternate work location</li> <li>· Install sound absorbing panels</li> <li>· Schedule work during quieter periods of day</li> </ul>
Confusion or losing place when categorizing or sorting	<ul style="list-style-type: none"> <li>· Provide marker to help track materials</li> <li>· Place item samples on outside of boxes</li> <li>· Institute a color-coded filing system</li> <li>· Create mnemonic associations (e.g., green/go, red/stop, yellow/special notice)</li> </ul>

Difficulty with sight (visual perception)	<ul style="list-style-type: none"> <li>· Provide neat and organized surroundings</li> <li>· Institute a color-coded filing system</li> <li>· Highlight important information</li> <li>· Designate distinct computer icons for specific computer functions</li> </ul>
Difficulty with hearing (auditory perception)	<ul style="list-style-type: none"> <li>· Catch employee's eye before starting conversation</li> <li>· Talk with them in quiet places</li> <li>· Ask them to repeat what was said</li> <li>· If they take notes, allow them to finish writing before continuing the conversation</li> <li>· Provide written instructions and demonstrate tasks<sup>c</sup></li> <li>· Confirm that the employee understands</li> </ul>
Difficulty with writing	<ul style="list-style-type: none"> <li>· Assist employee with developing outlines</li> <li>· Allow use of telephone calls instead of writing letters<sup>d</sup></li> </ul>
Difficulty with time management	<ul style="list-style-type: none"> <li>· Consider flex-time, unless coming in at specific time is an essential job function</li> <li>· Offer to remind them before deadlines</li> <li>· Provide computer software with reminder features (buzzers) to indicate important times and deadlines</li> <li>· Provide computer software which allows input of detailed schedules of projects and deadlines</li> </ul>
Restlessness	<ul style="list-style-type: none"> <li>· Allow employee to take frequent short breaks</li> </ul>

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a. Sauter & McPeck, *supra* note 8, at 275. (All information in this table originated from this Comment unless otherwise noted.)

b. DALE S. BROWN, CORNELL UNIVERSITY, WORKING EFFECTIVELY WITH PEOPLE WHO HAVE LEARNING DISABILITIES AND ATTENTION DEFICIT HYPERACTIVITY DISORDER (May 1994).

c. FOR EMPLOYERS . . . A LOOK AT LEARNING DISABILITIES, *supra* note 10.

d. DALE S. BROWN, *supra* note b.

e. FOR EMPLOYERS . . . A LOOK AT LEARNING DISABILITIES, *supra* note 10.

Table 3  
Accommodations During Various Employment Phases:  
Application and Interview, Training, and Work Performance\*

Phase	Accommodation
Application and interview process	<ul style="list-style-type: none"> <li>· Simplify and minimize wording on job application</li> <li>· Answer applicant's questions concerning application</li> <li>· Assist applicant in completing forms</li> <li>· Conduct verbal interview to obtain information which may be difficult for applicant to convey in writing</li> <li>· Describe job requirements in a clear and concise manner</li> <li>· Adjust the length of the interview to maximize applicant's ability to remain attentive and decrease stress</li> <li>· Conduct interview in a quiet, informal, and distraction-free setting</li> <li>· Advertise job in multiple formats (e.g., on radio and in newspaper)</li> </ul>
Job Training and Work Performance	<ul style="list-style-type: none"> <li>· Spend additional time with the employee to train him or her</li> <li>· Break the job into smaller, clearly defined steps or tasks</li> <li>· Use clear and basic language when instructing employee</li> <li>· Establish a set routine in the job</li> <li>· Develop a consistent work sequence</li> <li>· Allow employee to use timers or watches with alarms</li> <li>· Develop pictures, diagrams or checklists to assist the employee in learning tasks</li> </ul>

- Job Training and Work Performance  
(continued)
- Teach the employee to observe coworkers to learn work routines and appropriate work behaviors
  - Encourage coworkers to provide additional support, if needed

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a. SUSANNE M. BRUYERE, PH.D., C.R.C. & THOMAS P. GOLDEN, CORNELL UNIVERSITY, *WORKING EFFECTIVELY WITH PERSONS WHO HAVE COGNITIVE DISABILITIES* (May 1994). (All information in this table originated from this Comment unless otherwise noted.)

## 2. Connection Between Learning Disability and Poor Job Performance

As noted earlier in Part II, many learning disabled persons develop compensatory mechanisms to enable them to function effectively until changes occur in job structure, size, management, equipment, or pace.<sup>153</sup> When faced with increased difficulty in performing work, many learning disabled persons choose to work in positions that do not cause their disability to be an issue. An employee who exhibits excellent work skills in a production-type job may find himself struggling in a supervisory position. This difficulty may stem from a learning disability that hinders the person's ability to rapidly absorb new information and develop ways to organize and track such information.

As with many problems, the first task is to recognize its existence, and the second task is then to find solutions. Because many people function without knowing that they have a learning disability, it is important that employers and the general public become familiar with the indicators and effects of learning disabilities. Hopefully, once the public becomes aware that persons with learning disabilities are otherwise capable and intelligent, the bias and discrimination against learning disabled people will end. Public awareness may prompt individuals who have struggled in school and work settings to obtain counseling and minimize the impact of their disability. In the workplace, employers can provide training sessions for supervisors to explain the relationship between learning disabilities and work performance problems. These training sessions, like cultural sensitivity

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153. Sauter & McPeck, *supra* note 8, at 272-73.

training, may help supervisors effectively manage their subordinates.<sup>154</sup>

Employers should be careful when offering accommodations or when recommending that employees obtain professional assistance to reduce the impact of a learning disability. For example, if an employee has disclosed that he has problems with his memory, and the employer observes that this employee has difficulty completing an assignment, it is permissible for the employer to discuss the possibility of accommodation with the employee even if the employee has not requested an accommodation.<sup>155</sup> In this situation, the employer may provide the employee with, for example, a skills refresher course specifically designed for persons with memory problems. The employer may refer the employee to an Employee Assistance Program or other resource that has counselors specializing in the diagnosis of learning disabilities.<sup>156</sup> The employer could also develop and implement performance improvement plans for the learning disabled employee based on the following steps:

#### Checklist: Developing a Performance Improvement Plan

1. Identify the areas in which the employee is having difficulty.
2. Group the problems into related areas or functions.
  - a. Example: An employee has difficulty remembering oral instructions and has difficulty remembering the order of tasks involved in a new project.
3. Find a common connection between the employee's performance problems and a possible disability.
  - a. In the above example, the employee appears to have memory problems.

