

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

In accordance with N.J.S.A. 52:14B-5.1b, Chapter 13, Regulations Pertaining to Discrimination on the Basis of Disability, expires on May 31, 2013. See: 43 N.J.R. 1203(a).

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 Handicap, was readopted as R.2000 d.273, effective June 6, 2000. As a part of R.2000 d.273, Chapter 13, Regulations Pertaining to Discrimination on the Basis of Handicap, was renamed Regulations Pertaining to Discrimination on the Basis of Disability, effective July 3, 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 as R.2006 d.13, effective December 2, 2005. See: Source and Effective Date. See, also, section annotations.

In accordance with N.J.S.A. 52:14B-5.1c, Chapter 13, Regulations Pertaining to Discrimination on the Basis of Disability, was scheduled to expire on May 31, 2011. See: 43 N.J.R. 149(a).

CHAPTER TABLE OF CONTENTS

SUBCHAPTER 1. GENERAL PROVISIONS

- 13:13-1.1 Purpose
- 13:13-1.2 Construction
- 13:13-1.3 Definitions

SUBCHAPTER 2. EMPLOYMENT

- 13:13-2.1 Job advertising and solicitation
- 13:13-2.2 Job referrals
- 13:13-2.3 Employment criteria
- 13:13-2.4 Pre-employment inquiries
- 13:13-2.5 Reasonable accommodation
- 13:13-2.6 Wages and fringe benefits
- 13:13-2.7 Labor organizations
- 13:13-2.8 Exception

SUBCHAPTER 3. REAL PROPERTY

- 13:13-3.1 Application
- 13:13-3.2 Advertising and solicitation

- 13:13-3.3 Inquiries
- 13:13-3.4 Sale or rental
- 13:13-3.5 Eviction
- 13:13-3.6 Financing
- 13:13-3.7 Covered multifamily dwellings

SUBCHAPTER 4. ACCESS TO PUBLIC
ACCOMMODATIONS

- 13:13-4.1 Purpose
- 13:13-4.2 Definitions
- 13:13-4.3 Unlawful practices
- 13:13-4.4 Integrated settings
- 13:13-4.5 Examinations
- 13:13-4.6 Prohibited charges
- 13:13-4.7 Retaliation or coercion
- 13:13-4.8 Reasonable probability of serious harm
- 13:13-4.9 Smoking
- 13:13-4.10 Insurance
- 13:13-4.11 Reasonable accommodation
- 13:13-4.12 Examples of reasonable accommodation
- 13:13-4.13 Referrals

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).

ALJ appropriately decided teacher’s LAD (N.J.S.A. 10:5-1 et seq.) claim within the context of a school law dispute — which teacher himself initiated by choosing to file his appeal with the Commissioner of Education rather than the Division on Civil Rights, as the Board policy on which teacher relied in asserting Commissioner jurisdiction clearly gave him the option to do. The ALJ correctly analyzed petitioner’s claim primarily in terms of school law and secondarily in terms of the standard applicable to claims under the LAD, concluding from her review of the law, testimony and evidence that petitioner had no entitlement under the former and had not met his burden of proof under the latter. *Varjian v. Bd. of Educ. of Midland Park*, OAL Dkt. No. EDU 9917-05, 2007 N.J. AGEN LEXIS 1009, Commissioner’s Decision (October 15, 2007), aff’d, SB NO. 30-07, 2008 N.J. AGEN LEXIS 674 (N.J. State Bd. of Educ., May 27, 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).

Although teacher claimed that his work environment was rendered hostile by the cumulative effect of numerous adverse actions at the hands of the Board and its administration, for which there was no possible explanation other than discrimination toward him as a former cancer patient, reality revealed by the record was that teacher's absence and return to work coincided with the emergence of a new building-level administration which progressively undertook to make systematic changes in the operation of the high school, a number of which affected teacher's ability to maintain what he perceived as his accustomed position of status and autonomy (namely, teaching only honors and college prep courses). Teacher had no vested entitlement to teach what he wanted to teach and was no more entitled than any other teacher to determine his own schedule of classes. *Varjian v. Bd. of Educ. of Midland Park*, OAL Dkt. No. EDU 9917-05, 2007 N.J. AGEN LEXIS 1009, Commissioner's Decision (October 15, 2007), aff'd, SB NO. 30-07, 2008 N.J. AGEN LEXIS 674 (N.J. State Bd. of Educ., May 27, 2008).

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,

or to membership in a labor organization, in the newspaper having the largest circulation in the relevant labor market, unless the position sought to be filled requires specialized training, education, experience or licensing of a type not commonly found among members of the workforce in the relevant labor market.

2. Employers should encourage their referral sources to seek and refer qualified individuals with disabilities.

3. Employers are encouraged to list all job openings and requests for referrals with institutions, agencies, and organizations of or serving people with disabilities including the Division of Vocational Rehabilitation Services in the New Jersey Department of Labor.

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

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

Substituted references to people with disabilities for references to handicapped persons throughout; and in (c), substituted a reference to disability for a reference to handicap.

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

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

In (a), added "essential functions of the."

Case Notes

Rules precluding maintenance of classified advertising employment columns segregated on basis of sex upheld as not abridging freedom of the press and as within the Director's rulemaking power; individual rules examined. *Passaic Daily News v. Blair*, 63 N.J. 474, 308 A.2d 649 (1973).

13:13-2.2 Job referrals

(a) The knowing use by an employer of any employment agency or recruitment source which does not refer people with disabilities or which discriminates against people with disabilities is an unlawful act of discrimination.

(b) The failure or refusal of any employment agency or labor organization to refer for employment any individual because that individual is a person with a disability is an unlawful employment practice. It is unlawful for an employment agency or labor organization to comply with an employer's request for referrals if such a request indicates either directly or indirectly that the employer will discriminate against people with disabilities.

(c) It is an unlawful employment practice for any employment agency or labor organization to classify people with disabilities in any way which would deprive or have the effect of depriving people with disabilities of employment opportunities or otherwise affect employee status.

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

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

Substituted references to people with disabilities for references to handicapped persons throughout.

13:13-2.3 Employment criteria

(a) It is an unlawful employment practice for any employer, employment agency or labor organization to make use of any employment test or other selection criterion that

screens out or has the effect of screening out people with disabilities unless:

1. That test score or other selection criterion is shown to be job related for the position in question; and

2. Alternative job-related tests or criteria that do not screen out or have the effect of screening out fewer people with disabilities are not available.

(b) An employer, employment agency or labor organization shall select and administer tests concerning employment which accurately reflect, with the benefit of reasonable accommodation, the applicant's or employee's job skills, aptitude or competency, rather than reflecting the applicant's or employee's impaired sensory, manual or speaking skills (except where those skills are the factors that the test purports to measure, and are necessary to perform the essential functions of the job in question).

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

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

In (a), substituted references to people with disabilities for references to handicapped individuals throughout.

