

**CHAPTER 44. DISCRIMINATION ON THE BASIS OF
HANDICAP OR DISABILITY**

GENERAL PROVISIONS

- Sec.
- 44.1. Purpose.
- 44.2. Construction.
- 44.3. Enforcement.
- 44.4. Definitions.
- 44.5. General prohibitions.
- 44.6. Access.

EMPLOYMENT

- 44.11. Preemployment process.
- 44.12. Eliciting and disseminating information concerning an employe's handicap or disability.
- 44.13. Equipment modification.
- 44.14. Job modification.
- 44.15. Handicaps or disabilities not presently but potentially job related.

PUBLIC ACCOMMODATIONS

- 44.21. Generally.

Authority

The provisions of this Chapter 44 issued under the Pennsylvania Human Relations Act (43 P. S. §§ 951—963), unless otherwise noted.

Source

The provisions of this Chapter 44 adopted October 6, 1978, effective November 6, 1978, 8 Pa.B. 2715, unless otherwise noted.

GENERAL PROVISIONS

§ 44.1. Purpose.

The purpose of this chapter is to insure that all employment and public accommodations subject to the coverage of the act are conducted, operated, and made available in a manner which does not discriminate on the basis of handicap or disability and which will effectively promote integration of handicapped or disabled people into the mainstream of life in this Commonwealth.

Comment

The Commission considers the goal of integration to be mandated by the relevant legislative history, the precatory language that abounds through the act, and the definition of the term "discriminate" which includes "segregate" (Section 4(g) of the act). Efforts to comply with this chapter will be viewed by the Commission in light of their effect upon the integrationist policy.

§ 44.2. Construction.

(a) This chapter shall be construed liberally for the accomplishment of the purposes of the act.

(b) This chapter will be construed consistently with other relevant Federal and State laws and regulations except where the construction would operate in derogation of the purposes of the act and this chapter.

Comment

The purpose of subsection (b) is to make clear the Commission's intent to avoid varying and perhaps conflicting sets of rules and regulations for those subject to obligations created by this chapter. Thus, to the extent feasible, the Commission will consider compliance with prevailing requirements under sections 503—504 of the Federal 1973 Rehabilitation Act, Federal and State architectural barriers laws, etc., to satisfy the requirements of this chapter.

§ 44.3. Enforcement.

This chapter shall be subject to and will be enforced in accordance with the act, Chapter 42 (relating to special rules of administrative practice and procedure) and 1 Pa. Code Part II (relating to general rules of administrative practice and procedure).

Comment

This section is added in response to suggestions from numerous commentators, upon the Commission's first proposed regulations on handicap and disability.

§ 44.4. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Act—The Pennsylvania Human Relations Act (43 P. S. §§ 951—963).

Commission—The Human Relations Commission.

Facility—The term includes, but is not limited to, all or any portion of buildings, structures, equipment, roads, walks, parking lots, fixtures and other real or personal property.

Handicapped or disabled person—Includes the following:

- (i) A person who has or is one of the following:
 - (A) A physical or mental impairment which substantially limits one or more major life activities.
 - (B) A record of an impairment.
 - (C) Regarded as having an impairment.
- (ii) As used in subparagraph (i), the phrase:

(A) “Physical or mental impairment” means a physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin, and endocrine or a mental or psychological disorder, such as mental illness, and specific learning disabilities.

(B) “Major life activities” means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(C) “Has a record of such an impairment” means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

(D) “Is regarded as having an impairment” means has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator or provider of a public accommodation as constituting a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward the impairment; or has none of the impairments defined in subparagraph (i)(A) but is treated by an employer or owner, operator or provider of a public accommodation as having an impairment.

Nonjob-related handicap or disability—The term includes the following:

(i) A handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in, or has been engaged in. Uninsurability or increased cost of insurance under a group or employe insurance plan does not render a handicap or disability job-related.

(ii) A handicap or disability is not job-related merely because the job may pose a threat of harm to the employe or applicant with the handicap or disability unless the threat is one of demonstrable and serious harm.

(iii) A handicap or disability may be job-related if placing the handicapped or disabled employe or applicant in the job would pose a demonstrable threat of harm to the health and safety of others.