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154. See *Kent v. Derwinski*, 790 F. Supp. 1032, 1037 (E.D. Wash. 1991) (describing sensitivity training sessions that teach coworkers to interact and work with disabled employees).

155. 29 C.F.R. app. § 1630.9. "If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." *Id.*

156. See *id.*, § 1630.9.

The obligation to make reasonable accommodation applies to all services and programs provided in connection with employment, and to all nonwork facilities provided or maintained by an employer for use by its employees. Accordingly, the obligation to accommodate is applicable to employer sponsored placement or counseling services, and to employer provided cafeterias, lounges, gymnasiums, auditoriums, transportation and the like.

*Id.*

4. Discuss with the employee the importance of developing a method to assist her in improving her work performance in the problem area.
5. Consult with disability support services to determine successful strategies for dealing with the problem (see Appendix 2).
6. Work with the employee to develop an action plan.
  - a. Establish a process that the employee should follow in order to complete her job.
  - b. Examples:
    - i. Problem 1: remembering oral instructions
      - (1) supervisor provides the employee with instructions in both oral and written form.
    - ii. Problem 2: remembering the order of new tasks
      - (1) identify the major tasks,
      - (2) identify the subtasks that must be completed before starting the next major task,
      - (3) post a written checklist in a convenient location for the employee to review and confirm that she has completed all tasks.
7. Set goals for performance improvement.
  - a. Supervisors should provide the employee with encouragement, as well as periodic reviews of the process throughout the established time-frame for improvement.
  - b. Example: In six weeks, the employee's work-product evaluation should improve by twenty-five points.
8. If the employee continues to have problems performing the task, the supervisor should again consult disability support services to find other ways of improving performance.
  - a. Note: It may be necessary to break the problem into smaller segments and gradually strive for mastery of the larger tasks.
9. Supervisors need to be aware that a learning disabled employee, like all other employees, may need periodic reviews of the job tasks to ensure maximum performance.

If, however, an employee has job performance problems and either does not know that she is disabled or has not disclosed her disability, then the employer should not attempt to identify a learning disability. Under the ADA, an employer may be found in violation if he views an employee as having a substantially limiting impairment, and the employee is not impaired.<sup>157</sup> In such a situation, an employer should supervise, monitor and assess the employee's performance without reference to disability.

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157. 29 C.F.R. app. § 1630.2(l).



The employer could also adapt the Performance Improvement Plan by deleting all references to disability, and use the adapted plan for all employees who exhibit job performance problems. Perhaps the employee who is either undiagnosed or has not disclosed a known disability will have an opportunity to improve her job performance, and keep her job.

### 3. Employer and Coworker Expectations and Societal Attitudes

The critical task for integrating persons with learning disabilities into the workforce involves sensitizing both employers and coworkers to the effects of learning disabilities. Given societal misconceptions that impede the efforts of the learning disabled, the "regarded as" prong of the ADA definition of disability is an important means to combat discriminatory attitudes. This provision protects individuals with impairments that are not substantially limiting, but which the employer perceives as substantially limiting. Also protected are individuals with impairments that are only substantially limiting because of the attitudes of others. Finally, individuals who are not impaired, but who the employer views as impaired are protected under the "regarded as" provision.<sup>158</sup> Sadly, the three scenarios presented in the "regarded as" provision appear in many aspects of American life.

First, because people with learning disabilities may display difficulties in learning, comprehension, communication and social interaction,<sup>159</sup> employers and coworkers may underestimate or devalue the work of disabled employees. As a result, a person with an audio-perception problem may be regarded as slow and thus incapable of performing her job effectively. This employee may be denied opportunities to achieve and excel in the workforce, and such a denial results in the under-utilization of the employee, diminished employee job satisfaction, and waste of human and corporate resources.

Second, discriminatory attitudes and myths about disabilities may prevent learning disabled individuals from meeting their full potential. Discriminatory attitudes towards people with learning disabilities can be found in many aspects of life: in the elementary schoolyard where "special-ed" kids are taunted; at work where coworkers mock an employee for his slow speech; as well as in the law school classroom

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158. 29 C.F.R. app. § 1630.2(l).

159. Loretta K. Haggard, *Reasonable Accommodation of Individuals with Mental Disabilities and Psychoactive Substance Use Disorders Under Title I of the Americans with Disabilities Act*, 43 WASH. U. J. URB. & CONTEMP. L. 343, at 362-63 (citing ROBERT A. WEISGERBER ET AL., TRAINING THE HANDICAPPED FOR PRODUCTIVE EMPLOYMENT 16-18 (1980)).

where a professor questions whether a dyslexic can be a lawyer. Some additional examples of discriminatory attitudes:

- The belief that because a learning disability is not obvious, it does not exist.
- The fear that because learning disabilities are not obvious, people will claim that they are disabled in order to defraud businesses.
- The belief that a learning disabled person should do only what they can achieve without any accommodation; if one cannot make it through high school, college or graduate school—so be it.
- The attitude that a learning disabled person should not be a professional and that if they happen to be, they should disclose that fact to clients.
- The myth that learning disabled people are less intelligent, less productive, and pose liability problems.
- The attitude that only obvious disabilities, such as blindness, should be the object of societal protection, and that expanding the definition of disability undermines efforts to help the “truly disabled.”