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

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

In (b), added "essential functions of the."

Case Notes

Termination of car salesman for inadequate sales and performance affirmed. *Casey v. Winner Ford*, 97 N.J.A.R.2d (CRT) 161.

Dismissal of food service worker was due to her refusal to accept transfer ordered for legitimate financial reasons, and not due to age or handicap discrimination. *Cosimano v. Gardner Merchant Food Services, Inc.*, 96 N.J.A.R.2d (CRT) 53.

Employer that fails to determine whether employee's hearing impairment precludes performance or invites risk to self or others may not dismiss employee because of disability. *Downing v. Hostess Helpers, Inc.*, 96 N.J.A.R.2d (CRT) 11.

Vocational technical school improperly discriminated against instructor; diabetes. *Hawryluk v. Union County Vocational-Technical Schools*, 94 N.J.A.R.2d (CRT) 123.

13:13-2.4 Pre-employment inquiries

(a) It shall be an unlawful practice for an employer, employment agency or labor organization to elicit or attempt to elicit, either verbally or through the use of an application form or request for documentation, any information which would tend to divulge the existence of a disability or health condition, unless required or necessitated by Federal law or regulation. An employer, employment agency or labor organization may inquire whether an applicant is precluded from satisfactorily performing the essential functions of the job in question.

(b) It is not unlawful for an employer to invite applicants for employment to identify themselves as a person with a disability:

1. To satisfy the affirmative action requirements of Federal law;

2. To implement a court ordered or other bona fide affirmative action plan to promote the employment of people with disabilities; or

3. To implement a special program which is designed to benefit people with disabilities when a condition for a person's participation in the program is that he or she is a person with a disability.

(c) Employers who request such information must observe requirements under Section 503 of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., regarding the manner in which the information is requested and used, and the procedure for maintaining such information as a separate, confidential record, apart from regular personnel records.

(d) The act does not prohibit any officially recognized agency from keeping necessary records in order to provide services to individuals requiring rehabilitation or employment assistance.

(e) It is not unlawful for an employer to condition an offer of employment on the results of a medical examination held subsequent to such offer and prior to the employee's entrance on duty, provided that:

1. All entering employees are subjected to such examination; and

2. The results of such an examination are used in accordance with these regulations and are not used to disqualify an applicant except to the extent that any disability discovered would, even with reasonable accommodation, preclude the safe or adequate performance of the essential functions of the job in question, as defined in N.J.A.C. 13:13-2.8. An examination should consider the degree to which the person has compensated for his limitations and the rehabilitation services he has received or is receiving.

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).

In (a), substituted a reference to disability for a reference to handicap; and in (b), substituted references to people with disabilities for references to handicapped persons throughout.

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

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

In (a), added "essential functions of the" and deleted "duties" following "job"; in (e)2, added "essential functions of the."

13:13-2.5 Reasonable accommodation

(a) All employers shall conduct their employment procedures in such a manner as to assure that all people with disabilities are given equal consideration with people who do not have disabilities for all aspects of employment including, but not limited to, hiring, promotion, tenure, training, assignment, transfers, and leaves on the basis of their qualifications and abilities. Each individual's ability to perform a particular job must be assessed on an individual basis.

(b) An employer must make a reasonable accommodation to the limitations of an employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. The determination as to whether an employer has failed to make reasonable accommodation will be made on a case-by-case basis.

1. Under circumstances where such accommodation will not impose an undue hardship on the operation of an employer's business, examples of reasonable accommodation may include:

i. Making facilities used by employees readily accessible and usable by people with disabilities;

ii. Job restructuring, part-time or modified work schedules or leaves of absence;

iii. Acquisition or modification of equipment or devices; and

iv. Job reassignment and other similar actions.

2. An employer shall consider the possibility of reasonable accommodation before firing, demoting or refusing to hire or promote a person with a disability on the grounds that his or her disability precludes job performance.

3. In determining whether an accommodation would impose undue hardship on the operation of an employer's business, factors to be considered include:

i. The overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget;

ii. The type of the employer's operations, including the composition and structure of the employer's workforce;

iii. The nature and cost of the accommodation needed; and

iv. The extent to which accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.

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

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

Substituted references to people with disabilities for references to handicapped persons throughout; and in (a), substituted a reference to people who do not have disabilities for a reference to non-handicapped persons.

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

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

In (b)1ii, added "or leaves of absence."

Law Review and Journal Commentaries

Discrimination—Collateral Estoppel—Police Officers. Judith Nallin, 138 N.J.L.J. No. 1, 49 (1994).

Overview of the ADA: Legal Protections for Persons with Disabilities. Linds Wong, Johathan J. Schlein, Daniel J. Zirrit, 170 N.J.L.J. 8 (1995).

Disability Discrimination: Failure to Accommodate or Disparate Treatment. Arthur R. Fairbault, Jr., 223 N.J.L.J. 61 (2003).

Case Notes

Under the New Jersey Law Against Discrimination (LAD), an employer was not obligated to accommodate a commuting problem of an employee with epilepsy; a change to day shift sought by the employee was not an "accommodation," that the employer was legally obligated to provide, but was simply a request for an easier, more convenient commute. Laresca v. American Tel. & Tel., D.N.J. 2001, 161 F.Supp.2d 323.

Neither employee's computer illiteracy or difficulty nor his requested transfer suggested to employer that employee was unable to perform his job duties because of dyslexia and absent knowledge of employee's dyslexia disability, employer did not violate New Jersey Law Against Discrimination. Illingworth v. Nestle U.S.A., Inc., D.N.J. 1996, 926 F.Supp. 482.

Federal regulations did not preempt former employee's handicap discrimination and workers' compensation retaliation claims under New Jersey law. Kube v. New Penn Motor Exp., Inc., D.N.J.1994, 865 F.Supp. 221.

Accommodations listed under the ADA and Law Against Discrimination (LAD) are designed to make certain changes in the work environment or structuring of employees' time that will allow disabled employees to remain at work without their physical handicaps impeding their job performance. Jones v. Aluminum Shapes & Frank Wimmersberger, 772 A.2d 34 (2001).

"Reasonable accommodation" under the ADA and Law Against Discrimination (LAD) refers to the duty of an employer to attempt to accommodate the physical disability of the employee, not to a duty on the part of the employer to acquiesce to the disabled employee's requests for certain benefits or remuneration. Jones v. Aluminum Shapes & Frank Wimmersberger, 772 A.2d 34 (2001).

Employee failed to show that city should have allowed her to work at home in her court clerk position in order to accommodate her epilepsy disability as would show that employer's proffered reason for terminating employee was pretext for discrimination under Law Against Discrimination. Melick v. Township of Oxford, 294 N.J.Super. 386, 683 A.2d 584 (A.D.1996).

Municipality was not required to provide second opportunity for rehabilitation to firefighter who tested positive for cocaine and whose reinstatement after first testing positive was conditioned upon abstaining from use of drugs. Matter of Jackson, 294 N.J.Super 233, 683 A.2d 203 (A.D.1996).

Terminated police officer's handicap discrimination suit was precluded by adverse decision of Merit System Board. Ensslin v. Township of North Bergen, 275 N.J.Super. 352, 646 A.2d 452 (A.D.1994), certification denied 142 N.J. 446, 663 A.2d 1354.

No reasonable accommodation would permit officer to perform essential functions of job; no violation of Law Against Discrimination. Ensslin v. Township of North Bergen, 275 N.J.Super. 352, 646 A.2d 452 (A.D.1994), certification denied 142 N.J. 446, 663 A.2d 1354.

Adequate consideration given provisions of Law Against Discrimination. Ensslin v. Township of North Bergen, 275 N.J.Super. 352, 646 A.2d 452 (A.D.1994), certification denied 142 N.J. 446, 663 A.2d 1354.

Fire fighter who was an alcoholic and drug addict was a "handicapped person" under Law Against Discrimination. Matter of Cahill, 245 N.J.Super. 397, 585 A.2d 977 (A.D.1991).

School board failed to meet its obligation to reasonably accommodate high school teacher's mental disability (depression and anxiety) and specifically failed to engage in an interactive process with teacher to explore the feasibility of providing reasonable accommodations that

would have permitted teacher to return to work (adopting as modified Initial Decision, 2008 N.J. AGEN LEXIS 187). Ponsi v. Cliffside Park Bd. of Educ., OAL Dkt. No. CRT 10536-06, 2008 N.J. AGEN LEXIS 1237, Final Decision (September 1, 2008).

Jurisdiction of boards of education under N.J.S.A. 18A:16-4, to determine whether an employee who has previously been deemed ineligible for services based on "mental abnormality" has provided sufficient "proof of recovery" to warrant return to work, does not deprive the employee of the right to reasonable accommodations under the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. Ponsi v. Cliffside Park Bd. of Educ., OAL Dkt. No. CRT 10536-06, 2008 N.J. AGEN LEXIS 1237, Final Decision (September 1, 2008).

In a case where respondent technical school failed to appear, the ALJ found that a student had sustained the burden of proving that the school failed to accommodate her dyslexia. Guy v. Southern N.J. Tech. School, OAL Dkt. No. CRT 10486-07, 2008 N.J. AGEN LEXIS 313, Initial Decision (April 28, 2008).

Employer's behavior did not rise to the level of denial of reasonable accommodation for employee's carpal tunnel syndrome, where employee's own recitation of the events demonstrated that employer promptly provided the first set of equipment employee requested, and while the ergonomic keyboard and wrist rest proved to be an ineffective accommodation, employer provided precisely the equipment employee believed would solve the problem. Although the delay in providing the subsequently requested keyboard tray was unfortunate, the record reflected that employer made sufficient efforts to provide the accommodation to meet its obligations and that it acted in good faith (adopting as modified Initial Decision, 2007 N.J. AGEN LEXIS 796). Moebis v. Hartford Life Private Placement et al, OAL Dkt. No. CRT 6322-06, 2008 N.J. AGEN LEXIS 135, Final Decision (February 6, 2008).

In disability discrimination case, employer failed to demonstrate that accommodating employee's need for a smoke-free work environment in 2003 would have been an undue hardship, where (1) the ALJ found insufficient company president's testimony that banning smoking from the office area would impair productivity, and noted that president dismissed other possible accommodations out of hand after merely discussing them with his partner; and (2) Director found insufficient president's contention that employee could not be trusted to work in a secluded area. If employee had performance deficiencies, employer was free to address them independently, but an employee cannot be denied reasonable accommodations as a form of discipline for failure to comply with an employer's work rules (adopting as modified Initial Decision, 2007 N.J. AGEN LEXIS 430). Lampley et al. v. Astral Air Parts, Inc., OAL Dkt. No. CRT 1307-06, 2007 N.J. AGEN LEXIS 857, Final Decision (August 17, 2007).

In disability discrimination case, the fact that employer had now, in response to the Legislature's 2006 mandate, banned smoking from the same office area in which employee previously worked was sufficient to demonstrate that employee could have been accommodated without undue hardship in 2003 if employer had engaged in a good faith interactive process. Lampley v. Astral Air Parts, Inc., OAL Dkt. No. CRT 1307-06, 2007 N.J. AGEN LEXIS 857, Final Decision (August 17, 2007).

Once an employee has requested assistance due to a disability, it is the employer's obligation to initiate the process of working with the employee to determine the appropriate accommodations, and this interactive process is crucial. Lampley v. Astral Air Parts, Inc., OAL Dkt. No. CRT 1307-06, 2007 N.J. AGEN LEXIS 857, Final Decision (August 17, 2007).

Emotional distress damages of \$50,000 to compensate employee for her pain and humiliation was appropriate; especially in light of the testimony regarding the physical and emotional symptoms employee suffered as a result of employer's refusal to provide reasonable accommodations (smoke-free work environment) and unlawful termination of her employment when she was recuperating from cardiac surgical procedures, there was no merit in employer's contention that the amount of the award was punitive. Lampley v. Astral Air Parts, Inc., OAL Dkt. No.

CRT 1307-06, 2007 N.J. AGEN LEXIS 857, Final Decision (August 17, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 188) adopted, which denied a teacher's application for accidental disability benefits. Collateral estoppel applied to prevent the teacher from relitigating whether she was disabled, as it had been previously determined that she was not totally and permanently disabled in the context of N.J.S.A. 43:15A-43 and that she was able to perform the duties in the general area of her employment. The duties in the general area of her employment were to teach and the accommodation offered her after she was injured while assisting a student, pursuant to this section, afforded her the opportunity to perform the general duties of a teacher. In re Megargee, OAL DKT No. TYPPE 02690-2004S, 2006 N.J. AGEN LEXIS 683, Final Decision (April 20, 2006), *aff'd*, N.J. Sup. Ct., App. Div. (Docket No. A-4866-05T2) (June 14, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 890) adopted, which explained that reasonable accommodation for a disabled employee requires an "interactive process," in which "both employer and employee bear responsibility for communicating with one another to identify the precise limitations resulting from the disability and potential reasonable accommodation that could overcome those limitations." "In general, the interactive process must ordinarily begin with the employee providing notice to the employer of the employee's disability and any resulting limitations, and expressing a desire for reassignment if no reasonable accommodation is possible in the employee's existing job." *Fischbach v. Ocean County*, OAL Dkt. No. CSV 4180-06 (CSV 4698-05 On Remand), 2007 N.J. AGEN LEXIS 93, Final Decision (January 17, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 890) adopted, which concluded that, although the employee, who had hypertension, was unable to claim protection under the Americans with Disabilities Act, the employee was considered "handicapped" under the definition contained in the New Jersey Law Against Discrimination, N.J.S.A. 10:5-5; therefore, the requirement for reasonable accommodation applied. *Fischbach v. Ocean County*, OAL Dkt. No. CSV 4180-06 (CSV 4698-05 On Remand), 2007 N.J. AGEN LEXIS 93, Final Decision (January 17, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 890) adopted, which concluded that the employer reasonably accommodated the employee, who had hypertension and was considered "handicapped" under the New Jersey Law Against Discrimination; in order to both retain the employee, who had been employed as a Senior Recycling Operator, and to accommodate the limitations on his ability to perform certain duties, notably driving trucks, the employer assigned him to a position with a different title that did not require such duties. Merely because the employee's salary and title were diminished from that held previously did not make the accommodation unreasonable. *Fischbach v. Ocean County*, OAL Dkt. No. CSV 4180-06 (CSV 4698-05 On Remand), 2007 N.J. AGEN LEXIS 93, Final Decision (January 17, 2007).