Undue hardship—The factors to be considered in determining whether an undue hardship is imposed by the requirement that a reasonable accommodation be made to a person’s handicap or disability include, but are not limited to, the following:

(i) The overall size and nature of a business, organization, program or public accommodation, including number of employes, structure and composition of workforce, and number and type of facilities. However, financial capability to make reasonable accommodations shall only be a factor when raised as part of an undue hardship defense.

- (ii) Good faith efforts previously made to accommodate similar handicaps or disabilities.
- (iii) The extent, nature and cost of the reasonable accommodation needed.
- (iv) The extent to which handicapped or disabled persons can reasonably be expected to need and desire to use, enjoy or benefit from the employment or public accommodation which is the subject of the reasonable accommodation in question.
- (v) Legal or proprietary interest in the subject of proposed reasonable accommodations including authority to make the accommodations under the terms of a bona fide agreement, such as a lease, governing or describing rights and duties with respect to the subject.

Comment

The Commission chose to reject the recommendation of several commentators that "reasonable accommodation" be defined. The term is increasingly used without definition, in the literature of discrimination law, is an evolving concept that changes with the state of technology, and is probably best left to construction on a developmental, case-by-case basis.

The definition of "handicapped or disabled person" is adopted verbatim from the definition of the United States Department of H.E.W.'s section 504 regulations in accordance with the recommendations of most commentators. The Commission is satisfied that the Federal definition avoids the ambiguity commonly complained of with respect to its own earlier definition. The terms "handicap" and "disability" are used interchangeably because that appears to reflect the plain intent of the Legislature. Notwithstanding the suggestions of several commentators, the Commission is not convinced that it is authorized by the act nor that it would be wise to establish various classes of handicapped or disabled persons with different protections depending upon the severity of handicap or disability.

The Commission has satisfied itself that the definition of "non-job-related handicap or disability," § 44.4, is sufficient to overcome the criticism of many commentators that the chapter does not adequately tie protection from employment discrimination to qualification for employment. Although the Commission has deleted language from earlier proposed regulations specifically limiting the relevancy of collective bargaining agreements in the determination of job relatedness, the Commission remains committed to the well-established principle of law that private contracts, including collective bargaining agreements, are not valid to the extent that their terms violate antidiscrimination or other laws. Section 44.4, relating to conditions which might pose a threat of harm to the handicapped or disabled worker or applicant, is specifically intended to afford the same degree of self-determination as is available to able-bodied persons. This is considered consistent with the general goal of aiding persons with handicaps or disabilities to be full, independent participants in Pennsylvania life.

Factors relevant to a determination of undue hardship are set forth at § 44.4. However, the Commission emphasizes that the list is not exhaustive and that no single factor should ever be deemed necessarily dispositive.

It should also be noted that while the Commission deems the availability of the undue hardship defense to be necessary for the fair operation of this chapter, it will not be construed so as to develop into a large loophole for avoidance of the purposes of the act. As one thoughtful commentator upon the Commission's originally proposed regulations noted, places of employment and public accommodation have for many years complied with health, safety, fire codes, etc., without undue hardship. It is not anticipated that compliance with this chapter will impose any greater hardship than those codes.

In response to suggestions from some commentators the Commission has deleted the “size of budget” language that appeared as an undue hardship factor in earlier proposed regulations and at § 44.4 has clarified that financial capability will be a factor appropriately considerable only when raised as a defense.

In connection with the fourth undue hardship factor, at § 44.4, it will generally be presumed that handicapped or disabled persons need and desire to use, enjoy, and benefit from employment or public accommodations in proportion to their able-bodied counterparts. Failure or nonexistence of previous attempts to use, enjoy or benefit will usually be deemed irrelevant because of the likelihood that such failure is attributable to historical discrimination and negative societal stereotyping rather than to lack of interest.

The Commission considers it distinctly inappropriate to exempt a lessee or other non-owner of facilities from reasonable accommodation obligations. The General Assembly can hardly be presumed to have intended that a factory owner-employer owes significant obligations of reasonable accommodation to handicapped or disabled employees from which he or she would be exempt if the factory were controlled by virtue of a long-term lease. However, to counter-balance any unduly harsh effects of this position, the Commission has designated proprietary rights, at § 44.4, as a factor relevant to the determination of undue hardship. The Commission was persuaded to take this approach in light of the inclusion of nonownership interests in the definition of “facility” under the United States Department of H.E.W.’s regulations to implement section 504 of the 1973 Rehabilitation Act and in light of the availability of tax credits for alterations to unowned facilities to improve accessibility for the handicapped under section 2122 of the Federal Tax Reform Act of 1976.

Section 44.4 shall not necessarily exempt from a charge of unlawful discrimination pursuant to section 5(e) of the act a lessor or any third party who refuses to permit or who interferes with the making of reasonable accommodation.

Notes of Decisions

Undue Hardship

Termination of a police officer diagnosed with angina does not violate the State Human Relations Act when his condition prevented him from performing the essential functions of a police officer and the small size of the police department prevented city from making reasonable accommodation for the police officer’s handicap. *Shoemaker v. Human Relations Commission*, 634 A.2d 772 (Pa. Cmwlth. 1993).

Inability to obtain a position as police officer in city did not render individual handicapped. *Pittsburgh v. Human Relations Commission*, 630 A.2d 919 (Pa. Cmwlth. 1993).

The fact that a complainant is perceived as having a handicap or disability is sufficient, and it is not necessary for the complainant to further demonstrate that the “perceived” disability substantially limits one or more major life activities beyond the employer’s perception. *Civil Service Commission of Philadelphia v. Human Relations Commission*, 556 A.2d 933, 935 (Pa. Cmwlth. 1989); reversed 591 A.2d 281 (Pa. 1991).

Epilepsy of claimant, who was a urethane utility man, was considered a handicap which was job related because it posed a demonstrable threat to the health and safety of others. *Murphy v. Cartex Corp.*, 546 A.2d 1217 (Pa. Super. 1988).

The Pennsylvania Human Relations Act (43 P. S. § 955(a)) and the regulations promulgated thereunder were impliedly preempted to the extent that Federal law establishes particular standards for

mental and physical qualifications for security personnel at nuclear power plants. *Burns Internship Security Services, Inc. v. Human Relations Commission*, 547 A.2d 818 (Pa. Cmwlth. 1988).

An employer who reasonably relies on expert medical opinion stating that an applicant suffers from a job-related handicap has a good-faith defense under this section to a handicap discrimination claim even if employee's experts subsequently controvert this opinion. *Action Industries, Inc. v. Human Relations Commission*, 518 A.2d 610 (Pa. Cmwlth. 1986); appeal denied 531 A.2d 433 (Pa. 1987).

The definition of handicapped or disabled person, which includes a person who is regarded as having an impairment in addition to persons with an actual impairment or having a record of an actual impairment, is not an improper extension of the Human Relations Act nor is it at odds with fundamental principles of law. *State Police v. Human Relations Commission*, 457 A.2d 584 (Pa. Cmwlth. 1983).

Cross References

This section cited in 16 Pa. Code § 44.13 (relating to equipment modification); 16 Pa. Code § 44.15 (relating to handicaps or disabilities not presently but potentially job-related); and 16 Pa. Code § 45.4 (relating to definitions).

§ 44.5. General prohibitions.

(a) Handicapped or disabled persons may not be limited, classified or segregated in a way that adversely affects their opportunities to use, enjoy or benefit from employment and public accommodations subject to the coverage of the act; except that this subsection may not be construed so as to impose an undue hardship.

(b) Handicapped or disabled persons may not be denied the opportunity to use, enjoy or benefit from employment and public accommodations subject to the coverage of the act, where the basis for the denial is the need for reasonable accommodations, unless the making of reasonable accommodations would impose an undue hardship.

Comment

Consistent with the purpose of this chapter to assure effective equality of opportunity for handicapped or disabled persons in an integrated setting, subsection (a) disallows compliance by any means that limits, classifies, or segregates handicapped or disabled persons and which adversely affects their opportunities. Of course, separate job classifications, programs, facilities, etc., would be permissible where necessary to guarantee effective equality of opportunity; but the existence of such separate classifications, programs or facilities generally will not be sufficient to justify denying a handicapped or disabled person the opportunity to use, enjoy or benefit from the employment or public accommodations opportunities available to the able-bodied.

