

4112-5-08

Discrimination in the employment of the disabled.

(A) Discrimination prohibited. No qualified disabled person shall, on the basis of disability, be subjected to discrimination in employment as it relates to:

- (1) Recruitment, advertising and ~~the processing of~~ applications for employment;
- (2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;
- (3) Rates of pay or any other form of compensation or any changes in compensation;
- (4) Job assignment, job classification, organizations, organizational structure, position descriptions, lines of progression and seniority lists;
- (5) Departure and return from leaves of absence, sick leave or any other leave;
- (6) Fringe benefits available by virtue of employment, whether ~~or not~~ administered by the respondent, except as provided in paragraph (F) of this rule;
- (7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities and selection for leaves of absence to pursue training;
- (8) Employer-sponsored activities, including social or recreational programs; and
- (9) Any other term, condition or privilege of employment.

(B) Pre-employment inquiries.

- (1) Pre-employment inquiries are permissible if they are designed to:
 - (a) Determine whether an applicant can perform the job without significantly increasing the occupational hazards to himself or herself, to others, to the general public or to the work facilities; or
 - (b) Determine whether the applicant can perform the essential functions of the job with or without a reasonable accommodation.
- (2) The pre-employment inquiries permissible under ~~paragraph (E)~~ of this rule should be preceded by a statement that discrimination on the basis of a disability, which does not create the occupational hazards ~~nor or~~ prevent substantial job performance, as set out in paragraph (E) of this rule, is prohibited by state law.

- (3) Information obtained in accordance with this paragraph as to the medical condition or history of the applicant shall be collected only through the use of separate forms which shall be accorded confidentiality as medical records. Supervisors may, however, be given information and instructions necessary to the person's health and safety and may be informed of work restrictions and necessary accommodations.
- (4) If, pursuant to federal contract requirements or a bona fide affirmative action plan, an employer is required to maintain records of the number of disabled persons who apply, and/or who are employed, such records shall be gathered and maintained in such a fashion as to preclude their inadvertent or deliberate use for discriminatory purposes and to avoid possible misinterpretation by applicants of the purpose for which such data will be used.

(C) Pre-employment physical examinations.

- (1) Pre-employment physical examinations may be given after a conditional offer of employment has been extended to the applicant if such examinations are used:
 - (a) To determine those matters set out in paragraph (B)(1) of this rule;
 - (b) To establish a base line for health records and facilitate preventive medicine programs; or
 - (c) For other reasons demonstrated by the employer to be valid. Such examinations cannot be used to exclude an applicant, unless the disability resulting in the exclusion creates a significant occupational hazard or prevents substantial job performance as set out in paragraph (E) of this rule.
- (2) Information obtained in a physical examination shall be collected and used in the same manner as set out in paragraph (B)(3) of this rule.

(D) Burden of proof when applicant is excluded based on disability.

- (1) Burden of proof. If an applicant is refused employment, or an employee is discriminated against in any term, condition or privilege of employment because of a disability, the employer shall have the burden of establishing the basis for the refusal or discrimination, ~~whether it is based upon a BFOQ, occupational hazard, inability to substantially perform the job or inability of the employer to accommodate.~~
 - (a) The following are examples of potentially valid reasons to discriminate against disabled persons:

