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Successfully Navigating the ADA Interactive Process

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) changed the focus of employment law cases alleging a failure to accommodate under the ADA. Originally, most defense attorneys successfully defended ADA claims by arguing that the employee or applicant was not disabled. After the ADAAA, courts have placed a greater emphasis on an employer's response to a request for accommodation and whether the parties satisfied their obligation to act in good faith during the interactive process. Under the ADA, it is illegal for an employer to discriminate against a person with a disability if (1) that person is qualified to perform the essential functions of his job, and (2) the employer is aware of his limitations. 42 U.S.C. § 12112. While the ADA applies to both employees and job applicants, this article focuses on an employer's obligations to existing employees.

What Triggers the Right to an Accommodation?

In the overwhelming majority of cases, courts find that an employee must first make a request for accommodation. The request can be oral or in writing and can be made at any time. Even though the employer's policy may designate a specific individual to accept such requests, an employee can notify human resources, the employee's supervisor, or anyone in the chain of command. *Wallace v. Heartland Community College*, 48 F. Supp. 3d 1151, 1161 (C.D. Ill. 2014) (finding that that requests for accommodations need not be communicated through formal channels). If the person who receives the request is not authorized to respond on behalf of the employer, that person should promptly forward the request to the appropriate decision-maker.

While most requests come directly from the employee, employers should be alert for requests that come from other sources. A family member, health professional, or other representative may request an accommodation on behalf of an employee. For example, a doctor's note outlining medical restrictions for an employee constitutes a request for reasonable accommodation. Normally, an employer does not have to provide an accommodation unless it knows of the employee's disability, but where the disability and need for accommodation are obvious, the employee does not need to expressly ask for a reasonable accommodation. *Hedberg v. Indiana Bell Tel. Co., Inc.*, 47 F.3d 928, 934 (7th Cir. 1995). Thus, employees with a severe cognitive disability or obvious mental illness may be excused by courts for not making a formal request for accommodation. *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1178 (7th Cir. 2013).

Other possible triggers of the employer's knowledge of a disability are prolonged or frequent absences, workers' compensation injuries, knowledge of the employee receiving disability benefits, or an employee already using mitigating measures. *See* U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, at Question 40 (Oct. 17, 2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html (last visited Dec. 1, 2015). The request does not have to include any special words, such as "reasonable accommodation," "disability," or "Americans with Disabilities Act." What

triggers an employer's obligation to respond is any communication indicating the employee's need for some change due to a medical condition. If the nature of the communication is unclear or vague, an employer should clarify with the employee if there is a need for accommodation.

The Employer's Initial Response to the Request

Once an employer has knowledge of the employee's need for an accommodation, ideally, the employer should have the employee complete a form identifying the employee's medical condition, the job duties that the employee is having difficulty performing due to the disability, whether the job duties are essential or marginal, and the type of accommodation that the employee needs. An employer cannot make the completion of such a form mandatory and an employee will be "not necessarily bound to what she wrote on the [employer's] official form, but rather could also encompass other requests as long as they were clearly communicated to the [employer]." *Wallace*, 48 F. Supp. 3d at 1161.

If the employee's disability or need for accommodation is not obvious, an employer can mandate that the employee have a health care provider complete a medical inquiry form. This form should be limited to identifying the employee's disability for which he or she needs a reasonable accommodation and the functional limitations due to the disability. Employers cannot ask for the employee's complete medical records or for information related to other medical conditions. *See EEOC: Enforcement Guidance*, at Question 6.

The ADA permits an employer to send an employee for an independent medical examination if "such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A); *Pamon v. Board of Trustees of the University of Illinois*, 483 Fed. Appx. 296, 298 (7th Cir. 2012) (functional capacity evaluation requirement was reasonable because the exam would help the employer to make an individualized assessment of the employee's condition and his ability to do the job). However, keep in mind that the EEOC's position is that where the employee provides sufficient documentation from his or her own doctor, requiring an independent medical exam could be evidence of retaliation. *See EEOC: Enforcement Guidance*, at Question 30; 8 FEP Manual (BNA) 405:7609 (1999).

The Interactive Process

Once the employer receives the employee's completed forms or has enough information to be on notice of the employee's need for accommodation, the employer has the burden to make a reasonable effort to determine the appropriate accommodation. At this point, the employee and employee go through a flexible, interactive process identifying the precise limitations imposed by the disability and exploring potential accommodations that would overcome those limitations. Both parties are responsible for determining what accommodations are needed. *Reeves v. Jewel Food Stores, Inc.*, 759 F.3d 698, 702 (7th Cir. 2014). Employers must make an individualized determination in each case.