Notes of Decisions

Applicability

Section 44.5 applies only to employment and public accommodations, not to private housing. *Doral II Condominium Association v. Human Relations Commission*, 779 A.2d 605 (Pa. Cmwlth. 2001); appeal granted in part 801 A.2d 1207 (Pa. 2002); and order affirmed at 810 A.2d 634 (Pa. 2002).

Standard

Because the standard enunciated by the Federal courts establishes a direct violation of the Americans With Disabilities Act for failing to provide a reasonable accommodation for an employee's disability, the "reasonable accommodation standard" is the proper standard to be applied to determine whether an employer has engaged in disability discrimination. *Canteen Corp. v. Human Relations Commission*, 814 A.2d 805 (Pa. Cmwlth. 2003).

§ 44.6. Access.

(a) Every place of employment or public accommodation for which final design and construction plans are completed after November 6, 1978 shall be designed and constructed without architectural and other barriers or omissions that interfere with effective use and enjoyment of, benefit from, ingress to, egress from, and mobility within buildings, work areas, offices, facilities, and the like, by handicapped or disabled persons.

(b) After November 6, 1978, when all or part of a place of employment or public accommodation is subject to substantial alteration or alteration that could affect use by persons with a handicap or disability, alterations shall be planned and executed without architectural and other barriers or omissions that interfere with effective use and enjoyment of, benefit from, ingress to, egress from, and mobility within the altered portion by handicapped or disabled persons.

(c) With respect to existing facilities, employers and owners, operators or providers of public accommodations shall make reasonable accommodations to handicapped or disabled persons by eliminating architectural and other barriers or omissions that interfere with effective use and enjoyment of, benefit from, ingress to, egress from and mobility within buildings, work areas, offices, facilities, and the like by handicapped or disabled persons.

(d) An employer or owner, operator, provider of a public accommodation shall be deemed:

(1) To be exempt from the requirements of this section to the extent that they impose an undue hardship.

(2) To have complied with this section if design, construction or alteration is in conformance with relevant specifications of one of the following:

(i) *The American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by the Physically Handicapped*, published by the American National Standards Institute, 1430 Broadway, New York, New York 10018.

(ii) The Department of Labor and Industry Standards, 34 Pa. Code Chapter 47 Subchapter D (relating to facilities for handicapped), promulgated under the act of September 1, 1965 (P. L. 459, No. 235) (71 P. S. §§ 1455.1—1455.3a), known as the Architectural Barriers Law.

(e) Departures from the particular standards noted in subsection (d) shall be deemed to have satisfied the requirements of this chapter if it is evident that

equivalent access or equivalent opportunity to use, enjoy or benefit in an integrated setting is thereby provided.

Comment

Section 2122 of the Federal Tax Reform Act of 1976 provides tax credits for alterations of property to promote accessibility.

The concept of effective use and enjoyment as used in this section relates not merely to physical and architectural barriers but also to those barriers or omissions such as inadequate warning or directional information systems which render a facility less usable for or less "accessible" to a person with a visual or communicative handicap or disability.

EMPLOYMENT

§ 44.11. Preemployment process.

(a) A person may not be denied employment, promotion or another term, condition or benefit of employment solely for refusing to take a test, submit to a process, or answer a question prohibited by this section.

(b) An employer may not make use of an employment test, device or other selection criterion that screens out or tends to screen out persons with a handicap or disability unless both of the following factors apply:

(1) The test, device or other selection criterion is job-related for the position in question or a demonstrably related position.

(2) Alternative job-related tests, devices or criteria that do not screen out or tend to screen out as many handicapped or disabled persons are not shown by the Commission or the applicant to be available.

(c) An employer shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employe who has a handicap or disability that impairs sensory, manual or speaking skills, the test results accurately reflect the applicant's or employe's job skills, aptitude or whatever other factors the test purports to measure rather than reflecting the applicant's or employe's impaired sensory, manual or speaking skills, except where those skills are the factors that the test purports to measure.

