

(b) It is not unlawful for an employer to invite applicants for employment to identify themselves as handicapped:

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 handicapped persons; or
3. To implement a special program which is designed to benefit handicapped persons when a condition for a person's participation in the program is that he or she is handicapped.

(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 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).

13:13-2.5 Reasonable accommodation

(a) All employers shall conduct their employment procedures in such a manner as to assure that all handicapped persons are given equal consideration with non-handicapped persons 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 a handicapped employee or appli-

cant, 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 handicapped persons;
- ii. Job restructuring, part-time or modified work schedules;
- 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 handicapped person on the grounds that his or her handicap 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.

Law Review and Journal Commentaries

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

Case Notes

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.

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.

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.

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.

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).

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.

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.

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.

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 existence of handicap, 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 persons possessing handicaps.

(c) It is an unlawful practice for any employer to discriminate between persons who are handicapped and those who are not, 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-handicapped employees must be equally available to handicapped employees.

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

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 possesses a handicap.

(b) It is an unlawful employment practice for any labor organization to discriminate on the basis of a person's handicap in 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 of a handicap.

(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.

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 a handicap, cannot presently perform the job even with reasonable accommodation.

1. Refusal to refer, admit to membership, hire, or transfer a handicapped person may be lawful where the nature or extent of the handicap presently reasonably precludes the performance 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 handicap would interfere with the individual's ability to perform the duties of the job.

2. Refusal to select a handicapped individual may be lawful where it can be demonstrated that the employment of the handicapped person in a particular position would presently 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 handicap would create a hazard to the safety or health of such individual, other employees, clients or customers. A "hazard" to the handicapped person 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: