

**ADA Developments:  
What are the Courts Saying about Reasonable Accommodation?<sup>1</sup>**

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<sup>1</sup> **Nothing in this paper is legal advice from Mr. Fram or NELI.**

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## **About This Paper**

This paper presents a discussion of questions concerning reasonable accommodation and includes recent case citations on these issues. It does not, however, review the basic concepts in reasonable accommodation. A primer on an employer's reasonable accommodation obligations can be found in the EEOC's Technical Assistance Manual (Chapter 3), and the EEOC's "Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02). **This Guidance is available on the internet at [www.eeoc.gov](http://www.eeoc.gov).**

## **Introduction and Background**

The duty to provide reasonable accommodations to qualified individuals with disabilities is considered one of the most important statutory requirements of the ADA. This requirement has resulted in a great deal of ADA litigation.

In considering reasonable accommodation issues, it is most helpful to remember that reasonable accommodation involves the removal of *workplace barriers*. Therefore, as discussed later in this paper, *non-workplace barriers* are generally outside of the employer's reasonable accommodation obligations. It is also important to understand that the Supreme Court has expressly ruled that reasonable accommodations can involve "preferences" for an employee with a disability, so that s/he can "obtain the *same* workplace opportunities that those without disabilities automatically enjoy." *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516 (2002). The Court noted that "by definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially."

Employers should remember that workplace barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when or where work is performed, when breaks are taken, or how tasks are accomplished).

By way of a brief background, there are three general categories of reasonable accommodation:

- changes to the *job application process* so that a qualified applicant with a disability can be considered for the job;
- modifications to the *work environment* -- including how a job is performed -- so that a qualified individual with a disability can perform the job; and
- changes so that an employee with a disability can enjoy *equal benefits and privileges* of employment.

The ADA, the EEOC's regulations, and court decisions identify many types of reasonable accommodations that an employer may have to provide, such as:

- job restructuring;
- part-time or modified work schedules;
- reassignment to a vacant position;
- acquiring or modifying equipment;
- changing exams, training materials, or policies; and
- providing qualified readers or interpreters.

42 U.S.C. 12111(9); 29 C.F.R. § 1630.2(o)(2).

The EEOC has taken the position that an employer may need to provide a reasonable accommodation even if the individual does not need the accommodation to perform the job's essential functions. For example, the EEOC has argued that even though an employee was able to perform her essential functions as a Software Engineer, the employer still had to consider letting her work at home because her doctor felt this would be "advisable" in light of her



complications from cancer surgery. See EEOC's Brief in Rauen v. U.S. Tobacco, No. 01-3973 (Brief filed in Seventh Circuit, 8/9/02). The EEOC based its position on the fact that other required accommodations (such as reallocation of marginal functions, leave, and schedule modifications) do not necessarily accommodate the ability to perform essential functions.

One interesting question is whether an employer must accommodate only the “substantial limitation” underlying the disability claim, or whether it must accommodate any limitations flowing from the disability. The EEOC has taken the position that an employer must accommodate any workplace limitations flowing from the individual’s disability, even if those limitations are not the “substantial limitations” underlying the disability. See EEOC's Amicus Curiae Briefs in Rook v. Xerox, No. 02-20109 (Brief filed in Fifth Circuit, 5/8/02) and Felix v. New York City Transit Authority, No. 01-7967 (Brief filed in Second Circuit, 12/14/01). In Rook, a woman with cancer had a disability based on her substantial limitation in reproduction because of her hysterectomy. The employer apparently argued that it was not required to provide accommodations other than for the limitation in reproduction. However, the EEOC took the position that the employer was required to provide leave for stress-related problems flowing from the cancer. In Felix, the employee, a subway token clerk, developed post-traumatic stress disorder because the booth to which she was assigned was firebombed just before she arrived. Although her disability was based on a substantial limitation in the major life activity of sleeping, the EEOC argued that the employer also was required to provide an accommodation (in this case, reassignment) because the employee’s PTSD also made her unable to work in an underground subway station. The EEOC reasoned that accommodations go to any “known physical or mental limitations” flowing from the disability. In Felix v. New York City Transit Authority, 324 F.3d 102 (2d Cir. 2003), the court agreed with the EEOC that an employer must provide an accommodation to a disability, even if the substantially limited “major life activity” is not related to the accommodation. However, in this case, the court determined that the plaintiff was seeking accommodation (reassignment) for a condition (the PTSD) that did not qualify as a disability because it did not substantially limit a major life activity. The court held that the plaintiff’s insomnia was a separate disability, but that the reasonable accommodation request (the reassignment) was unrelated to the insomnia. The court noted that it does not matter that the PTSD and the insomnia were both caused by the same traumatic event. On the other hand, in Wood v. Crown Redi-Mix, Inc., 2003 U.S. App. LEXIS 16137 (8th Cir. 2003), the court held that there “must be a causal connection between the major life activity that is limited and the accommodation sought.” In this case, the plaintiff argued that he was substantially limited in

reproduction because of a workplace injury. However, his requested accommodation was unrelated to a limitation in reproduction. The court held that since the ADA “requires employers to reasonably accommodate limitations, not disabilities,” it need not provide an accommodation to a limitation other than the substantially limited major life activity. The court noted that “where the reasonable accommodation requested is unrelated to the limitation, we do not believe an ADA action may lie.”

At a minimum, the accommodation must be needed because of limitations flowing from a disability. In Peebles v. Potter, 354 F.3d 761 (8th Cir. 2004), the employee wanted a vacant light duty position, and wanted to be excused from the employer’s requirement that employees desiring such positions submit documentation concerning their disability status while they were on extended leave. The court held that the employer was not required to modify the workplace rule requiring the documentation where the employee’s failure to submit his documentation had nothing to do with his disability.

Of course, employers should always keep in mind that they do not have to provide an accommodation that causes an *undue hardship*. "Undue hardship" means significant difficulty or expense in providing the accommodation. This analysis focuses on the particular employer's resources, and on whether the accommodation is unduly extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business. 42 U.S.C. 12111(10); 29 C.F.R. § 1630.2(p).

Since employers do not have to alter non-workplace barriers, they are not required to provide personal use items, such as equipment that helps someone in daily activities, on *and* off the job. This includes things like prosthetic limbs, wheelchairs, or eyeglasses if those items are used off the job. The EEOC has also said that an employer is not required to provide other personal use items, such as a hot pot or refrigerator if those items are not provided to employees without disabilities. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02).

## **General Reasonable Accommodation Issues**

### The Term "Reasonable"

There has been a great deal of controversy about what the term "reasonable" means in the context of "reasonable accommodation." In U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 122 S. Ct. 1516 (2002), the U.S. Supreme Court held that a reasonable accommodation is one that "seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." After a plaintiff makes this showing, the employer bears the burden of showing "special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." The Supreme Court approvingly cited this "practical" approach adopted in lower court cases such as Reed v. Lepage Bakeries, Inc., 244 F.3d 254 (1st Cir. 2001). In Reed, the court stated that a "reasonable request for an accommodation must in some way consider the difficulty or expense imposed on the one doing the accommodating." For example, the court noted, it would not be "reasonable" for someone to request that an employer relocate its operations to a warmer climate. Therefore, a plaintiff must show both that a "proposed accommodation would enable her to perform the essential functions of her job," and "at least on the face of things, it is feasible for the employer under the circumstances." The employer can then defend by showing that "the proposed accommodation is not as feasible as it appears but rather that there are further costs to be considered, certain devils in the details." The court noted that "the difficulty of providing plaintiff's proposed accommodation will often be relevant both to the reasonableness of the accommodation and to whether it imposes an undue hardship."

Interestingly, the Supreme Court did not mention (either to accept or reject) the approach taken by most Courts of Appeals, which have stated that the term "reasonable" itself requires a cost/benefit analysis. In other words, in determining whether the accommodation is "reasonable," an employer should look at the *costs* of providing the accommodation weighed against the *benefits* of the accommodation. See, e.g., Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001); Walton v. Mental Health Association of Southeastern Pennsylvania, 168 F.3d 1228 (3rd Cir. 1999); Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775 (6th Cir. 1998); Keys v. Joseph Beth Booksellers, Inc., 1999 U.S. App. LEXIS 1581 (6th Cir. 1999)(unpublished); Woodman v. Runyon, 132 F.3d 1330 (10th Cir. 1997); Vande Zande v. Wisconsin Department of Administration, 44 F.3d 538 (7th Cir. 1995); Borkowski v. Valley Central School District, 63 F.3d 131 (2d Cir. 1995); Kennedy v. Dresser Rand Co., 193 F.3d 120 (2d Cir. 1999); and Monette v. Electronic Data Systems, 90 F.3d 1173 (6th Cir. 1996). The Vande Zande court noted that the cost of the accommodation should "not be disproportionate to the benefit." Id. at 542. The court stated that an employer can show that the accommodation is

not *reasonable* because its "costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health." *Id.* The Borkowski court explained that although the plaintiff bears the burden of production on whether an accommodation is "reasonable" (using a cost/benefit analysis), this burden "is not a heavy one." The court said that a plaintiff must simply "suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." The Borkowski court stated that for the employer to successfully maintain that an accommodation is not reasonable because of cost, it *must* present some evidence as to the cost of providing the accommodation in relation to the benefits of the accommodation. 4 AD at 1273. In Monette, the court stated that "determining whether a proposed accommodation is "reasonable" requires a factual determination of reasonableness (perhaps through a cost-benefit analysis or examination of the accommodations undertaken by other employers) untethered to the defendant employer's particularized situation." *See also Willis v. Conopco*, 108 F.3d 282 (11th Cir. 1997)(whether an accommodation is "reasonable" is a "'generalized' inquiry" looking at "the run of cases" while whether an accommodation imposes an undue hardship "focuses on the hardship imposed" on the particular employer). In one of the most illustrative cases to date, Walsh v. United Parcel Service, 201 F.3d 718 (6th Cir. 2000), the court applied a cost-benefit analysis to an employee's request for long-term (arguably indefinite) leave. The court stated that "[w]hen both the time and likelihood of return to work cannot be roughly quantified after a significant period of leave has already been granted, the costs of the requested additional leave outweigh the benefits. The employer incurs additional administrative costs and more importantly is forced to shoulder long-term uncertainty regarding the composition of its work force. Further, during the extended leave, the employee loses valuable work skills, and if the employee ever returns, he or she will likely require significant retraining. When this is balanced against the potential benefit derived from the employee returning to work, which must be significantly discounted by the obvious indeterminacy involved, the cost exceeds the likely benefit."

It is possible that after U.S. Airways, an employer can still maintain that whether an accommodation is "reasonable" on its face depends on whether the costs greatly exceed the benefits. *See, e.g., Felix v. New York City Transit Authority*, 324 F.3d 102 (2d Cir. 2003)(Jacobs, concurring; Leval, dissenting)(both agreeing that a "cost/benefit analysis" is appropriate in ADA cases).

In U.S. Airways, the Supreme Court explicitly rejected the position previously taken by the EEOC that “reasonable” has no independent definition, simply meaning that the accommodation is “effective” (*i.e.*, the accommodation *works*). Appendix to 29 C.F.R. § 1630.9; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (3/1/99) at p. 5.<sup>2</sup> Indeed, after the U.S. Airways v. Barnett decision, the EEOC modified its position to be that a modification must be “reasonable” and “effective.” EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at “General Principles.” The EEOC also has stated that the cost/benefit analysis applied by most Courts of Appeals “has no foundation in the statute, regulations, or legislative history of the ADA.” EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at ft. 9.

Sometimes, courts have simply mixed up the issue of when an accommodation is “reasonable” and when it causes an “undue hardship” (discussed later). For example, in Groncki v. Stewart’s Ice Cream Co., Inc., 2000 U.S. App. LEXIS 31758 (2d Cir. 2000)(unpublished), the court stated that “reasonableness” depends on “cost and efficiency,” looking at “the financial or administrative burdens which would be placed on the employer,” including “the nature of the accommodation needed; the nature of the defendant's business; [and] the impact of the accommodation on the operation of the defendant's business.” The court also stated that it is the employer’s “burden to prove by a preponderance of the evidence that the requested accommodation is unreasonable.” These factors (including the burden of proof issue) are generally considered to be part of an undue hardship determination, not whether an accommodation is reasonable.

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<sup>2</sup> Importantly, in a litigation brief, the EEOC has stated that “a workplace modification that does not enable an individual to meet average productivity or performance standards is not an effective or reasonable accommodation within the meaning of the ADA.” See EEOC's Brief in EEOC v. Humiston-Keeling, Inc., No. 99-3281 at p. 21 (Brief filed in Seventh Circuit, 11/8/99). Therefore, the EEOC argued, assigning an employee with an injured arm to a job that she could not effectively perform was not a reasonable accommodation.