(d) Except as provided in subsections (f) and (g), preemployment inquiries that are intended to reveal or that may have the tendency to reveal the existence of a present or recurring handicap or disability shall be limited to those necessary to determine whether the handicap or disability is job-related; however, an employe or applicant to whom an oral or written inquiry is directed shall be provided the opportunity to explain why the handicap or disability is nonjob-related, including what special efforts the employe or applicant makes or what reasonable accommodations can be made to render the handicap or disability nonjob-related.

(e) An employer may not deny reasonable requests from an applicant for assistance in completing the application process.

(f) When an employer is taking remedial action to correct the effects of past discrimination against or is taking voluntary action to overcome the effects of

conditions that resulted in limited opportunities for handicapped or disabled persons, the employer may invite applicants for employment to indicate whether and to what extent they have a nonjob-related handicap or disability, provided that:

- (1) The employer states clearly on a written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts.

(2) The employer states clearly that the information is being requested on a voluntary basis, that it will be kept confidential subject to the exceptions set forth in § 44.12 (relating to eliciting and disseminating information concerning an employe's handicap or disability), and that refusal to provide it will not subject the applicant or employe to adverse treatment.

(g) Nothing in this chapter is deemed to preclude a bona fide medical examination; provided that all similarly situated employes or applicants are subject to the same examination without regard to handicap or disability.

Comment

This section is patterned after sections 84.13.14 of H.E.W.'s section 504 regulations. Subsection (a) is not intended to protect a person who acts in an untruthful, dishonest or deceptive manner in response to a preemployment process prohibited by this section. Rather, it protects the individual who refuses to submit to such a process. Subsections (b), (c) and (d) meet the objections of earlier commenters that the chapter did not sufficiently clarify that all preemployment selection criteria and screening processes must be job related.

The final sentence of § 44.11(d) merely provides the opportunity in certain circumstances for the applicant to explain why a seemingly job related handicap or disability is in fact nonjob-related or what reasonable accommodations can be made to render it nonjob-related. It is not intended to create special privileges in the applicant to intrude upon the employer's business operation. For example, the subsection does not mandate that a handicapped or disabled applicant be permitted to inspect a work site, or be made privy to special information in order to assess how his handicap or disability can be accommodated.

§ 44.12. Eliciting and disseminating information concerning an employe's handicap or disability.

Information concerning a handicap or disability, medical condition or medical history of an employe, whether past, present or recurring, shall be accorded confidentiality as medical records and shall be retained only through the use of forms accorded confidentiality as medical records. The information may only be disseminated with the permission of the employe or when the employer can show a demonstrable business necessity for the dissemination including, but not limited to, the following:

- (1) Responsible supervisors may be provided relevant information regarding restrictions on the work or duties of handicapped or disabled persons and regarding necessary accommodations.
- (2) First aid, safety and other personnel may be provided relevant information where appropriate, if the condition might require emergency treatment or extraordinary measures by the personnel in the event of a safety hazard.
- (3) Government agencies investigating compliance with any law may be provided relevant information upon request.
- (4) Authorized representatives of a labor organization may be provided relevant information in the context of a bona fide labor dispute or grievance procedure.

(5) Insurers may be provided relevant information upon request for bona fide insurance purposes.

Comment

The reference in this section to past handicap or disability is not deemed inconsistent with section 5(b)(1) of the act, in that information relating to past handicaps or disabilities may be part of the bona fide medical examinations permissible under § 44.11.

Generally the section permits breaches of confidentiality and dissemination of information concerning an employe's handicap or disability only if the employer can show that sound business reasons necessitate the dissemination.

The example at paragraph (1) refers to supervisory personnel who have responsibilities relevant to the work or duty restrictions of the handicapped or disabled worker.

Paragraph (4) has been included to permit an employer to reveal otherwise confidential information in order to avoid serious labor strife, e.g., the situation in which a union protests the job duty modifications permitted for one worker under § 44.14 without knowing why the modifications are being made.