Attorneys guiding their clients through the interactive process should keep in mind Seventh Circuit Pattern Jury Instruction 4.08 which provides as follows:

> Once an employer is aware of an [employee's/applicant's] disability and an accommodation has been requested, the employer must discuss with the [employee/applicant] [or, if necessary, with his doctor] whether there is a

> reasonable accommodation that will permit him to [perform/apply for] the job. Both the employer and the [employee/applicant] must cooperate in this interactive process in good faith.
>
> Neither party can win this case simply because the other did not cooperate in this process, but you may consider whether a party cooperated in this process when deciding whether [a reasonable accommodation existed] [to award punitive damages]."

Seventh Circuit Pattern Jury Instructions, 4.08. When an employer claims that it was not aware of a disability and the employee alleges that the employer knew or should have known, the jury may also receive this instruction:

> If the employer has reason to know that the [employee/applicant] has a disability and the [employee/applicant] is having problems [at work/applying for the job] because of the disability, it must engage in discussions with him and, if necessary, with his doctor, to decide if he is actually disabled."

Id. at Committee Comment (b).

Ideally, the interactive process should involve a face-to-face meeting with the employee, his or her supervisor, and anyone else empowered to make decisions on types of accommodations that would be reasonable. During that meeting, the employer should do the following:

1. Identify the employee's disability.
2. What is the employee asking for? The employee must request something concrete, not a "second chance" or "to be accommodated" without an explanation of what is needed.
3. Identify what job duties the employee cannot perform.
4. Determine with the employee's input whether those job duties are essential functions of the job or marginal functions. How much time per week does the employee spend performing those functions?
5. Identify potential accommodations.
6. Assess the effectiveness each proposed accommodation would have in enabling the employee to perform the essential functions of the position.
7. Consider the employee's preference and select and implement the accommodation that is most appropriate for both the employee and the employer.

While these steps will almost always be the same for each interactive process meeting, the ADA requires that employers conduct an individualized assessment in each case of both the particular job at issue and the specific physical or mental limitations of the employee.

Oftentimes an employer cannot complete all of these steps during the initial meeting because further information is needed or the supervisor needs to consult with others (including a doctor or legal counsel) before responding to the employee's request. Many employers are reluctant to communicate with an employee's doctor given HIPAA laws and concerns related to worker's compensation claims. Despite those reservations, given the language of Pattern Instruction

4.08, employers should ask the employee for permission to speak with his doctor when there is confusion over the employee's disability or type of accommodation that would help the employee. This request should be documented.

What are the Essential Functions of the Position?

During this process, the parties will ideally agree as to which job duties are essential. If the parties cannot agree, courts will look to the following factors to make the determination: (1) employer's judgment; (2) written job descriptions prepared prior to advertising or conducting interviews; (3) amount of time spent performing that function; (4) consequences of this employee not performing that function; (5) the terms of a collective bargaining agreement; and (6) work experience of prior employees or incumbents in similar jobs. 29 C.F.R. § 1630.2(n)(3); *Shell v. Smith*, 789 F.3d 715, 718 (7th Cir. 2015). For this reason, employers must ensure that their job descriptions are current, accurate, and include the physical requirements of the position.

When an employer does not discipline or correct an employee for failure to perform an essential function, it suggests that the job duty is not essential. *See Wallace*, 48 F. Supp. 3d at 1158. Employees who work in teams and normally allocate job duties among themselves by substituting and reassigning tasks among themselves can also demonstrate to courts that certain job duties are not essential. *See Miller v. Illinois Dept. of Transp.*, 643 F.3d 190, 200 (7th Cir. 2011). For this reason, employers must be vigilant to determine that each employee is performing all essential functions of a position or risk a court finding that certain duties are not essential.

Is the Accommodation Requested Reasonable?

Employers are required to accommodate reasonable requests when the accommodation would be effective and its costs are not clearly disproportionate to the benefits that it will produce. An accommodation is reasonable where either the accommodation seems reasonable on its face or the accommodation is reasonable on the particular facts. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002). In such a case, the employer then has the burden to accommodate the employee or show that the accommodation would be an undue hardship. *Barnett*, 535 U.S. at 402.

Reasonable accommodation does not include elimination or change of essential job functions; assignment of essential job functions to other employees; providing employees with assistive devices that would also be needed off the job (eyeglasses, wheelchair, prosthetic limb); providing personal use amenities if not provided to employees without disabilities (*e.g.* refrigerator, hot pot); lowering productivity standards that are uniformly applied to all employees; or allowing continued unpredictable or unreliable attendance. See, EEOC Enforcement Guidance. Having another employee perform an essential job function for an employee with a disability is not a reasonable accommodation and is not required under the ADA. *Majors v. General Electric Co.*, 714 F.3d 527, 534 (7th Cir. 2013). An employer can make these types of accommodations for employees, but is not required by law to make such changes.