## Whether There is a Duty to Provide Reasonable Accommodation in "Record Of" and "Regarded As" Cases

Whether an employer must provide reasonable accommodation in “record of” and “regarded as” cases is a critically important issue concerning individuals who do not currently have a substantially limiting impairment. As discussed below, the EEOC and courts seem to be saying that employers do not need to provide reasonable accommodation in “regarded as” cases. It is possible, however, that an employer might have to provide reasonable accommodation in “record of” cases.

The EEOC has publicly taken the position that an employer does not have a duty to provide reasonable accommodation to someone who is only covered under the ADA because s/he is "regarded as" having a disability. This position is based on the underlying reason for providing reasonable accommodation -- to dismantle *workplace barriers*. In "regarded as" cases, the only workplace barrier at issue is the employer's allegedly discriminatory attitude. See EEOC's Amicus Curiae Brief in *Derbis v. U.S. Shoe Corp.*, (Brief filed with Fourth Circuit, 1/24/95) at 8, ft. 8 (court decision reported at 3 AD Cases 1029 (D. Md. 1994), aff'd in part, rem'd in part, 67 F.3d 294 (4th Cir. 1995)(unpublished)). Specifically, the EEOC stated that, "[i]n the Commission's view, . . . a person who is only regarded as having a disability is not entitled to a reasonable accommodation. . . . Such a person must therefore prove that she is able to do the job without accommodation." Similarly, in nationwide training conducted throughout 1996, EEOC headquarters trained EEOC investigators that "[o]nly persons who actually have a substantially limiting impairment are entitled to reasonable accommodation under the ADA. Persons who are regarded as having a substantially limiting impairment are not entitled to reasonable accommodation." EEOC ADA Case Study Training (1996), C.S.1 at p. 6. Puzzlingly, in a amicus curiae brief, the EEOC stated that "there may be merit to the position that a plaintiff, in a "regarded as" case, is not entitled to accommodation under the ADA (although the Commission has not yet taken an official position on this issue)." EEOC's Amicus Curiae Brief in *Deane v. Pocono Medical Center*, No. 96-7174 (Brief filed with Third Circuit, 9/22/97) at 6.

Some federal Courts of Appeals have expressly held that employers are not required to provide accommodations in “regarded as” cases. For example, in *Kaplan v. City of North Las Vegas*,

323 F.3d 1226 (9th Cir. 2003), the court held that “regarded as” plaintiffs are not entitled to reasonable accommodation. The court noted that this result was necessary to avoid the “perverse and troubling result” that impaired employees “would be better off under the statute if their employers treated them as disabled even if they were not.” The court stated that employees can dispel stereotypes about disabilities by “demonstrat[ing] their capacity to be productive members of the workplace notwithstanding impairments.” However, if “regarded as” employees were entitled to reasonable accommodation, the court noted, employees would be discouraged from educating employers about their capabilities. Instead “it would improvidently provide those employees a windfall if they perpetuated their employers’ misperception of a disability.” In Workman v. Frito-Lay, Inc., 165 F.3d 460 (6th Cir. 1999), the court -- citing the EEOC’s Case Study Manual -- noted that if an employee is covered by the ADA only under the “regarded as” category, this “would obviate the Company’s obligation to reasonably accommodate” the individual. Similarly, in Newberry v. East Texas State University, 161 F.3d 276 (5th Cir. 1998), the court stated that “an employer need not provide reasonable accommodation to an employee [with an alleged compulsive disorder] who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment.” Likewise, in Weber v. Strippit, Inc., 1999 U.S. App. LEXIS 17919 (8th Cir. 1999), the court held that “regarded as” individuals “are not entitled to reasonable accommodations.” The court stated that “[i]mposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results.” In Gilday v. Mecosta County, 124 F.3d 760 (6th Cir.), amended, 7 AD Cases 1268 (6th Cir. 1997), the court stated that a person requesting reasonable accommodation must be “actually” disabled under the ADA, “not merely considered to be disabled or to have a record of a disability. A person without an actual disability would not need any accommodation. Similarly, in Coulson v. Goodyear Tire & Rubber Co., 2002 U.S. App. LEXIS 4623 (6th Cir. 2002) (unpublished), the plaintiff alleged that he was regarded as having a mental disability, and that he needed to be reassigned to another work area so that he would not have to work with certain employees. The court noted that “it is not clear that an accommodation analysis should be performed in a case like this one, where the real issue is alleged discrimination based on a perceived, rather than actual, disability.” In Shannon v. New York City Transit Authority, 332 F.3d 95 (2d Cir. 2003), the court noted that “it is not at all clear that a reasonable accommodation can ever be required in a ‘regarded as’ case.” In Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3rd Cir. 1999), the court stated that the Third Circuit has “yet to resolve this issue.” The court noted that, “[o]n the one hand, the statute does not appear to distinguish between disabled and ‘regarded as’ individuals in requiring

accommodation. On the other hand, it seems odd to give an impaired but not disabled person a windfall because of her employer's erroneous perception of disability, when other impaired but not disabled people are not entitled to accommodation."

On the other hand, in Williams v. Philadelphia Housing Authority Police Dept., 380 F.3d 751 (3d Cir. 2004), the court held that a "regarded as" plaintiff may be entitled to reasonable accommodation because, in part, the statute does not distinguish between categories of "disability" in requiring reasonable accommodation. The court rejected the employer's contention that accommodation in this context would give a "windfall" to an employee because of the employer's perception. Specifically, the court noted that this employee (who could not carry a firearm because of his depression) would have been entitled to reassignment to a radio-room job if the employer did not harbor the misperception that the employee should not be around firearms at all.

The EEOC has taken the position that reasonable accommodation is required in "record of" cases. The Commission has explicitly stated that, "[b]y its terms, the statute requires employers to make reasonable accommodations for the known limitations of individuals with a 'record of' a disability. See EEOC's Amicus Curiae Brief in Bizelli v. Parker Amchem and Henkel Corp., Brief filed with Eighth Circuit, 3/24/99) at 18. Although the issue is controversial, it is possible that courts might agree with this position. For example, in Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499 (7th Cir. 1998), the court noted that reasonable accommodation might be required for individuals with a record of a disability, "notwithstanding their inability to demonstrate a present impairment that is substantial enough to qualify as disabling under the ADA." Therefore, according to the court, a "record of" plaintiff could "demand reasonable accommodations to ongoing or recurrent limitations." The court also stated, however, that it is *unclear* whether an employer has "a duty to accommodate an employee based on her history of a substantially limiting impairment, even if her current limitations are not substantial." On the other hand, as noted above, in Gilday v. Mecosta County, 124 F.3d 760 n.4 (6th Cir.), amended, 7 AD Cases 1268 (6th Cir. 1997), the court stated that a person with only a "record of" a disability is not entitled to reasonable accommodation.

Some courts have not distinguished between actual disabilities (on the one hand) and record of/regarded as disabilities (on the other hand) in determining whether accommodation is required. In Amadio v. Ford Motor Company, 238 F.3d 919 (7th Cir. 2001), a "regarded as"



case, the court analyzed whether a reasonable accommodation would have permitted the plaintiff to perform his job. In Jay v. Internet Wagner Inc., 233 F.3d 1014 (7th Cir. 2000), the court determined that the employer did not violate the law because it reasonably accommodated the employee's "perceived" disability, by offering him a reassignment. Likewise, in Corrigan v. Perry, 1998 U.S. App. LEXIS 5859 (4th Cir. 1998)(unpublished), the court determined that the plaintiff did not have a current disability. However, the court assumed -- for the sake of argument -- that the employee may have been "regarded as" disabled, and still analyzed whether the plaintiff was denied a reasonable accommodation. Similarly, in Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996), the court implicitly determined that reasonable accommodation could be available in a "regarded as" case. The court held both that: (1) the individual may have been regarded as disabled; *and* (2) he may be able to prove that "he could perform his job with reasonable accommodations." In Deane v. Pocono Medical Center, 142 F.3d 138 (3d Cir. 1998), the court expressly declined to decide whether individuals who are simply "regarded as" disabled are entitled to accommodations.<sup>3</sup>

In addition, at least one federal Court of Appeals has held that an individual is not entitled to reasonable accommodation unless his/her disability affects the ability to work. In Burch v. Coca-Cola, 119 F.3d 305 n.4 (5th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998), the court stated that although an individual can show "disability" by demonstrating that s/he is substantially limited in any major life activity, s/he is only entitled to reasonable accommodation if the "substantially limiting impairment somehow affected his ability to perform the job. Without such a showing, there would be nothing for an employer to accommodate."

#### Employee's Duty to Ask for an Accommodation/Employer Knowledge of the Disability

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<sup>3</sup> The Deane court held that even in a "regarded as" case, an individual is qualified if s/he can perform only the essential job functions. The court noted that even if such individuals are not entitled to accommodations (such as restructuring of marginal functions), they may still be entitled to other relief such as "injunctive relief against future discrimination."

A good deal of existing authority supports the notion that generally, an individual must request an accommodation. Even the EEOC has stated that, in general, "it is the responsibility of the individual with a disability to inform the employer than an accommodation is needed." Appendix to 29 C.F.R. § 1630.9; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at "General Principles" and Question 40.<sup>4</sup> Interestingly, EEOC's internal procedures on reasonable accommodation provide that the employee may request accommodation "from his/her supervisor; another supervisor or manager in his/her immediate chain of command; the Office Director; or the Disability Program Manager." Internal EEOC "Procedures for Providing Reasonable Accommodation for Individuals with Disabilities" (2/2001) at II.

Many cases expressly support the point that an individual must request accommodation. For example, in Doner v. City of Rockford, 2003 U.S. App. LEXIS 20761 (7th Cir. 2003)(unpublished), the court stated that "when a disabled employee gives notice of a desire for accommodation, this triggers a mutual duty to communicate in good faith to determine a reasonable solution." In Brown v. Lucky Stores, 246 F.3d 1182 (9th Cir. 2001), the court stated that the "general rule" is that "an employee must make an initial request" for an accommodation. Likewise, in Clark v. Whirlpool Corp., 2004 U.S. App. LEXIS 19130 (6th Cir. 2004)(unpublished), the court held that the employer had no obligation to provide a reasonable accommodation where the employee did not request anything on her return to production work after her injury. In this case, she merely alleged that Whirlpool "forced" her to return to work under an unwritten "100 percent healed" policy, and assigned her to a job exceeding her physical capabilities. In Miletta v. Waste Management of New York, 2002 U.S. App. LEXIS 19215 (2d Cir. 2002)(unpublished), the plaintiff who was severely injured in a car accident argued that the employer should have transferred him as an accommodation. However, the court held that the employer had no such duty where the employee did not request accommodation or

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<sup>4</sup> See also 7/29/98 Informal Guidance letter from Christopher J. Kuczynski, Assistant Legal Counsel ("In order to receive a reasonable accommodation, an employee with a disability must request one from the employer. The employee should explain why a particular accommodation is needed.").