Of course, nothing in this section will be construed to permit the dissemination of information as is prohibited by a superseding law or regulation such as the H.E.W. section 504 regulations.

Cross References

This section cited in 16 Pa. Code § 44.11 (relating to preemployment process).

§ 44.13. Equipment modification.

(a) An employer shall make reasonable accommodations by modifying equipment and tools so that they can be used by a handicapped or disabled employe; provided that the modification does not impose an undue hardship upon the employer.

(b) A handicapped or disabled person shall be allowed to provide his own equipment or tools in order to function properly in the job applied for or engaged in.

(c) In determining whether or not an undue hardship is imposed by the requirement that reasonable accommodations be made in accordance with this section, factors to be considered in addition to those appearing in § 44.4 (relating to definitions) include, but are not limited to:

- (1) The effect the modification has on use of the equipment by others.
- (2) The effect the modification has on warranties governing the equipment.
- (3) The permissibility of making the modifications under applicable health and safety laws.

Comment

The Commission believes that subsection (a) places the burden of modifying equipment on the employer subject to an undue hardship defense. Subsection (b) merely prohibits the employer from disqualifying the employe who wishes to provide his or her own tools or equipment. Subsection (b) is not intended to prevent employers from requiring that the tools and equipment provided by handicapped and disabled workers comply with bona fide safety standards.

§ 44.14. Job modification.

(a) An employer shall make reasonable accommodations by modifying a job, including, but not limited to, modification of duties, scheduling, amount or nature of training, assistance provided, and the like, provided that the modification does not impose an undue hardship.

(b) Nothing in this section may be construed to require application of different production, attendance or disciplinary standards for the handicapped or disabled worker.

Comment

The Commission considers the requirement of job modification subject to the undue hardship defense to be consistent with a fundamental principle that underlies this chapter, to wit that some degree of special treatment or “reasonable accommodation” is within the contemplation of Act 318. Act 318 indicates that a handicap or disability is only job related if it substantially interferes with essential functions of a job. Conversely, a nonsubstantial interference, or interference with nonessential functions does not make a handicap or disability job related. Thus, the Commission expressly rejects the suggestion of some commentators that any need to modify a job renders a handicap or disability job related. Rather, the Commission believes that the General Assembly intended handicapped or disabled people to receive, not identical treatment, but treatment that would create for them effective equality of opportunity.

Subsection (b) clarifies, as requested by some commenters, that a handicap or disability is job related if it would require changes in production, attendance, or disciplinary standards. However, this subsection is, of course, subject to the general requirement to make reasonable accommodation, as set forth in § 44.5(b).

Notes of Decisions*Reasonable Accommodations*

“Reasonable accommodations” to the needs of a handicapped employe did not include the application of a different attendance standard nor the creation of a new job. *Magel v. Federal Reserve Bank of Philadelphia*, 776 F.Supp. 200, 204 (1991); affirmed 5 F.3d 1490 (3rd Cir. (Pa.) 1993).

AIDS is a “handicap” for purposes of the Pennsylvania Human Relations Act (43 P. S. §§ 951—1003). Employer failed to demonstrate that the accommodation of employe infected with AIDS works undue hardship on the enterprise’s operation. *Cain v. Hyatt*, 734 F.Supp. 671 (E.D. Pa. 1990).

If the employe suffers from arthritis and can no longer perform her job duties, and the employer makes every reasonable effort to continue the employe, offering her a disability retirement or a demotion to a position which has duties she can perform in absence of the availability of any other positions for which she is qualified, the employer is justified in suspending and removing her for rejecting both of the alternatives offered. *Laws v. Philadelphia County Board of Assistance*, 412 A.2d 1377, 1380 (Pa. Cmwlth. 1980).

§ 44.15. Handicaps or disabilities not presently but potentially job-related.

(a) An employer may not terminate, subject to different terms or conditions of employment, or refuse to hire or promote an employe or applicant because of a present handicap or disability which is not job-related but which may worsen and become job-related or because of a past job-related handicap or disability

which may or may not recur; provided that this subsection is not construed so as to impose an undue hardship on the employer.