Adopting Initial Decision's conclusion that county employer had reasonably accommodated an employee, who had hypertension, by assigning him to a position with a different title which did not require that he perform certain duties, notably driving trucks, even though the accommodation involved the employee's demotion from "Senior Recycling Operator" to the position of "Recycling Operator." Nonetheless, since the employee asserted that he would not have promotional opportunities to the Assistant Supervisor, Recycling Operations position if he remained in the Recycling Operator title, the Merit System Board recommended that future announcements for Assistant Supervisor, Recycling Operations, be open to employees holding the titles of Senior Recycling Operator and Recycling Operator, pursuant to N.J.A.C. 4A:4-2.4 (adopting 2006 N.J. AGEN LEXIS 890). *Fischbach v. Ocean County*, OAL Dkt. No. CSV 4180-06 (CSV 4698-05 On Remand), 2007 N.J. AGEN LEXIS 93, Final Decision (January 17, 2007).

Employer did not attempt to accommodate driver's disability where record reflected no evidence that employer considered modifying its scheduling procedures to provide driver with assignments or otherwise explored alternative assignments that would address limitations pre-

sented by driver's disability (AIDS diagnosis limiting him to part-time work). By conditioning driver's return to work on being able to perform functions his physician had not cleared him to perform, employer denied, or, at best, ignored driver's medical limitations instead of trying to accommodate them. *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).

Employer's assertion that there were no bus driver positions available, plus its failure to inform driver that it considered driver's medical clearance deficient, supported the conclusion that employer did not consider reasonable accommodation before deciding to deny re-employment to driver due to his disability. *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).

Collection of disability compensation by an employee does not necessarily render a disability-based discrimination claim invalid, and the employee must be given the opportunity to explain the inconsistency; driver's application for disability benefits presented no bar to driver's failure to hire/denial of reasonable accommodation claim. *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).

Where city employer considered possible accommodations, offered the accommodation of resignation and re-enrollment, and reasonably arrived at the conclusion that employee's injuries precluded job performance as a police officer, dismissal of employee's complaint was appropriate. Employee rejected the accommodation offered by city, and requested a different accommodation—permission to complete the non-physical components of the academy and return to the academy to complete the physical training once her injury healed but reasonable accommodation provisions do not mandate that an employer provide the specific accommodation requested by an employee. *Hidalgo v. Camden City Police Dep't*, OAL Dkt. No. CRT 02913-01, 2006 N.J. AGEN LEXIS 558, Final Decision (June 5, 2006).

Reasonable accommodation requires the employer and the employee to work together in good faith to assess the employee's abilities and limitations and the range of available accommodations that would not impose an undue burden on the employer's operations. *Hidalgo v. Camden City Police Dep't*, OAL Dkt. No. CRT 02913-01, 2006 N.J. AGEN LEXIS 558, Final Decision (June 5, 2006).

Dismissal of youth worker for mental incapacity was improper absent attempt to reasonably accommodate. *Roberts v. Division of Youth and Family Services*, 97 N.J.A.R.2d (CSV) 9.

Employer took reasonable steps to accommodate handicapped computer operator before firing her. *O'Hara v. Department of the Treasury*, 96 N.J.A.R.2d (CSV) 273.

Alcoholism which initially led to excessive absenteeism did not warrant tenured teacher's removal once she successfully completed school district's rehabilitation program. *Jersey City School District v. Howard*, 95 N.J.A.R.2d (EDU) 301.

Excessive absenteeism provided sufficient cause for school board to terminate employee from her position as a tenured secretary. *Matter of Tenure Hearing of Jones*, 95 N.J.A.R.2d (EDU) 285.

Use of illegal amphetamines in breach of drug rehabilitation contract with school board was unbecoming and warranted tenured teacher's dismissal. *Matter of Yanniello Tenure Hearing*, 95 N.J.A.R.2d (EDU) 262.

Inability to do assigned tasks of engineering technician warranted termination when psychological disability from which employee was suffering could not be accommodated. *Sallie v. Department of Transportation*, 95 N.J.A.R.2d (CSV) 100.

Board of education reasonably accommodated alcoholic teacher; dismissal. *State Operated School District of Jersey City v. Howard*. 93 N.J.A.R.2d (EDU) 556.

Turnpike Authority unlawfully discriminated against employee on basis of his handicap. *Troxell v. New Jersey Turnpike Authority*, 92 N.J.A.R.2d (CRT) 5.

13:13-2.6 Wages and fringe benefits

(a) An employer's wage scale must be unrelated to the disability of its employees, except where permitted by State or Federal law.

(b) Occupational training and retraining programs, including, but not limited to, guidance programs, apprentice training programs and executive training programs, shall not be conducted in such a manner as to discourage or otherwise discriminate against people with disabilities.

(c) It is an unlawful practice for any employer to discriminate against people with disabilities, with regard to fringe benefits provided either directly by an employer or through contracts with insurance carriers. Fringe benefits as used in this section include, but are not limited to, medical, hospital, accident and life insurance, retirement benefits, profit sharing and bonus plans, and leave. This subsection does not, for example, prohibit any employer from providing medical insurance which does not cover the cost of any medical condition arising out of preexisting illnesses, which costs are incurred following an employee's date of hire. Rather, whatever medical insurance is made available to non-disabled employees must be equally available to employees with disabilities.

(d) Regulations promulgated pursuant to the Law Against Discrimination shall supersede any inconsistent term of a collective bargaining agreement.

Amended by R.2000 d.273, effective July 3, 2000.
See: 32 N.J.R. 1155(a), 32 N.J.R. 2445(a).

In (a), substituted "disability of its employees" for "existence of handicap"; in (b), substituted "people with disabilities" for "persons possessing handicaps"; and in (c), substituted "against people with disabilities" for "between persons who are handicapped and those who are not", substituted a reference to non-disabled employees for a reference to non-handicapped employees, and substituted a reference to employees with disabilities for a reference to handicapped employees.