even tell the employer that he was ready to return to work. In fact, the court noted, the plaintiff's communications to the employer indicated that he would never be able to return to work at all. Likewise, in Clouatre v. Runyon, 2003 U.S. App. LEXIS 25148 (5th Cir. 2003)(unpublished), the court held that even if the employee had "effectively notified the employer of his mental disability," he was still not entitled to a reasonable accommodation where he did not give any "indication to management as to how it could accommodate him in a reasonable fashion." In MacGovern v. Hamilton Sunstrand Corp., 2002 U.S. App. LEXIS 23796 (2d Cir. 2002)(unpublished), the court held that where the employer exempted the employee from mandatory overtime (because of the employee's initial request), and the employee "did not indicate that he deemed that accommodation inadequate," the employer "was under no obligation to do more than it did." In Burke v. Southern Iowa Methodist Medical Center, 2002 U.S. App. LEXIS 1811 (8th Cir. 2002)(unpublished), the employee claimed that the employer failed its reasonable accommodation obligation when it unilaterally offered her a specific full-time position (at the termination of her long-term disability coverage) instead of engaging in an interactive process. The court disagreed, noting that the employee never triggered the interactive process by requesting accommodation; instead, the employee had simply turned down the offer. The court rejected the employee's argument that the employer "should have known she was capable of performing part-time work similar to what she had done before going on long-term disability," and also rejected her contention that an employer had an affirmative duty to initiate the interactive process – without a request for accommodation – since she had depression. In Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361 (11th Cir. 1999), the court noted that a cashier, who could not lift the required amount of weight, could not establish an ADA violation since she never requested an accommodation. The court stated that "the initial burden of requesting an accommodation is on the employee. Only after the employee has satisfied this burden and the employer fails to provide that accommodation can the employee prevail on a claim that her employer discriminated against her." Likewise, in Robin v. Espo Engineering, 200 F.3d 1081 (7th Cir. 2000), the court noted that even though the employer may have lacked compassion towards the employee undergoing chemotherapy, the employee was not entitled to reasonable accommodation because he did not request an accommodation under the ADA; the court stated that it must "regretfully recognize that without such a request, [the employer] was not required to accommodate his disability." In Montoya v. New Mexico, 2000 U.S. App. LEXIS 2687 (10th Cir. 2000)(unpublished), a custodial supervisor was fired after a number of performance problems including emotional outbursts involving profanity. He sued, alleging that he should have been provided reasonable accommodation for his mental disability. The court

noted, however, that he was not entitled to accommodation because he did not show that the employer knew of his disability nor that he ever requested accommodation. Likewise, in Jones v. United Parcel Service, 214 F.3d 402 (3d Cir. 2000), the plaintiff claimed that the employer failed to provide a reasonable accommodation, including reassignment. However, the court noted that he “never requested an accommodation or assistance for his disability.” Although the plaintiff claimed that the employer had “constructive notice” of his desire for accommodation because it was aware that he did not believe he could return to his former manual labor job, the court disagreed. The court stated that the plaintiff did not present evidence showing that the employer “should have known that Jones sought an accommodation” since he did not provide notice making it clear that he wanted assistance for his disability. In Kanofsky v. University of Medicine & Dentistry of New Jersey, 2002 U.S. App. LEXIS 23407 (3d Cir. 2002)(unpublished), the court found that the employee was not qualified where he never requested an accommodation which he needed to perform the job. In Hinson v. Tecumseh Products Co., 2000 U.S. App. LEXIS 26778 (6th Cir. 2000)(unpublished), the court found that an assembly line worker with acute anxiety and major depression was not legally entitled to a reasonable accommodation because she never asked for one. In Loulseged v. Akzo Nobel Inc., 178 F.3d 731 (5th Cir. 1999), the employer changed the duties of its lab technicians to require them to carry one-gallon containers on a rotating basis. The employee, who had a back impairment, resigned because she did not think she could perform this duty. The court noted that the employee could not claim that the employer had not accommodated her since she had been silent as to her needs. Similarly, in Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998), the court stated that “[t]here is no question that the EEOC has placed the initial burden of requesting an accommodation on the employee. The employer is not required to speculate as to the extent of the employee’s disability or the employee’s need or desire for an accommodation.” In Shiflett v. GE Fanuc Automation Corp., 1998 U.S. App. 13186 (4th Cir. 1998)(unpublished), the court stated that an employer “is entitled to notice before becoming liable for failure to accommodate.” The court noted that when an employee “is performing the job satisfactorily” and “where the employee will not acknowledge the need for or request an accommodation,” the employer “cannot be required to guess or read the employee's mind.” Likewise, in Wallin v. Minnesota Department of Corrections, 153 F.3d 681 (8th Cir. 1998), the court noted that where a disability, its resulting limitations, and the needed accommodations are not obvious to the employer, the employee bears the burden of notifying the employer about his/her needs.

Similarly, in Steinacker v. National Aquarium in Baltimore, 1997 U.S. App. LEXIS 13731 (4th Cir. 1997)(unpublished), the court dismissed an electrician's claim for reasonable accommodation "because there is no evidence that he requested an accommodation" for an ADA disability. In Taylor v. Principal Financial Group, Inc., 93 F.3d 155 (5th Cir.), cert. denied, 117 S. Ct. 586 (1996), the court denied the plaintiff's ADA claim because he had not submitted "a formal request for accommodation under the ADA." In Scarborough v. Runyon, 92 F.3d 1187 (7th Cir. 1996)(unpublished), the court suggested that a letter carrier was not entitled to a reasonable accommodation when she "admitted that she did not seek any accommodation from the Postal Service, which prevented the interactive process envisioned by the statute from taking place." Similarly, in Lewis v. Zilog, Inc., 908 F. Supp. 931 (N.D. Ga. 1995), aff'd, 87 F.3d 1331 (11th Cir. 1996), the court stated that an ADA plaintiff must offer the employer "a suggestion of a reasonable accommodation which would allow her to perform the essential functions of her job." In Huppenbauer v. The May Department Stores Co., 1996 U.S. App. LEXIS 27480 (4th Cir. 1996)(unpublished), the court noted that an individual must "make a clear request for an accommodation and communicate it to his employer." In Huppenbauer, the court noted that the employer did not have notice of the employee's disability and need for accommodation. The court also stated that general knowledge in the workplace that the plaintiff had a "heart condition" was not enough to trigger the employer's obligation to provide reasonable accommodation. Likewise, in Walker v. Connetquot Central School District, 2000 U.S. App. LEXIS 14620 (2d Cir. 2000)(unpublished), the court held that the employer did not violate the ADA (by failing to provide a reasonable accommodation) where the employee failed to even request an accommodation.

Employers should be aware that some courts have suggested that if the employer knows both about the disability and the need for accommodation, it may have an obligation to provide the accommodation -- *even without* an express request that a modification is needed because of a disability. For example, in Smith v. Henderson, 376 F.3d 529 (6th Cir. 2004), the court held that the employer, the U.S. Postal Service, should have engaged in the interactive process when a newly-promoted Supervisor asked the employer to transfer time-consuming accounting duties to a subordinate employee. This was so even though the Supervisor did not "use the word 'accommodation' or specifically mention that she was seeking to delegate the accounting function because of her disability" since the employer "was aware" of her disability "and her medical need to avoid working overtime so as not to exacerbate her rheumatoid arthritis" (since it had accommodated her prior to her promotion). The court noted that the employer "knew or

should have known” that the employee “sought to delegate her accounting duties in order to make her job conform with her medical restrictions.” In Stephenson v. United Airlines, 2001 U.S. App. LEXIS 11400 (9th Cir. 2001)(unpublished), the court stated that an “employer is obligated to engage in an interactive process with employees when an employee requests an accommodation or if the employer recognizes that an accommodation is necessary.” In this case, the employee arguably requested an accommodation by bringing in a doctor’s note with restrictions on standing, walking, driving, lifting, and carrying, among other things. The court also noted that there is a continuing duty to accommodate even without an express request “where the employer is aware that the initial accommodation is failing and further accommodation is needed.” Similarly, in Mulholland v. Pharmacia & Upjohn, Inc., 2002 U.S. App. LEXIS 24200 (6th Cir. 2002)(unpublished), the court held that the employer had a duty to accommodate the employee with a memory impairment (caused by a head injury) even when he did not expressly ask for an accommodation since the employer “was aware both of the disability, and the measures required to accommodate,” (e.g., that the employee performed better when instructions were in writing). In this case, however, the court found that the employer complied with the ADA by providing instructions in writing and discharging the employee for misconduct in falsifying his timesheets.

It is important to remember that some states are more pro-employee than the ADA. For example, in Downey v. Crowley Marine Services, Inc., 236 F.3d 1019 (9th Cir. 2001), the court noted that while the ADA’s reasonable accommodation process is triggered by the employee’s giving notice of a disability and desire for accommodation, Washington State law is less burdensome for employees. Under Washington State law, the court held that “simple notice of an employee’s disability is sufficient to trigger an employer’s responsibility to accommodate.” In that case, the court further stated that once the employer knew that the employee’s condition “interfered with his ability to work” in his position, state law required the employer to identify other available jobs and help the employee apply for those jobs.

There *is* general agreement that an employer must *know* about a disability in order to be liable for failing to provide a reasonable accommodation. For example, in Young v. Westchester County Department of Social Services, 2003 U.S. App. LEXIS 1915 (2d Cir. 2003)(unpublished), the court held that the employer was not liable for failing to provide reasonable accommodation when it did not know that the employee had a disability. In this case, the employer only knew that the employee was having trouble breathing and speaking, but was

told by the employee's doctors that the problems were temporary and that she would return to work shortly. The court pointed out that this was not the type of case where the "symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability." In Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560 (7th Cir. 1996), the court stated that "[b]efore an employer may be liable for failing to provide an employee with reasonable accommodation, the employer must be aware of the employee's disability." Likewise, in Tan v. Runyon, 1996 U.S. App. LEXIS 15826 (unpublished), the court considered the claim of an applicant who was rejected after he allegedly lied on his application by falsely stating that he had submitted a urine sample for drug testing. The applicant brought an ADA suit (including a reasonable accommodation claim), asserting that he did not understand the form because of a mental disability. The court rejected the claim, noting (among other things) that "[a]n employer must know about the existing specific disability before it can be liable for failing to accommodate the disabled person's needs." Likewise, in Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130 (7th Cir. 1996), the court stated that, "[a]n employer that has no knowledge of an employee's disability cannot be held liable for not accommodating the employee."

A number of other cases support this point, such Chapman v. AI Transport, 180 F.3d 1244 (11th Cir. 1999)(employee did not make known to the employer that his inability to engage in business travel resulted from his heart condition where he said that he was experiencing stress related to the travel); Hunt-Golliday v. Metropolitan Water Reclamation District, 104 F.3d 1004 (7th Cir. 1997)(the duty to provide reasonable accommodation "is limited by the employer's knowledge of the disability" and the employee "has the initial duty to inform the employer of a disability"); Miller v. National Casualty Co., 61 F.3d 627 (8th Cir. 1995)(employer was not required to make reasonable accommodation when it did not know about disability); Morisky v. Broward County, 80 F.3d 445 (11th Cir. 1996)("vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations" under the ADA; employer was not expected to know that plaintiff had a disability based on statements on application that she had taken special education courses); Senate Sergeant-at-Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996)(an entity's "duty to accommodate arises only when it knows of a disability, and its duty is therefore prospective from the time when it gained knowledge of the disability"). See also Hedberg v. Indiana Bell Telephone Co., 47 F.3d 928 (7th Cir. 1995) ("ADA does not require clairvoyance" on the part of employers).

Certainly, in cases where a disability truly prevents the individual from asking for a reasonable accommodation *and* the employer knows about the person's disability and need for accommodation, it is risky for an employer to fail to provide a needed accommodation that does not impose an undue hardship. For example, in Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996), the court considered the reasonable accommodation claim of a janitor with a mental disability who said that it would be too stressful to work at his assigned school. The court rejected the employer's argument that the employee was not entitled to reasonable accommodation since he had not requested an accommodation. Specifically, the court noted that "an employer cannot expect an employee to read its mind and know that he or she must specifically say 'I want a reasonable accommodation,' particularly when the employee has a mental illness. The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help." In Miller v. Illinois Department of Corrections, 107 F.3d 483 (7th Cir. 1997), the court stated that if the "nature of the disability is such as to impair the employee's ability to communicate his or her needs, as will sometimes be the case with mental disabilities, the employer, provided of course that he is on notice that the employee has a disability, has to make a reasonable effort to understand what those needs are even if they are not clearly communicated to him." However, as the court noted in Brown v. Chase Brass & Copper Co., 2001 U.S. App. LEXIS 15726 (6th Cir. 2001), where an employee's disability "clearly does not impede his ability to request an accommodation," he "must request it in the first instance."

Similarly, the EEOC has stated that although an individual generally must request accommodation, the situation could be different if, "because of the disability, the employee is unable to request the accommodation."<sup>5</sup> For example, the EEOC has written that "an employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation." In Brown v. Lucky Stores, 246 F.3d 1182 (9th Cir. 2001), the court held that the employer did not need to provide an accommodation where the employee did not request an

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<sup>5</sup> 2/1/95 Informal Guidance letter from Claire Gonzales, Director of Communications and Legislative Affairs.



accommodation, and the evidence did not show that she “was unable to request a reasonable accommodation” or that the employer “knew or had reason to know that [she] had a disability preventing her from making such a request.”

The EEOC has also written that if the individual “states that s/he does not need a reasonable accommodation, the employer will have fulfilled its obligation.” EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 40. Courts seem to agree with this position. For example, in Umble v. Arrowhead Community Hospital & Medical Center, 2001 U.S. App. LEXIS 7857 (9th Cir. 2001)(unpublished), the court held that the employer did not fail to provide reasonable accommodation to the plaintiff’s migraine headaches where, among other things, the employee “maintained throughout the termination proceedings that her job performance was satisfactory and that she did not require leave or any other accommodation to return to work.” In Bonneville v. Blue Cross and Blue Shield of Minnesota, 2000 U.S. App. LEXIS 11905 (8th Cir. 2000)(unpublished), the plaintiff claimed that she was entitled to reasonable accommodation because she had suffered a head injury resulting in learning and memory impairments. The court disagreed in light of the evidence showing that the plaintiff “repeatedly asserted that she had learned to compensate” for these impairments. Similarly, in Larson v. Koch Refining Co., 5 AD Cases 136 (D. Minn. 1995), the court held that the employer had no obligation to accommodate an employee's alcoholism when the employee expressly denied having an alcohol problem.