Due to this hostility toward persons with learning disabilities, debunking the myths and stereotypes about such disabilities will be a monumental task.<sup>160</sup> Fortunately, many learning disabled individuals have made great contributions to society despite their impairments. For example, both Albert Einstein and Leonardo daVinci exhibited behaviors typical of persons with learning disabilities.<sup>161</sup> Einstein could not perform basic mathematical functions,<sup>162</sup> and daVinci wrote backwards.<sup>163</sup> To decipher daVinci’s handwriting, “normal” readers must use a mirror.<sup>164</sup>

Recently, Forbes Magazine published an article listing the accomplishments of dyslexic billionaires (see Appendix 1).<sup>165</sup> Despite their difficulties with reading and writing, these people defied social attitudes to succeed in business. For instance, Paul Orfalea, the founder of Kinko’s copy shops, flunked out of second grade and spent

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160. See *Arline*, 480 U.S. at 284 (describing how the myths, stereotypes, and fears about persons with disabilities are as “handicapping” as the actual impairment).

161. See, e.g., THOMAS G. WEST, *IN THE MIND’S EYE: VISUAL THINKERS, GIFTED PEOPLE WITH LEARNING DISABILITIES, COMPUTER IMAGES, AND THE IRONIES OF CREATIVITY* (1991).

162. *Id.* at 121.

163. *Id.* at 146.

164. *Id.*

165. Wendy Gimán, *Dyslexic Billionaires*, *FORBES*, Dec. 4, 1995, at 295.

six weeks at a school for the mentally retarded.<sup>166</sup> In business, successful dyslexics include William Hewlett (of Hewlett-Packard), Charles Schwab (a renowned discount broker), Craig McCaw (a successful cellular phone license holder), Ray Smith (Bell Atlantic's Chief Executive), Richard Strauss (a Dallas real estate developer),<sup>167</sup> and Nelson Rockefeller (Vice-President of the United States and Governor of New York).<sup>168</sup>

In leadership, science and the arts, persons who have overcome learning disabilities include: Woodrow Wilson (twenty-eighth President of the United States), Winston Churchill (prime minister of Great Britain), Thomas Edison (scientist, inventor), Agatha Christie (author), Cher (actor), Harry Belafonte (singer, actor, activist), Henry Winkler (actor, producer, director), Tom Cruise (actor), Magic Johnson (basketball player), Greg Louganis (diving champion), and Bruce Jenner (track and field champion).<sup>169</sup> These learning disabled individuals succeeded in their fields because they had the determination and ability to minimize the impact of their limitations. To ensure that other learning disabled persons meet their full potential, both teachers and employers "need to be aware that some students [and employees] who make the most errors at earlier stages will be capable, in time, of surpassing all their classmates and their teachers as well."<sup>170</sup> Employers, teachers, and those people who presently struggle with learning disabilities should remember the accomplishments of these famous people to guide them through the challenges they encounter.

Third, the "regarded as" prong may be violated if an employer makes an adverse employment decision based on an erroneous belief that an employee has a substantially limiting impairment that the individual does not in fact have.<sup>171</sup> Consider, for example, that a rumor circulates around an office that the data entry technician has attention deficit hyperactivity disorder<sup>172</sup> (ADHD) because he is often restless and impatient. The employer discharges this employee even though the rumor is completely unfounded, and the employee has no impairment at all. This employee is considered an individual with a disability because the employer viewed this individual as being

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166. *Id.*

167. *Id.*

168. Interview with Nelson Rockefeller, TV GUIDE MAGAZINE, Oct. 16, 1976.

169. LEARNING DISABILITIES ASS'N OF COLORADO, PEOPLE WHO'VE MADE IT (on file with the *Seattle University Law Review*).

170. West, *supra* note 161, at 217.

171. 29 C.F.R. app. § 1630.2(l).

172. See *supra* note 25.

disabled. By discharging this employee, the employer has discriminated on the basis of disability and has violated the ADA.

Hopefully, like the Civil Rights Act of 1964, the ADA will open people's minds to see beyond a person's race, sex, or disability. In the future, perhaps people will not think twice about a person in a wheel chair being a ski instructor and mountain bike racing champ,<sup>173</sup> or about people with learning disabilities who are successful in government, business, science, and the arts.

#### 4. Workforce Integration

Integrating learning disabled persons into the workforce benefits society, business, and the economy in numerous ways. By working together as partners, employers and disabled individuals can break down the barriers that often prevent disabled persons from being productive members of society. To ensure that learning disabled individuals meet their full potential, employers need to change their expectations about what constitutes proper work performance, as well as revise their own attitudes towards persons with disabilities. For example, a large telemarketing agency recently hired a new account representative who is a talented salesperson, but is easily distracted due to a learning disability. The employer has customarily placed all of his account representatives in an open room divided by cubicles. During peak customer calling times, the office is very busy and noisy. Under the ADA, this employer would be required to make reasonable accommodations for this employee. Based on an individualized assessment of the employee's disabilities, the employer could assign this employee to a quieter workspace or schedule the employee's working hours during off-peak times.<sup>174</sup> When an employer changes his expectations about what constitutes proper work performance, welcomes modifications to the way his business is structured, and

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173. Michael Finkel, *One Hot Seat*, SPORTS ILLUSTRATED, Aug. 8, 1994 (describing Matt Feeney, ski instructor and 1992 National Off-Road Wheelchair Champion); Bill Strickland, *Phoenix Rising: These Disabled Downhillers Don't Want to Inspire You, They Want to Pass You*, MOUNTAIN BIKE MAGAZINE, Nov. 1996, at 124 (describing how Matt Feeney and other disabled athletes ski, mountain bike, surf, and play basketball, golf, tennis and rugby. The article notes that "[t]he real barrier, of course, is that only a few people thought such a world was possible.").

