

# 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.

## : 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

## : rules for “substantially limited in a major life activity” (cont.)

- *Detailed medical or scientific evidence of comparison to “most people” not required*
- *Only one “major life activity” need be substantially limited*
- *No minimal duration – impairments lasting fewer than 6 months are covered if they are substantially limiting while they last*

# 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

- 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

# Employee Parking

- Two cases recognizing that providing accessible parking for employees may be reasonable accommodations:
  - Feist v. Louisiana Dept. of Justice, Office of the Atty. Gen., 730 F.3d 450 (5<sup>th</sup> Cir. 2013)
  - Cloe v. City of Indianapolis, 712 F.3d 1171 (7<sup>th</sup> Cir. 2013)

# 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.)

- Employer failed to engage in interactive process:
  - Rorrer v. city of Stow, 743 F.3d 1025 (6<sup>th</sup> Cir. 2014)
  - Spurling v. C & M Fine Packing, Inc., 739 F.3d 1055 (7<sup>th</sup> Cir. 2014)
  - Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013)



# Interactive Process (cont.)

- Employer engaged in interactive process:
  - Born v. Knight Facilities Mgt., Inc., 2014 WL 715711 (6<sup>th</sup> Cir. Feb. 25 2014)
  - Cloe v. City of Indianapolis, 712 F.3d 1171 (7<sup>th</sup> Cir. 2013)

# Undue Delay May Be Denial of Reasonable Accommodation

- Cloe v. City of Indianapolis, 712 F.3d 1171 (7<sup>th</sup> Cir. 2013)
  - Employer that took 5 months to provide accessible parking space and 2 to 4 weeks to provide employee with her own printer had met its obligation to provide reasonable accommodations
- Valle-Arce v. Puerto Rico Ports Auth., 651 F.3d 190 (1<sup>st</sup> 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

# Telework

- EEOC v. Ford Motor Co., \_\_\_\_ F.3d \_\_\_\_,  
2014 WL 1584674 (6th Cir. April 22, 2014)  
– telework may have been reasonable  
accommodation

# 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**
- Employer does not have to **bump another employee** to create a vacancy
- Reassignment that would violate seniority system **generally is not reasonable**
- Employer 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
- Henschel v. Clare County Road Comm’n, 737 F.3d 1017 (6<sup>th</sup> Cir. 2013) – employer did not have to create a new job or bump a more senior employee

# Reassignment (cont.)

- Kempton v. Michigan Bell Tel. Co., 534 Fed. Appx. 487 (6<sup>th</sup> Cir. 2013) – employer did not have to make temporary position permanent
- Sanchez v. Vilsack, 695 F.3d 1174 (10<sup>th</sup> 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 of 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
- Resources available to the employer
- Impact of the accommodation on the operation of the employer's business



# 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
  - Roddy v. City of Villa Rica, Ga., 536 Fed. Appx. 995 (11<sup>th</sup> Cir. 2013) Robert v. Bd. Of Cty Comm'rs of  
Robert v. Board of Cty. Comm'rs, 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

- Employer may take actions not required as reasonable accommodations
- Employer will not be deemed to have regarded an individual as disabled just because it exceeded its legal obligations
- An employer 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 disseminate reasonable accommodation policies
- Know the requirements of your employer'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](http://www.askjan.org)
- Chris Kuczynski, [christopher.kuczynski@eeoc.gov](mailto:christopher.kuczynski@eeoc.gov)