13:13-2.7 Labor organizations

(a) It is unlawful for any labor organization to exclude or expel any individual from membership or from any apprenticeship program because that individual is a person with a disability.

(b) It is an unlawful employment practice for any labor organization to discriminate on the basis of disability with respect to hiring, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment, representation, grievances or any other matter directly or indirectly related to membership in or employment by such an organization.

(c) It is unlawful for a labor organization to cause or to attempt to cause an employer to discriminate against an individual because that individual is a person with a disability.

(d) It is unlawful to engage in any activity proscribed by (a), (b), or (c) above notwithstanding that activity is authorized or required by the constitution or by-laws of a labor organization or by a collective bargaining agreement or other contract to which the labor organization is a party.

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).

In (a), substituted "is a person with a disability" for "possesses a handicap" at the end; in (b), substituted "disability with" for "a person's handicap in" following "basis of"; and in (c), substituted "that individual is a person with a disability" for "of a handicap" at the end.

13:13-2.8 Exception

(a) It shall be lawful to take any action otherwise prohibited under this section where it can reasonably be determined that an applicant or employee, as a result of the individual's disability, cannot perform the essential functions of the job even with reasonable accommodation.

1. Refusal to refer, admit to membership, hire, or transfer a person with a disability may be lawful where the nature or extent of the individual's disability reasonably precludes the performance the essential functions of the particular employment. Such a decision, however, must be based upon an objective standard supported by factual evidence rather than on the basis of general assumptions that a particular disability would interfere with the individual's ability to perform the essential functions of the job.

2. Refusal to select a person with a disability may be lawful where it can be demonstrated that the employment of that individual in a particular position would be hazardous to the safety or health of such individual, other employees, clients or customers. Such a decision must be based upon an objective standard supported by factual or scientifically validated evidence, rather than on the basis of general assumptions that a particular disability would create a hazard to the safety or health of such individual, other employees, clients or customers. A "hazard" to the person with a disability is a materially enhanced risk of serious harm.

3. The burden of proof is upon the employer, employment agency or labor organization to demonstrate in each case that the exception relied upon is based upon an objective standard supported by factual evidence, but no exception shall be based on:

i. A refusal to select a person with a disability because of the preferences of co-workers, clients, customers or the employer.

ii. A refusal to select a person with a disability because of the increased cost of insurance whether actual or anticipated, under a group or employee insurance plan provided in accordance with the law or as a fringe benefit.

iii. A refusal to select a person with a disability because of an assumption not supported by factual documented proof that such individual will incur a high rate of absenteeism in the future.

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).

Substituted references to persons with disabilities for references to handicapped individuals throughout.

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

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

In (a), deleted "presently" throughout; added "essential functions of the" to introductory paragraph (a) and (a)1; in (a)1, also substituted "essential functions" for "duties."

Case Notes

Temporary leave of absence did not have to be granted under New Jersey Law Against Discrimination (NJLAD) to reasonably accommodate handicapped employee's inability to presently perform essential functions of his job. *Conoshenti v. Public Service Electric & Gas Company*, 364 F.3d 135.

Municipality was not required to provide second opportunity for rehabilitation to firefighter who tested positive for cocaine and whose reinstatement after first testing positive was conditioned upon abstaining from use of drugs. *Matter of Jackson*, 294 N.J.Super. 233, 683 A.2d 203 (A.D.1996).

Employer may not base his decision to discharge a handicapped employee for safety reasons on subjective evaluations or conclusory medical reports. *Greenwood v. State Police Training Center*, 127 N.J. 500, 606 A.2d 336 (1992).

Employer does not have good cause to terminate a public employee on basis of a physical limitation unless limitation either prevents employee from adequately performing job or creates substantial risk of serious injury. *Greenwood v. State Police Training Center*, 127 N.J. 500, 606 A.2d 336 (1992).

Possible consequences of an injury to police trainee who had limited vision in his right eye did not constitute good cause for trainee's dismissal. *Greenwood v. State Police Training Center*, 127 N.J. 500, 606 A.2d 336 (1992).

Police Training Commission did not have good cause to dismiss trainee who had limited vision in his right eye from police training program. *Greenwood v. State Police Training Center*, 127 N.J. 500, 606 A.2d 336 (1992).

Alleged different treatment of information regarding condition of surgeon who was patient at his own hospital and was diagnosed as having acquired immunodeficiency syndrome (AIDS) would not support cause of action under the New Jersey law against discrimination. *Estate of Behringer v. Medical Center at Princeton*, 249 N.J.Super. 597, 592 A.2d 1251 (L.1991).

In determining whether surgeon with AIDS may legitimately be restricted in his surgical privileges, test to be applied is whether continuation of surgical privileges causes reasonable probability of substantial harm to others, including co-workers and patients. *Estate of Behringer v. Medical Center at Princeton*, 249 N.J.Super. 597, 592 A.2d 1251 (L.1991).

Where physician is being treated at his own hospital, it is imperative that hospital take reasonable steps to insure confidentiality not only of human immunodeficiency virus (HIV) test result, but also of disease diagnosis which is conclusive of acquired immunodeficiency syndrome (AIDS). *Estate of Behringer v. Medical Center at Princeton*, 249 N.J.Super. 597, 592 A.2d 1251 (L.1991).

In context of informed consent, risk of surgical accident involving AIDS-positive surgeon would be legitimate concern to surgical patient, warranting disclosure of risk. *Estate of Behringer v. Medical Center at Princeton*, 249 N.J.Super. 597, 592 A.2d 1251 (L.1991).

In deciding whether nature and extent of employee's handicap reasonably precludes job performance, employer may consider whether handicapped person can do his or her work without posing serious threat of injury to health and safety of himself or herself or other employees. *Jansen v. Food Circus Supermarkets, Inc.*, 110 N.J. 363, 541 A.2d 682 (1988), on remand.

To invoke safety defense as justification for otherwise unlawful handicap discrimination employer must reasonably conclude that employee's handicap poses materially enhanced risk of serious injury. *Jansen v. Food Circus Supermarkets, Inc.*, 110 N.J. 363, 541 A.2d 682 (1988), on remand.

Employer's decision not to employ handicapped person must be justified by a "probability" rather than a "possibility" of injury to handicapped person or others. *Jansen v. Food Circus Supermarkets, Inc.*, 110 N.J. 363, 541 A.2d 682 (1988), on remand.

Opinion by employer's medical experts that epileptic employee employed as meatcutter would probably suffer another seizure at work did not support conclusion that such a seizure would probably result in harm to employee or others. *Jansen v. Food Circus Supermarkets, Inc.*, 110 N.J. 363, 541 A.2d 682 (1988), on remand.

Epileptic supermarket employee was reasonably precluded from performance of duties of meat cutter; decision of employer to terminate employee was reasonably arrived at and sufficiently supported by

independent medical testimony that there was a reasonable probability of future seizures. *Jansen v. Food Circus Supermarkets, Inc.*, 214 N.J.Super. 51, 518 A.2d 486 (App.Div.1986), reversed 110 N.J. 363, 541 A.2d 682.