(b) In determining whether or not an undue hardship is imposed by the requirements of subsection (a), factors to be considered in addition to those appearing at § 44.4 (relating to definitions) include, but are not limited to:

- (1) The length, cost and nature of training required for the job.
- (2) The length of service the employer can reasonably expect before the employee's handicap or disability is likely to become job-related.

Comment

Changes have been made from an earlier proposed version of this section to meet the suggestions of commentators. Job advancement and past handicaps or disabilities which might or might not recur have been added to the protections of the section. An undue hardship defense has been added as well as defenses aimed at protecting an employer's right to expect a reasonable return on investment. However, consistent with the thrust of § 44.5 and § 44.4 the Commission rejects the suggestion that this section be tied to an employee waiver of disability and death benefits.

Notes of Decisions

An employer may refuse to promote an employee to a position based on the employee's physical inability to perform essential functions without the employer's actions being deemed discriminatory. *Department of Corrections v. Weaver*, 606 A.2d 547 (Pa. Cmwlth. 1992); appeal denied 612 A.2d 986 (Pa. 1992).

AIDS is a "handicap" for purposes of the Pennsylvania Human Relations Act (43 P. S. §§ 951—1003). Employer failed to demonstrate that the accommodation of employee infected with AIDS works undue hardship on the enterprise's operation. *Cain v. Hyatt*, 734 F.Supp. 671 (1990).

The Human Relations Commission's determination that applicant's handicap is nonjob related is in accordance with the law when the employer fails to prove a demonstrable or serious threat of harm to applicant or that it will suffer undue hardship if applicant is employed. *State Police v. Human Relations Commission*, 457 A.2d 584 (Pa. Cmwlth. 1983).

PUBLIC ACCOMMODATIONS

§ 44.21. Generally.

If a handicapped or disabled person, with reasonable accommodation, meets the essential eligibility requirements for and is similarly situated with able-bodied persons in terms of need and desire to use, enjoy or benefit from a public accommodation, then reasonable accommodations shall be made to assure the person opportunity substantially equivalent to that of able-bodied persons to use, enjoy and benefit from the public accommodation in an integrated setting; provided that nothing in this section may be construed to impose an undue hardship upon an owner, operator or provider of a public accommodation, and provided further that nothing in this section may be construed so as to impose a demonstrable and serious threat of harm to the handicapped or disabled person or a demonstrable threat of harm to the health and safety of others.

Comment

This section requires that public accommodations made available to handicapped or disabled persons be substantially equivalent to, meaning equally effective as those available to able-bodied persons. Merely offering identical public accommodations without taking account of an individual's handicap or disability may have the effect of excluding that individual from use, enjoyment, or benefit of the public accommodation.

It should specifically be noted that section 4(e) of the act defines public accommodation to include educational institutions. Accordingly, the Commission construes § 44.21 to require that public school districts which provide free education for able-bodied children must provide a substantially equivalent service for handicapped and disabled children; i.e. an education suitable to their individual needs. Compliance with the Department of Education's regulation concerning Special Education—Program Responsibility, 22 Pa. Code Chapter 13 (Reserved), will be deemed sufficient to satisfy obligations created by this chapter.

Similar to § 44.4, which make health and safety factors relevant to determining the job relatedness of a handicap or disability, the Commission has met the concerns of some commentators by adding a new proviso to the effect that reasonable accommodation is not required where it will impose a demonstrable and serious threat of harm to the handicapped or disabled person seeking such accommodation or where it will impose any demonstrable threat of harm to the health and safety of others. The distinction, of course, is not due to any lack of regard for the health and safety of handicapped or disabled persons but rather to permit such persons the same degree of freedom of choice available to able-bodied persons.

Notes of Decisions*Applicability*

Section 44.21 applies only to employment and public accommodations, not to private housing. *Doral II Condominium Association v. Human Relations Commission*, 779 A.2d 605 (Pa. Cmwlth. 2001); appeal granted in part 801 A.2d 1207 (Pa. 2002); and order affirmed at 810 A.2d 634 (Pa. 2002).

[Next page is 45-1.]

44-14

(336380) No. 408 Nov. 08

Copyright © 2008 Commonwealth of Pennsylvania