

Reasonable Accommodation

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Definition of Disability

- Basic Definition
 - An **impairment** that **substantially limits** one or more **major life activities**
 - A **record** of such an impairment
 - Being **regarded as** having such an impairment
- ADA Amendments Act of 2008 makes it much easier to meet definition
- Focus after ADAAA should be on need for accommodation rather than on whether someone has a covered disability.

Recap: New rules for “substantially limited in a major life activity”

- “Shall be construed broadly” and “should not demand extensive analysis
- Need not have “severe limitation” or be “significantly restricted”
- Major life activities include “major bodily functions”
- Ameliorative effects of mitigating measures not considered
- Impairments that are “episodic” or “in remission” are substantially limiting if they would be when active

29 C.F.R. §1630.2(j)(1)

- 9 “rules of construction”
- 29 C.F.R. §1630.2(j)(1)(ix): impairment can be “substantially limiting” even if lasts or is expected to last fewer than 6 months – *i.e., duration is a relevant factor, but even short-term conditions if sufficiently limiting could be covered under prong 1*

Types of Impairments That Will Easily be Found to Be Disabilities

- Deafness, blindness, mobility impairments requiring use of a wheelchair, intellectual disability (mental retardation), partially or completely missing limbs
- Autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy
- Mental impairments such as major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, schizophrenia

Condition, Manner, or Duration § 1630.2(j)(4)

- Regulations retain these factors as concepts to consider, if relevant, in determining whether a substantial limitation exists
- May consider difficulty, effort, or length of time required to perform major life activity; pain; amount of time major life activity may be performed; the way an impairment affects the operation of a major bodily function

“Qualified”

- Has not changed as result of ADA Amendments Act
- To be qualified, an individual must:
 - Meet the basic skill, education, training, and other job-related requirements; and
 - Be able to perform the **essential** (or fundamental) functions of a position with or without reasonable accommodation

What is Reasonable Accommodation?

- A change in the workplace or in the way things are customarily done that provides an individual with a disability with equal employment opportunities
- Accommodations are available for
 - the application process
 - to enable an individual with a disability to perform essential job functions
 - to provide equal **benefits and privileges** of employment.

“Benefits and Privileges” of Employment

- Access to portions of facility used by employees (e.g., cafeterias, break rooms, etc.)
- Access to information communicated in the workplace
- Employer-sponsored social events
- Employer-sponsored training, whether by the employer or a third party

Requests for Reasonable Accommodation

- Generally, an individual with a disability must request reasonable accommodation.
- Request for some change in the workplace or in the way things are done that is needed because of a medical condition. Do not have to be in writing.
- Do not have to use “magic words.”
- May come from a third party (e.g., an employee’s family member or doctor).

When May Employer Ask About Need for Accommodation?

- May ask all job applicants if accommodation is needed for application process.
- May ask applicants with obvious disabilities that employer reasonably believes will require accommodation whether they will need accommodation, and if so, what type.
- After making job offer, may ask all entering employees in the same job category to answer disability-related questions or take medical exams.

When May Employer Ask About Need for Accommodation?

- During employment, employer may only ask disability-related questions if it has reasonable belief employee (1) will be unable to do essential functions because of medical condition; or (2) will pose a direct threat due to a medical condition
- If one of these conditions is met, employer could ask about need for accommodation

Timing of Requests

- May be made at any time during the application process or during employment
- Employee does not lose right to request an accommodation because he did not do so during the application stage
- Employees may make more than one request for reasonable accommodation

Interactive Process

- Employer should engage in an interactive process with the individual asking for the accommodation.
- May involve determining whether the requester has a disability, what accommodations are possible, or both.

Interactive Process (cont.)