- (i) Compliance with a specific requirement set out in a statute of the United States or an authorized regulation of an agency of the United States government; and
 - (ii) Compliance with a specific requirement set out in a statute of the state of Ohio or an authorized regulation of any agency of the state of Ohio, or in an ordinance, authorized rule or other official act of a unit of local government of the state of Ohio, unless the Ohio civil rights commission finds that the state or local requirement is not consistent with the laws against discrimination.
- (b) The following are examples of invalid reasons to discriminate against disabled persons:
 - (i) Preferences or objections of co-workers, the employer, clients or customers; and
 - (ii) Physical or administrative obstacles or inadequacies in work facilities that reasonably can be corrected as provided in this rule.
- (2) Bona fide occupational qualifications. With respect to discrimination against the disabled, the commission construes the BFOQ exception found in Division (E) of section 4112.02 very narrowly.
 - ~~(a) Division (E) of section 4112.02 of the Revised Code, which is distinct from the exemption language of division (L) of section 4112.02 of the Revised Code, permits discrimination against the disabled when such discrimination is based on a BFOQ. The commission construes the BFOQ exception very narrowly and requires an employer to prove that all or substantially all persons with a particular disability are unable to perform the typical duties of the job in question.~~
 - ~~(b) The following job requirements are BFOQs:
 - ~~(i) Any specific requirement set out in a statute of the United States or an authorized regulation of an agency of the United States government; and~~
 - ~~(ii) Any specific requirement set out in a statute of the state of Ohio or an authorized regulation of an agency of the state of Ohio, or in an ordinance, authorized rule, or other official act of a unit of local government of the state of Ohio, unless the Ohio civil rights commission finds that the state or local requirement is not consistent with the laws against discrimination.~~~~

~~(c) The following are not BFOQs:~~

~~(i) Preferences or objections of co-workers, the employer, clients or customers; and~~

~~(ii) Physical or administrative obstacles or inadequacies in work facilities that reasonably can be corrected as provided in paragraph (E) of this rule.~~

(3) Occupational hazards.

(a) Division ~~(L)~~ (K) of section 4112.02 of the Revised Code, provides that a disabled person need not be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the disabled person, other employees, the general public or the facilities in which the work is to be performed. If this section is relied upon to refuse to hire or train a disabled person, it is the employer's burden to establish the manner and degree to which such occupational hazards would be increased. Objective standards must be used to evaluate any such increased hazards. Only "significant" increases in hazards justify refusal to hire or train. Thus, the hazard must be reasonably foreseeable with a significant probability of happening.

(b) Occupational hazards specifically recognized by the United States department of labor's occupational safety and health administration, which are not correctable by reasonable accommodation, meet the requirements of division ~~(L)~~ (K) of section 4112.02 of the Revised Code and will justify refusal to employ or train a disabled person.

(c) Even if under existing circumstances occupational hazards would be significantly increased, an employer may not rely on division ~~(L)~~ (K) of section 4112.02 of the Revised Code to refuse to employ or to train a disabled person if through reasonable accommodation pursuant to paragraph (E) of this rule the significantly increased occupational hazards could be avoided.

(4) Ability to perform the job.

(a) Division ~~(L)~~ (K) of section 4112.02 of the Revised Code further provides that a disabled person need not be employed or trained in a job that requires him or her routinely to undertake any task, the performance of which is substantially and inherently impaired by his or her disability. The determination of whether a disabled person is substantially unable

to perform a job must be made on an individual basis, taking into consideration the specific job requirements and the individual disabled person's capabilities.

- (b) An employer cannot rely on division ~~(H)~~ (K) of section 4112.02 of the Revised Code to exclude a disabled person unless the job requires him or her to routinely undertake a task which such person cannot substantially perform. A task which is an infrequent, irregular or nonessential element of a job cannot be used to exclude a disabled person.
- (c) An employer cannot rely on division ~~(H)~~ (K) of section 4112.02 of the Revised Code to exclude a disabled person if, through reasonable accommodation pursuant to paragraph (E) of this rule, the disabled person can substantially perform the essential elements of the job.
- (d) The performance of a job by a disabled person is not substantially and inherently impaired by his or her disability within the meaning of division ~~(H)~~ (K) of section 4112.02 of the Revised Code, if such person is capable of performing the job, with reasonable accommodation to his or her disability, at the minimum acceptable level of productivity applicable to a non-disabled incumbent employee or applicant for employment.
- (e) A physician's opinion on whether a person's disability substantially and inherently impairs his or her ability to perform a particular job will be given due weight in view of all of the circumstances including:
 - (i) The physician's knowledge of the individual capabilities of the applicant or employee, as opposed to generalizations as to the capabilities of all persons with the same disability, unless the disability is invariable in its disabling effect;
 - (ii) The physician's knowledge of the actual sensory, mental and physical qualifications required for substantial performance of the particular job; and
 - (iii) The physician's relationship to the parties.