174. 29 C.F.R. app. § 1630.9 (stating that some of the barriers that prevent disabled persons access to employment include "rigid work schedules that permit no flexibility as to when work is performed or when breaks may be taken, or inflexible job procedures that unduly limit the modes of communication that are used on the job, or the way in which particular tasks are accomplished").

views disabled individuals as productive and valuable employees, both the employer and employee benefit.

As partners in the employment process, persons with disabilities need to adapt to the changing needs of business and industry by developing and improving their compensatory mechanisms to maximize their work performance. Like any other employee, learning disabled employees should update their skills, institute a system of checking their work to ensure job quality, and find ways to make themselves a valuable employee. In order to be full partners in the employment process, learning disabled employees must also know their rights, be able to identify discrimination, and be able to advocate for themselves. When both the disabled employee and employer know their duties, rights, and responsibilities under the ADA, the barriers to equal employment will crumble.

#### 5. Benefits of Employing Persons who are Learning Disabled

Employing learning disabled persons benefits society both socially and economically. The social benefits of integration include infusing the workforce with new ideas and talent, providing equal employment and opportunity, and enabling disabled individuals to live independently. For all disabled persons, the ADA's reasonable accommodation provisions operate to dispel the notion that the "normal, able-bodied" way is both the only and superior method of performing certain functions. The economic benefits of integrating people with both obvious and nonobvious disabilities into the workplace can be measured through increases in tax revenues generated from employment, and reductions in the number of people receiving government assistance.<sup>175</sup> An employer may find that learning disabled employees are highly enthusiastic, motivated and productive, have better attendance records, and are willing to accept responsibility.<sup>176</sup> A learning disabled person's motivation may also be contagious because she is grateful for the opportunity to work; such appreciation may promote respect and positive attitudes in other workers.<sup>177</sup>

Over the long term, a business owner may find that having learning disabled employees in the workforce promotes efficiency and

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175. SUSANNE M. BRUYERE, PH.D., C.R.C. & THOMAS P. GOLDEN, CORNELL UNIVERSITY, WORKING EFFECTIVELY WITH PERSONS WHO HAVE COGNITIVE DISABILITIES (May 1994).

176. LEARNING DISABILITIES ASS'N OF COLORADO, *supra* note 150.

177. *Id.*

skills development for all employees because the company has instituted policies and operating systems that are generally beneficial. For example, if a learning disabled employee has difficulty understanding oral instructions, the company could institute a practice of writing down all instructions and e-mailing them to the responsible employee. The net effect of this practice would be that managers could track the assignment of tasks and could confirm that the tasks have been completed. Also, if the employer institutes a skills-refresher course to assist a learning disabled employee with performing a certain task, the employer can offer the refresher course to other employees who are not disabled but who may benefit from this review.

Employers should remember that disabled people are not necessarily incapable of performing jobs, they often just complete jobs in a different way.<sup>178</sup>

#### 6. Other Steps Employers Can Take

In addition to statutorily mandated steps, employers can assist learning disabled individuals in meeting their full potential by creating a supportive workplace and expanding their perceptions of what constitutes proper work performance.

Employers can establish a work environment that enables a learning disabled person to work effectively and develop positive relationships with coworkers. To create a positive environment, an employer should consider these suggestions:

- When an employer finds himself needing to explain instructions to a learning disabled person, he should avoid speaking in an overly-simple (or loud) manner which may offend the disabled person.
- Whenever possible, the employer should assign jobs that both match and challenge the disabled employee.
- The employer should speak directly and frankly to the disabled employee about work performance issues.
- The employer should encourage natural social relationships with coworkers.
- The employer should discuss with the disabled individual appropriate accommodations that will enable him or her to complete a given job.<sup>179</sup>

By creating a supportive environment, the disabled employee can achieve his or her goals of being an independent and successful

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178. Sue A. Krenek, *Beyond Reasonable Accommodation*, 79 TEX. L. REV. 1969, 1979 (1994).

179. BRUYERE, *supra* note 175.

member of the workforce. The employer also benefits because he has a dedicated and motivated employee who will work hard to generate profits.

Employers should be patient and sensitive in dealing with a learning disabled employee. They should also encourage disabled employees to develop creative ways to complete jobs. In the past, some creative solutions to job completion included inventing the light bulb (Edison), creating intriguing murder mysteries (Christie), as well as developing the theory of relativity (Einstein). The channeling of Edison, Christie, and Einstein's creativity, knowledge and enthusiasm into the arts and sciences resulted in great social advancements. In both the present and the future, an employer who changes his expectations about what constitutes proper work performance may also reap the benefits of creative solutions.

### B. A Guide for Employees

#### 1. Strengths and Limitations of a Learning Disability

An individual with a learning disability (or family members or vocational counselors) should become completely familiar with her disability, and the effects it will have on job performance. Once the disabled person is familiar with her disability, she can work on developing compensatory mechanisms to lessen the effects of the disability on job performance. The disabled person should also thoroughly familiarize herself with the ADA, and should become aware of the local, state, and federal resources available to her. Finally, a person with a learning disability should investigate companies that have successfully integrated similarly situated individuals; this will provide the employee with ideas she can communicate to employers when the employer and employee discuss solutions.

The disabled person also must learn to be candid about her limitations. Denying the fact that one has memory problems or trouble reading can only result in increased problems in the future. Recognizing that one has difficulties with a particular task or group of tasks serves as a starting point for developing successful compensatory mechanisms. Because many persons with learning disabilities have average or above average intelligence,<sup>180</sup> it is not unusual for them to develop their own ways to minimize the impact of their limitations. For example, a person with difficulties with memory may institute a practice of making written lists of projects to accomplish. Another

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180. FOR EMPLOYERS . . . A LOOK AT LEARNING DISABILITIES, *supra* note 10.

person with limited manual dexterity may type her work projects or class notes to complete tasks more efficiently. If possible, the learning disabled person should seek professional assistance in remediating her learning disability. Although professional help is expensive, the long-term benefits of developing compensatory mechanisms may prove invaluable because the learning disabled person may be able to earn promotions or develop other marketable skills.

