

CHAPTER 13

REGULATIONS PERTAINING TO DISCRIMINATION
ON THE BASIS OF DISABILITY

Authority

N.J.S.A. 10:5-1 through 10:5-49.

Source and Effective Date

R.2006 d.13, effective December 2, 2005.
See: 37 N.J.R. 2607(a), 38 N.J.R. 335(a).

Chapter Expiration Date

Chapter 13, Regulations Pertaining to Discrimination on the Basis of Disability, expires on December 2, 2010.

Chapter Historical Note

Chapter 13, Regulations Pertaining to Discrimination on the Basis of Handicap, was adopted as new rules by R.1985 d.305, effective June 17, 1985. See: 17 N.J.R. 671(a), 17 N.J.R. 1574(a).

Pursuant to Executive Order No. 66(1978), Chapter 13, Regulations Pertaining to Discrimination on the Basis of Handicap, was readopted as R.1990 d.360, effective July 16, 1990. See: 22 N.J.R. 1436(a), 22 N.J.R. 2181(a).

Pursuant to Executive Order No. 66(1978), Chapter 13, Regulations Pertaining to Discrimination on the Basis of Handicap, was readopted as R.1995 d.424, effective July 12, 1995. See: 27 N.J.R. 1954(a), 27 N.J.R. 2956(c).

Pursuant to Executive Order No. 66(1978), Chapter 13, Regulations Pertaining to Discrimination on the Basis of Disability, was readopted as R.2000 d.273, effective June 6, 2000. See: 32 N.J.R. 1155(a), 32 N.J.R. 2445(a).

Chapter 13, Regulations Pertaining to Discrimination on the Basis of Disability, was readopted by R.2006 d.13, effective December 2, 2005. See: Source and Effective Date. See, also, section annotations.

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SUBCHAPTER 1. GENERAL PROVISIONS

13:13-1.1 Purpose

This chapter is designed to implement the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. (“the act” or “the statute”), as it pertains specifically to discrimination on the basis of physical and mental disability.

Amended by R.1995 d.243, effective May 15, 1995.

See: 26 N.J.R. 1942(a), 27 N.J.R. 2005(a).

Amended by R.2000 d.273, effective July 3, 2000.

See: 32 N.J.R. 1155(a), 32 N.J.R. 2445(a).

Changed N.J.A.C. reference, and substituted a reference to disabilities for a reference to handicaps.

Amended by R.2006 d.13, effective January 3, 2006.

See: 37 N.J.R. 2607(a), 38 N.J.R. 335(a).

Substituted “,” for “.” following “Discrimination.”

Case Notes

Any handicapped individual aggrieved by an action or inaction of the Commission may take an informal appeal to a Commission-designated representative. *Ryans v. New Jersey Commission for the Blind and Visually Impaired*, 542 F.Supp. 841 (D.N.J.1982).

“Tax leveling” approved, to increase backpay award under the Law Against Discrimination, N.J.S.A. 10:5-1 et seq., to compensate for the higher tax burden incurred by receiving backpay in a lump sum. *Ponsi v. Cliffside Park Bd. of Educ.*, OAL Dkt. No. CRT 10536-06, 2008 N.J. AGEN LEXIS 1237, Final Decision (September 1, 2008).

Discussion of attorney fees and costs pursuant to N.J.S.A. 10:5-27.1. *Williams v. State Shuttle/Top Ten Leasing, Inc.*, OAL Dkt. No. CRT 5188-04, 2006 N.J. AGEN LEXIS 986, Final Decision (Attorney Fee Order) (August 17, 2006).

To prove pretext, employee may not simply show that the employer’s reason was false but must also demonstrate that a discriminatory reason more likely motivated the employer’s actions than the employer’s proffered legitimate reason. *Williams v. State Shuttle/Top Ten Leasing, Inc.*, OAL Dkt. No. CRT 5188-04, 2006 N.J. AGEN LEXIS 1094, Final Decision (August 17, 2006).

In disability discrimination case, employer’s reasons for failing to re-hire bus driver were unworthy of credence and were a pretext for disability discrimination where employer alternately claimed that it offered bus driver a position, but he rejected it; that it did not re-hire driver because it had replaced him and had no appropriate position for him; that driver did not have appropriate medical clearance to return to work, and was unable to perform full range of duties; and that it did re-

hire driver but he failed to call in for assignments. Director found employer's multiplicity of reasons to justify its actions inconsistent and contradictory, compelling the conclusion that employer's articulated reasons were unworthy of credence. *Williams v. State Shuttle/Top Ten Leasing, Inc.*, OAL Dkt. No. CRT 5188-04, 2006 N.J. AGEN LEXIS 1094, Final Decision (August 17, 2006).

Attorney fees under N.J.S.A. 10:5-27.1. *Heusser v. N.J. Highway Auth.*, OAL Dkt. No. CRT 01863-98, 2005 N.J. AGEN LEXIS 1071, Final Decision (August 30, 2005).

13:13-1.2 Construction

(a) Consistent with the public policy underlying the Law Against Discrimination and with firmly established principles for the interpretation of such remedial legislation, the remedial provisions of the statute will be given a broad construction and its exceptions construed narrowly.

(b) The provisions of these regulations are severable. If any provision or the application of any provisions of these regulations to any person or circumstances is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

13:13-1.3 Definitions

The following words and terms, as used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Covered multifamily dwellings" means buildings covered by the provisions of the Barrier-Free Subcode of the State Uniform Construction Code Act, N.J.S.A. 52:27D-119 et seq. and N.J.A.C. 5:23-7.

"Disability" as used in this chapter will have the same meaning as the term "disability" is given by N.J.S.A. 10:5-5(q). "A person with a disability" also means:

1. A person who is perceived as or believed to be a person with a disability, whether or not that individual is actually a person with a disability; and
2. A person who has been a person with a disability at any time.

Amended by R.1995 d.243, effective May 15, 1995.

See: 26 N.J.R. 1942(a), 27 N.J.R. 2005(a).

Amended by R.2000 d.273, effective July 3, 2000.

See: 32 N.J.R. 1155(a), 32 N.J.R. 2445(a).

Rewrote "Handicapped" definition as "Disability".

Amended by R.2006 d.13, effective January 3, 2006.

See: 37 N.J.R. 2607(a), 38 N.J.R. 335(a).

In definition "Disability" substituted "disability" for "handicapped."

Case Notes

Obese person may be considered handicapped for purposes of law against discrimination. *Gimello v. Agency Rent-A-Car Systems, Inc.*, 250 N.J.Super. 338, 594 A.2d 264 (A.D.1991).

Employer's articulated reasons (employee's "lie" about her activities during her medical leave plus past performance problems) were not true reasons for discharging employee, but were pretext for disability discrimination. Company president's decision to discharge employee

because he couldn't "deal with it anymore," despite her offer of medical documentation explaining that her doctor had cleared her to engage in other restricted activities, but had not yet cleared her to return to work, demonstrated nothing less than an intolerance for employee because of her disability (adopting as modified Initial Decision, 2007 N.J. AGEN LEXIS 430). *Lampley v. Astral Air Parts, Inc.*, OAL Dkt. No. CRT 1307-06, 2007 N.J. AGEN LEXIS 857, Final Decision (August 17, 2007).

To prove pretext, employee must do more than show that the reason her employer gave for dismissing her was false; she must show that the employer's true reason was unlawful discrimination, in this case, discrimination against people with obesity. Even if police officer recruit had presented evidence to show that she was treated less favorably than similarly situated recruits, she did not present sufficient evidence to show that she was targeted because of perceived obesity. *Hidalgo v. Camden City Police Dep't*, OAL Dkt. No. CRT 02913-01, 2006 N.J. AGEN LEXIS 558, Final Decision (June 5, 2006).

Police officer recruit was not differentially treated or subjected to a hostile work environment due to perceived obesity, and city police department reasonably arrived at the decision that her temporary disability, a shoulder injury, precluded job performance where there was medical evidence that employee had an injury and that she would be unable to complete the physical training portion of the academy class in which she was enrolled. City offered to accommodate employee's disability by permitting her to resign from the academy, so that she could re-enroll in a new session once her shoulder healed, and employee presented no contradictory medical evidence to show that she was able to safely engage in physical training at the time of her dismissal, or would have been able to do so at any time before her academy class graduated. *Hidalgo v. Camden City Police Dep't*, OAL Dkt. No. CRT 02913-01, 2006 N.J. AGEN LEXIS 558, Final Decision (June 5, 2006).

SUBCHAPTER 2. EMPLOYMENT

13:13-2.1 Job advertising and solicitation

(a) It is unlawful to print or cause to be printed any advertisement which has the effect of discouraging people with disabilities from applying for a job for which they are qualified, despite a particular disability or which contains the words "able-bodied persons wanted," or their equivalent. An employer may include a statement of the particular physical or mental abilities reasonably necessary for the performance of the essential functions of the job.

(b) The publication by any communications medium of any notice of advertisement relating to employment, or to membership in a labor organization, indicating any preference, limitation, specification, or discrimination based on disability is unlawful unless such notice or advertisement falls within one of the exceptions enumerated by N.J.A.C. 13:13-2.8.

(c) All employers, labor organizations and employment agencies should conduct job vacancy, membership recruitment and employment referral programs in such a manner as to assure that all persons, including people with disabilities, are given fair and adequate notice of job vacancies, membership opportunities and employment referral opportunities:

1. Employers and labor organizations are encouraged to place notices or advertisements relating to employment,