

The Influence of the Americans with Disabilities Act, The Family Medical Leave Act, and the Pregnancy Discrimination Act on Academic Librarianship

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Abstract: Employees' mental and physical problems require appropriate responses from the library manager. Familiarity with the Americans with Disabilities Act, the Family and Medical Leave Act, and the Pregnancy Discrimination Act is legally essential. The authors offer guidelines on the application of each act in relation to the other two.

In 1990, the Americans with Disabilities Act (ADA)¹, a comprehensive civil rights statute, elevated disabled persons to a new level of protected status similar to the human rights afforded minorities with the enactment of the Civil Rights Act of 1964.² The ADA eliminates discriminatory practices directed toward persons with physical or mental disabilities and affords them the opportunity to live productive lives in the least restrictive environment.³

Provisions of the Family and Medical Leave Act (FMLA) of 1993⁴ also concern the issues of disabilities; and, when academic library managers attempt to frame their organizations' medical and disability leave policies, they should fully comply with both the ADA and the FMLA. The Equal Employment Opportunity Commission (EEOC), which enforces Title I of the ADA, and the Department of Labor, which enforces the FMLA, have, to

date, provided employers with no concrete guidelines concerning how these acts relate to each other. Complicating matters, the obligations for nondiscrimination imposed by the Pregnancy Discrimination Act (PDA) of 1978⁵ may additionally impact leaves of absence and related issues.

This article identifies critical issues among the ADA, the FMLA, and the PDA and offers strategies that can be followed to resolve some of the problems that will certainly arise in the future as these statutes interact and managers attempt to comply with their respective mandates.

Who Is Covered by Title I of the ADA?

Title I of the ADA prohibits any form of discrimination against a "qualified individual with a disability" based solely on the individual's disability. This prohibition applies to all aspects of employment, including recruitment, hiring and placement, retention and promotion, compensation and fringe benefits (including leaves of absence), and the disciplining and discharging of employees.⁶

A "disability" is broadly defined by Title I of the ADA to cover a wide range of actual disabilities and perceived disabilities in addressing the social issue of equity. The act defines the term "disability," as:

- A "physical or mental impairment" that "substantially limits" one or more major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; or
- A record of having such an impairment; or
- Being regarded as having such an impairment.⁷

A physical impairment will affect one or more of the major body systems; a mental impairment will take the form of a mental or psychological disorder.⁸

A person is "substantially" impaired if s/he is unable to engage in one or more life activities. In other words, the individual is unable to perform a major life activity that an average person in the general population can perform. Considered in establishing what constitutes a significant impairment is the condition and manner (including duration or lack of) in which a person can perform a major life activity, compared to the average individual in the general population. Measures of impairment take into consideration both the nature and severity of the impairment. It is also necessary to take into ac-

count the permanent or expected long-term impact of the impairment.⁹

The ADA attempts to protect a "qualified individual with a disability" from discrimination on the basis of that disability. The protected party is a person with a disability who, with or without "reasonable accommodation," is capable of performing the "essential functions" of a position that s/he is seeking or is already holding.¹⁰

In order to ascertain what, in fact, are the "essential functions" of a library position, the ADA provides that consideration must be given to the employer's judgment about what functions of a position are essential. The employer is required to state these essential job functions clearly in the written job description.¹¹ For example, given a job description that contains the requirement that an academic librarian is responsible for conducting on-line searches of a university's databases, what is truly "essential" about this job requirement? In this case, what is essential is that the academic librarian be knowledgeable about the methodology of searching and that s/he be able to direct searches if, in the case of that particular librarian, the computer system is not personally accessible because of his/her disability. A non-essential task in the same case scenario is that the academic librarian be required to feed paper into a printer if s/he does not have the dexterity to do so. Clearly, a subordinate or another individual could be called upon to complete the task of feeding paper. It is not essential to the professional work of an academic librarian.

Once the academic library manager has determined that an applicant for employment or a current employee of the university library is a "qualified individual with a disability" and that the individual can perform the "essential" duties of the position at issue, it then becomes necessary for the manager to ascertain what would constitute a "reasonable accommodation" that the academic library should consider implementing. A reasonable accommodation that an academic library might be required to provide could include modifying existing buildings to eliminate architectural barriers, modifying equipment or adding devices to be used in the performance of the job (e.g., to eliminate sensory barriers), restructuring the actual job, creating part-time or modified work schedules, or reassigning an employee who develops a disability to a vacant position for which s/he is qualified.¹²

It should be noted that an academic library may be held liable under the ADA for discrimination if it fails to make reasonable accommodations to a known disabled person who is otherwise qualified to perform the essential

functions of a position, unless the library can demonstrate that the accommodation would impose an "undue hardship" on the effective operation of the library.¹³ An "undue hardship" is an action (including a proposal of accommodation demanding subsequent implementation) which would in the overall consideration require significant expense or difficulty to the employer. Consideration includes the overall size and financial resources of the library; the composition, structure, and functions of the library's work force; and the total impact of the accommodation upon the operation of the library.¹⁴ For example, an institution with a historic library that poses a serious architectural problem in adaptation to accommodate the orthopaedically disabled may cite the undue hardship section of the ADA as a defense for not providing accessibility to work areas. A good argument can be made in these cases that the extensiveness of alteration needed for compliance would constitute an irreparable loss to the historic integrity and value of the structure. Such a severity of loss of historic character, along with the real expense of alteration, can serve as an example of how to apply the undue hardship proviso.

Indeed, many of the nation's oldest institutions of higher education still operate academic libraries located within historic buildings, the alteration of which would require a huge investment of institutional funds in achieving accessibility for the disabled. Often, of course, inconspicuous alternatives exist, such as a side door or a loading dock. When possible, a good faith effort should be made to provide access through these alternative entrances.

Although academic librarians are philosophically in agreement with the concepts of fair and equal treatment of patrons and colleagues with disabilities, the library professional also holds a duty or responsibility to his/her employer to hire the best possible employees who can meet the needs of the positions to be filled. The responsibility of hiring only the best qualified applicants is not in conflict with the mandates of the ADA. Indeed, it should be noted that the ADA provides the library with two significant principles of equality. One is the establishment of employment standards aimed to maintain an institution's standards of excellence; a second is the prohibition of preclusive standards that adversely affect the disabled.

Academic libraries are permitted to establish standards of employment that must first be met before an offer of employment is made. Thus, the application of qualification standards, tests, or selection criteria that screen out, or tend to do so, individuals with disabilities are permitted to the extent that the library can show these selection criteria to be "job-related and...consistent with business necessity." Holding to the standards should

include, if appropriate, an affirmation that the accommodation necessary to allow a disabled librarian to perform the duties of the position cannot be provided.¹⁵

Another principle of equality provided by the ADA addresses employment standards that preclude or eliminate disabled librarians from possible employment by a library. For example, a library might establish qualification standards that preclude an individual with a disability from a particular position on the basis that the individual would pose a direct threat to the health and safety of him/herself or another library employee. Such standards could act as grounds for denial of an application for employment.¹⁶ The necessity of the restrictive standards is a matter for review.

There is no substitute for a good faith effort in the form of an offer of reasonable accommodation in attempting to meet the needs of a person with a disability. The "good faith effort" defense is available even in situations in which a library has violated the ADA and in which compensatory and punitive damages are available to a prevailing party. If the library manager can demonstrate that s/he attempted to make a good faith effort (in consultation with the disabled applicant for employment or promotion) to identify barriers and to make a reasonable accommodation to the disabled applicant's needs and if that accommodation fails or proves impractical to implement, then the library is likely not to be seen as violating the ADA.¹⁷

The ADA prohibits pre-offer medical examinations and inquiries of an applicant concerning whether s/he has a disability or the nature and severity of a disability.¹⁸ However, library managers may make pre-employment inquiries concerning an applicant's ability to perform job-related functions.¹⁹ Managers may also require medical examinations of applicants subsequent to an offer of employment and prior to the commencement of that employment. Additionally, library managers may condition an offer of employment on the outcome of a medical examination, provided that similar examinations or inquiries are mandatory for all applicants for employment in that particular job classification and provided that the examinations are not designed to discriminate against otherwise qualified applicants with disabilities.²⁰

The ADA requires that medical information and any medical history obtained concerning an applicant's health condition must be maintained on separate forms and in separate medical files. This material must, with certain specific statutory exceptions, be handled as confidential records.²¹ Subsequent to an offer of employment, the manager can ask an applicant if s/he is

disabled and can inquire about the nature and severity of a disability, but only to the extent that such information can be shown to be "job-related and consistent with business necessity."²² The library manager also has the responsibility of ensuring that inquiry concerning the medical history of a staff member or information obtained pursuant to a medical examination is protected as confidential material.²³

The ADA does not prevent the library from prohibiting the use of alcohol and illegal drugs by employees on the work site.²⁴ If an employee is a drug addict or alcoholic, the manager still may hold that employee to the same standards of employment or job performance that the library holds other employees.²⁵

The Pregnancy Discrimination Act

This paper should make clear whether the ADA covers pregnancy as a medical condition. Taking into consideration the large number of female employees found particularly in the library field and the need of an organization to avoid any unnecessary litigation, this issue is of extreme importance to the library manager.

The Pregnancy Discrimination Act (PDA) was enacted in 1978 as an amendment to Title VII of the Civil Rights Act of 1964.²⁶ Popularly known as "Title VII," this portion of the Civil Rights Act generally prohibits discrimination on the basis of race, color, religion, sex, or national origin by organizations, including libraries, that have fifteen or more staff members.²⁷ The PDA was enacted in response to a ruling by the Supreme Court in the case of the *General Electric Company v. Gilbert*, 429 U.S. 125 (1976), wherein the court held that an employer was not denied the authority, under Title VII (in its unamended form of that time), that of excluding from a disability plan, pregnancy-related disabilities. The rationale for the ruling stated that discrimination on the basis of pregnancy was not the same as discrimination on the basis of sex. As a result of the reaction to this court decision, the PDA added a subsection (K) to Section 701 of Title VII, broadening the terms "because of sex" or "on the basis of sex" to encompass discrimination "on the basis of pregnancy, childbirth, or related medical conditions."²⁸

The PDA also provides that "[w]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability

or inability to work.”²⁹ The EEOC has developed regulations pertaining to pregnancy and childbirth-related leaves of absence that require the employer to establish policies that treat pregnancy and childbirth-related leaves the same as leaves of absence required for other medical reasons. In terms of the commencement and duration of the medical or disability leave of an employee, the PDA states that leave extensions, reinstatement rights, health or disability insurance plan coverage, and seniority and other benefits and privileges accrued while on leave must not be denied that employee.³⁰ In short, a library manager must insure that his/her policies concerning medical leaves of absence do not treat pregnancy differently from other medical conditions.