## 2. Myths and Facts About Disabilities

Learning disabled individuals should also develop an employment strategy in order to portray themselves as having more benefits than costs as an employee.<sup>181</sup> For example, one can cite a national survey of 920 employers which revealed that these employers view their disabled employees as reliable, hardworking, and productive and that "the costs of employing them is not a significant barrier to their employment."<sup>182</sup>

To disprove the myth that employing learning disabled persons is not efficient and profitable, a person with dyslexia could develop a one to two page summary sheet that describes their particular difficulties, and explains ways these difficulties have been overcome in school or for a previous employer.<sup>183</sup> The person could also provide her employer with the results of recent employer surveys evaluating the work performance of disabled employees.<sup>184</sup> Table 4 sets forth both the myths and the facts of employing disabled individuals.

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181. Thomas N. Martin & Louis Vieceli, *The Business of Rehabilitation Placement: What to Understand About Private Employers Before Approaching Them*, J. OF REHABILITATION, Oct.-Dec. 1988, at 50.

182. *Id.* (citing Louis Harris and Associates, Inc., *The ICD Survey II: Employing Disabled Americans*, ICD-INTERNATIONAL CENTER FOR THE DISABLED (1987)).

183. A disabled person could present their limitations and compensatory mechanisms in a simple 1-2 page bullet list or chart. For example, if the person has difficulty reading small or faint printed words, this person could describe her limitation as: Limitation—difficulty reading faint or light print; Compensatory strategy—provide employee assignments in large, dark print. A simple change such as using e-mail to track employee assignments will assist a learning disabled employee and may increase overall worker efficiency and accountability. If a process is efficient, in many instances, it is also profitable.

184. Martin and Vieceli, *supra* note 181, at 50. One possible survey that a disabled person could cite is Louis Harris and Associates, Inc., *The ICD Survey II: Employing Disabled Americans*, ICD-INTERNATIONAL CENTER FOR THE DISABLED (1987).



Table 4  
Employing Disabled Persons: Myths v. Facts

Myths	Facts
Increased insurance costs	90% of more than 2,700 employers reported no increase in insurance costs as a result of employing the disabled <sup>a</sup>
Workplace modifications are expensive	31% of accommodations cost nothing, 50% cost less than \$50, and 69% cost under \$500. Accommodations tend to be inexpensive for learning disabilities <sup>b</sup>
Disabled employees are safety threats	96% of disabled employees were rated at average or above in safety; 92% of nondisabled employees were rated at average or above average in safety <sup>c</sup>
Disabled employees have job performance problems	92% of disabled employees were rated at average or above in job performance; 91% of nondisabled employees were rated at or above average <sup>d</sup>
Disabled employees have attendance problems	85% of disabled employees were rated at average or above in attendance; 91% of nondisabled employees were rated at average or above in attendance <sup>e</sup>

a. Martin, *supra* note 181, at 50 (citing J.A. Schapire and F. Berger, *Responsibilities and Benefits in Hiring the Handicapped*, 24 CORNELL HOTEL-RESTAURANT ADMIN. Q. 59-67 (1984)).

b. Sauter & McPeck, *supra* note 8, at 273 (citing Job Accommodation Network, FACTS ABOUT DISABILITY, President's Committee on Employment of People with Disabilities, March 1992).

c. Martin, *supra* note 181, at 50 (citing E.I. du Pont de Nemours and Company, *Equal to the Task: 1981 Du Pont Survey of Employment of the Handicapped* (1982)).

d. *Id.*

e. *Id.*

### 3. Accommodations

Next, in seeking employment, individuals with learning disabilities must articulate their limitations to employers if they choose to disclose their disability and request reasonable accommodations.<sup>185</sup> Because their disabilities are not obvious, they must be prepared to provide medical documentation about their learning disabilities.<sup>186</sup> To persuade prospective employers of their ability to perform the job successfully, learning disabled job applicants should explain how he or she successfully overcame the disability in school or in other jobs. In addition, the prospective employee should be familiar with useful adaptive technologies or other accommodations that can be made to ensure appropriate job performance. This awareness of possible accommodations will assist the employer in determining reasonable accommodations.

In addition, the learning disabled person should provide the employer with a list of local and national resources that the employer can consult with questions about providing reasonable accommodations (see Appendix 2).

### 4. Rights Under the ADA

Persons with disabilities must know their rights under the ADA to obtain appropriate accommodations, as well as to identify discrimination. Being aware of the fundamental framework of the ADA is essential for persons with disabilities to successfully find and maintain employment. Only when one knows his rights can he recognize permissible inquiries, required accommodations, proper testing procedures, and the potential for employment discrimination. In a nutshell, a disabled person seeking employment must know:

- Employers cannot make pre-employment inquiries about the existence of a disability.<sup>187</sup> For example, an employer cannot ask whether the applicant has a disability on job applications forms or during an interview.<sup>188</sup> The employer may ask only whether the applicant can perform the essential functions of the

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185. Jamie Satcher, *Employment, the Americans with Disabilities Act of 1990, and Youth with Learning Disabilities*, 29 INTERVENTION IN SCHOOL & CLINIC 208, 209 (1994).

186. *Id.*

187. Satcher, *supra* note 3, at 16.

188. *Id.*

- job with or without accommodation.<sup>189</sup> At this point, an applicant has a choice of disclosing his disability or not.<sup>190</sup>
- Employers must modify or change the work environment or process by which tasks are completed (reasonable accommodations) unless the accommodations result in undue hardship.<sup>191</sup>
  - The ADA protects individuals who have an impairment, have a record of an impairment, or are regarded as having an impairment.<sup>192</sup>
  - The ADA protects a disabled person from employment discrimination as long as he is a qualified individual with a disability (i.e., he can perform the essential functions of the job with or without accommodations).<sup>193</sup> The ADA serves as an equalizer in the sense that if two persons have the same qualifications (education, skills, experience, etc.), but a disabled individual can only perform a job with an accommodation, an employer cannot consider the need for an accommodation in his employment decision.<sup>194</sup> Both candidates must be viewed as equally qualified.
  - The ADA also protects individuals from those testing requirements that screen out qualified persons with disabilities.