- Hoppe v. Lewis Univ., 692 F.3d 833 (7th Cir. 2012) – plaintiff failed to clarify relationship between requested accommodation (new office) and her disability (adjustment disorder)
- Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013) – employer failed to engage in interactive process by investigating whether someone who is deaf could be a lifeguard

Undue Delay May Be Denial of Reasonable Accommodation

- Valle-Arce v. Puerto Rico Ports Auth., 651 F.3d 190 (1st Cir. 2011)
 - Took 17 months to provide employee with modified work schedule

Documenting Disabilities

- An employer may obtain **reasonable documentation** that an employee has a disability and needs an accommodation if the disability and/or need for accommodation are not obvious.
- Employer may require that documentation of the existence of an impairment come from a health care professional.
- Documentation must be **sufficient**, but the amount of documentation required must be **reasonable**.

Documenting disability After ADA Amendments Act

- Documentation will probably be different:
 - Will focus on limitations individual would experience **without** mitigating measures
 - May include more information about how **major bodily functions** (e.g., endocrine functions for someone with diabetes) are substantially limited

Effect of GINA on Requests for Documentation

- Title II of GINA prohibits employers from requesting, requiring, or purchasing genetic information (which includes family medical history) of applicants and employees
- Inadvertent acquisition of genetic information does not violate Title II of GINA
- If request for documentation for accommodation indicates that genetic information should not be provided, any genetic information employer gets will be deemed inadvertent

GINA Notice – Model Language

- The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. ‘Genetic information’ as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Choosing an Accommodation

- Primary consideration should be given to the employee's choice
- Employer may ultimately choose from among accommodations, as long as the one provided is effective

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Types of Accommodations

- Physical modifications
- Sign language interpreters and readers
- Assistive technology and modification of equipment or devices

Types of Accommodations

- Job restructuring
- Modified work schedules
- telework
- Leave (where employee needs more time off than provided for by leave policy, or time off for reasons not covered by policy)
- Changing supervisory methods
- Job coach

Job Restructuring

- Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013) – lifeguard who is deaf might be excused from certain marginal functions, such as responding to patron requests for information or directions

Modified Work Schedule

- McMillan v. New York, --- F.3d ---, 2013 WL 779742 (2d Cir. 2013) – later start and end time may have been a reasonable accommodation for an employee with schizophrenia
- Valle-Arce v. Puerto Rico Ports Auth., 651 F.3d 190 (1st Cir. 2011) – flexible start time for employee with fibromyalgia
- Carter v. Pathfinder Energy Servs., Inc., 662 F.3d 1134 (10th Cir. 2011) – part-time schedule for oiler driller with diabetes

Leave as a Reasonable Accommodation

- Generally, leave is a reasonable accommodation when
 - More is needed than is available under the employer's policy or under the FMLA; and/or
 - Leave is needed for a disability-related reason that is not covered by the employer's policy or by the FMLA.

Types of Leave Provided as a Reasonable Accommodation

- Extended leave – leave for a continuous period of time beyond what employer normally grants as a benefit of employment or what the FMLA allows
- Intermittent leave -- leave needed on an occasional basis that may or may not be predictable (e.g., absences attributable to brief flare-ups of a condition)

Purpose of Leave as a Reasonable Accommodation

- To obtain treatment for a disability
- To recover from symptoms of a disability
- To obtain disability-related training (e.g., training a service animal)
- To make repairs to equipment needed because of a disability
- To avoid temporary adverse conditions in the workplace

Handling Leave Requests

- Avoid rigid application of “no fault” leave and attendance policies
 - EEOC v. Sears Roebuck and Co (consent decree entered 2009) – \$6.2 million settlement on behalf of 35 workers terminated after exhausting leave under company policy
 - EEOC v. Verizon Maryland, et al – consent decree providing \$20 million settlement for workers disciplined or terminated for exceeding allowable number of absences due to disability

Handling Leave Requests (cont.)

- Communication is critical during extended leave for employers and employees
- Consider reassignment if retaining employee in current position while on leave would be undue hardship
- Consider reasonable accommodations that would enable employees on leave to work (e.g., modified or part-time work schedules, telework)

Reassignment

- Accommodation of **last resort**
- Position must be **vacant**
- Must be **equal** in terms of pay, status, etc., or as close as possible
- Is not limited **geographically**
- Employee must be **qualified** for the new position, but does not have to be best qualified

Reassignment (cont.)

