

DIVISION ON CIVIL RIGHTS

Regulations Pertaining to Discrimination on the Basis of Disability

Proposed Readoption with Amendments: N.J.A.C. 13:13

Authorized by: J. Frank Vespa-Papaleo, Esq., Director

Authority: N.J.S.A. 10:5-8 and 10:5-12

Calendar Reference: See Summary below for explanation of exception to calendar requirement

Proposal Number:

Submit comments by _____ to:
Gary LoCassio, Assistant Director
Division on Civil Rights
P.O. Box 089
Trenton, New Jersey 08625-0089

The agency proposal follows:

Summary

The New Jersey Division on Civil Rights (“Division”), in the Department of Law and Public Safety, enforces the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to 49. Pursuant to Executive Order No. 66 (1978) and N.J.S.A. 52:14B-5.1, the Division’s rules concerning discrimination against persons with disabilities, N.J.A.C. 13:13, expire on June 6, 2005. The rules explain the LAD’s prohibitions against discrimination on the basis of disability in the areas of employment, housing and access to places of public accommodation. The Division has reviewed these rules and has determined them to be necessary, reasonable and proper for the purpose for which they were originally promulgated. However, the Division proposes certain amendments to N.J.A.C. 13:13 in the area of housing discrimination in order to conform the rules to recent changes to the LAD, and to ensure that the Division’s rules related to housing discrimination are consistent with the Federal Fair Housing Act (FHA), 42 U.S.C. §3601 et seq. and regulations promulgated thereunder. These proposed amendments are required in order for the Division to achieve certification as a substantially equivalent agency by the Department of Housing and Urban Development (HUD), which in turn allows for the Division to enter into a work-sharing relationship with HUD. Such a work-sharing arrangement with HUD

would make the Division eligible for Federal funding for case processing and other outreach initiatives. Amendments to N.J.A.C. 13:13-2.5(b)(1) and 13:13-2.8(a) are also proposed to clarify that a leave of absence is a form of reasonable accommodation in employment under the LAD. Similarly, the amendment to N.J.A.C. 13:13-4.11 would clarify that making modifications in policies, practices and procedures is just one example of a reasonable accommodation that a place of public accommodation may have to provide for a patron with a disability.

A summary of N.J.A.C. 13:13 and the proposed amendments thereto follows.

Subchapter 1 sets forth general provisions in connection with the chapter. The proposed amendment to N.J.A.C. 13:13-1.3 substitutes the word “disability” for the word “handicapped” to conform the rule to the definition of “disability” in the LAD.

Subchapter 2 sets forth rules concerning disability discrimination in employment. The Division proposes amendments to N.J.A.C. 13:13-2.5(b)(1) and 13:13-2.8(a) to clarify that permitting an employee to take a leave of absence may be a reasonable accommodation under the LAD. N.J.A.C. 13:13-2.8(a) currently states that there is an exception to an employer’s obligation to provide a reasonable accommodation “where it can reasonably be determined that an applicant or employee, as a result of the individual’s disability, cannot presently perform the job even with reasonable accommodation (emphasis added).” In Conoshenti v. Public Service Electric & Gas Company, 364 F. 3d 135 (3rd Cir. 2004), the court interpreted the language “presently perform” in the regulation to mean that the LAD requires that the disabled employee “be able to perform the essential functions of his job during the application of the reasonable accommodation--that is, at the same time that the reasonable accommodation is being implemented.” Conoshenti, supra, 364 F.3d at 151. Because of this interpretation, the court held that a leave of absence could not be considered a possible reasonable accommodation under the LAD, since the affected employee could not concurrently be on leave and perform his/her job. The Conoshenti court’s holding in this regard runs counter to the Division’s decision in Cebula v. Catalina Marketing Corp., OAL Dkt. No. CRT 05588-02 (January 26, 2004), in which the Director concluded that “time off from work is a form of accommodation which may be

reasonable, depending on the particular circumstances of the case.” (p. 22). See also Soules v. Mt. Holiness Memorial Park, 354 N.J. Super. 569, 577 (App. Div. 2002)(discussing leave of absence as an accommodation under LAD); Tynan v. Vicinage 13 of the Superior Court of New Jersey, 351 N.J. Super. 385, 401-02 (App. Div. 2002)(same). Moreover, the Director’s determination that a leave of absence may be a reasonable accommodation under the LAD is consistent with case law and interpretive guidance under the Americans With Disabilities Act (ADA) that a leave of absence may be a reasonable accommodation for an employee with a disability. See Criado v. IBM Corporation, 145 F.3d 437, 443 (1st Cir. 1998); 29 C.F.R. pt. 1630, App. (Equal Employment Opportunity Commission interpretive guidance on ADA stating that a reasonable accommodation could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment). Therefore, in order to alleviate the confusion that might be caused by the court’s decision in Conoshenti and to clarify that a leave of absence is a form of reasonable accommodation available under the LAD, the proposed amendments delete the word “presently” when it appears in N.J.A.C. 13:13-2.8(a), 13:13-2.8(a)(1), and 13:13-2.8(a)(2) and includes leaves of absence in the list of examples of types of reasonable accommodations in N.J.A.C. 13:13-2.5(b)(1)(ii).

Subchapter 3 sets forth rules concerning disability discrimination with respect to real property. The proposed amendment to N.J.A.C. 13:13-3.1 conforms the rule to the recent amendment to N.J.S.A. 10:5-12i with respect to the types of financial transactions covered by the prohibitions against discrimination in lending in the LAD. The proposed amendments to N.J.A.C. 13:13-3.2(a) conform the rule to the recent amendment to N.J.S.A. 10:5-5n with respect to the definition of "real property" that is covered by the LAD. The proposed amendments to N.J.A.C. 13:13-3.2(b) clarify that the prohibitions against discriminatory advertising apply broadly to any type of posting, advertisement or listing in any form of media regarding any type of real property. These amendments were required by HUD to enable the Division to obtain substantial equivalency certification.

Subchapter 4 sets forth rules concerning disability discrimination with respect to access

to places of public accommodation. The proposed amendment to N.J.A.C. 13:13-4.11(a) would clarify that making reasonable modifications in policies, practices and procedures is only one aspect of the duty of a place of public accommodation to provide reasonable accommodation. In reviewing the existing language of N.J.A.C. 13:13-4.11(a) for re-adoption, the Division believes that an incorrect inference could be drawn from the fact that the heading of the rule is “reasonable accommodation” but the text of the rule only addresses reasonable modifications in policies, practices and procedures, that this is the only form of reasonable accommodation required. To ensure that no confusion exists, the Division proposes to amend N.J.A.C. 13:13-4.11(a) upon re-adoption to indicate that places of public accommodation must provide reasonable accommodation, which includes making reasonable modifications in policies, practices and procedures.

As the Division has provided a 60-day comment period on the notice for this proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The rules proposed for re-adoption with amendment will have a beneficial social impact in that the rules help to explain the LAD’s prohibitions against discrimination on the basis of disability in the areas of employment, housing and access to places of public accommodation. The proposed amendments will also have a beneficial impact on the residents of New Jersey by conforming the Division’s regulations to recent amendments of the LAD. The proposed amendments related to housing discrimination will allow the Division to enter into a work-sharing agreement with HUD, which would permit victims of housing discrimination to pursue rights under both federal and state law without having to separately pursue a complaint with HUD and the Division. Such an arrangement would also be beneficial to those entities charged with housing discrimination, as they would only be subject to a single investigative proceeding.

The proposed amendments to N.J.A.C. 13:13-2.5(b)(1) and 13:13-2.8(a) would have a beneficial social impact in light of the conflicting interpretation of the regulations by the court in

Conoshenti by clarifying for employees and employers that a leave of absence is a possible reasonable accommodation under the LAD. In a similar manner, the proposed amendment to N.J.A.C. 13:13-4.11 would have a beneficial social impact by clarifying the requirement that places of public accommodation provide reasonable accommodations for patrons with disabilities.

Economic Impact

While under the rules proposed for readoption with amendments employers, housing providers and places of public accommodation may incur costs in providing reasonable accommodations to individuals with disabilities, these costs depend on the particular circumstances and are limited to costs that do not impose an undue hardship on the business. Moreover, any costs incurred in complying with these rules would otherwise be incurred in complying with the similar reasonable accommodation requirements of the Americans with Disabilities Act. The proposed amendments to N.J.A.C. 13:13-2.5 and 2.8 that provide that a leave of absence may be a reasonable accommodation in employment under the LAD should not significantly affect employers since most employers are also covered by the ADA, under which it is well-settled that a leave of absence is a possible reasonable accommodation. Furthermore, the rules provide that an employer does not have to provide an accommodation, including a leave of absence, when it would impose an undue hardship on the operation of the employer's business. The rules proposed for readoption with amendments that are related to housing discrimination will have a positive economic impact on the State as they will permit the Division to enter into a work-sharing agreement with HUD, allowing the Division to become eligible for federal funding for case processing and other outreach initiatives.

Federal Standards Analysis

A Federal standards analysis is not required because the rules proposed for readoption with amendments are intended to codify changes to and clarify the New Jersey Law Against Discrimination, and is not intended to implement or comply with any program established under Federal law or under a State statute that incorporates or attempts to effectuate Federal law,

standards or requirements. To the extent that proposed amendments to the housing discrimination rules would allow the Division to enter into a work-sharing arrangement with HUD, the proposed amendments are consistent with the FHA and are required by HUD.

Jobs Impact

The Division believes that the rules proposed for readoption with amendments will have no impact on the number of jobs in the State.

Agriculture Industry Impact

The Division believes that the rules proposed for readoption with amendments will have no impact on the agriculture industry.

Regulatory Flexibility Analysis

The rules proposed for readoption with amendments will not impose any reporting or recordkeeping requirements on small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rules would impose compliance requirements on small businesses that are employers, owners of places of public accommodation or involved in the sale or rental of real property, particularly related to providing reasonable accommodations to individuals with disabilities. However, the requirements imposed on small businesses continue to be limited to those accommodations that are reasonable in light of a number of factors, including the size and financial resources of the business in question and the nature and cost of the accommodation needed. The rules specifically provide that the size of the business be taken into account when determining whether an accommodation needs to be provided. Further, the scope of the rules is consistent with the coverage of the LAD, which prohibits discrimination by businesses involved in employment, housing and public accommodations, regardless of size. While some small businesses choose to retain the services of an attorney when addressing the issue of disability discrimination, which is the subject matter of the rules, the Division believes that professional services are not required for compliance with the rules and that the guidance provided by the rules should make it easier for small businesses to understand the LAD's prohibitions against discrimination based on disability without having to

retain professional services.

Smart Growth Impact

The Division does not anticipate that the rules proposed for readoption with amendments will have any impact on the achievement of smart growth and implementation of the State Development and Redevelopment Plan, otherwise known as the State Plan.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 13:13.

Full text of the proposed amendments follows (additions indicated in boldface and underline **thus** deletions indicated in brackets [thus]):

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.

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 "[handicapped] **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.

SUBCHAPTER 2. EMPLOYMENT

13:13-2.5 Reasonable accommodation

(a) (No change).

(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. (No change).

3. (No change).

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 [presently] perform 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 [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 disability would interfere with the individual's ability to perform the duties 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 [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 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.

4. (No change).

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 [of commercial loans or other forms of] **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 [housing accommodations] **any real property or part or portion thereof or any agent or employee thereof.**

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 [or the household of the owner's family] 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 [or the household of the owner's or occupant's family] 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** [indicates any preference, limitation, specification or otherwise discriminates] based upon disability.

(c) (No change.)

(d) (No change.)

SUBCHAPTER 4. ACCESS TO PUBLIC ACCOMMODATIONS

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**

[modifications] would impose an undue burden on its operation.

(b) (No change.)