In addition, in one federal court case, the EEOC took the position that where a food store knew that its grocery bagger had autism (which affected his communication skills and ability to interact with others), it should have -- on its own -- considered providing reasonable accommodation when the employee made loud and possibly inappropriate comments to customers. Specifically, the EEOC wrote that the employer "was required to consider accommodation, even though [the employee] did not expressly request one, because the company was aware of [his] disability and the need for accommodation was clear, but the very nature of his disability prevented [him] from recognizing that need." EEOC's Amicus Curiae Brief in Taylor v. Food World, Inc., No. 97-6017 (Brief Filed with Eleventh Circuit, 4/30/97).

In Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999), the court agreed that an individual normally must initiate the interactive process (including requesting reassignment if no accommodation exists in the current job. However, the Davoll court discussed an exception to this rule, which it

called the “futile gesture doctrine.” Specifically, if the individual knows that the request would be futile, s/he might not need to initiate the interactive process. For example, the court noted that if the individual “knows of an employer’s discriminatory policy against reasonable accommodation, he need not ignore the policy and subject himself ‘to personal rebuffs’ by making a request that will surely be denied.” In this case, since the plaintiffs “were well aware of Denver’s policy of refusing to reassign disabled police officers to Career Service positions,” they did not need to make this “futile” request.

### Content of Employee's Request for Accommodation

Of course, the next question is what exactly does the individual have to *say* when asking for a reasonable accommodation. In the past, the EEOC stated that, "if an employee requests time off for a reason related or possibly related to a disability (e.g., 'I need six weeks off to get treatment for a back problem'), the employer should consider this a request for ADA reasonable accommodation as well as FMLA leave." See EEOC Fact Sheet: "The FMLA, the ADA, and Title VII of the Civil Rights Act of 1964" at p. 8 (question 16). **This Fact Sheet is available on the internet at [www.eeoc.gov](http://www.eeoc.gov).** However, more recently, the EEOC has stated that when an individual informs an employer that an adjustment or change is needed simply because of “a medical condition,” that is enough to qualify as a reasonable accommodation request. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, No. 915.002 (10/17/02) at Question 1.

Courts endorse the view that employers should not require the employee to use "magic" language, or even use the term "reasonable accommodation" in the request. For example, in Conneen v. MBNA America Bank, N.A., 334 F.3d 318 (3d Cir. 2003), the court noted that “the law does not require any formal mechanism or ‘magic words,’ to notify an employer” that accommodation is needed. The employee must, however, “either by direct communication or other appropriate means,” make it clear that s/he “wants assistance for his or her disability.” The court noted that the employer must have enough information to know of the disability and desire for an accommodation, ‘or circumstances must at least be sufficient to cause a reasonable employer to make appropriate inquiries about the possible need for an accommodation.’ This is true even in cases where the individual “may be reluctant” to discuss his/her needs “with anyone,

particularly his/her employer.” Logically, the court stated that “the quantum of information that will be required will, therefore, often depend on what the employer already knows.” In Parkinson v. Anne Arundel Medical Center, 2003 U.S. App. LEXIS 22442 (4th Cir. 2003)(unpublished), the court noted that requests for accommodation need not necessarily be in writing or invoke any formal language. In Taylor v. Phoenixville School District, 184 F.3d 296 (3rd Cir. 1999), the court stated that an employee need not put a request in writing and need not use the words “reasonable accommodation” to trigger the interactive process. Rather, “[w]hat matters under the ADA are not formalisms about the manner of the request, but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.” In Taylor, the court held that the employer was on notice since an administrative assistant was notified about the plaintiff’s hospitalization for her mental condition. Similarly, in Allen v. Rapides Parish School Board, 204 F.3d 619 (5th Cir. 2000), the court found that letters sent by the employee and his doctor about his tinnitus (a hearing condition) and possible mitigation of the condition triggered the interactive process. In Zivkovic v. Southern California Edison Co., 302 F.3d 1080 (9th Cir. 2002), the court noted that “an employee is not required to use any particular language when requesting an accommodation but need only inform the employer of the need for an adjustment due to a medical condition.” In this case, the court held that the interactive process was “triggered” when the applicant wrote on his application that he was hard of hearing, and stated in his interview that he would have performed better in the application process if he had been given a sign language interpreter. In Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723 (8th Cir. 1999), the court found that the employer may have been adequately notified of the employee’s need for accommodation. The court pointed to the fact that the employee told a human resources employee that he had a stress syndrome and he needed an unmonitored telephone line to be able to talk to his “support network.” In addition, the court noted that the employee had experienced a panic attack in his supervisor’s office, sometimes cried at work, and was known to be taking medications. In Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, rehearing denied, 1999 U.S. App. LEXIS 25675 (8th Cir. 1999), the court stated that the employee’s notice “must merely make it clear to the employer that the employee wants assistance for his or her disability.” As noted above, in Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996), the court held that the employer erred by not considering accommodations after the employee (a janitor) brought in a doctor's note stating that due to the employee's "illness and past inability to return to work," he needed to be assigned to a school that would be "less stressful." The court stated that the employer could

not require the employee to use specific language like, "I want a reasonable accommodation." Similarly, in McGinnis v. Wonder Chemical Co., 5 AD Cases 219 (E.D. Pa. 1995), the court rejected the employer's argument that the plaintiff was not qualified for his Truck Maintenance Supervisor job (requiring heavy lifting, bending, and twisting). In that case, the employee claimed that he could do the essential functions with reasonable accommodations. The court implicitly agreed that the employer *was* on notice of the need for reasonable accommodation because the employee told his supervisor that his pain prevented him from working. Interestingly, in this case, the court noted that the employer was *also* on notice of the employee's need for FMLA leave. Therefore, employers should carefully monitor *FMLA leave requests* to determine whether the individual also is requesting an ADA reasonable accommodation.

Federal courts have held that the individual must give sufficient notice both that a workplace modification is needed *and* that it is needed because of a condition that could be a disability. For example, in Brenneman v. MedCentral Health System, 366 F.3d 412 (6th Cir. 2004), the court held that the plaintiff's telling his supervisor that he was "ill" or "not feeling well" did "not constitute a request for leave as an accommodation for his diabetes" because "this statement would not have reasonably apprised defendant that the absences were related to a disability rather than some general illness." In Collins v. Prudential Investment and Retirement Services, 2005 U.S. App. LEXIS 148 (3d Cir. 2005)(unpublished), the employee told her supervisor that she "was seeking assistance from the OVR" which was assessing her "cognitive abilities." However, the evidence showed that the supervisor did not know what an OVR was or what an OVR did, and there was no indication that the employee might have a disability or might need an accommodation. In Montgomery v. Alcoa, Inc., 2001 U.S. App. LEXIS 8096 (6th Cir. 2001)(unpublished), the plaintiff claimed that the employer should have accommodated him because he disclosed on his pre-employment physical that he had diabetes. However, the court disagreed, noting that "even if this information was passed on to the defendants," the employee "never informed them that he was limited by his diabetes or required any accommodation." Therefore, since he "never requested to be allowed to go home when he needed to inject insulin," the court concluded that the employer was "justified in discharging him for excessive absenteeism." Similarly, in Russell v. TG Missouri Corp., 340 F.3d 735 (8th Cir. 2003), the plaintiff left her post in the middle of her shift, even after she was told that this would result in an "unscheduled absence." Although she told her supervisor, "I need to leave, and I need to leave right now," she did not indicate that this was because of her bipolar disorder. As a result,

the court held that “it simply cannot reasonably be inferred that [the employer] failed to accommodate her disability.” In Estades-Negrone v. The Associates Corp. of North America, 345 F.3d 25 (2003), aff’d on rehearing, 2004 U.S. App. LEXIS 15525 (1st Cir. 2004), the court held that the employee did not trigger the employer’s obligation to provide reasonable accommodation where her request for a reduced workload or an assistant were not linked to any medical condition. Rather, these requests simply came after the employer allegedly increased the employee’s workload. The court noted that the employee did not repeat these requests after she was later diagnosed with depression. Similarly, in Parkinson v. Anne Arundel Medical Center, 2003 U.S. App. LEXIS 22442 (4th Cir. 2003)(unpublished), the plaintiff claimed that the employer refused to provide him a required reasonable accommodation -- time off for a doctor’s appointment because of his heart condition. In this case, the employee told the employer in September 1998 that he could not work overtime. In December 1999, after working overtime several times during the preceding year, the employee simply told his supervisor that he needed to go a “doctor’s appointment” and that another employee could do the work. The court held that the plaintiff did not sufficiently alert that this request was connected to his earlier accommodation request. Specifically, the court noted that the employee “failed to link explicitly his refusal to stay to limitations imposed by his impairment” and “it would have been far more reasonable” for the employer “to have understood his request not to work overtime to have been made for an entirely unrelated reason: so that he would not miss an appointment he had scheduled for that afternoon.” In Reed v. Lepage Bakeries, Inc., 244 F.3d 254 (1st Cir. 2001), the court noted that “the ADA's reasonable accommodation requirement” must be “triggered by a request” which is “sufficiently direct and specific,” and which “must explain how the accommodation requested is linked to some disability.” In this case, the court found that the plaintiff’s request to be able to “walk away” from conflicts gave “scant indication that, due to a disability, she needed some special sort of accommodation,” especially where she did not explain that her inability to handle conflict was due to her bipolar disorder. Likewise, in Curry v. Empire Berol, U.S.A., 1998 U.S. App. LEXIS 461 (6th Cir. 1998)(unpublished), the court considered the reasonable accommodation claim of an employee who told his employer that he needed to leave work because he was “sick.” The court noted that this request was insufficient to trigger the employer's reasonable accommodation obligation because “it had no knowledge of the reason behind [the employee's] request,” his heart problems. Similarly, in Hammon v. DHL Airways, Inc., 165 F.3d 441 (6th Cir. 1999), the court held that the employee, a pilot, never adequately told his employer that his performance problems were caused by an alleged anxiety disorder. The court noted that although the employee told his employer about his “loss of

confidence,” he “never suggested that his emotional problems stemmed from a condition of disability.” In Gammage v. West Jasper School Board of Education, 179 F.3d 952 (5th Cir. 1999), the court noted that even though the employer knew about the employee’s kidney disorder, “the ADA does not require an employer to assume that an employee with a disability suffers from a limitation.” The court stated that the employee must “assert not only a disability, but also any limitation resulting therefrom.” In Miller v. Illinois Department of Corrections, 107 F.3d 483 (7th Cir. 1997), the court noted that if an employee who can no longer perform a job because of disability "says to the employer, 'I want to keep working for you -- do you have any suggestions?' the employer has a duty under the Act to ascertain whether he has some job that the employee might be able to fill." See also Hendricks-Robinson v. Excel Corp., 154 F.3d 685 (7th Cir. 1998)("a request as straightforward as asking for continued employment is a sufficient request for accommodation").

It is important to note, however, that some courts seem to have adopted a standard that is tougher for employees. For example, in Keys v. Joseph Beth Booksellers, Inc., 1999 U.S. App. LEXIS 1581 (6th Cir. 1999)(unpublished), the court held that the employee, who had “trance-like, non-epileptic ‘spells,’” did not adequately request accommodation by asking his employer to “work with him” until he could get his medical condition under control. In Taylor v. Principal Financial Group, Inc., 93 F.3d 155 (5th Cir.), cert. denied, 117 S. Ct. 586 (1996), the employee notified his employer that he had bi-polar disorder and that he needed a reduction in his "objectives" and less "pressure." The court stated that, in the first place, the employee's notification that he had bi-polar disorder was not sufficient; rather, according to the court, the employee had an obligation to notify the employer of the *limitations* resulting from the disorder. Second, the court noted that the employee had an obligation to identify specific reasonable accommodations (since the appropriate accommodation was not obvious); the request for reduced "objectives" and "pressure" was "too indefinite and ambiguous." Likewise, in Seaman v. CSPH, Inc., 179 F.3d 297 (5th Cir. 1999), the court stated that in mental disability cases “in which the resulting limitations are not obvious to the employer, an employee cannot remain silent and expect his employer to bear the burden of identifying the need for and suggesting appropriate accommodation.” The court dismissed the employee’s ADA case, finding that the employee, a Domino’s Pizza store manager with alleged bipolar disorder, “produced no evidence that he requested any specific accommodation and that such a request was denied.” In that case, the court noted that the employer had tried to help the employee by providing two days off per week, not disciplining him for his unexcused absences, and relieving him of his obligation to

wear a pager. Similarly, in Miller v. National Casualty Co., 61 F.3d 627 (8th Cir. 1995), the court held that the employer had no duty to investigate reasonable accommodations despite that fact that the employee brought in a note documenting "situational stress reaction" and the employer was notified by the employee's sister that the employee "was mentally falling apart and the family was trying to get her into the hospital."