- **Vacant** means that the position is available or will become available within a reasonable time
- Does not have to be a **promotion**
- Agency does not have to **bump another employee** to create a vacancy
- Reassignment that would violate seniority system **generally is not reasonable**
- Agency does not have to pay cost of relocation, unless it does so for other employees who transfer voluntarily

Reassignment (cont.)

- EEOC v. United Airlines, Inc., 693 F.3d760 (7th Cir. 2012) – may be a reasonable accommodation to modify a “best qualified” policy to provide reassignment as reasonable accommodation
- Otto v. City of Victoria, 685 F.3d 715 (8th Cir. 2012) – employer need not create a job to which employee with disability can be reassigned
- Sanchez v. Vilsack, 695 F.3d 1174 (10th Cir. 2012) – reassignment to location closer to treatment may be required

Actions Not Required

- Lowering production or performance standards
- Excusing violations of conduct rules that are job-related and consistent with business necessity (e.g., violence, threats of violence, theft, destruction property)
- Removing an essential function
- Monitoring use of medication
- Providing personal use items
- Actions that would result in undue hardship

Undue Hardship

Consider the following factors:

- Nature and cost of the accommodation
 - Agency will probably not be able to assert cost as a defense
- Resources available to the agency
- Impact of the accommodation on the operation of the agency

Leave: Specific Undue Hardship Issues

- Leave without a specific date of return is not necessarily an undue hardship
- Leave will be an undue hardship if employee can give no idea of when or whether he or she will be able to return
 - Henry v. United Bank, 686 F.3d 50 (1st Cir. 2012)
 - Robert v. Bd. Of Cty Comm'rs of Brown Cty., 691 F.3d 1211 (10th Cir. 2012) – employee on leave must provide estimated date for when she will be able to return and perform essential functions

Confidentiality

- Information about an employee's reasonable accommodation must be kept confidential
- **Exceptions:** Information may be disclosed
 - To supervisors and managers for necessary work restrictions or reasonable accommodations
 - To individuals involved in making decisions about reasonable accommodations
 - Where necessary for emergency treatment;
 - To officials investigating compliance with Rehabilitation Act;
 - For workers' compensation and insurance purposes

Confidentiality

- Many agencies have someone other than employee's immediate supervisor review documentation supporting accommodation request
- Where this is done, supervisor will receive only information necessary to provide accommodation
- Agencies should be careful not to have individuals review reasonable accommodation requests who may also be involved in any EEO complaint related to the request

Going Beyond Legal Obligations

- Agency may take actions not required as reasonable accommodations
- Agency will not be deemed to have regarded an individual as disabled just because it exceeded its legal obligations
- An agency may inform an employee that it is taking an action beyond what the Rehabilitation Act requires

What if an Employee Will Not Accept Accommodation?

- Employer may not require someone to accept a reasonable accommodation.
- Someone who does not accept an accommodation and, as a result, cannot do the job or would pose a “direct threat” will not be considered qualified.

Accommodation Tips

- Develop and disseminated reasonable accommodation policies
- Know the requirements of your agency's reasonable accommodation procedures and follow them
- Respond to requests promptly
- Engage in good faith in the interactive process
- Construe "disability" broadly
- Clearly communicate reasons for denying any reasonable accommodation
- Individualized assessment: Do not assume that individuals with the same disability need the same accommodation

Resources

- Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the AD, <http://www.eeoc.gov/policy/docs/accommodation.html>
- The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil rights Act of 1964, <http://www.eeoc.gov/policy/docs/fmlaada.html>

Resources (cont.)

- Applying Performance and Conduct Standards to Employees with Disabilities, <http://www.eeoc.gov/facts/performance-conduct.html>
- The Job Accommodation Network, www.askjan.org
- Chris Kuczynski, christopher.kuczynski@eeoc.gov