The EEOC regulates the PDA. In light of its regulation, if a manager fails to establish a medical leave policy which covers staff members, or if established medical leave is insufficient, the lack of established policy or inadequacy of the existing policy may violate Title VII. As a result, an employee who is inadequately covered may argue that the policy has a disparate impact on female library employees and is not consistent with business necessity.³¹

The concept of an employer’s medical leave policy treating all medical disabilities identically has been legally challenged. Indeed, it has been successfully contended that such supposedly equal treatment of all, but dissimilar, disabilities has a “disparate impact” and, hence, may, in particular cases, violate Title VII. This concept of “disparate impact” was upheld in the case of *Abraham v. Graphics Arts International Union* (660 F. 2nd 811, D.C. Circuit 1981), which contended the employer’s medical leave policy, which allowed only a 10-day leave of absence for all disabilities, had a discriminatory effect toward women with medical conditions attendant to pregnancy and childbirth. In a word, the court held that such medical leave policies constitute sex discrimination and violate Title VII. Also, in *United States Equal Employment Opportunity Commission v. Warshawsky & Co.*, 768 F. Supp. 647 (N.D. Ill. 1992), an employer’s medical leave policy which denied extended leave to employees with less than one year’s seniority was held to have a disparate impact on female employees; and the policy was, therefore, found to violate Title VII.

The Family and Medical Leave Act

The Family and Medical Leave Act (FMLA)³² covers private sector organizations that employ fifty or more employees and public sector organizations irrespective of the number of employees.³³ The FMLA provides that

an eligible employee may take twelve weeks of unpaid leave during any twelve-month period without jeopardizing his/her employment status, so long as the reasons for the leave are based upon any of the four following situations:

1. to care for the employee's newborn child, within the twelve-month period following the child's birth
2. to care for a child newly placed with the employee through either adoption or foster care, within the twelve-month period following that placement
3. to care for the employee's spouse, child, or parent, if that relation has a "serious health condition"
4. for the employee to care for him/herself when a serious health condition renders the employee unable to perform his/her job³⁴

An employee must have been in service with a library of fifty or more employees; if in the private sector, for at least twelve months, and have been employed during those preceding months for at least 1,250 hours.³⁵ If the library is in the public sector, the same conditions apply regardless of the number of employees in the organization.

The FMLA defines a "serious health condition" as including any injury, illness, or mental or physical problem requiring inpatient care or "continuing treatment" by a health care provider.³⁶ The FMLA defines "continuing treatment" as being treatment by a health care provider for a health problem which results in a period of absence of least three work days.³⁷

The FMLA does not mandate managers to pay for the leave taken by employees. A library may offer a fringe benefit which provides for paid leave. If so, the library may credit that paid leave towards the twelve-week FMLA leave that an employee is eligible to receive.³⁸ The manager may also require the employee to substitute accrued vacation leave, personal leave, family leave, or sick leave towards the twelve weeks of leave allowed under the FMLA.³⁹

An employee of a library may take his/her leave under the FMLA intermittently, or s/he may create a reduced-hour work schedule to accommodate the need of caring for a family member who has a serious health condition or to accommodate the employee's own personal need to care for him/herself because of a serious health problem.⁴⁰ In order to qualify for intermittent leave, the employee must demonstrate that the leave is medically

necessary. The type of leave based on medical necessity must be certified by a health care provider who is treating either the employee or a member of the employee's family.⁴¹

In situations in which employees elect to take either intermittent leaves or reduced-hour schedules, libraries are allowed to transfer employees temporarily to positions that offer equivalent pay and fringe benefits to the employees' regular (or original) positions, so long as the library can demonstrate that the transfers best accommodate the desired leaves.⁴² Once a leave has terminated, the FMLA requires the manager to reinstate the employee in the position held prior to the commencement of the leave or to place the employee in an "equivalent position" that s/he is otherwise qualified to hold with equal pay, fringe benefits, and seniority.⁴³ "Equivalent position" refers to an alternate position with the library which has the same pay, fringe benefits, and working conditions as the position previously held by the employee.⁴⁴ For example, if the employee was formerly employed as a reference librarian in the library of a school of law, an equivalent position might be as an instructor in legal research and writing. Notwithstanding the reinstatement section of the FMLA, the act does not mandate that a manager find a position for an employee who otherwise would have been laid off. Specifically, this means an instance in which an employee's previous position has been -- and would have been -- eliminated from the manning table in spite of the employee's individual circumstances, including personal health complications.⁴⁵