As part of the interactive process, employers should consider the following types of reasonable accommodations:

1. Changing ordinary work rules such as modifying performance goals or no-fault leave policies to allow employees more time off – unless it can be shown that (i) there is another effective accommodation that would enable the employee to perform the essential functions, or (ii) granting additional leave would cause an undue hardship.

2. Changing or altering facilities to make them more accessible and usable.
3. Acquisition or modification of equipment or devices.
4. Appropriate adjustment or modifications of examinations, training materials, or policies.
5. Provision of qualified readers or interpreters.
6. Allowing employee to bring in his or her own aids or services.
7. Changes to workplace conditions such as allowing an employee to work at home for a time or changing the temperature or ventilation in an office space.
8. Altering an employee's schedule such as changing an employee's work hours, allowing an employee to leave early or arrive late, providing periodic breaks, allowing employee time off, or changing an employee from full-time to part-time.
9. Job restructuring by reallocating or redistributing nonessential, marginal job functions.
10. Reassignment to a vacant position.

If no reasonable accommodation is available in an employee's present job, the ADA requires an employer to try to assign the employee to a vacant position for which he or she is qualified. If the reassignment was practical and did not require the employer to turn away a more qualified applicant, the employer must make the reassignment. *E.E.O.C. v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013).

Stumbling Blocks in the Reasonable Accommodation Process

If consultation with the employee does not reveal potential appropriate accommodations, the employer should seek technical assistance from outside agencies such as the Job Accommodation Network, the EEOC, or state or local rehabilitation agencies. An employer cannot simply reject an employee's request for an appropriate accommodation without offering suggestions or at least express a willingness to continue discussing possible accommodations. *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 806 (7th Cir. 2005). The employer must explain why it is rejecting the request or offer alternatives. An employee with a disability is not required to accept an accommodation, aid, service, opportunity or benefit offered by the employer. But, if the employee rejects an offer of something that is necessary to enable the employee to perform the essential functions of the position and the employee cannot, as a result of that rejection, perform the essential functions of the position, the employee will not be considered qualified. 29 C.F.R. 1630.9(d).

Some employers refuse to engage in the interactive process because the employer does not believe that the employee is disabled or because the employer finds that the request on its face is unreasonable or would pose an undue burden. Even where the employer questions whether the employee truly has a disability, the employer is best served by going through the process. A court may disagree with the employer and find that the employee is disabled. Under such circumstances, an employer can be liable for failure to accommodate. If the employee is not disabled, the fact that an employer did not accommodate the employee is of no consequence because the ADAAA provides that employers do not have to accommodate employees who are "regarded as" disabled. 42 U.S.C. § 12201(h); 29 C.F.R. §§ 1630.2(o)(4) and 1630.9(e). Since there is no downside to having the discussion with an employee, the conservative approach for employers is to engage in the interactive process even where it is unlikely that the employee has a disability.

Failure to engage in the interactive process is not an independent basis for liability under the ADA, but can be considered to determine whether a reasonable accommodation existed or if the employer should be held liable for punitive

damages. "[A]n employer who has failed to provide a reasonable accommodation will be liable *only* if it bears responsibility for the breakdown of the interactive process." *Wallace*, 48 F. Supp. 3d at 1161. A party does not act in good faith by failing to make reasonable efforts to help the other party determine what specific accommodations are necessary, obstructing, or delaying the interactive process, failing to communicate by way of initiation or response, or failing to provide missing information to the other party. *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1285 (7th Cir. 1996). Employers must respond as expeditiously as possible. If there is a long delay in completing the interactive process, courts will look at (1) the reason for the delay, (2) the length of the delay (3) how much each side contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide. *See EEOC: Enforcement Guidance*, at Question No. 10, n. 38.

If an employee does not give an employer enough information to determine the necessary accommodations, the employer cannot be liable for failing to accommodate the disabled employee. *Reeves*, 759 F.3d at 702. "An employer can take no solace in its failure to engage in this process in good faith if what results is an unreasonable or inappropriate accommodation offer." *Hoppe v. Lewis University*, 692 F.3d 833, 840 (7th Cir. 2012).

Assessing the Effectiveness of a Potential Accommodation

After identifying potential accommodations, the employer should assess the effectiveness of each potential accommodation. If more than one accommodation will enable the employee to perform the essential functions, or if the employee would prefer to provide his or her own accommodation, the preference of the employee with a disability should be given primary consideration. *See* U.S. Equal Employment Opportunity Commission, *The ADA: Your Responsibilities as an Employer*, at Additional Questions and Answers on the Americans with Disabilities Act, *available at* http://www.eeoc.gov/facts/ada17.html (last visited Dec. 1, 2015). The employer has the ultimate discretion to choose between effective accommodations and may choose the less expensive accommodation or one that is easier for it to provide. *See* 29 C.F.R. § 1630, Appendix to Part 1630, at § 1630.9.