### 5. Other Steps Employees Can Take

A learning disabled individual should research the hiring practices of companies to determine which businesses have successfully integrated persons with disabilities into their labor force. To determine which companies have integrated persons with disabilities, the learning disabled person can contact their local Equal Employment Opportunity Commission, state office of vocational counseling, or school placement office. The disabled person may also search computer databases for newspaper articles about businesses and disability issues.

A learning disabled person should continually revise and update compensatory mechanisms. For example, given the proliferation of computer software programs, a learning disabled person with difficulty organizing projects or meeting deadlines can input his project deadlines into a scheduling program that reminds him of the upcoming deadline. For jobs that are not computerized, learning disabled persons should develop other job-specific compensatory mechanisms. To assist in this

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189. *Id.*

190. *Id.*

191. 29 C.F.R. app. § 1630.2(p).

192. 42 U.S.C.A. § 12102(2)(A)-(C) (West Supp. 1995).

193. 29 C.F.R. app. § 1630.2(m).

194. *Id.* § 1630.9(b).

process, the Alabama Department of Education developed a list of helpful tips that can be used when a learning disabled employee begins a new job or learns new tasks.<sup>195</sup> Like their nondisabled colleagues, persons with learning disabilities must always look for ways to become valuable employees. In addition, because learning disabled employees often bring a fresh perspective to the established methods of operation, employers may find that having learning disabled persons in the labor force facilitates revisions and improvements in operations, which in turn increases efficiency and profitability.

Tips for learning a new job<sup>196</sup>—In seeking employment, or maintaining a present job, a disabled person should:

1. Spend extra time learning a job or task, even if not paid for the extra time. She should take home copies of price lists or other important information that needs to be memorized. She should practice completing forms (e.g., time sheets, return/exchange forms, etc.) If working at a chain restaurant or business with more than one location, the disabled person should visit another location to observe other employees. If she completes tasks or jobs slowly, then extra time should be taken to finish part of the job (perhaps the employee should arrive early or stay late).
2. Ask a supervisor or other coworker for help when necessary. (Even though a supervisor or coworker may appear impatient, it is better to ask than to make mistakes).
3. Never ask for help if she can manage on her own.
4. Take the time to do the job correctly, even if people pressure the employee to go faster. In most jobs, it is more important to be accurate than fast.
5. On the first few days of the job, she should ask questions to make sure that she understands the various aspects of the job. She should ask someone to watch her perform the task to check and see that it has been completed correctly. She should repeat the order or sequence of the task to her trainer to confirm that she understands.
6. Offer to complete tasks which she can handle but that others are avoiding. In the future, she can request assistance from others with a job she cannot do alone.
7. Develop a system for remembering important information (e.g., make lists, say them aloud, have friends or parents quiz her, etc.)

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195. ALABAMA DEPARTMENT OF EDUCATION, IF YOU ARE AN EMPLOYEE WITH A LEARNING DISABILITY (on file with the *Seattle University Law Review*).

196. *Id.*

8. When she makes a mistake, she should acknowledge the error and correct it immediately.
9. Arrive to work on time. If she has trouble managing time, she should develop a strategy for arriving early.
10. Try hard and make a good effort. Sometimes, when one constantly makes mistakes, it is easy to act as if she does not care or is doing it on purpose. The disabled employee should show that she is making an effort by completing the following:
  - a. Paying attention. Maintaining eye contact. Occasionally, nodding her head as someone speaks. Responding to what the speaker has said. Summarizing what the speaker has said. Asking questions.
  - b. Watching what she is doing while working. She should not allow her mind or eyes to wander when she is working. She should walk with a purpose from place to place.

### C. Heather and Bob: Strategies for Seeking Employment

*Heather: to disclose or not disclose*—Entering a new profession presents many questions not only for persons who are disabled, but for those who are not disabled as well. Often, job hunters struggle to get a foot in an employer's door, and once in, they work hard to make a good impression. Heather knows that once she has a job, she will work hard and complete quality projects. First, however, she wonders how to get an interview due to her low law school grade point average and class rank. Heather must decide whether or not to disclose her disability to prospective employers.

The risks of disclosure are potentially great because Heather may discover that employers are reluctant to hire her based on the perception that she is not as intelligent as other applicants, that she will be less productive, and that she will expose the firm to potential malpractice lawsuits. Even if Heather is hired, the employer may assign her to less important projects and limit her opportunities for achievement and promotion. Unless the employer clearly sets forth and enforces a policy prohibiting disability discrimination, coworkers may also question Heather's ability and competence.<sup>197</sup>

On the other hand, disclosure of the disability also has benefits. These benefits include creating an open dialogue between the employer and Heather about her disability, the opportunity to implement accommodations that will enable Heather to excel as an attorney, and

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197. If any of these risks become real, Heather may have claims of disability discrimination under the ADA (provided, of course, that she can marshal enough evidence to take the claims to trial).

the chance to develop goals to improve performance and other marketable skills.

Nondisclosure of her disability may also have benefits. If Heather decides not to disclose her learning disability, these benefits include the possibility that she can successfully perform the job without anyone knowing that she is disabled. Furthermore, by not disclosing her disability, Heather will not have to endure the discrimination she might encounter if her disability was known.

However, if Heather decides not to disclose her disability, she risks the possibility that performance problems may arise and the employer may view her work as unsatisfactory and terminate her employment. She may be assigned to less important projects based on the employer's perception that she is less productive or competent, and Heather herself may experience lower self-esteem and confidence because she is not successful in her work. Only if Heather is confident that once hired she can perform the work should she seriously consider nondisclosure.