Another significant aspect of the FMLA is the section that requires the library to reinstate benefits which had accrued prior to the commencement of leave.⁴⁶ Also, it is important to note that the FMLA mandates that an employer continue to carry group health care coverage for the duration of the employee's leave.⁴⁷ On his/her part, the employee who is on leave is required to continue paying the usual premiums for such coverage.⁴⁸

Academic library employees who are covered by the FMLA are provided with three important areas of protection:

1. First, when leave is to be taken either for pre-planned medical treatment of a family member or for treatment of the employee's own serious health problem, an employee is required to schedule treatment sessions so they do not interfere unduly with the operation of the library.⁴⁹ Hence, the employee must confer with the library manager when planning treatment sessions so that the leave taken will best meet the scheduling needs of both the library and the employee.⁵⁰

2. Second, an employee is required under the FMLA to give the library at least 30-days notice of the intent to take a leave for medical treatment if such treatment is foreseeable. If the circumstances do not allow the employee to give early warning of the need for medical leave, the FMLA requires the employee to notify the manager of the need for medical treatment "at the earliest possible date." Normally, "the earliest possible date" is construed to mean within one or two working days of learning of the need for medical treatment.⁵¹ Pursuant to a uniformly-enforced policy, the library could delay permission for leave till the notice period has passed if the required notice is not provided.⁵² Quite simply, the organization cannot be expected to make a response or be held accountable for not doing so when it is in ignorance of a need.
3. Third, when an employee requests leave to care for a family member with a serious health condition or for that employee to care for his/her own serious health problem, the library may require the certification of a health care provider to verify the need for leave.⁵³ Under the FMLA, the library may make leave conditional upon the provision of certification, only if the library gives the employee a minimum of fifteen calendar days to obtain such certification.⁵⁴ Once leave has been granted under the FMLA, the library may also require the employee to provide continuing certification by the health care provider of the employee's ability (or inability) to return to work.⁵⁵

Relationship Between the ADA, PDA, and the FMLA

Comparing and contrasting the ADA, PDA, and FMLA reveals their combined impact on academic libraries and aids in the avoidance of needless employment discrimination litigation. The librarian should not be overwhelmed when first reviewing the mandates of the three acts. S/he should first be aware that the requirements of the three acts are to be seen as supplemental rather than conflicting. That is to say, a manager who attempts to comply with one of these acts will not find him/herself automatically in violation of the other two acts.⁵⁶ In other words, meeting the conditions of the three acts will not result in the creation of a dilemma for the manager attempting to comply with the law. The manager will not be forced to weigh the potential liability and risk factors of selecting the appropriate act for compliance.⁵⁷ The manager should, rather, concentrate on a review of the library's employment policies and focus on the equitable application of those policies to determine if the library is in compliance with all relevant mandates of each act. Concord among the acts will care for itself.

Coverage

The first step that must be taken to determine the impact of these statutes is to ascertain if the library is, in fact, covered by the acts. As stated previously, only large private sector organizations with a minimum of fifty employees are covered by the FMLA. However, public sector organizations -- which would include many academic libraries -- are subject to the regulations of the FMLA regardless of the number of employees they have. Notwithstanding the universal coverage of academic libraries in the public sector, the individual seeking benefits under the FMLA must still meet all of the requirements of eligibility for leave. These include the same requirements that must be met by private sector organizations with a minimum of fifty employees.

Even if the library does not qualify for FMLA leave, an employee with a serious medical condition may be protected by one or more of the remaining statutes. As of July 26, 1994 (coincident with the implementation of Title VII), libraries with a minimum of fifteen employees became subject to the provisions of the ADA.⁵⁸ Hence, employees who do not qualify for FMLA leave, but request leave as a result of a physical or mental disability, may qualify for leave under the ADA. For example, an employee who loses sight as a result of retinitis pigmentosa, but does not qualify for leave under the FMLA, may request leave for participation in a rehabilitation program as reasonable accommodation for disability under the ADA. The employee may also request a modified work schedule allowing him/her to work a reduced number of hours per week in order that s/he might adjust to the disability and learn the use any low vision aids that are prescribed.

The PDA, as an amendment to Title VII, covers libraries with a minimum of fifteen employees. As a general rule, the ADA does not regard pregnancy as a disability. However, certain situations might arise in which a female employee who is not covered for leave under the FMLA might file a claim of sex discrimination if she is refused disability leave for pregnancy or for medical conditions related to childbirth. For example, if a library covered by the FMLA has a policy that permits its employees to take medical leaves of up to twenty weeks for any disability, but allows female employees only a maximum leave of twelve weeks for pregnancy and childbirth, this policy could clearly be interpreted as being a prima facie violation of Title VII as amended by the PDA, even if female employees impacted by the policy were eligible for FMLA leave.

Statutory Definitions of "Disability" Under the ADA and "Serious Health Conditions" Under the FMLA

The next step that should be taken by an academic library that is covered by both the ADA and FMLA is to ascertain if an employee with a medically-related disability has a "disability" protected by the ADA or a "serious health condition" protected by the FMLA or if, perhaps, the employee is covered by both acts.