### Whether Employer Can Require that Reasonable Accommodation Requests Be Written and/or Comply with Other Procedures

The EEOC has stated that requests for accommodation do not need to be in writing. Although the employer may ask the individual "to fill out a form or submit the request in written form," the employer cannot ignore the oral request. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, No. 915.002 (10/17/02), at Question 3. Interestingly, however, EEOC's internal procedures on reasonable accommodation require employees to submit a written request confirming any oral request for accommodation. Internal EEOC "Procedures for Providing Reasonable Accommodation for Individuals with Disabilities" (2/2001) at III ("employees seeking a reasonable accommodation **must follow up an oral request either by completing the attached 'Confirmation of Request' form or otherwise confirming their request in writing (including by e-mail) to the Disability Program Manager. . . . While the written confirmation should be made as soon as possible following the request, it is not a requirement for the request itself. EEOC will begin processing the request as soon as it is made, whether or not the confirmation has been provided.**") (bold in original). Courts would likely agree with EEOC's position. For example, as noted earlier, in Parkinson v. Anne Arundel Medical Center, 2003 U.S. App. LEXIS 22442 (4th Cir. 2003)(unpublished), the court noted that requests for accommodation need not necessarily be in writing.

Interestingly, at least one Court of Appeals has held that an employee may need to follow the procedures in the applicable collective bargaining agreement for communicating the need for reasonable accommodation. In Lockard v. General Motors Corp., 2002 U.S. App. LEXIS 25787 (6th Cir. 2002)(unpublished), the court held that the employee did not properly request a reasonable accommodation because he did not use the procedures required by the collective bargaining agreement.

## Employer's Duty to Engage in Interactive Process When Accommodation is Requested

Once an accommodation has been requested, the employer should initiate an interactive process with the individual. In Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000), vacated on other grounds, 535 U.S. 391, 122 S. Ct. 1516 (2002), the court noted that the interactive process requires employers to “analyze job functions to establish the essential and nonessential job tasks,” to “identify the barriers to job performance” by consulting with the employee to learn “the precise limitations” and to learn “the types of accommodations which would be most effective.” In Williams v. Philadelphia Housing Authority Police Dept., 380 F.3d 751 (3d Cir. 2004), the court noted that once an accommodation has been requested, the employer should engage in the interactive process to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” In Eshaya v. Boeing Co., 2004 U.S. App. LEXIS 24525 (9th Cir. 2004)(unpublished), the court found that the employer had effectively engaged in the interactive process by exploring the suggestions of the employee and his representatives and offering “objectively reasonable explanations” as to why certain ideas would not work. Likewise, in Taylor v. Phoenixville School District, 184 F.3d 296 (3rd Cir. 1999), the court stated that the interactive process “as its name implies, requires the employer to take some initiative.” Further, the Taylor court noted, “the interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. That's not the proactive process intended: it does not help avoid litigation by bringing the parties to a negotiated settlement.” The Taylor court noted that employers can show good faith in the interactive process by “taking steps like the following: meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee's request, and offer and discuss available alternatives when the request is too burdensome.

In Zivkovic v. Southern California Edison Co., 302 F.3d 1080 (9th Cir. 2002), the court stated that the “interactive process requires: (1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective. The



court remanded the case to the lower court, noting that if the employer only communicated with the applicant's mother (rather than the applicant) about whether the applicant needed an accommodation, that would not be a sound interactive process. However, after the lower court later decided the case and it was appealed again to the Ninth Circuit, the Court of Appeals found that the evidence showed that the employer had indeed effectively engaged in the interactive process. The court noted that the applicant told the employer he read lips well, the applicant himself declined a sign language interpreter, he was offered written questions to read during the first interview but did not ask to read questions during the second interview, and he did not appear to have difficulty understanding or answering questions (and did not ask for help). Zivkovic v. Southern California Edison Co., 2004 U.S. App. LEXIS 13690 (9th Cir. 2004)(unpublished). In Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, rehearing denied, 1999 U.S. App. LEXIS 25675 (8th Cir. 1999), the court agreed with these steps to show good faith interaction. Likewise, in Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560 (7th Cir. 1996), the court stated that "[o]nce an employer's responsibility is triggered, the employer must engage with the employee in an 'interactive process' to determine the appropriate accommodation under the circumstances." In Ammons v. Aramark Uniform Services, Inc., 368 F.3d 809 (7th Cir. 2004), the court held that the employer adequately performed its duty to engage in the interactive process by meeting with the plaintiff, giving him an opportunity to discuss his abilities, restrictions, and ideas for accommodation, and meeting with the plaintiff's supervisor to discuss reasonable accommodation. The court held that, despite the plaintiff's arguments, the "duty to engage in an interactive process does not mandate a meeting with an employee's attorney and vocational counselor."

This interaction is meant to identify the individual's functional limitations and the potential reasonable accommodation that is needed. See 29 C.F.R. § 1630.2(o) and 1630.9, Appendix. In addition, this interaction identifies whether the accommodation is truly needed *because of* the disability. For example, in Edmonson v. Potter, 2004 U.S. App. LEXIS 26683 (4th Cir. 2004)(unpublished), the court held that the employee was not entitled to schedule changes "for her personal convenience, i.e., to accommodate her babysitter and care for her brother, and not to accommodate an alleged disability." Likewise, in Gaines v. Runyon, 107 F.3d 1171 (6th Cir. 1997), a Rehabilitation Act case, the court held that the plaintiff's requested accommodation of reassignment to a particular shift was not needed because of his epilepsy; rather, the employee's medical documentation showed that he simply needed a straight shift (which he already *had*) because of his need for a consistent sleep pattern. Similarly, in Boykin v. ATC/Vancom of

Colorado, 247 F.3d 1061 (10th Cir. 2001), the court held that the employer did not violate the ADA by offering the plaintiff (who could no longer perform his job) a reassigned position even if it knew he could not accept it due to his school schedule. The court noted that the ADA does not require accommodation for conditions which are not disabilities or modifications “requested primarily for [the] personal benefit of the disabled individual” (citation omitted).

Importantly, an employer may not be safe simply *acceding* to the individual's requested accommodation. For example, in Feliberty v. Kemper Corp., 98 F.3d 274 (7th Cir. 1996), the court stated that the "employer's proffered accommodation is not reasonable simply because it fulfills the employee's request." Rather, the employer has some responsibility for identifying an appropriate accommodation; the "determination of a reasonable accommodation is a cooperative process in which both the employer and the employee must make reasonable efforts and exercise good faith." The court noted that "reasonableness" depends on "a good-faith effort to assess the employee's needs and to respond to them," not simply to defer to the employee's requested accommodation. In Feliberty, the requested accommodation, a modified work station because of the employee's carpal tunnel, was not effective.

At least one court has held that while an employer "should normally advise an employee of available accommodations once the employee informs the employer that an accommodation is needed, it is equally true that an employer has no duty to reiterate self-evident options to an employee when she is clearly already aware of them." Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996). Therefore, the court held that the employer did not have a duty to tell the employee about the availability of paid and unpaid medical leave, voluntary time off, and personal and vacation days since the plaintiff knew that these accommodations "already existed."

The EEOC has stated that the employer's response to a reasonable accommodation request should be "expeditious." The amount of time it reasonably takes depends on issues such as whether the employer has complete control over possible modifications (for example, widening an employer-owned parking space) or whether the employer must order equipment from a third party (for example, adaptive equipment for a blind employee). See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 10. In Jay v. Internet Wagner Inc., 233 F.3d 1014 (7th Cir. 2000), the court noted that "unreasonable delay in providing an accommodation can provide evidence of discrimination." In that case, however, the court determined that the employer acted as quickly as possible in

offering a reassigned position to the plaintiff in light of his work restrictions and seniority. In Selenke v. Medical Imaging of Colorado, 248 F.3d 1249 (10th Cir. 2001), the court agreed that “delay in providing reasonable accommodation may violate the ADA,” but stated that in assessing claims of delay, it would look at factors such as “the length of the delay, the reasons for the delay, whether the employer has offered any alternative accommodation while evaluating a particular request, and whether the employer has acted in good faith.” In this case, the court concluded that the employer did not violate the ADA because of delays (of up to several months) in providing accommodations for a radiologist technician whose severe headaches were caused by fumes in the workplace. The court noted that when the plaintiff complained about the fumes, the employer had contacted contractors who had built the laboratory, retained an industrial hygienist and others to evaluate the workplace, installed a vent, paid for a respiratory mask for the plaintiff, allowed her to take leave, and offered her an alternative position so she would not be exposed to the particular chemicals.

Courts have generally held that an employer's failure to initiate the interactive process is not itself a "per se" violation of the ADA. For example, in Williams v. Philadelphia Housing Authority Police Dept., 380 F.3d 751 (3d Cir. 2004), the court noted that an employer who does not act in good faith in the interactive process “will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations” (citation omitted). In Deily v. Waste Management of Allentown, 2003 U.S. App. LEXIS 1295 (3d Cir. 2003)(unpublished), the court noted that since no accommodation would have allowed the plaintiff to perform his job, the employer “was not obliged to participate in the interactive process of accommodation required by the ADA.” In Peebles v. Potter, 354 F.3d 761 (8th Cir. 2004), the court noted that it would not “impose liability merely for failing to fulfill” the “procedural” interactive process, where the requested accommodation was unreasonable. In Baskin v. St. Louis Beer Sales, 2004 U.S. App. LEXIS 23759 (8th Cir. 2004)(unpublished), the court held that where the plaintiff had not shown the possibility of a reasonable accommodation, there was no independent “interactive process” cause of action. Likewise, in Alexander v. Northland Inn, 321 F.3d 723 (8th Cir. 2003), the court noted that there “is no per se liability if an employer fails to engage in an interactive process.” Similarly, in Doner v. City of Rockford, 2003 U.S. App. LEXIS 20761 (7th Cir. 2003)(unpublished), the court held that the interactive process “is not actionable” unless “the failure to interact resulted in the loss of a reasonable accommodation that otherwise would have been reached,” since the “failure to jaw about

accommodation” is “harmless.” In this case, the court held that the plaintiff did not show that an accommodation existed that would have enabled him to continue working for the employer. In Earl v. Mervyns, Inc., 207 F.3d 1361 (11th Cir. 2000), the court noted that where no reasonable accommodation exists, the employer is “under no duty to engage in an ‘interactive process.’” Likewise, in Willis v. Conopco, 108 F.3d 282 (11th Cir. 1997), the court considered the reasonable accommodation claim of an employee in a laundry detergent packing plant who was allergic to the detergent. After finding that the employer was not liable for failing to accommodate, the court also held that there is no independent cause of action for failing to “investigate” reasonable accommodations. The court stated that the ADA “is not intended to punish employers for behaving callously if, in fact, no accommodation for the employee's disability could reasonably have been made.” The court noted, however, that the possibility of an ADA lawsuit will as a practical matter, lead employers to investigate the possibility of reasonable accommodation. See also Lucas v. W.W. Grainger, Inc., 257 F.3d 1249 (11th Cir. 2001)(even if an employer does not engage in the interactive process, a plaintiff’s “discrimination claims fail unless he can show that an accommodation reasonably could have been made”). Similarly, in Rehling v. City of Chicago, 207 F.3d 1009 (7th Cir. 2000), the plaintiff, a police officer, claimed that the City violated the ADA by failing to engage in the interactive process. The court noted, however, that while “the ADA does envision a flexible, interactive process by which the employer and employee determine the appropriate reasonable accommodation,” this process “is not an end in itself; rather it is a means for determining what reasonable accommodations are available to allow a disabled individual to perform the essential job functions of the position.” Therefore, a plaintiff must demonstrate that the employer failed to provide an available accommodation, not just that the employer did not engage in the interactive process. In Ozowski v. Henderson, 237 F.3d 837 (7th Cir. 2001), the court stated that “the failure to engage in the interactive process by itself does not give rise to relief.” See also Emerson v. Northern States Power Co., 256 F.3d 506 (7th Cir. 2001)(“an employer’s failure to engage in the interactive process or causing the process to breakdown by itself is insufficient to support employer liability”); Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019 (7th Cir. 1997)(dismissing the plaintiff’s complaint that Wal-Mart failed to engage in the interactive process, noting that the “interactive process the ADA foresees is not an end in itself; rather, it is a means for determining what reasonable accommodations are available . . . .”). As noted above, in Taylor v. Phoenixville School District, 184 F.3d 296 (3rd Cir. 1999), the court extensively discussed the employer’s interactive process obligations. Nonetheless, the court concluded that an employer who acts in bad faith in the interactive process is liable under the ADA only “if the