(E) Reasonable accommodation.

- (1) An employer must make reasonable accommodation to ~~the disability of an a~~ disabled employee or applicant, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business.

(2) Accommodations ~~may take the form, for example, of~~ include, but are not limited to, providing access to the job, job restructuring, acquisition or modification of equipment or devices or a combination of any of these. Job restructuring may consist, among other things, of realignment of duties, revision of job descriptions or modified and part-time work schedules. ~~Specific examples include~~ For example:

(a) If a job entails primarily typing duties with some irregular messenger or delivery tasks, the messenger or delivery tasks could be assigned to an ambulatory employee so that a nonambulatory disabled person with satisfactory typing skills could be employed.

(b) If a disabled employee is required to have physical therapy during normal working hours, his or her work schedule could be modified to allow the employee to make up the time lost because of the therapy.

(3) In determining whether an accommodation would result in undue hardship to an employer, the following factors may be considered:

(a) Business necessity;

(b) Financial cost and expense where such costs are unreasonably high in view of the size of the employer's business, the value of the disabled employee's work, whether the cost can be included in planned remodeling or maintenance; ~~and the requirements of other laws and contracts; and~~

(c) The requirements of other laws and contracts; and

~~(e)~~ (d) Other appropriate considerations which the employer can support with objective evidence.

(4) The exceptions to the prohibition against discrimination because of disability set out in division (E) of section 4112.02 and division ~~(L)~~ (K) of section 4112.02 of the Revised Code, and paragraph (E) of this rule are not applicable where reasonable accommodation would remove the limitation on the disabled person's ability to safely and substantially perform the job.

(F) Application and testing procedures.

(1) An employer may not use any test or other criterion which creates barriers to employment opportunities of disabled persons unless:

(a) ~~The employer proves that the~~ test or criterion being used has been validated as is valid and related to job performance for the position in question; and

(b) Alternative tests or criteria to predict the same job performance, but which have less adverse effect, are shown to be unavailable.

(2) Validated tests shall be administered to disabled persons in a manner which ensures that the test accurately reflects the applicant's or employee's job skills, aptitude or whatever other factor the test purports to measure, rather than reflecting the person's disability itself, except where such disability impairs the very factors which the test purports to measure.

(G) Fringe benefits.

(1) An employer may not discriminate on the basis of disability in providing fringe benefits to employees. Any fringe benefit plan must provide for equal benefits and equal contributions to the plan by disabled and non-disabled persons unless any difference in benefits or contributions is justified by verifiable actuarial figures and an actual substantial increase in cost to the employer.

(2) Where, on an actuarial basis as set forth in paragraph (G)(1) of this rule, participation by a disabled person in a fringe benefit is prohibitive because of a substantial increase in cost of the benefit, the employee shall have the option of either paying the additional cost of the benefit above the cost for non-disabled persons or losing the benefit, but being paid by the employer a sum equal to the contribution the employer would have made for the benefit on behalf of the employee.

(3) In no event shall a disabled person be denied employment because of inability to participate in a fringe benefit plan as described in paragraphs (G)(1) and (G)(2) of this rule.

(H) Voluntary affirmative action plans.

(1) In determining whether an employer has violated the proscriptions of Chapter 4112. of the Revised Code against discrimination based on disability, the Ohio civil rights commission will consider evidence of an employer's efforts to establish and implement a voluntary affirmative action plan for employment of disabled persons. The Ohio civil rights commission is specifically interested in implementation of such plans which has resulted in employment of disabled persons and in changes in employment practices or procedures which will facilitate access to employment by disabled persons.

(2) Approval by an agency of the United States government of an employer's affirmative action plan that is required by federal law, does not relieve such employer of the obligations imposed by Chapter 4112. of the Revised Code, as

it relates to employment of disabled persons, but such plans will be treated as voluntary plans for the purposes of paragraph (H)(1) of this rule.

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Certification

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