When a person reviews the definition of "serious health condition," as interpreted by the Department of Labor's interim regulations,⁵⁹ s/he clearly sees that the FMLA's definition of the term "serious health condition" is broader than the statutory definition of "disability" under the ADA. The principal reason for the broader definition of a "serious health condition" under the FMLA is the short-term nature of most serious health conditions, which generally do not impair a major life activity. The permanent or long-term impairment of a major life activity would constitute a disability covered under the ADA. The manager should also keep in mind that the FMLA allows an employee with a serious health condition to take only up to twelve weeks of unpaid leave per leave year as a result of a serious medical condition. On the other hand, a job applicant or library employee who is a "qualified individual with a disability" may be eligible for a wide assortment of reasonable accommodations which, of course, includes leaves of absence.

To restate the statutory definition, a "serious health condition" is an illness, an injury, or a physical or mental condition requiring either inpatient care in a medical facility (i.e., overnight hospitalization) or continuing treatment by a health care provider. "Continuing treatment" refers to a situation in which a person receives at least two treatments by a health care provider for the same health condition. A "serious health condition" further refers to a condition that necessitates a period of absence from work of three or more calendar days. Library employees who are only moderately ill with the flu or a bad cold are potentially covered by the FMLA and may qualify for leave.

The definition of the term "disability" under the ADA is narrower than the definition of "serious health condition" under the FMLA. The definition of "disability" is limited to a physical and mental impairment that "substantially limits" one or more of the individual's major life activities.⁶⁰ Therefore, temporary or non-chronic impairments that promise to be of short duration, with little or no expectation of long-term or permanent impact, are usually not disabilities.⁶¹ For example, non-chronic impairments -- such as sprained joints, concussions, broken limbs, flu, migraines, and the common cold -- are not considered disabilities and are not covered by the act.⁶²

Three factors must be considered in determining whether a person is substantially impaired according to the ADA:

1. the nature and severity of the impairment;
2. the duration or expected duration of the impairment; and
3. the permanent or long-term impact or the expected permanent or long-term impact resulting from the impairment.⁶³

As a result of the ADA's narrow definition of the term "disability," managers should be aware that there are a great many physical or mental conditions for which employees are eligible to receive leave under the FMLA, but extremely few conditions qualify as disabilities under the ADA.

The manager must decide whether a specific medical problem is a "disability" or a "serious health condition." According to the interim regulations of the FMLA, the employee's notice, written or verbal, of a desire to take leave under the FMLA is "sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave."⁶⁴ The employee also need not assert his/her rights under the FMLA or mention the FMLA in order to satisfy the notice provisions of the act.⁶⁵ Instead, "the employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought;" and, if the employer confirms that the requested leave qualifies under the FMLA, that employer then has the duty of informing the employee in writing that leave will be counted against the employee's overall twelve weeks of leave per leave year under the FMLA.⁶⁶

The ADA also places on the library, the responsibility of determining whether an employee is a "qualified individual with a disability" and is capable of performing the "essential functions of the position" with or without "reasonable accommodation."⁶⁷ The manager must first ascertain if the employee has a "physical or mental condition" which "substantially limits" one or more of his/her "major life activities."⁶⁸ If the manager determines that the employee is disabled, s/he must then ascertain if that person is otherwise "qualified" for the library position being sought or currently held. The EEOC regulations state that this determination will be undertaken by using a two-step process. "The first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc."⁶⁹ "The second step is to determine whether the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation."⁷⁰

Step two is where the employer attempts to determine through the development of a dialogue with the disabled employee whether a reasonable accommodation to meet the needs of the disabled employee can be achieved without resulting in undue hardship to the employer. It is the "employer who must make a reasonable effort to determine the appropriate accommodation."⁷¹

"Essential Functions of the Position" Under the ADA and "Functions of the Position" Under the FMLA

When comparing and contrasting the ADA with the FMLA, it is worth noting the differences between the terms "essential functions of the position" under the ADA and "functions of the position" the FMLA. Under the ADA, a person with a disability must be able to perform the "essential functions of the position," with or without being afforded reasonable accommodation, in order to be protected from discrimination.

At this juncture, the manager should familiarize him/herself with the meaning and application of what is meant by "essential job functions." It is impossible, if not impractical, to state categorically or to list in minute detail the job functions essential to a specific position. Judgment should be based on a case-by-case review of each employment position at issue. The ADA provides the manager with three factors which should be taken into consideration in this situation:

1. whether the position exists to perform a particular function
2. the number of other employees available to the library to perform that function or among whom performance of that function can be distributed
3. the degree of experience or skill required to perform the function.⁷²

If a disabled person is able to perform the essential functions of the position, with or without reasonable accommodation, then the disabled person is covered by the ADA. On the other hand, contrasting the conditions of the "functions of the position" of the FMLA with the ADA's "essential function" mandate, an employee is entitled to job-protected leave under the FMLA only if the employee has a serious health condition which prevents him/her from performing the "functions of the position." Under the interim regulations of the Department of Labor, an employee is unable to perform the "functions of the position" when s/he is either unable to work at all (i.e., a total incapacitation) or is unable to perform the "essential functions of the position" as defined by the ADA.⁷³ Eligibility for protection under the ADA

is centered on the employee's ability to perform the essential job functions of the position, while eligibility for protection under the FMLA is focused on the employee's inability to perform any of the job functions. The ADA is a declaration of an employee's right to work; the FMLA is an affirmation of the employee's right to relief from work when such relief is medically advisable.