jury can reasonably conclude that the employee would have been able to perform the job with accommodations.” Similarly, in Donahue v. Consolidated Rail Corporation, 224 F.3d 226 (3d Cir. 2000), the court rejected the plaintiff’s argument that the employer should be liable for not engaging in the interactive process, noting that an employer is liable only if it refused to provide an actual accommodation. In Mengine v. Runyon, 114 F.3d 415 (3d Cir. 1997), the court held that there is no independent legal violation by failing to engage in the interactive process; however, the court noted that “if an employer fails to engage in the interactive process, it may not discover a way in which the employee’s disability could have been reasonably accommodated, thereby risking violation” of the law. In Walter v. United Airlines, Inc., 2000 U.S. App. LEXIS 26875 (4th Cir. 2000)(unpublished), the court held that “an employee cannot base a reasonable accommodation claim solely on the allegation that the employer failed to engage in an interactive process.” In Loulsaged v. Akzo Nobel Inc., 178 F.3d 731 (5th Cir. 1999), the court noted that the “interactive process is not an end in itself -- it is a means to the end of forging reasonable accommodation.” In Ballard v. Rubin, 284 F.3d 957 (8th Cir. 2002), the court noted that “the mere failure of an employer to engage in the interactive process does not give rise to per se liability, although for summary judgment purposes such failure is considered prima facie evidence that the employer may be acting in bad faith.” Likewise, in Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723 (8th Cir. 1999), the court rejected the plaintiff’s argument that his employer’s failure to consult with him about a modified schedule for his stress syndrome constituted discrimination. The court noted that there is no “per se liability” for simply failing to engage in the interactive process. See also Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, rehearing denied, 1999 U.S. App. LEXIS 25675 (8th Cir. 1999)(noting that “there is no per se liability under the ADA if an employer fails to engage in the interactive process”) and Dropinski v. Douglas County, 298 F.3d 704 (8th Cir. 2002)(stating that any discussion of the employer’s alleged failure to engage in the interactive process would be “superfluous” in light of the court’s conclusion that no reasonable accommodation existed). In Jacques v. Clean-Up Group, Inc., 96 F.3d 506 (1st Cir. 1996), an “all-purpose cleaning person” could not drive because of his epilepsy and was unable to report to the worksite at the required starting time. He was given an alternate, less desirable work assignment. The employee sued, claiming (in part) that the employer’s failure to suggest alternative accommodations violated the ADA. The court found that despite the employer’s failure to suggest “additional options” for the employee, the jury could reasonably have concluded that the employee did not need reasonable accommodation. The court noted that although “[t]here may well be situations in which the employer’s failure to engage in an informal interactive process would constitute a failure to

provide reasonable accommodation," these cases turn "heavily upon their facts and an appraisal of the reasonableness of the parties' behavior." Likewise, in Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999), the court noted that liability attaches for failure to provide accommodation, not failure to participate in the interactive process. In Frazier v. Simmons, 254 F.3d 1247 (10th Cir. 2001), the court noted that "even if we assume a breakdown in the interactive process occurred," the case was dismissed because the plaintiff had not shown "that a reasonable accommodation was possible."

On the other hand, some Courts of Appeals have suggested that the interactive process may be a requirement. In Vinson v. Thomas, 288 F.3d 1145 (9th Cir. 2002), the court held that "there is a mandatory obligation to engage in an informal interactive process." Similarly, in Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001), the court stated that "once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations."<sup>6</sup> In Connolly v. Entex Information Services, Inc., 2001 U.S. App. LEXIS 26802 (9th Cir. 2001)(unpublished), the employee claimed that the employer was liable for failing to engage in good faith in the interactive process to accommodate his Attention Deficit Disorder. The court disagreed, noting that although the employer did not meet with the employee weekly (as he had requested), it e-mailed him and spoke with him regularly on the phone to discuss reasonable accommodations, offered him a leave of absence, reduced his workload, gave him more individualized supervision, and offered him an alternative position at the same pay and title (which the employee refused). In Calero-Cerezo v. U.S. Department of Justice, 355 F.3d 6 (1st Cir. 2004), the court noted that the interactive process requires "a great deal of communication between the employee and employer" and that the "employer's refusal to participate in the process may itself constitute evidence of a violation of the statute." In Lenker v. Methodist Hospital, 210 F.3d 792 (7th Cir. 2000), the plaintiff claimed that the jury should have been specifically instructed that it was an ADA violation if the employer did not truly interact with the plaintiff in trying to provide an

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<sup>6</sup> However, the Vinson and Humphrey courts went on to state that employers "who fail to engage in the interactive process in good faith face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible." This suggests that it is questionable whether there is independent liability for failure to engage in the interactive process if a reasonable accommodation was not possible.

accommodation for his Multiple Sclerosis. The court stated that the jury did not need such an instruction since the jury had already been instructed (among other things) that the employer had a “duty to analyze the job involved” and “determine its purpose and essential functions,” a “duty to consult with the employee to determine” job-related limitations and “how those limitations could be overcome with a reasonable accommodation,” and that “the employer was obliged to identify, in consultation with the employee, potential accommodations, and to assess the effectiveness each would have in enabling the individual to perform the essential functions of the position.” Interestingly, in Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001), the court noted that even if there is some type of mandatory obligation to engage in the interactive process, “liability nonetheless depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the disabled person to perform the job's essential functions.”

The EEOC has been inconsistent on this issue. On the one hand, the EEOC has stated that “[f]ailure of the employer to engage in the interactive process when the employee has requested an accommodation is a violation of the ADA.” EEOC's Brief in EEOC v. Sisters of Providence Hospital, (Brief filed in Ninth Circuit, 6/30/98) at 11. Similarly, the EEOC has stated that an employer “must make a reasonable effort to determine the appropriate accommodation.” EEOC Amicus Curiae Brief in Barnett v. U.S. Air, Inc., No. 96-16669 (Brief filed in Ninth Circuit, 12/11/98) at pp. 15-16. The EEOC conceded that the regulations state only that the interactive process “may be necessary.” However, the EEOC stated that:

use of the word ‘may’ in the regulations denotes only that there will be some cases where an accommodation may be identified by an employer without any further interaction or where it may be obvious on its face that no accommodation would permit an employee to continue working. However, in other cases, an employer that decides that no accommodation is possible without communicating with and sharing information with the employee requesting accommodation would breach its duty to ‘make a reasonable effort to determine the appropriate accommodation.

Interestingly, the EEOC further stated that it was taking “no position” on whether an employer could be sued for failing to engage in the interactive process if no reasonable accommodation was available. On the other hand, in its “Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002” (10/17/02), the EEOC never stated that the interactive process is a legal obligation. Rather, the EEOC stated that failure to engage in the interactive process simply “could result in liability for failure to provide a reasonable accommodation.”

Guidance at Question 6. Most recently, in Broussard v. Potter, 2002 EEOPUB LEXIS 6239 (EEOC 2002), a case against the U.S. Postal Service, the EEOC (in a formal agency decision) held that the failure to engage in the interactive process does not itself constitute a violation of the law. Similarly, in Doe v. Barnhart, 2003 EEOPUB LEXIS 970 (EEOC 2003), a case against the Social Security Administration, the EEOC (in another formal decision) noted that there is no liability for simply failing to engage in the interactive process.

Although the failure to engage in the interactive process might not be an independent ADA violation, the employer may lose its summary judgment motion by failing to engage in this process. In Taylor v. Phoenixville School District, 184 F.3d 296 (3rd Cir. 1999)(noted above), the court found that the employer did not properly engage in the interactive process. The court stated that “where there is a genuine dispute about whether the employer acted in good faith” in the process, “summary judgment will typically be precluded.” Likewise, in Rehling v. City of Chicago, 207 F.3d 1009 (7th Cir. 2000)(noted above), the court stated that “[a]lthough the interactive process is not an end itself,” summary judgment may be precluded “where there was an issue as to whether the employer engaged in an appropriate interactive process or caused such a process to breakdown.” In Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000), vacated on other grounds, 535 U.S. 391, 122 S. Ct. 1516 (2002), the court also expressly noted that “summary judgment is available only where there is no genuine dispute that the employer has engaged in the interactive process in good faith.” Similarly, in Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999), the court stated that “summary judgment would be premature if there is a genuine dispute” as to whether the employer “participated in good faith” in the interactive process. Likewise, in Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, rehearing denied, 1999 U.S. App. LEXIS 25675 (8th Cir. 1999), the court stated that summary judgment is typically precluded where the employer did not engage in the interactive process. In Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996), the employer failed to engage in the interactive process after a janitor notified it that he needed to work at a "less stressful" school because of his illness (a mental disability). The court denied the employer's motion for summary judgment specifically because the employer had not engaged in the interactive process. The court noted that the employer should have communicated with the employee in order to determine an appropriate accommodation. The court stated that, at a minimum, the employer should have "simply . . . inquire[d] of Bultemeyer or his psychiatrist about what he needed to be able to work." Importantly, in Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011 (8th Cir. 2000), the court noted that “although there is no



per se liability under the ADA if an employer fails to engage in an interactive process,” for summary judgment purposes, “the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith.” The EEOC has taken the position that an employer should lose its motion for summary judgment if it did not engage in the interactive process. EEOC’s Amicus Curiae Brief in *Wilson v. Noco Motor Fuels, Inc.*, Nos. 00-7919 & 00-7696 (Brief filed in Second Circuit, 11/29/00), at 15.

On the other hand, in *Donahue v. Consolidated Rail Corporation*, 224 F.3d 226 (3d Cir. 2000), the court expressly held that failure to engage in good faith in the interactive process is not alone sufficient to defeat a motion for summary judgment. In that case, the court noted that to defeat a motion for summary judgment, the plaintiff must present at least some evidence that an accommodation actually existed.

#### Documenting Disability When Reasonable Accommodation is Requested

If someone requests reasonable accommodation, the employer may generally ask him/her for information about the disability. For example, the employer is entitled to know that the individual has a *covered disability* and that s/he needs an accommodation *because of* the disability. The EEOC has specifically issued policy to this effect. In its "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations" (10/10/95), the EEOC said that if someone requests reasonable accommodation and the disability and/or the need for accommodation is not obvious, an employer may ask for reasonable documentation about the individual's disability and functional limitations. **This Guidance is available on the internet at [www.eeoc.gov](http://www.eeoc.gov).** In its “Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002” (10/17/02) at Question 6, the EEOC reiterated that an employer may require documentation “to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. However, since the employer cannot ask for unrelated information, “in most situations, an employer cannot request a person’s complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation.” For example, in cases where a disability is not obvious, an employer “may ask the employee for documentation describing the impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee’s ability to perform the activity or

activities.” The EEOC has also stated that an individual “can be asked to sign a limited release allowing the employer to submit a list of specific questions” to the individual’s “health care or vocational professional.” In addition, the EEOC has written that an employer may require the individual to go to the health professional of the employer’s choice if the individual provides insufficient information.” In such a case, however, the EEOC has cautioned that the employer “should explain why the documentation is insufficient,” “allow the individual to provide the missing information,” and “pay all costs associated with the visit(s)” to the employer-chosen health professional. Guidance at p. 13-16. In EEOC v. Prevo's Family Market, Inc., 135 F.3d 1089 (6th Cir. 1998), the court specifically stated that “an employer need not take the employee's word for it that the employee has an illness that may require special accommodation. Instead, the employer has the ability to confirm or disprove the employee's statement.” In Butler v. Wal-Mart Stores, 1999 U.S. App. LEXIS 32511 (10th Cir. 1999)(unpublished), the employee, a store greeter, argued that she should not have been required to produce medical documentation concerning her standing restriction. The court stated that it is “job-related and consistent with business necessity” to require such information when the employer is attempting to make reasonable accommodations.

#### Demonstrating Good Faith in Attempting to Accommodate

Certainly, the amount of effort an employer puts forth in attempting to accommodate bears a direct relationship to potential damages if it improperly fails to accommodate. For example, the Civil Rights Act of 1991 excludes certain damages in cases where the employer can show good faith in attempting to accommodate. Specifically, the statute states that in reasonable accommodation cases, punitive and certain compensatory damages:

may not be awarded . . . where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

42 U.S.C. 1981A.

Interestingly, in some cases, good faith attempts to accommodate have been relevant to *liability* in addition to damages. For example, in Riley v. Weyerhaeuser Paper Co., 898 F. Supp. 324 (W.D.N.C. 1995), aff'd, 77 F.3d 470 (4th Cir. 1996), the court found that the employer had not failed to provide a reasonable accommodation. In its decision, the court discussed the fact that the employer produced a great deal of evidence "of its efforts to consider reasonable accommodations," including: discussions between the plaintiff, the plant superintendent, and the production manager; preparation of job descriptions and videotapes of jobs for the plaintiff to show his physician; and evidence that the employer contacted the federal Job Accommodation Network. However, other courts have noted that "good faith" is relevant to damages, but not to liability. For example, in Garza v. Abbott Laboratories, 940 F. Supp. 1227 (N.D. Ill. 1996), the court considered the employer's claim that it was not liable for failure to provide reasonable accommodation because it had a good faith belief that the accommodation was not "reasonable" (*i.e.*, the employer allegedly had a good faith belief that the accommodation cost over one million dollars). The court stated that a "good faith" belief "merely limits the damages recoverable" in ADA cases, but "does not address the employer's overall liability."