Having considered the risks and benefits of both disclosure and nondisclosure, Heather can approach her job search in two basic manners.

*Plan A: Do not disclose*—If Heather chooses not to disclose her disability, she should try to get a job using strategies that any prospective employee would use. She could emphasize her undergraduate credentials, her experience with the Rhodes Scholarship Competition, her demonstrated ability in legal writing as well as her client and trial skills, and her past experience in business. She should apply for both full- and part-time positions, and develop good references in the legal profession through volunteer work and internships. Heather should be patient and follow all potential leads to find a job through the back door (e.g., professional contacts who know of openings and can vouch for the quality of her work).<sup>198</sup>

*Plan B: Disclose*—If it becomes obvious that prospective employers are mistaking her disability and its effects for incompetence, then Heather should consider disclosing her disability. Before disclosing, Heather should complete the following tasks. First, she should research the ADA's employment provisions to become familiar with the scope of its protections. Second, to convince prospective employers of her knowledge and ability to be a successful attorney,

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198. If Heather chooses not to disclose her disability, and she obtains employment, she is not thereafter precluded from disclosing her disability and requesting reasonable accommodations.

Heather should prepare and send the following materials to employers:<sup>199</sup>

- a resume detailing her undergraduate accomplishments and successes in law school;
- a cover letter explaining how her learning disability has caused her to struggle in law school, but also how she persevered and obtained her degree, passed the bar, and developed compensatory mechanisms to practice law effectively;
- a brief summary sheet describing her strengths and difficulties, and explaining how she has overcome her limitations;
- a list of possible accommodations that can be made that would enable her to work effectively as a lawyer;
- a fact sheet dispelling the myths of hiring disabled persons (e.g., Table 5);
- medical documentation explaining her disability and its limitations;
- letters of recommendation from law school professors stating that she demonstrated knowledge in class and in discussions during office hours, yet scored poorly on exams;
- a letter of recommendation from any professional counselors who have worked with Heather's disability; and finally,
- a list of local and national resources that can be consulted concerning any questions the employer has about providing reasonable accommodations (e.g., Appendix 2).

The final task Heather should complete prior to disclosing her disability to prospective employers is to research local and regional law firms to determine hiring "track records." She can contact the Equal Employment Opportunity Commission, her law school placement office, and use on-line legal databases to determine which law firms are equal opportunity employers.

Once she has completed these tasks, Heather can target those law firms with favorable reputations for hiring persons with disabilities. She can send cover letters, resumes, and the additional information to the human resource offices of these firms. Hopefully, someone who is aware of learning disabilities or is persuaded by Heather's organization and documentation of her strengths and weaknesses will invite her for an interview.

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199. Heather should consider providing this information to employers in several phases. For example, during the first phase, she should send prospective employers her resume and cover letter. During phase two, the interview, she should be prepared to provide, if requested, medical documentation and the other materials describing her specific learning disability, reasonable accommodations, the myths of hiring disabled persons, as well as a list of local and national resources, and letters of recommendation.

*Bob: coping with job-related examinations*—Because Bob's dyslexia prevents him from demonstrating his knowledge and ability on written examinations, he should consider taking the following five steps.

First, like Heather, Bob must be aware of the basic provisions of the ADA. Because dyslexia affects Bob's test-taking ability, and because the ADA requires that tests relate to the skills relevant to the job being tested for, Bob's knowledge of the ADA will prove especially useful. For example, if the drilling manager test evaluated his reading ability for a position that does not require reading as an essential function, then, under the ADA, Bob may challenge the testing requirements. Likewise, if the employer requires that all drilling managers read at a twelfth grade level, the job of drilling manager must actually require this ability, or that requirement may be deemed discriminatory.

Second, Bob should determine whether companies in the oil business typically administer written tests to prospective employees and employees seeking promotions. If job examinations are not typically used, then Bob can selectively apply to those companies that do not administer written tests. If most businesses in his field use written tests, then Bob should consider the following third and fourth steps.

Third, Bob must decide whether to disclose that he has a learning disability when applying for the job. If he decides to disclose, Bob may also consider providing a prospective employer with the same type of information that Heather would consider presenting to prospective employers.

Fourth, if Bob applies to a company that administers written tests to evaluate an applicant's ability to perform job skills, Bob can request accommodations or can develop successful compensatory strategies. Bob can request that the employer modify the exam so that the effects of Bob's dyslexia are minimized. These modifications could include an alternative location or time for testing, a distraction-free testing space, a time extension, physically modifying the exam (e.g., having large print, providing audio versions), providing adaptive equipment (e.g., providing a talking computer or calculator, or providing a large print screen), or modifying the test procedure (e.g., providing an oral test, or allowing the use of computers). Bob may also consult a professional who specializes in dyslexia so that successful compensatory mechanisms can be developed.<sup>200</sup>

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200. Bob may find that the strategies he developed during remediation provide him with the skills necessary to complete the exam without disclosing his disability or requesting accommodations.



Finally, Bob should spend extra time learning the components of his new job. He should ask his trainer or supervisor questions and seek clarification when necessary. Because he has a great deal of experience working on oil wells, Bob probably will adjust to the changes of his new position quickly. If Bob finds that he has difficulties with a particular task, he must remember that both disabled and nondisabled persons often struggle with learning new jobs. Bob must remember that he is a top-notch drilling manager, and should not automatically attribute problems he encounters to his disability.

Both Heather and Bob need to take a pro-active approach to ensure that they have equal opportunity. To ensure that they obtain and maintain employment they must know their strengths and limitations, their rights under the ADA, and they must be aware of the local and national resources that can assist the employer in determining reasonable accommodations.