This dichotomy creates a potential problem for the manager, as can be seen from the following example. A staff member who is entitled to coverage by the FMLA is seriously injured while away from work. The injury sustained is a broken arm that requires six weeks of recovery, a fact documented by the employee's physician. Due to the serious nature of the break, the employee will be permanently impaired in his/her ability to perform the essential functions of his/her regular position, even with reasonable accommodations. There is, however, an equivalent position presently available at the library which the employee is physically capable of performing without the necessity of reasonable accommodation being provided. The employee's rights under the ADA and the FMLA are significantly different.

Under the FMLA, the employee is entitled to six weeks of leave following the sustaining of the injury. The interim regulations pertaining to the FMLA state that a library in this situation cannot force a staff member who is eligible for FMLA leave to accept a reasonable accommodation in lieu of taking his/her full twelve weeks of leave.⁷⁴ In contrast, the ADA mandate requires that the library allow the staff member the opportunity of returning to work and, if need be (as in this example), of transferring to an available position as a reasonable accommodation of his/her disability. Under the FMLA, there exists a condition of prohibition imposed on the employer against the removal of permitted leave; under the ADA, there exists a condition of affirmation and permission in terms of the employee's right to work.

Leaves of Absence as Reasonable Accommodation

The ADA and the FMLA interact in situations requiring the library employee to request a leave of absence, which can be taken either in a single block of time or as a modified work schedule as reasonable accommodations for the employee's disability under by the ADA. The request for a modified work schedule occurs in situations in which the employee needs specialized medical treatment which can only be obtained at times that conflict with normal working hours (e.g., employees requiring dialysis treatment) or in which the disabled employee needs frequent rest periods or shorter working hours. In this situation, there is no reason why leave under the FMLA cannot

also be seen as being reasonable accommodation under the ADA. In other words, a leave of absence under the FMLA will also satisfy the mandates of reasonable accommodation of the ADA. In situations where the employee has exhausted his/her twelve-week leave under the FMLA, s/he may then be eligible for protection under the ADA since the leave or reduced work schedule can be interpreted as being a reasonable accommodation.

Return to Work as an Accommodation

There is a point of contact between the ADA and the FMLA in that a staff member who has taken medical leave under the FMLA is also eligible for reasonable accommodation provided by the ADA, once the staff member has returned to work. The FMLA states that a serious health condition should not be interpreted as being an ADA-protected disability since the majority of serious health conditions are short-term in nature. Notwithstanding this general rule, there are situations in which serious health conditions entitle the staff member to FMLA leave and require reasonable accommodation under the ADA. The manager must be cautious when dealing with a staff member who has been on FMLA leave when s/he may think that employee might also be covered by the ADA. A three-factor test can be applied to help in this determination:

1. The manager should notify the employee of his/her rights under the FMLA so that the employee is aware of the maximum allowable period of leave available, along with the consequences of failing to return to work at the expiration of this period of time.
2. The manager should determine if the staff member has a disability as defined by the ADA and should ascertain if the employee is capable of performing the essential job functions of the specific position within the library.⁷⁵
3. If the manager determines that the staff member does, in fact, have a disability, then that manager should ascertain if the employee in question is qualified for that position.

As an example of possible complications, an academic librarian may have a person in his/her family who is terminally ill. During the FMLA leave taken to care for that relative, the librarian is in an accident and is permanently disabled as a result of that accident. All the protections due a person with a disability under the ADA are now applicable, and reasonable accommodation is now required of the employer in the form of a same position or a same-pay position as that position the librarian held before s/he went on FMLA leave.

If the above three-factor test is applied and the manager makes the determination that the library does not need to make reasonable accommodation at the present time, the library will have very importantly established documentation that will support a "good faith" defense to a complaint of employment discrimination under the ADA. On the other hand, the three-factor test may indicate that accommodations need to be made by the library, hence, the staff member should be reinstated in a position at the library.

Conclusion

This article has explored the definitions and essential functions of the ADA, FMLA, and PDA with the intent of focusing upon their applications to the academic library setting. Much attention has been paid to the actual language of the statutes and regulations because the ADA, the FMLA, and the PDA are recently enacted statutes without a large body of case law or supporting articles to provide academic library administrators with guidelines in applying the provisions of the law.

This article has attempted to provide the reader with the technical information necessary for understanding the interaction of the three acts; and, when possible, the authors have offered practical applications showing how an academic library manager could meet the legal obligations raised by these acts.