#### Employee's Failure to Cooperate in Providing Medical Documentation and/or Identifying a Reasonable Accommodation

Failing to cooperate in the interactive process can be fatal to an individual's ADA claim for reasonable accommodation. Cooperation can include a number of things, such as being willing to try an accommodation, being willing to discuss alternatives, and providing needed documentation. The EEOC has stated that during the interactive process, the individual "does not have to be able to specify the precise accommodation" needed, but "s/he does need to describe the problems posed by the workplace barrier." See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 5.

Courts agree that individuals must cooperate in the interactive process. For example, in Carter v. Northwest Airlines, Inc., 2004 U.S. App. LEXIS 5663 (7th Cir. 2004)(unpublished), the court held that the employer did not fail in its duty to provide reasonable accommodation where it attempted to meet with the employee about whether he could return to his job and the employee did not respond to the employer's calls or invitation to meet. In addition, although the employee

claimed to be qualified for a keyboard-oriented job, he declined to take the required keyboard test (even after the employer paid for him to take a keyboard class). In Allen v. Pacific Bell, 348 F.3d 1113 (9th Cir. 2003), the court held that the employer was not required to continue considering the employee for his former Services Technician position where the medical documentation clearly showed that he was not qualified for the job's essential non-sedentary tasks and, despite the employer's requests, the employee failed to provide evidence that his condition had changed. The court also held that the employer was not required to continue searching for other accommodations when the employee did not show up for a keyboard test (which was being given in order to assess his qualifications). The employee claimed that the reason he refused to take the test was his fear that he would fail it (as he had done in the past). In Phelps v. Optima Health, Inc., 251 F.3d 21 (1st Cir. 2001), the court held that the employee was responsible for the break-down in the interactive process. The court noted that the employer began the interactive process "immediately" after the employee's termination, "returned her phone calls and letters promptly, and generally acted in good faith." The employee, on the other hand turned down job opportunities offered by the employer, and placed "significant conditions" on her reassignment which "severely limit[ed]" the employer's flexibility. In Barzellone v. City of Tulsa, 2000 U.S. App. LEXIS 5987 (10th Cir. 2000)(unpublished), the plaintiff claimed that the City failed to accommodate her after she could no longer work as a police officer because of her Multiple Sclerosis and depression. The court, however, found that the plaintiff failed her own "'interactive' requirements," after she refused the City's offer of a position at the zoo, refused to be interviewed for a "Neighborhood Inspector" position, and failed to update her medical records. Similarly, in Rubio v. Mt. Sinai Hospital, 2000 U.S. App. LEXIS 6803 (7th Cir. 2000)(unpublished), the employee could no longer work as a painter after he had a stroke. The court held that the employer did not fail to accommodate the employee after the employee simply refused the employer's offer of a computer job and did not even respond to the employer's offer for him to consider several other sedentary jobs. In Turner v. Fleming Companies, 1999 U.S. App. LEXIS 1194 (6th Cir. 1999)(unpublished), the employee claimed that he needed a modified schedule to allow him to attend therapy sessions. The employer offered the employee a schedule which the employee believed was inadequate, and the employee refused to even try the proposed schedule. The court denied the employee's ADA claim because he "never gave [the employer's] facially reasonable accommodation offer a chance." As noted earlier, in Loulseged v. Akzo Nobel Inc., 178 F.3d 731 (5th Cir. 1999), the employer changed the duties of its lab technicians to require them to carry one-gallon containers on a rotating basis. The employee, who had a back impairment, did not indicate her concerns about the assignment;

instead, she simply resigned. The court noted that the employee was responsible for the breakdown of the interactive process by staying silent, noting that “[o]ne cannot negotiate with a break wall.” In Seth v. City of Seattle, 1999 U.S. App. LEXIS 28046 (9th Cir. 1999)(unpublished), the court held that the City met its ADA obligations where the plaintiff did not respond to the City’s letters to him “describing available positions and requesting additional information” about his qualifications. Similarly, in Roberts v. Cushing Regional Hospital, 2000 U.S. App. LEXIS 39 (10th Cir. 2000)(unpublished), the court affirmed that the plaintiff’s ADA claim must fail because he “refused a reasonable accommodation that was offered and otherwise refused to participate in the interactive process of arriving at a reasonable accommodation.” In Stewart v. Happy Herman’s Cheshire Bridge, Inc., 117 F.3d 1278 (11th Cir. 1997), the court considered whether the employer failed to provide reasonable accommodation to an employee who requested a 30-minute paid break because of her problems involving standing, lifting, and urinating. In that case, the employer offered five possible alternatives; the employee refused these alternatives without providing “any substantive reasons as to why all five of the proffered accommodations were unreasonable given her medical condition.” The court held that since the employer made “reasonable efforts to communicate with the employee” and the employee caused “a breakdown in the interactive process,” “[l]iability simply cannot arise under the ADA.” Similarly, in Webster v. Methodist Occupational Health Centers, Inc., 141 F.3d 1236 (7th Cir. 1998), the court stated that an employee cannot simply "refuse reasonable accommodations during the interactive process" and then later "suggest something different and claim that the employer still has a duty to consider further accommodations. Otherwise, there would be no statute of limitations on ADA claims."

As noted above, failing to comply with the employer's reasonable request for documentation (done as part of the interactive process) can destroy the individual's case. For example, the EEOC has stated that where the employer has sought documentation of a non-obvious disability and the employee does not provide reasonable documentation, “then s/he is not entitled to reasonable accommodation.” EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/01) at Question 6.

Courts agree with this conclusion. For example, in Kratzer v. Rockwell Collins, Inc., 2005 U.S. App. LEXIS 2997 (8th Cir. 2005), the court held that the employer did not fail to provide an accommodation for a sheet metal worker to take a mechanical test (needed for a promotion), where the employee failed to provide requested documentation concerning her foot and leg

restrictions and the appropriate accommodation. Specifically, the employee did not go to her doctor for an updated physical evaluation for over two years after the employer asked for the information. Similarly, in Tyler v. Ispat Inland Inc., 245 F.3d 969 (7th Cir. 2001), the court held that the employer was not liable for failure to transfer the employee as an accommodation where he refused to release his psychological records supporting his claim that he needed the transfer to alleviate stress and to aid in treatment of his mental disability. In Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001), the court discussed the fact that the plaintiff may have been responsible, at least in part, for a less-than-perfect interactive process because he may have wanted to “retain a level of privacy concerning his physical difficulties.” The court noted, however, that an employer “cannot be held responsible for knowing information about a disability that an employee deliberately chooses to withhold.” Likewise, in Templeton v. Neodata Services, Inc., 162 F.3d 617 (10th Cir. 1998), the court held that when the employee failed “to provide medical information necessary to the interactive process,” she was “preclude[d] from claiming that the employer violated the ADA by failing to provide reasonable accommodation.” The court further stated that an employer “cannot be expected to propose reasonable accommodation absent critical information on the employee’s medical condition and the limitations it imposes.” In Templeton, the employee admittedly refused to authorize her physician to release medical information to the employer because she believed the employer was trying to force her to go on medical leave.

In Vawser v. Fred Meyer, Inc., 2001 U.S. App. LEXIS 21805 (9th Cir. 2001)(unpublished), the employee's doctor requested that the employer accommodate the employee with a "structured five-day workweek" schedule. When the employer requested clarification of what this meant, the employee's doctor unilaterally concluded that the employer was refusing to accommodate the employee, and refused to respond. The court held that the employer did not violate the ADA because the employee's doctor was responsible for the breakdown in the interactive process, noting that the employer "is not responsible for a communications failure by Vawser's doctor." Similarly, in Steffes v. Stepan Co., 144 F.3d 1070 (7th Cir. 1998), the employee with chronic obstructive pulmonary disease, notified the employer that she could not be exposed to chemicals. She was bumped from her original position because of union seniority provisions and the employer searched for an alternative position before terminating her employment. The employer offered the employee a newly-opened position in its chemical warehouse on the condition that the employee’s doctor certify that she could work around the chemicals in the warehouse. The doctor’s statement was not responsive to the employer’s request (e.g., it assumed the chemicals

were always in sealed containers), but the employee did not try to get a more comprehensive statement from her doctor. The court noted that the employee was responsible for the breakdown in the interactive process because the employer had legitimate concerns about the employee's work restrictions, and the employee "had it within her power" to obtain more comprehensive and responsive information from her doctor. In Collier v. Milliken & Company, 2002 U.S. App. LEXIS 20358 (4th Cir. 2002)(unpublished), the plaintiff's doctor submitted to the employer the plaintiff's work restrictions, and the employer offered the plaintiff a position which it believed would be consistent with those restrictions. After the plaintiff claimed the position was a "physical impossibility," the employer asked the plaintiff's doctor, who "declined to state one way or the other" whether the plaintiff could perform the job. The court found that, based on these facts, the employer was not at fault for somehow failing to provide a reasonable accommodation. Likewise, in Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130 (7th Cir. 1996), the court considered whether an employee who asked for reasonable accommodation was entitled to such an accommodation when she failed to both provide a requested medical release and to answer additional questions about what accommodation she needed. In that case, the employee had severe depression, as well as viral fatigue and osteoarthritis; the employer argued (and the court agreed) that the employee lost her right to accommodation because she was responsible for the breakdown in the reasonable accommodation "interactive process" by failing to cooperate with the employer's requests. The court stated that the employer "cannot be held liable for failure to make 'reasonable accommodation'" when it "was never able to obtain an adequate understanding of what action it should take."

Importantly, it appears that an employer may require cooperation in determining whether an accommodation continues to be needed. For example, in Conneen v. MBNA America Bank, N.A., 334 F.3d 318 (3d Cir. 2003), the employer had given the employee a temporarily modified schedule, letting her come in one hour late because of her morning sedation caused by depression medication. Some time later, a new supervisor asked the employee if there was any reason she could not return to her regular schedule and the employee agreed that she could work the regular hours. When the employee continued to be late, the employee blamed her tardiness on heavy traffic, her parents, and her dog's "gastric distress." After she was terminated, the employee claimed that the employer should have continued the modified schedule. However, the court disagreed, noting that the employee never requested a continuation of her modified schedule, and that an employer "cannot be held liable for failing to read [the employee's] tea

leaves.” The court noted that the employee “had an obligation to truthfully communicate any need for an accommodation, or to have her doctor do so on her behalf if she was too embarrassed to respond to MBNA's many inquiries into any reason she may have had for continuing to be late. In Kennedy v. Superior Printing Co., 215 F.3d 650 (6th Cir. 2000), the employer requested updated medical information from the plaintiff in order to verify that he was still entitled to a modified schedule (which the employer had provided for over one year). Although the plaintiff maintained that the employer was simply trying to obtain information to defend its decision not to accommodate, the court concluded that the employer was entitled to require the employee to “provide medical documentation sufficient to prove that he had a condition requiring accommodation.” The court pointed out that since the plaintiff failed to cooperate with the employer’s repeated requests for “medical documentation demonstrating the need for accommodation” and since the employee failed to show up for two independent medical examinations, the employer did not violate the ADA by refusing to provide the requested accommodation.

Courts may require less of an employee with a mental disability. For example, in Loulsaged v. Akzo Nobel Inc., 178 F.3d 731 (5th Cir. 1999), the court noted that mental disability cases present “unique problems,” where employees “may not be fully aware of the limitations their conditions create, or be able to effectively communicate their needs to an employer.” Therefore, according to the court, employers in such cases “may have an extra duty to explore the employee’s condition . . . and the interactivity of the process may be of less importance.”

### Telling Other Employees That an Employee is Receiving Accommodation

A difficult practical question that frequently arises in the workplace is what -- if anything -- an employer may tell other employees about one employee's reasonable accommodation. It is important to remember that the ADA prohibits employers from disclosing an employee's "medical" information (with limited exceptions) Therefore, the hard question is whether the mere fact that someone is receiving reasonable accommodation is "medical" information. Some disability-rights advocates have argued that disclosing that someone is receiving an ADA reasonable accommodation essentially *reveals* that the individual has a disability.