Employers should note that an employee's willingness to provide his or her own accommodation does not relieve the employer of the duty to provide the accommodation if the employee is unable or unwilling to continue to do so. *Id*.

A trial period is a good option for employers who are unsure if the proposed accommodation would be effective, feasible, or practical. Since employers may choose among effective accommodations, if the trial period is not successful, the employer can try something else if the first option does not work. Accommodations need not be the ones requested as long as they are effective in removing pertinent barriers. This means that the accommodation enables the employee to perform the essential functions of the position and gives the employee an equal opportunity to enjoy the benefits and privileges of employment that employees without disabilities enjoy. *Id.*

Employer Defenses

1. Undue Hardship

An employer is not required to provide an accommodation to an employee when it poses an undue hardship on the employer. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors: (1) the nature and cost of the accommodation needed; (2) the overall financial resources of

the employer in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (3) the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and (4) the type of operation or operations of the employer, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer. 42 U.S.C. § 12111(10)(B).

When the cost poses an undue hardship the employer must show that the cost is undue as compared to the employer's budget. 29 C.F.R. § 1630, Appendix to Part 1630, at § 1630.15(d). An employer cannot compare the cost of the accommodation to the salary of the employee with a disability in need of the accommodation. Even if the cost would be an undue burden, the employer cannot avoid making the accommodation if the employee with a disability can arrange to cover that portion of the cost that rises to the undue hardship level, or can otherwise arrange to provide the accommodation. *Id.* at § 1630.2(p). Employers must also determine whether funding is available from an outside source, such as a state rehab agency or if the employer would be eligible for certain tax credits or deductions to offset the cost. *Id.* at § 1630.2(p).

If an employee requests a leave of absence but cannot give the employer a definitive return date, the employer is required to accommodate the leave, absent undue hardship. See EEOC: Enforcement, at Question 44. Most likely, an employer would be able to permit a certain amount of time off and should grant the request for that amount of time and require periodic updates. It is important that employers make these assessments on a case-by-case basis.

Accommodations that would fundamentally alter the nature or operation of the business pose an undue hardship. However, an employer would not be able to show undue hardship if the disruption to its employees was the result of those employees' fears or prejudices towards the employee's disability and not the result of the provision of the accommodation. *See* 29 C.F.R. § 1630, Appendix to Part 1630, at § 1630.15(d). Similarly, an employer cannot show undue hardship by claiming that the accommodation requested would have a negative impact on the morale of other employees but not on the ability of these employees to perform their jobs. *See EEOC: Enforcement Guidance*, at n. 118.

2. Federal Law or Regulation Prohibits Accommodation

Another defense to support an employer's inability to provide an accommodation is that the challenged action is required or necessitated by another federal law or regulation, or that another federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required. 29 C.F.R. § 1630.15(e). For example, if an employee drives a truck and takes medication that makes him ineligible to drive based on federal regulations, an employer may lawfully refuse to permit the employee to operate the truck while on that medication.

3. Direct Threat

An employer may require, as a qualification standard, that an employee not pose a direct threat to the health or safety of himself/herself or others. The standard must apply to all employees, not just to employees with disabilities. If an employee poses a direct threat as a result of a disability, the employer must determine whether a reasonable

accommodation would either eliminate the risk or reduce it to an acceptable level. 29 C.F.R. § 1630.2(r). If no accommodation exists that would either eliminate or reduce the risk, the employer may discharge an employee who poses a direct threat.

The direct threat standard requires that the risk to the employee or others must be a significant risk, *i.e.*, high probability, of substantial harm; a speculative, remote or slight risk is insufficient. *See* 29 C.F.R. § 1630, Appendix to Part 1630, at § 1630.2(r). After identifying the risk, an employer should consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. *Id.* Employers must rely on objective, factual evidence and not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes about the nature or effect of a particular disability, or of disability generally. *Id.* Relevant evidence may include input from the employee with a disability, the experience of the employee with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the employee with the disability. *Id.* Thus, expert medical opinion will likely be necessary.

Conclusion

Lack of communication between an employee and management is frequently the cause of an alleged ADA violation. Management attorneys should encourage their clients to be proactive and not ignore situations where a disability affects an employee's ability to do the job. Documentation and following the steps outlined in this article are key to an employer prevailing on a failure to accommodate claim.

About the Author

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