

DATA SHEET

AMERICANS WITH DISABILITIES IN THE SCENIC ARTS

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NOTE: This data sheet deals exclusively with health and safety issues and does not address other accommodations for disabled people required by the Equal Employment Opportunity Commission (EEOC) and Architectural and Transportation Barriers Compliance Board (ATBCB). It also does not address the current acceptance of Multiple Chemical Sensitivity as "handicap" requiring accommodation on a case-by-case basis by the U.S. Department of Housing and Urban Development's Fair Housing Act.

HEALTH AND SAFETY CONSIDERATIONS

Some people have misinterpreted the Americans with Disabilities Act to mean that no person with a disability can be rejected for any kind of employment. This is not the case. We need to examine the actual limits on access to employment for people with disabilities.

Guidelines for employers and workers can be found in the Department of Justice's "Nondiscrimination on the Basis of Disability in State and Local Government Services" (28 CFR 35.101-190), "Equal Employment Opportunity for Individuals with Disabilities" (29 CFR 1630.1-16), the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities" (36 CFR 1191) and the supplementary material published with these regulations in the Federal Register (FR). These guidelines also can be applied to scenic artists and their employers.

29 CFR 1630.2(p) Undue Hardship

The Interpretive Guidance on Title 1 for Undue Hardship says that "An employer ... is not required to provide an accommodation that will impose an undue hardship on the operation of the employer's ... business." This Undue hardship "refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business." The example given explains this.

For example, suppose an individual with a disabling visual impairment that makes it extremely difficult to see in dim lighting applies for a position as a waiter in a nightclub and requests that the club be brightly lit as a reasonable accommodation. Although the individual may be able to perform the job in bright lighting, the nightclub will probably be able to demonstrate that that particular accommodation, though inexpensive, would impose an undue hardship if the bright lighting would destroy the ambience of the nightclub and/or make it difficult for the customers to see the stage show. (56 FR 35744-5)

This example is relevant to work in theater where people with similar visual impairments can be excluded from tasks that require them to maneuver backstage during blackouts or seat people after the curtain is up. And any disability which would interfere substantially with the very nature and financial viability of a scenic art work will also qualify. Examples might include color blindness and an inability to climb ladders.

29 CFR 1630.2(r) Direct Threat

In the Interpretive Guidance on Title 1 for Direct Threat it says that: " An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others." This text should be read in its entirety to understand when the threat is considered "significant." However, I call attention to the following:

For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk. (56 FR 35745).

Other commonly accepted restrictions on jobs might include hearing impaired people working on rigging (a job in which hearing warning calls without visual contact is important), people with epilepsy working on any job involving operation of dangerous machinery or motor vehicles. An example of how to find out when a risk is "substantial" is given in the guidance:

The assessment that there exists a high probability of substantial harm to the individual, like the assessment that there exists a high probability of substantial harm to others, must be strictly based on valid medical analyses and/or on other objective evidence. This determination must be based on individualized factual data.... (56 FR 35745)

The problem here is that most employers do not require the disclosure of medical conditions or limitations on which such decisions must be based. It is in this grey area that many disputes arise over when a disability is substantial.

For this reason, qualification standards and descriptions of the physical requirements for various jobs should be developed. And these descriptions must be detailed. For example, a position only described as "Scenic Artist" would not be informative. Instead, the physical description of the work might include:

SCENIC ARTIST: Must be able to discern subtle differences of color, climb ladders and work safely on scaffolds, lift paint containers and equipment up to a weight of 50 pounds, tolerate exposure to chemicals in products used in the scene shop at levels below the OSHA permissible exposure limits, wear respiratory protection when needed, etc.....

This description can be accompanied with either a disclosure requirement or a written procedure for facilitating removal of individuals who knowingly take jobs for which they do not meet the physical qualifications.

Physical requirements for scenic designers and lighting designers would be much less rigorous and more accommodation could be required on the part of employers. To enable employers to develop job descriptions, Appendix A includes an "Essential Functions Information Form." This form is to be filled out while observing someone already doing a job or class activity.

Other job/class qualifications can take the form of licenses or certifications. Examples of "safety qualifications that would be justifiable in appropriate circumstances" in the "Section-by Section Analysis" of 28 CFR 35.130 includes:

...eligibility requirements for drivers' licenses, or a requirement that all participants in a recreations rafting expedition be able to meet a necessary level of swimming proficiency. (56 FR 35705)

In fact, a small and growing number of employers are now requiring scenic artists to have up-to-date documentation that they have been trained to meet certain OSHA requirements. Examples include fork lift and powered lift training, scaffold training, respiratory medical certification and fit testing, hazard communication and personal protective equipment training, and more.

ALLERGIC PEOPLE

In a discussion of the definition of "substantially limits" in 29 CFR 1630.1(j), the Equal Employment Opportunity Commission identifies allergy as a disability:

... Suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found else-where, that makes breathing extremely difficult. ...[This] individual would be substantially limited.... (56 FR 35742)

Since serious allergies are a recognized disability, job descriptions should include the types of chemical products which will be used. Otherwise, for example, workers allergic solvents and paint chemicals conceivably could demand that all use of these products cease where they work! Further, the employer would have to accommodate them with alternative materials or alternate work.

Workers who first develop an allergy to a chemical on a particular job must be accommodated even though they can no longer perform the task for which they were hired. They cannot be let go. However, in the scenic arts, jobs usually are of short duration. This makes proving the allergy was developed at a particular job site almost impossible. Worse, once the job is over, future employers are not under an any obligation to hire the now disabled worker. I know of scenic artists whose careers were ruined in this way.

FAMILY PLANNING

Job descriptions that include potential chemical exposures may also be used to alert workers planning a family. While there are no laws to specifically protect the developing fetus, employers may be sued on behalf of a child born with defects or health problems caused by chemicals used on the job. These suits are a poor substitute for a healthy child.

The best way to prevent reproductive problems is for employers to provide a shop with sufficient ventilation and protective equipment to control exposure. The OSHA regulations also require employers to provide detailed ingredient information and training on all chemicals used in the workplace. Women and men workers planning families can take this information to their doctors for further information about potential effects on the fetus.

MULTIPLE CHEMICAL SENSITIVITIES (MCS)

While allergy is discussed by the EEOC, MCS is specifically excluded from consideration by the ADA. In the General Issues section of the Supplementary Information provided with 36 CFR.1991, it says that, during the proposed rule's comment period, the Architectural and Transportation Barriers Compliance Board received over 400 comments from individuals who identified themselves as chemically sensitive.

The commenters described health problems from indoor contaminants such as those from building materials, furnishings, cleaning products and fragrances. They suggested lessening exposures by providing windows that open, improving heating and ventilation, and selecting building materials and furnishings that do not contain certain substances. The Board's response was:

Chemical and environmental sensitivities present some complex issues which require coordination and cooperation with other Federal agencies and private standard setting agencies. Pending further study of these issues, the Board does not believe it is appropriate to address them at this time. (56 FR 35412)

This seems to indicate that accommodation is not required for individuals whose claims of disability from exposures to chemicals cannot be supported by traditional allergy testing or other accepted medical diagnostic procedures. There are some court actions in which individuals claiming MCS have won the right to be accommodated. However, such accommodations are rare.

OTHER APPLICABLE LAWS

OSHA regulations also require certain physical abilities on the part of workers doing hazardous work. For example, jobs for which respirators must be worn require that workers are healthy enough to wear a respirator (29 CFR 1910.134). This must be determined by "medical professional" such as a doctor or person trained to evaluate detailed medical questionnaires or pulmonary tests.

Employers also have the right to require workers to be clean shaven if they are expected to wear respirators. A worker who cannot shave because of a skin condition can be refused employment on a job that requires use of a respirator.

EMERGENCY EGRESS

In most cases, disabled individuals who meet job description requirements cannot be excluded because of architectural barriers such as stairs. For this reason, disabled people's needs must be considered when building or renovating shops and studios.

Access is only half of the problem. Egress is the other half. There is no point in getting disabled people into a facility if they cannot be easily and quickly evacuated in an emergency. Unfortunately, this fact was overlooked in the rush to provide access. Only recently has the National Fire Protection Association begun revising their Life Safety standard (NFPA 101) to provide guidelines for egress of disabled people. All construction and renovation plans must be assessed for egress of disabled people.

Existing facilities also must be assessed to assure that disabled people are not allowed into areas from which they cannot be rapidly evacuated in an emergency. For example, people whose life support system is in their wheel chairs (which means they cannot be lifted from their chairs and carried to safety) must not be allowed on floors with heat-seeking elevators.

SUMMARY

In this data sheet, I emphasized some negative aspects of accommodation. On the positive side, I have observed that opening access to many types of disabled persons has been positive over all. Some of the benefits include reducing physically hazardous tasks when possible, replacing highly toxic chemicals with safer ones, and eliminating dangerous or unguarded equipment. The substitution of safer materials and equipment results in providing workplaces that are healthier and safer for all the workers.

Scene painting and construction, on the other hand, always will entail certain physical requirements which cannot be met by some types of disabled people. For emotional and humanitarian reasons we may want to open jobs to everyone. But in this case we would endanger the very people we are trying to help. Just as surely as we must evaluate a potential employee's credentials, work record, skills, and certifications when they are hired, we must also evaluate their physical ability to do the job without endangering themselves or others.