Fire department did not illegally discriminate in refusing to hire 53-year-old applicant for firefighter position. *McKeever v. Kirkwood Board of Fire Commissioners*, 96 N.J.A.R.2d (CRT) 79.

Alcoholism which initially led to excessive absenteeism did not warrant tenured teacher's removal once she successfully completed school district's rehabilitation program. *Jersey City School District v. Howard*, 95 N.J.A.R.2d (EDU) 301.

SUBCHAPTER 3. REAL PROPERTY

13:13-3.1 Application

This subchapter on discrimination in real property applies to vendors and lessors of property and their agents, real estate brokers, agents and salespersons, lending institutions and other persons. For the purpose of this subchapter, lending institutions include banks, building and loan associations, insurance companies and any other enterprise whose business consists in whole or in part in the making or purchasing of any loan or extension of credit, for whatever purpose, whether secured by residential real estate or not, including, but not limited to, financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any real property or part or portion thereof, or any agent or employee thereof.

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.2006 d.13, effective January 3, 2006.

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

Substituted "or purchasing of any loan or extension of credit, for whatever purpose, whether secured by residential real estate or not, including, but not limited to," for "of commercial loans or other forms of" and substituted "any real property or part or portion thereof, or any agent or employee thereof" for "housing accommodations."

13:13-3.2 Advertising and solicitation

(a) This section applies to real property, public housing and the rental of:

1. A single apartment or flat in a two-family dwelling, the other occupancy unit of which is occupied by the owner as a residence at the time of such rental; and
2. A room or rooms to another person or persons by the owner or occupant of a one-family dwelling occupied by the owner or occupant as a residence at the time of such rental.

(b) It is unlawful for any person to make, print, circulate, issue, display, post, utter, disseminate or publish or cause to be made, printed, circulated, issued, displayed, posted, uttered, disseminated or published any notice, listing, statement, sign or advertisement with respect to the sale, rental, sub-lease, assignment or lease of real property which expresses, overtly or subtly, directly or indirectly, any

preference, limitation, specification, or discrimination based upon disability.

(c) It is unlawful for any real estate broker, agent or salesperson to accept for listing any housing accommodation when the seller or lessor or his or her agent has expressed, directly or indirectly, an intention to discriminate against people with disabilities.

(d) It is not unlawful for any person to make, print or publish or cause to be made, printed or published any notice, listing, statement, or advertisement which indicates that barrier free accommodations are available for sale, rent, lease or occupancy.

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).

In (b) substituted "disability" for "a handicap"; in (c) added "or her" following "his" and substituted "people with disabilities" for "handicapped persons".

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

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

In (a)1 and (a)2, deleted "or the household of the owner's or occupant's family"; rewrote (b).

13:13-3.3 Inquiries

It is unlawful for any person to make or cause to be made any written or oral inquiry or record concerning the disability of any prospective purchaser, tenant or prospective occupant of any real property, or the disability of any other person associated with a prospective purchaser, tenant or prospective occupant, unless such information is required by an agency of local, State or Federal government and the person states clearly that the information requested is intended for use solely by the government agency.

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).

Substituted a reference to disability for a reference to handicap.

13:13-3.4 Sale or rental

(a) It is unlawful for any person to discriminate on the basis of disability in the actual showing, sale, rental or lease of available real property. For example, a representation to any person, because that person is a person with a disability, that real property is not available for inspection, sale or rental when such real property is in fact so available is a violation of the act.

(b) It is unlawful for any person to misrepresent the price of real property listed for sale, rent or lease or to fail to communicate to the seller or lessor any offer made by a prospective buyer or lessor because the applicant or prospective occupant is a person with a disability, or because of any other person associated with the applicant or prospective occupant is a person with a disability.

(c) It is unlawful for any person to fail or refuse to show, rent or lease any real property to a person because he or she is a person with a disability who is accompanied by a guide or service dog or animal. Policies which restrict the availability of housing accommodations to persons without pets shall be void with respect to the above-mentioned segment of this protected class.

(d) It is unlawful for any person to fail or refuse to show, rent or lease any real property because a person with a disability will be residing or intends to reside in a dwelling or because of the disability of any person associated with a buyer or renter.

(e) It is unlawful for any person to discriminate against any individual because of disability in the price, terms, conditions or privileges of the sale, rental or lease of real property or in the provision of services for facilities in connection therewith. People with disabilities shall not be required to pay extra compensation or additional security deposits as a result of their maintaining or requiring special practices or accessories though such persons may be liable for any specific damage which may be done to the premises by virtue of their requirement.

1. This provision does not require a landlord to install or bear the expense of any such special accessories or practices. Apart from requiring payment for specific damage which may be done to the premises, however, a landlord may not charge a person with a disability an extra fee, for example, for keeping a guide or service dog or animal or maintaining special equipment such as a shower bar.

(f) It is unlawful for any person to:

1. Refuse to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by the person with a disability, if the modifications may be necessary to afford the person with a disability full enjoyment of the premises, except that, in the case of a rental, the landlord may:

i. Where it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted;

ii. Where it is necessary in order to ensure with reasonable certainty that funds will be available to pay for the restorations at the end of the tenancy, negotiate as part of such a restoration agreement a provision requiring that the tenant pay into an interest bearing escrow account, over a reasonable period, a reasonable amount of money not to exceed the cost of the restorations and, the interest in such account shall accrue to the benefit of the tenant; and

iii. Condition permission for a modification on the renter providing a reasonable description of the proposed modifications as well as reasonable assurances that the work will be done in a workmanlike manner and that any required building permits will be obtained; and

2. Refuse to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling.

(g) It is unlawful for any person to fail or refuse to rent to, or to impose different terms of tenancy upon, any person with a disability because that individual is a recipient of Federal, State or local assistance, including medical assistance or housing subsidies.

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 the section.

13:13-3.5 Eviction

It is an unlawful act of discrimination for any person to evict a tenant because the tenant is a person with a disability, or because that person is associated with another person who is a person with a 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).

Substituted references to persons with disabilities for references to persons who possess handicaps throughout.

13:13-3.6 Financing

It is unlawful for any lending institution or person to discriminate against an individual seeking a loan or other form of financial assistance whether in the initial extension of credit or in the terms and conditions of the obligation because that individual or an intended occupant of real property is a person with a disability, or because that individual or intended occupant is associated with another person who is a person with a disability. An application for loans or other forms of financial assistance means and extends to the purchase of an existing property, the construction of new buildings and the rehabilitation, repair or maintenance of existing property.

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).

Substituted references to persons with disabilities for references to persons who possess handicaps throughout.

13:13-3.7 Covered multifamily dwellings

In connection with the design and construction of covered multifamily dwellings for first occupancy after March 13, 1991, it shall be unlawful to fail to design and construct

dwellings which comply with the standards set forth in 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.

