Australian Human Rights Commission

everyone, everywhere, everyday

Good practice, good business

Eliminating discrimination and harassment from your workplace

DISABILITY DISCRIMINATION AND HARASSMENT

The information provided is a guide only. Employers should obtain legal advice if they have specific questions about their obligations under disability discrimination legislation.

What is disability discrimination?

The *Disability Discrimination Act 1992* (DDA) makes it unlawful to discriminate against a person because of their disability. The Act also covers people who are relatives, friends, and carers of people with a disability.

Direct disability discrimination happens when a person with a disability is treated less favourably than a person without a disability would be treated in the same or similar circumstances.

Discrimination also happens when there is a requirement or condition or practice that is the same for everyone but has an unfair effect on a particular group of people. This is known as **indirect discrimination**. For example, requiring a deaf employee to attend meetings where no Auslan interpreter is provided to enable them to understand what is being said could be indirect discrimination.

When disability discrimination is not unlawful

The DDA states that in some circumstances it is not unlawful to discriminate against a person with a disability. For example, where a person cannot perform the inherent requirements of a job it is not unlawful for an employer to not employ the person. However, the employer has to have considered whether the person could perform the requirements of the job with ***'reasonable adjustment'*** for the disability.

For example, could a person with vision impairment perform a clerical job with voice-activated software? If it would impose an ***'unjustifiable hardship'*** on the employer to provide the reasonable adjustment, it may not be unlawful discrimination. Or if the employer was a small business and had to put a lift in to make the workplace accessible, it might impose an unjustifiable hardship.

Choosing the best person for the job

Employers should choose the best person for the job, whether or not that person has a disability. They should make this decision based on a person's ability to perform the essential activities of the job, not on assumptions about what a person can or cannot do because of a disability.

This means that if a person with a disability can do the essential activities or ***'inherent requirements'*** of a job, he or she should have just as much chance to do that job as anyone else. For example, an essential activity or 'inherent requirement' for a telephonist's job is the ability to communicate by telephone, but it is not an 'inherent requirement' to hold the phone in the hand.

When is disability discrimination prohibited in employment?

The DDA makes it unlawful to discriminate against people with disabilities in employment, including:

- recruitment processes, such as advertising, interviewing, and other selection processes
- decisions on who will get the job
- terms and conditions of employment, such as pay rates, work hours and leave
- promotion, transfer, training or other benefits associated with employment

- dismissal or any other detriment, such as demotion or retrenchment.

The DDA also covers contract work, and membership of partnerships of three or more people, as well as discrimination by:

- bodies with control over professional, trade or occupational qualifications
- federally registered trade unions
- employment agencies.

For example, it is unlawful for an employment agency not to refer a person with a disability to a job if he or she can do the job.

Making workplace adjustments

If a person with a disability is the best person for the job then the employer must make workplace changes or ***'workplace adjustments'*** if that person needs them to perform the essential activities of the job. In most cases the person with a disability will be able to tell the employer what is needed. If necessary, employers should also seek advice from government agencies or organisations which represent or provide services to people with a disability.

Examples of 'workplace adjustments' employers may need to make include:

- changing recruitment and selection procedures, for example, providing a sign language interpreter for a deaf person, or ensuring the medical assessor is familiar with a person's particular disability and how it relates to the job requirements
- modifying work premises, for example, making ramps, modifying toilets, providing flashing lights to alert people with a hearing loss
- changes to job design, work schedules or other work practices, for example, swapping some duties among staff, regular meal breaks for a person with diabetes
- modifying equipment, for example, lowering a workbench or providing an enlarged computer screen.

Causing unjustifiable hardship

The DDA does not require workplace changes to be made if this will cause major difficulties or unreasonable costs to a person or organisation. This is called ***'unjustifiable hardship'***. Before claiming that adjustments are unjustified, employers need to:

- thoroughly consider how an adjustment might be made
- discuss this directly with the person involved
- consult relevant sources of advice.

If making these adjustments would cause hardship it is up to the employer to show that they are unjustified.

What is disability harassment?

The DDA makes it unlawful for harassment in relation to a disability, or based upon a relative or associate having a disability. Examples of harassment on disability grounds include:

- humiliating comments or action about a person's disability, such as insults
- comments or action which create a hostile environment
- overbearing or abusive behaviour towards staff with intellectual disabilities
- disparaging remarks to staff who have made compensation claims.

For further information on employment and the Disability Discrimination Act see the *Disability rights employment page* at:
www.humanrights.gov.au/disability_rights/employment/employment.html

Case example: Complaint of disability discrimination in employment

The complainant had been employed as a warehouse supervisor for some years with the respondent company. The complainant suffered a workplace injury which resulted in impairment to his spine and leg. The complainant alleged that his employment was terminated after the injury because his employer felt he was unable to safely perform the inherent requirements of his position.

The complainant disputed that he was unable to perform his duties safely and claimed the employer had not asked him whether there was any reasonable adjustment that would assist him perform his duties. The complainant noted that he had evidence that he could improve his mobility with a foot brace and he also claimed that the employer had not raised any concerns about his performance or mobility prior to terminating his employment.

The respondent company claimed that the complainant was unsteady when he walked and stated it had genuine concerns that the complainant could fall or trip in the warehouse, thus endangering himself and fellow workers.

The complaint was resolved through a conciliation process with the employer agreeing to reinstate the complainant and pay him $52,000 in compensation for lost wages, superannuation and legal costs.

Source: Human Rights and Equal Opportunity Commission 2002-03 Annual Report.