In addition, Bob and Heather must continually update and revise their job skills. To find other employment opportunities and learn of the successes of other disabled persons, they should also develop and maintain contacts with professionals in their field—both disabled and nondisabled.

## VI. CONCLUSION

The task of integrating persons with learning disabilities into the workplace presents many important questions that are not easily answered. Perhaps in the future all disabled persons can live and work without fear of discrimination. Hopefully, this paper provides a starting point for developing successful methods of assisting learning disabled persons in the attainment of successful and productive careers.

Employing persons with learning disabilities benefits employers in terms of business efficiency and profitability, and benefits society in general. Because many learning disabled persons are highly creative, employers may find that employing learning disabled persons results in finding solutions to seemingly unsolvable problems.

Thomas West, an author who advocates that learning disabilities may be a gift instead of a limitation, suggests that success in learning standard concepts impedes creative growth:

In the end, probably the most effective deterrent to really original work is not so much the career distractions and disincentives as the fact that the professionals often have learned their lessons too well. If you have had great success in learning to think the way your teachers and associates think, then it is all the more difficult to think in some really original and unexpected way.<sup>201</sup>

Maybe one day, the stigma of being learning disabled will be replaced by respect and acceptance.

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201. West, *supra* note 161, at 192.

## APPENDIX 1

Dyslexic Billionaires and Other Famous  
People with Learning DisabilitiesDyslexic Billionaires:<sup>a</sup>

Charles Schwab (discount broker)  
Paul Orfalea (founder of Kinko's Copy Shops)  
William Hewlett (Hewlett Packard)  
Craig McCaw (cellular phone license holder)  
Ray Smith (Bell Atlantic Chief Executive)  
Richard Strauss (Dallas real estate developer)

Famous People:<sup>b</sup>

Woodrow Wilson (28th President)  
Winston Churchill (Prime Minister of Great Britain)  
Nelson Rockefeller (Vice President of the United States,  
N.Y. Governor)  
Albert Einstein (physicist, inventor)  
Thomas Edison (scientist, inventor)  
Leonardo da Vinci (artist)  
Agatha Christie (author)  
Hans Christian Anderson (author)  
Richard Coen (journalist)  
Cher (actor, singer)  
Harry Belafonte (singer, actor, activist)  
Henry Winkler (actor, producer, director)  
Tom Cruise (actor)  
Magic Johnson (basketball player)  
Greg Louganis (diving champion)  
Bruce Jenner (track and field champion)

Teacher comments about these famous people:<sup>c</sup>*Poor spellers*

Hans Christian Anderson  
 William Butler Yeats  
 George Bernard Shaw

*Poor readers and spellers*

George Patton  
 Woodrow Wilson  
 Nelson Rockefeller

*Shows no promise*

Abraham Lincoln  
 Henry Ford  
 Michael Faraday

*Bottom of class*

Thomas Edison

*Dull and inept*

James Watt

*Mentally slow*

Albert Einstein

*Expelled from school*

Albert Einstein

*Poor mathematicians*

Benjamin Franklin  
 Pablo Picasso  
 Carl Jung

Salvador Dali

Edgar Allan Poe

George Bernard Shaw

Percy Bysshe Shelley

*Dreamer*

Paul Gauguin

*Idiot*

Auguste Rodin

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a. Giman, *supra*, note 165, at 295.

b. LEARNING DISABILITIES ASS'N OF COLO., PEOPLE WHO'VE MADE IT.

c. LEARNING DISABILITIES ASS'N OF COLO., WHAT TEACHERS HAD TO SAY ABOUT THESE FAMOUS PEOPLE WHO HAD LEARNING DISABILITIES.

## APPENDIX 2

## RESOURCES

ADA Regional Disability and  
Business Technical Assistance  
Center Hotline  
(800) 949-4232 (voice/TTY)

Arc  
500 East Border St Ste 300  
Arlington TX 76010  
(817) 261-6003 (voice)  
(817) 277-0553 (TDD)

Association on Higher  
Education and Disability  
PO Box 21192  
Columbus OH 43221

Association of Persons in  
Supported Employment  
5001 West Broad St Ste 34  
Richmond VA 23230

Bridges to Success: The LD  
Career Project  
Jamie Satcher Director  
University of Alabama  
Box 870231  
Tuscaloosa AL 35487-0231

Equal Employment  
Opportunity Commission  
1801 L Street NW  
Washington DC 20507  
(800) 669-4000 (voice)  
(800) 800-3302 (TTY)  
(800) 669-EEOC (publications-  
voice)

HEATH Resource Center  
One Du Pont Circle Ste 800  
Washington DC 20036-1193  
(202) 939-9320  
(800) 544-3284 (voice/TTY)

Job Accommodation Network  
West Virginia University  
PO Box 6080  
Morgantown WV 26506-6080  
(800) 526-7234

Learning Disabilities  
Association of America  
4156 Library Road  
Pittsburgh PA 15234

Learning Disabilities Research  
& Training Center  
The University of Georgia and  
Roosevelt Warm Springs  
Institute for Rehabilitation  
534 Aderhold Hall  
Athens GA 30602

National Center for Law and  
Learning Disabilities  
PO Box 368  
Cabin John MD 20818  
(301) 469-8308

Orton Dyslexia Society  
(800) 222-3123

President's Committee on  
Employment of People with  
Disabilities  
1331 F Street NW  
Washington DC 20004  
(202 376-6200)

Program on Employment and  
Disability at the School of  
Industrial and Labor  
Relations  
Cornell University  
Ithaca NY 14853-3901  
(607) 255-7727 (voice)  
(607) 255-2891 (TTY)

State Offices of Vocational  
Rehabilitation

U.S. Department of Justice  
Office on the Americans with  
Disabilities Act  
Civil Rights Division  
PO Box 66118  
Washington DC 20035-6118  
(202) 514-0301 (voice)  
(202) 514-0383 (TDD)  
(202) 514-6193 (Electronic  
Bulletin Board)