New Rule, R.1995 d.243, effective May 15, 1995.
See: 26 N.J.R. 1942(a), 27 N.J.R. 2005(a).

SUBCHAPTER 4. ACCESS TO PUBLIC ACCOMMODATIONS

13:13-4.1 Purpose

The purpose of this subchapter is to implement the provisions of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to 49, as it pertains to unlawful discrimination against people with disabilities by the owners, lessees, proprietors, managers, superintendents, agents or employees of any place of public accommodation.

Amended by R.2001 d.480, effective December 17, 2001.
See: 33 N.J.R. 1852(a), 33 N.J.R. 4380(b).
Rewrote the section.

13:13-4.2 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings:

“LAD” means the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to 49.

“Path of travel” means a continuous, unobstructed means of pedestrian passage by which the facilities may be approached, entered, and exited, and which connects the facility to an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and to other parts of the facility, and includes a continuous, unobstructed means of pedestrian passage to the areas of the facility where goods or services are made available to the general public, and to the restrooms, telephones, and drinking fountains.

“Person with a disability” and “people with disabilities” shall have the same meaning as the term “handicapped” or “disabled” as defined in N.J.S.A. 10:5-5(q), and explained in N.J.S.A. 10:5-4.1, and shall include people who are perceived as having a disability.

“Place of public accommodation” shall include the places set forth in N.J.S.A. 10:5-5(l), and shall also specifically include organizations that make membership available to the general public and entities that offer examinations or courses related to applications, licensing, certification or credentialing for secondary or post-secondary education, professional, or trade purposes.

“Qualified interpreter” means an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary.

“Service animal” means any animal individually trained to do work or perform tasks for the benefit of a person with a disability, including, but not limited to, guiding people with impaired vision, alerting people with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or retrieving dropped items.

“Service dog” means any guide dog, signal dog, or other dog individually trained to do work or perform tasks for the benefit of a person with a disability, including, but not limited to, guiding people with impaired vision, alerting people with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or retrieving dropped items.

“Smoking” means the burning of a lighted cigar, cigarette, pipe, or any other matter or substance which contains tobacco.

New Rule, R.2001 d.480, effective December 17, 2001.
See: 33 N.J.R. 1852(a), 33 N.J.R. 4380(b).
Former N.J.A.C. 13:13-4.2, General practices, recodified to N.J.A.C. 13:13-4.3.

13:13-4.3 Unlawful practices

(a) It shall be unlawful for an owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation to refuse, withhold from or deny an individual, either directly or indirectly, on account of that person’s disability or perceived disability, access to any of the accommodations, advantages, facilities or privileges of a place of public accommodation. It shall also be unlawful for an owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation to discriminate against a person with a disability in the price, eligibility criteria, methods of administration, standards, terms, or conditions upon which access to such accommodations, advantages, facilities or privileges may depend.

(b) It shall be unlawful for an owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, directly or indirectly, such as through contractual, licensing, or other arrangements, to accord a person with a disability differential terms, conditions or privileges of a place of public accommodation, or to accord a person with a disability differential opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation otherwise offered to the general public.

1. Separate goods, services, privileges, facilities, or terms and conditions of enjoyment shall be deemed differential unless such action is necessary to provide a person with a disability with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that offered to the general public, and provided the separate accommodation comports with the standards set forth in N.J.A.C. 13:13-4.4.

(c) It shall be unlawful for an owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation to refuse, withhold, or deny, either directly or indirectly, the right of people with disabilities to be accompanied in any place of public accommodation by guide or service dogs, specially trained by a service animal trainer as that term is defined in the LAD. This subsection shall also apply to trainers of service or guide dogs engaged in the actual training process and activities of such animals, and to service animal trainers and people with disabilities accompanied by service animals other than dogs, provided the use of such other service animals in the place of public accommodation is deemed to be a reasonable accommodation under all of the circumstances. Service animal trainers or people with disabilities accompanied by service or guide dogs or service or guide animals shall be liable for any damage done to the premises or facilities by such dogs or animals.

(d) It shall be unlawful for an owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation to publish, circulate, issue, display, post or mail or cause to be printed, circulated, issued, displayed, posted or mailed any written, printed or broadcast notice indicating directly or indirectly that the right of a person with a disability to have equal access to a place of public accommodation will be denied or abridged.

(e) It shall be unlawful for any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of that person's disability or on the disability of such other person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, except as provided by N.J.S.A. 10:5-12(l) with respect to collective bargaining, labor disputes, and actions to protest unlawful discrimination or unlawful employment practices.

Recodified from N.J.A.C. 13:13-4.2 and amended by R.2001 d.480, effective December 17, 2001.
See: 33 N.J.R. 1852(a), 33 N.J.R. 4380(b).
Rewrote the section.

13:13-4.4 Integrated settings

(a) An owner, lessee, proprietor, manager, superintendent, agent or employee of a place of public accommodation shall, to the extent reasonable, afford goods, services, facilities, privileges, advantages, and accommodations to a person with a disability in the most integrated setting appropriate to the needs of that person.

(b) Notwithstanding the existence of separate or different programs or activities provided in accordance with this subchapter, an owner, lessee, proprietor, manager, superintendent, agent or employee of a public accommodation shall not deny a person with a disability the opportunity to

participate in programs or activities that are not separate or different, in accordance with N.J.A.C. 13:13-4.8.

New Rule, R.2001 d.480, effective December 17, 2001.
See: 33 N.J.R. 1852(a), 33 N.J.R. 4380(b).

13:13-4.5 Examinations

An owner, lessee, proprietor, manager, superintendent, agent or employee of a place of public accommodation that offers examinations or courses related to applications, licensing, certification or credentialing for secondary or post-secondary education, professional, or trade purposes shall assure that examinations are selected and administered to best ensure that when an examination is administered to a person with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills, except where those skills are the factors that the examination purports to measure.

New Rule, R.2001 d.480, effective December 17, 2001.
See: 33 N.J.R. 1852(a), 33 N.J.R. 4380(b).

13:13-4.6 Prohibited charges

It shall be unlawful for an owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation to impose a surcharge on a particular person with a disability or any group of people with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that may be required by law.

New Rule, R.2001 d.480, effective December 17, 2001.
See: 33 N.J.R. 1852(a), 33 N.J.R. 4380(b).

13:13-4.7 Retaliation or coercion

(a) It shall be unlawful for any person to discriminate against any individual because that individual has opposed any act or practice prohibited by the LAD or because that individual filed a complaint, testified, assisted, or participated in any investigation or proceeding under the LAD.

(b) It shall be unlawful for any person to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by the LAD.

New Rule, R.2001 d.480, effective December 17, 2001.
See: 33 N.J.R. 1852(a), 33 N.J.R. 4380(b).