Endnotes and References

1. P.L. 101-336, 42 U.S.C. SS 12101 to 12213. See also "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R. Part 1630 (including Appendix: "Interpretive Guidance on Title I of the Americans with Disabilities Act").
2. Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C. SS 1981 (1994).
3. 3 42 U.S.C. S 12101(a) (Supp. III 1991).
4. P.L. 103-3, 29 U.S.C. SS 2601 to 2654.
5. P.L. 95-555 42 U.S.C. S 2000e-(k). See also "Guidelines on Discrimination Because of Sex," 29 C.F.R. Part 1604 (including Appendix: "Questions and Answers on the Pregnancy Discrimination Act").
6. 42 U.S.C. S 12112(a); 29 C.F.R. S 1630.4.
7. 42 U.S.C. S 12102(2); 29 C.F.R. S 1630.2(I).
8. 29 C.F.R. S 1630.2(h). Important for the purpose of this article, pregnancy is not a disorder. 29 C.F.R. Part 1630 App. S 1630.2(h).
9. 29 C.F.R. S 1630.2(j).

10. 42 U.S.C. S 12111(8).
11. Ibid.
12. 42 U.S.C. S 12111(9).
13. 42 U.S.C. S 12111(9).
14. 42 U.S.C. S 12111(10).
15. 42 U.S.C. S 12111(10).
16. 42 U.S.C. S 12113(b).
17. 42 U.S.C. S 1981a(a)(3). In this respect, the EEOC regulations advocate the use of a "flexible, interactive process" involving both the employer and the qualified individual with a disability to determine whether an appropriate accommodation to that individual's known disability exists.
29 C.F.R. Part 1630 App. S 1630.9.
18. 42 U.S.C. S 12112(d)(2)(a).
19. 42 U.S.C. S 12112(d)(2)(b).
20. 42 U.S.C. S12112(d)(3).
21. Ibid.
22. 42 U.S.C. S 12112(4)(a).
23. 42 U.S.C. S 12112(4)(c).
24. 42 U.S.C. S 12114(c)(1)-(2).
25. 42 U.S.C. S 12114(c)(4).
26. P.L. 88-352, 42 U.S.C. SS 2000e to 2000e-17.
27. 42 U.S.C. SS 2000e(b), 2000e-2(a).
28. 42 U.S.C. S 2000e(k)
29. Ibid. Subsection (K) further provides that an employer is not required under Title VII to pay for health insurance benefits for abortion, except in cases in which the life of the mother would be endangered if the fetus were carried to term or except where medical complications have arisen from an abortion.
30. 29 C.F.R. S 1604.10(b)
31. 29 C.F.R. S 1604.10(c). The disparate impact theory of liability under the Title VII was first recognized by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). It was codified as an amendment to Title VII by the Civil Rights Act of 1991, P.L. 102-166, at 42 U.S.C. S 2000e-2(k).
32. P.L. 103-3, 29 U.S.C. SS 2601 to 2654. See also "Family and Medical Leave Act Interim Final Rules," 29 C.F.R. Part 825. The Department of Labor's interim FMLA regulations were promulgated on June 4, 1993. The FMLA became effective August 5, 1993, except that the act had differing effective dates for employers subject to collective bargaining agreements. As of February 5, 1994, however, the FMLA was effective for all covered employers, regardless of union or non-union status.
33. 29 U.S.C. S 2611(4).

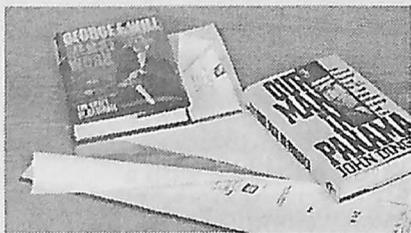
34. 29 U.S.C. S 2612(a).
35. 29 U.S.C. S 2611(2)(A)-(B).
36. 29 U.S.C. S 2611(11).
37. 29 C.F.R. S 825.114, 825.800.
38. 29 U.S.C. S 2612(c), (d)(1).
39. 29 U.S.C. S 2612(d)(2); 29 C.F.R. S 825.207.
40. 29 U.S.C. S 2612(b)(1).
41. 29 C.F.R. S 825.117.
42. 29 U.S.C. S 2612(b)(2).
43. 29 U.S.C. S 2614(a)(1).
44. 29 C.F.R. S 25.215(a), (e).
45. 29 C.F.R. S 825.216(a).
46. 29 U.S.C. SS 2611(5), 2614(a)(2)-(3).
47. 29 U.S.C. S 2614(c)(1).
48. 29 C.F.R. S 825.210(a).
49. 29 U.S.C. S 2612(e)(2)(A).
50. 29 C.F.R. S 825.208(a).
51. 29 U.S.C. S 2612(e); 29 C.F.R. SS 825.302(a)-(b), 825.303(a)53.
52. 29 C.F.R. S 825.304(a)-(b).
53. 29 U.S.C. S 42613(a). The employer may require the health care provider to certify the date on which the serious health condition commenced, the probable duration of that condition, and the inability of the employee to perform the functions of his/her position or the necessity for the employee to care for a family member. If applicable, the medical authority may be asked to verify the medical need for intermittent, reduced-hour, or scheduled leave. That authority may also be required to provide appropriate medical information regarding the condition and treatment prescribed in support of all the employee's claims.
54. 29 C.F.R. S 825.311(a)-(b).
55. 29 U.S.C. SS 2613(e), 2614(a)(4).
56. Unfortunately, this is not the case with respect to the intersection of the ADA and other federal statutes such as the National Labor Relations Act, as amended, 29 U.S.C. SS 141 to 197, and perhaps in some instances the Occupational Safety and Health Act, as amended, 29 U.S.C. SS 651 to 678. The ADA, however, is a continuation of the Rehabilitation Act of 1973, as amended, 29 U.S.C. SS 794, 794a (1988).
57. As a result, a detailed analysis of the remedies available under the ADA, Title VII, and the FMLA is not necessary to the issues addressed in this article. However, the remedies available under each statute may be briefly summarized as follows. Under the ADA and Title VII (the PDA), a prevailing plaintiff may recover appropriate equitable relief such as back pay, reinstatement, front pay, compensatory and punitive damages in cases

of intentional discrimination only (i.e., disparate treatment rather than disparate impact theory of liability), attorneys' fees, and costs. 42 U.S.C. SS 1981a, 2000e-5(g), 12117(a). Under the FMLA, a prevailing plaintiff may recover back pay (or an amount equal to 12 weeks' wages or salary), interest at the prevailing rate, statutory liquidated double damages equal to the amount of back wages and interest (subject to reduction by the court upon a showing of "good faith" on the part of the employer), equitable relief (where appropriate), attorneys' fees, expert witness fees, and costs. 29 U.S.C. S 2617(a).

The Department of Labor has administrative enforcement responsibility for the FMLA, while the EEOC has administrative enforcement responsibility for the ADA and Title VII. These regulatory authorities should be kept in mind by library managers seeking to comply with all three statutes, particularly to the extent that these federal agencies continue to fail to coordinate their regulatory and enforcement efforts.

58. 42 U.S.C. S 12111(5).
59. Importantly, J. Dean Speer, Director of the Division of Policy and Analysis at the Department of Labor's Wage and Hour Division, has recently stated that the interim regulatory definition of "serious health condition" will be revised in final regulations. J. Dean Speer, "Comments to the Legislative Conference of the Society for Human Resources Development," March 16, 1994.
60. Of course, the definition of "disability" also refers to an individual with a record of such an impairment or who is regarded as having such an impairment. With regard to reasonable accommodation, however, it is difficult to contemplate a scenario in which an individual with such a disability would actually require a leave of absence to accommodate a mere record of impairment or perception of impairment. Rather, this type of disability appears to be directed more toward the nondiscrimination provisions of the ADA.
61. 29 C.F.R. Part 1630 App. S 1630.2(j).
62. Ibid.
63. 29 C.F.R. S 1630.2(j).
64. 29 C.F.R. S 825.302(c).
65. Ibid.
66. 29 C.F.R. SS 825.301(c), 825.302(c).
67. However, the employer is not required to make this determination if it unaware that the individual has a potentially disabling health condition in the first instance. See, e.g., *Hedberg v. Indiana Bell Telephone Co.*, 3 A.D. Cases (BNA) 111 (S.D. Ind. 1994) (granting employer's motion for summary judgment on basis of its complete lack of knowledge of plaintiff's alleged "disability" under the ADA).

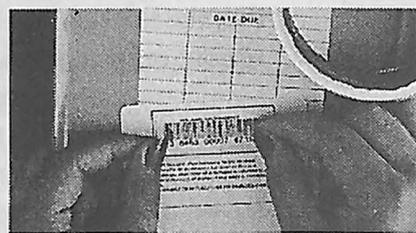
68. 29 C.F.R. Part 1630 App. S 1630.2(g)-(j).
69. 29 C.F.R. Part 1630 App. S 1630.2(m).
70. Ibid. See also 29 C.F.R. Part 1630 App. S 1630.2(n)-(o).
71. 29 C.F.R. Part 1630 App. S 1630.9.
72. 29 C.F.R. Part 1630 App. S 1630.9.
73. 29 C.F.R. S 825.1615.
74. 29 C.F.R. S825.702(d).
75. See 29 C.F.R. Part 1630. App. S 1630.14(c). Usually, the information furnished by the employee's health care provider should be sufficient to make a determination about whether the employee has a "disability" within the meaning of the ADA.



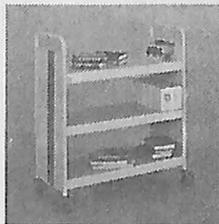
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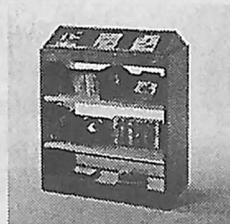
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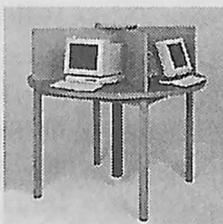
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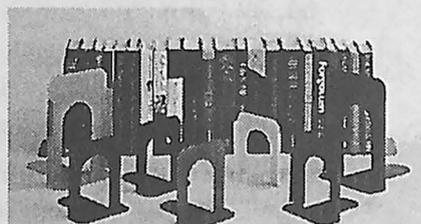
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