13:13-4.8 Reasonable probability of serious harm

(a) Nothing in this subchapter shall be construed as requiring an owner, lessee, proprietor, manager, superin-

tendent, agent or employee of any place of public accommodation to permit a person with a disability to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation if to do so creates a reasonable probability of serious harm to the person with a disability, or to others, that cannot be eliminated with reasonable accommodation.

(b) In determining whether providing a person with a disability with access to a public accommodation poses a reasonable probability of serious harm to that individual, or to others, that cannot be eliminated with reasonable accommodation, an owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain the probability that the serious harm will actually occur and whether reasonable modifications of policies, practices, or procedures will eliminate the probability of serious harm.

(c) An owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation may impose legitimate safety requirements that are necessary for the safe operation of the facility. Such safety requirements shall be based on actual risks and not on mere speculation, stereotypes, or generalizations about people with disabilities.

New Rule, R.2001 d.480, effective December 17, 2001.
See: 33 N.J.R. 1852(a), 33 N.J.R. 4380(b).

13:13-4.9 Smoking

Nothing in this subchapter shall be construed as making it unlawful to prohibit or impose restrictions on smoking in places of public accommodation.

New Rule, R.2001 d.480, effective December 17, 2001.
See: 33 N.J.R. 1852(a), 33 N.J.R. 4380(b).

13:13-4.10 Insurance

(a) Nothing in the LAD or this subchapter shall be construed as interfering with the operation of the terms or conditions and administration of any bona fide insurance plan or program.

(b) It shall be unlawful for an owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation to refuse to serve a person with a disability because its insurance company conditions coverage or rates on the absence of people with disabilities.

New Rule, R.2001 d.480, effective December 17, 2001.
See: 33 N.J.R. 1852(a), 33 N.J.R. 4380(b).

13:13-4.11 Reasonable accommodation

(a) An owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation shall make reasonable accommodations to the limitations of a patron or prospective patron who is a person with a disability,

including making such reasonable modifications in policies, practices, or procedures, as may be required to afford goods, services, facilities, privileges, advantages, or accommodations to a person with a disability, unless the owner, lessee, proprietor, manager, superintendent, agent or employee of the place of public accommodation demonstrates that making the accommodations would impose an undue burden on its operation.

(b) In determining whether an accommodation is unreasonable because it will impose an undue burden on the operation of a place of public accommodation, factors to be considered include:

1. The overall size of the business which runs the place of public accommodation with respect to the number of employees, number and type of facilities, and size of budget;
2. The nature and cost of the accommodation sought;
3. Whether the accommodation sought will result in a fundamental alteration to the goods, services, program or activity offered; and
4. Whether the accommodation sought involves an alteration that will threaten or destroy the historic significance of a building or facility that is eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. §§ 470 et seq.) or designated as historic under State or local law.

New Rule, R.2001 d.480, effective December 17, 2001.
See: 33 N.J.R. 1852(a), 33 N.J.R. 4380(b).
Amended by R.2006 d.13, effective January 3, 2006.
See: 37 N.J.R. 2607(a), 38 N.J.R. 335(a).

In (a), added "reasonable accommodations to the limitations of a patron or prospective patron who is a person with a disability, including making" and substituted "accommodations" for "modifications."

13:13-4.12 Examples of reasonable accommodation

(a) Accommodations that may be reasonable in a particular situation include, but are not limited to:

1. Permitting the use of service or guide animals, other than dogs, that are individually trained to do work or perform tasks for the benefit of a person with a disability;
2. Making reasonable structural alterations such as:
 - i. Repositioning shelves or telephones;
 - ii. Rearranging furniture and equipment;
 - iii. Installing accessible door hardware;
 - iv. Adding raised markings on elevator control buttons;
 - v. Installing flashing alarm lights;
 - vi. Widening doors and installing offset hinges to widen doorways; and/or

- vii. Installing an accessible paper cup dispenser at an existing inaccessible water fountain;
- 3. Providing at least one accessible restroom for each sex or an accessible single unisex restroom, and making alterations such as the following to ensure accessibility:
 - i. Installing grab bars in toilet stalls;
 - ii. Rearranging toilet partitions to increase maneuvering space;
 - iii. Insulating lavatory pipes under sinks to prevent burns;
 - iv. Installing a raised toilet seat;
 - v. Installing a full-length bathroom mirror; and/or
 - vi. Repositioning the paper towel dispenser in a bathroom;
- 4. Creating designated accessible parking spaces;
- 5. Installing vehicle hand controls;
- 6. Providing an accessible check-out aisle or modifying policies and practices to ensure that an equivalent level of convenient service is provided to a person with a disability as is provided to others;
- 7. Providing auxiliary aids and services to ensure effective communication, such as:
 - i. Qualified, effective interpreters, notetakers, computer-aided transcription services, written materials, accessible telephones, including telephone handset amplifiers, assistive listening devices or systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, "telecommunications devices for deaf persons" (TDD's), and videotext displays or alternate effective means for decoding captions to facilitate television use by people with impaired hearing;
 - ii. Qualified readers, Brailled materials and versions of books, books and materials on audio cassettes, and large print materials; and/or
 - iii. Other specialized equipment or devices;
- 8. Providing wheelchair seating spaces and seats with removable aisle-side arm rests that permit people who use wheelchairs to sit with family members or other companions and that are located so that the seats:
 - i. Are dispersed throughout the seating area;

- ii. Provide lines of sight and choice of admission prices comparable to what is available to members of the general public; and

- iii. Adjoin an accessible route that also serves as a means of egress in case of emergency;

9. Offering examinations or courses in a place and manner accessible to people with disabilities or offering alternate accessible arrangements; such accommodations shall include making reasonable modifications to the time permitted for completion of an examination or course; and/or

10. To the extent reasonable, ensuring that the path of travel to the areas of the facility where goods or services are made available to the general public, and to the restrooms, telephones, and drinking fountains, are readily accessible to and useable by people with disabilities, including people who use wheelchairs; this may include, but shall not be limited to:

- i. Providing accessible entrances, walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps, clear floor paths through lobbies, corridors, rooms, and other areas, parking access aisles, and accessible elevators and lifts;

- ii. Remodeling merchandise display areas in a department store;

- iii. Replacing an inaccessible floor surface and/or removing high pile, low density carpeting; and/or

- iv. Eliminating a turnstile or providing an alternative accessible path.

New Rule, R.2001 d.480, effective December 17, 2001.
See: 33 N.J.R. 1852(a), 33 N.J.R. 4380(b).

13:13-4.13 Referrals

An owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation may refer a person with a disability to another place of public accommodation, if that person is seeking, or requires, treatment or services outside of the referring entity's area of specialization, and if, in the normal course of its operations, the referring entity would make a similar referral for an individual who is not a person with a disability and who seeks or requires the same treatment or services.

New Rule, R.2001 d.480, effective December 17, 2001.
See: 33 N.J.R. 1852(a), 33 N.J.R. 4380(b).