Certainly, the safest approach an employer can take is to simply *not* disclose this fact to other employees. Of course, that is easier said than done, since other employees -- or unions -- may insist on knowing why one employee gets to perform the job in a different manner (or under different policies). Therefore, an employer may simply need to say *something*. There is a strong argument that an employer would not violate the ADA by telling other employees that, in order to comply with federal law, it has made a modification for the particular employee, but that federal law prohibits the employer from further disclosure. This broad statement arguably does not disclose that the individual has a disability because a number of federal laws impose a variety of workplace requirements (e.g., requirements under the Occupational Safety and Health Act or the Family and Medical Leave Act of 1993). In fact, the EEOC's position is that although an employer may not tell employees that it is providing a reasonable accommodation for an employee, the employer may "explain that it is acting for legitimate business reasons or in compliance with federal law." EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (3/25/97), at p. 18. **This Guidance is available on the internet at [www.eeoc.gov](http://www.eeoc.gov).** Of course, an employer can always decide that it is willing to take the additional risk of disclosing more specific information (in order to maintain workplace peace).

Another interesting issue is what an employer may tell a supervisor to whom an employee is being reassigned as an accommodation. In an informal guidance letter, the EEOC has stated that if a manager/supervisor is normally involved in interviewing applicants, s/he may be informed "that an employee with a disability is to receive the position as a reassignment." The EEOC elaborated that "it should normally be sufficient to inform the manager/supervisor that the employee has a disability, and that the ADA requires that s/he be given the position as a reassignment as long as s/he is qualified."<sup>7</sup>

#### Employer's Right to Choose the Accommodation

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<sup>7</sup> 1/31/00 Informal Guidance letter from Peggy R. Mastroianni, Associate Legal Counsel.

An employer's obligation is to provide an effective accommodation -- not *necessarily* the accommodation that the individual most wants. See Appendix to 29 C.F.R. § 1630.9. Indeed, the EEOC has consistently stated that although an employer must give an "effective" accommodation, it need not be the "best" accommodation.<sup>8</sup> Although an employer should give consideration to the individual's preferred accommodation, the employer is free to choose any effective accommodation that is less expensive or easier to provide. This means that an employer may provide an accommodation that requires an employee to remain on the job (for example, a reallocation of marginal functions or a temporary transfer) despite the employee's request for "leave" as an accommodation. See EEOC Enforcement Guidance: Workers' Compensation and the ADA, No. 915.002 (9/3/96), at p. 18; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 10/17/02) at Question 9. On the other hand, an employer may not choose an ineffective accommodation over an effective accommodation. For example, the EEOC has stated that an employer may not require an employee to go on leave if an accommodation would allow the employee to work. See EEOC's Amicus Curiae Brief in Bizelli v. Parker Amchem and Henkel Corp., Brief filed with Eighth Circuit, 3/24/99) at 24. For example, in an informal guidance letter, the EEOC wrote that an employer could not choose "leave" as the accommodation if the employee requested "to work at home for a fixed period of time" because work-at-home is the more effective accommodation.<sup>9</sup>

Courts have subscribed to the position that an employer may choose among effective accommodations. For example, in Trepka v. Board of Education of Cleveland City School District, 2002 U.S. App. LEXIS 1357 (6th Cir. 2002)(unpublished), the court noted that an employer has the "ultimate discretion" to choose among effective accommodations and that an "employer need not provide the accommodation that the employee requests or prefers" if another reasonable accommodation is provided. In this case, the employee (a teacher) wanted to be

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<sup>8</sup> 5/15/95 Informal Guidance letter from Elizabeth M. Thornton, Deputy Legal Counsel.

<sup>9</sup> 9/27/01 Informal Guidance Letter from Sharon Rennert (Senior Attorney Advisor)(although "leave and working at home are forms of reasonable accommodation," these "are not equally effective because only one – working at home – allows the employee to perform his job.").

assigned to a classroom closer to the parking lot because of her back and neck injuries. The employer instead offered her assistance (a cart and/or custodial help) in carrying items from her car to the classroom. The court held that this offer complied with the ADA because the plaintiff did not show that it was inadequate. In Smith v. Honda of America Manufacturing, Inc., 2004 U.S. App. LEXIS 10336 (6th Cir. 2004)(unpublished), the court noted that the employer has the right to choose between effective accommodations. When an employee “declines an offered reasonable accommodation,” s/he “forfeits the status as a ‘qualified individual with a disability.’” (citation omitted). In this case, the employer transferred the plaintiff to a production job in which she would “not be exposed to undue amounts of airborne contaminants” (pursuant to her restrictions). Although the plaintiff claimed that she wanted a transfer to an office position, the court noted that she continues to be able to work in the production position without suffering any problems, and that the position conformed to her medical restrictions. In Gronne v. Apple Bank for Savings, 2001 U.S. App. LEXIS 533 (2d Cir. 2001)(unpublished), the court stated that an employer has the discretion to choose among effective accommodations. Therefore, although the employee wanted to be transferred, the employer could chose to provide an accommodation which would allow the employee to perform her job in the current location. In Kiel v. Select Artificials, Inc., 169 F.3d 1131 (8th Cir. 1999), the court noted that “if more than one accommodation would allow the individual to perform the essential functions of the position,” the employer can choose whichever accommodation it wishes to provide. The court stated that an employer “may choose the less expensive accommodation or the accommodation that is easier for it to provide.” In Leine v. California Department of Rehabilitation, 1999 U.S. App. LEXIS 32521 (9th Cir. 1999)(unpublished), the plaintiff, a blind employee, requested Braille computer equipment and sued because she was not given this equipment for 19 months. The court noted, however, that the ADA does not require an employer “to provide the accommodation of Leine's choice, only a reasonable accommodation.” The court pointed out that the employer had given the employee a number of workplace accommodations, including a reader to assist her in accessing her computer and reading data, a driver to take her on departmental business, an assistant to transcribe her work, an upgraded voice synthesizer program and a screen-reader program. In addition, the court noted that during this period, the employer solicited bids for Braille computer equipment and hired a consultant to evaluate the employee’s computer needs. Similarly, in Allen v. Rapides Parish School Board, 204 F.3d 619 (5th Cir. 2000), the court found that the employer had provided a number of accommodations (such as extended leave and two transfers) to the employee who heard a constant ringing in his ears. The court noted that the employee was not entitled to the accommodation of his choice

(transfer to a specific position he desired). In Connolly v. Entex Information Services, Inc., 2001 U.S. App. LEXIS 26802 (9th Cir. 2001)(unpublished), the employee claimed that the employer violated the ADA by not giving him his requested accommodation, a reassignment to the highly-coveted “special projects” area. The court disagreed, noting that the ADA’s “goal is to identify an accommodation that allows the employee to perform the job effectively, not to provide the job of the employee's choice.” In this case, the employer offered the employee a job he had previously performed effectively, but the employee refused the job because he found it monotonous. In Rehling v. City of Chicago, 207 F.3d 1009 (7th Cir. 2000), the plaintiff, a police officer, could no longer perform his job because of a leg amputation. According to the court, the City offered him two possible positions -- a job on the midnight shift at O'Hare Airport and one in the Alternative Response Unit. The plaintiff refused these offers because he wanted a position in a particular department. The court concluded, however, that “[i]t is well-established that an employer is obligated to provide a qualified individual with a reasonable accommodation, not the accommodation he would prefer.” As a result, “an employee who requests a transfer cannot dictate the employer's choice of alternative positions.” Likewise, in Walter v. United Airlines, Inc., 2000 U.S. App. LEXIS 26875 (4th Cir. 2000)(unpublished), the court noted that “the ADA does not require an employer to provide the specific accommodation requested by the disabled employee, or even to provide the best accommodation, so long as the accommodation provided to the disabled employee is reasonable. In this case, the employer made a number of attempts to accommodate a reservations agent with photosensitivity who said that she could not work around fluorescent lights (for example, the employer changed the bulbs in her work area and parts of the cafeteria, constructed screens to block out light, exempted her from various policies). The court held that the employer is not liable simply because it did not provide every single one of the accommodations requested by the employee. In Stewart v. Happy Herman’s Cheshire Bridge, Inc., 117 F.3d 1278 (11th Cir. 1997), the court stated that an individual is entitled “only to a reasonable accommodation,” not “the accommodation of her choice.” In Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996), the court noted that an employer does not have to provide the accommodation that an individual wants, as long as it has "made available other reasonable and effective accommodations."

Interestingly, in Basith v. Cook County, 241 F.3d 919 (7th Cir. 2001), the court held that where the employer went “beyond” the ADA by creating a special job for the plaintiff, it was under “no duty” to provide the accommodation the employee wanted – a wheelchair so that he could continue to perform his original job. It might, however, be possible to argue that the employer-

provided accommodation was not as effective as the accommodation requested by the employee. On the other hand, although not a reasonable accommodation case, in Cripe v. City of San Jose, 261 F.3d 877 (9th Cir. 2001), the City claimed that it could deny its disabled police officers on modified duty the right to compete for desirable “specialized duty” assignments since it had already given them modified positions with the same pay and benefits. The court rejected this argument, noting that the ADA “clearly requires that qualified disabled persons be allowed to compete for and accept” positions they seek, and does not permit an employer to deny a position to an individual “on the ground that he has been afforded a different position that he does not desire.”

As discussed below in the section on "Reassignment," at least one federal court appears to have held that an employer may choose to offer an employee (who could no longer perform his job) additional training to remain in that job, rather than reassign the employee. Schmidt v. Methodist Hospital, 89 F.3d 342 (7th Cir. 1996)

Of course, an employee is free to refuse an accommodation offered by the employer. See Appendix to 29 C.F.R. § 1630.9(d). Nonetheless, the employer has certainly met its ADA obligations by *offering* an effective accommodation. In addition, the EEOC and courts have specifically stated that although an individual cannot be forced to accept a reasonable accommodation, if s/he cannot perform the job without it, s/he will not be considered "qualified" under the law. 29 C.F.R. § 1630.9(d); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 11.<sup>10</sup> For example, in Hedrick v. Western Reserve Care System and Forum Health, 355 F.3d 444 (6th Cir. 2004), the court noted that although an individual with a disability “is not required to accept an accommodation, aid, service, opportunity or benefit,” if s/he “rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired,” then s/he “will not be considered a qualified individual with a disability.” In this case, since the plaintiff, a nurse who could no longer perform her duties, rejected the most equivalent position (as a “referral center scheduler”) because of the salary, the court held that she was not a qualified individual with a disability.

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<sup>10</sup>3/10/94 Informal Guidance letter from Philip B. Calkins, Acting Director of Communications and Legislative Affairs (“[i]f an employee refuses an effective reasonable accommodation, but cannot perform a job's essential functions without it, s/he will no longer be considered qualified and will lose protection under the ADA”).

Similarly, in McGuire v. Board of Education of Raceland-Worthington Independent Schools, 2004 U.S. App. LEXIS 24104 (6th Cir. 2004)(unpublished), a Kentucky case decided under ADA principles, the court held that the employee, a school teacher with arthritis, was not “qualified” where she rejected the employer’s offer of the accommodation that she needed to perform the job (a first-floor classroom).

In Crocker v. Runyon, 207 F.3d 314 (6th Cir. 2000), the court found that employer, the Postal Service, offered the letter carrier with a leg impairment “an accommodation in the form of a more sedentary job, which he refused.” As a result, the court determined that the plaintiff was not “an otherwise qualified individual” since he rejected a needed reasonable accommodation. Similarly, in Keever v. City of Middleton, 145 F.3d 809 (6th Cir. 1998), the court considered whether a police officer who could no longer perform his position was qualified after he turned down a reassignment to a desk job. The officer wanted assignment to a less stressful shift or to a detective position, and he felt that the desk job was demeaning and had fewer challenges and satisfaction than being a street officer. The court concluded that, given the officer’s stress-related attendance problems, the city’s offer was reasonable (although not the officer’s “preferred accommodation”), and that the officer was not qualified since he refused the offer. In Crawford v. Union Carbide Corp., 1999 U.S. App. LEXIS 32483 (4th Cir. 1999)(unpublished), the employee lost her job due to a reorganization, and the employer offered her an alternative position that she allegedly could perform despite her respiratory condition. The employee refused the position because she considered it a demotion. The court found that the employer “satisfied any duty it may have had to accommodate Crawford by offering her the records clerk position,” and therefore did not need to consider her request for other positions when she refused this position. Similarly, Willett v. State of Kansas, 1997 U.S. App. LEXIS 19213 (10th Cir. 1997)(unpublished), concerned a nurse with lupus who could no longer perform her job and turned down the employer's offer of a transfer. The court noted that if an individual who cannot perform his/her essential functions rejects a reasonable accommodation offer, s/he is not a qualified individual with a disability. See also Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996)(although an individual "is not required to accept an offered accommodation," if s/he rejects one that is needed to perform the job, s/he will not be "qualified"); Smith v. Midland Brake, 180 F.3d 1154 (10th Cir. 1999)(if an employee could not be accommodated in the original job and s/he rejects reassignment to an equivalent position (or lower-level position if no equivalent position exists), “the employer is under no obligation to continue offering other reassignments”); Andrews v. Virginia, 2000 U.S. App. LEXIS 24264 (4th Cir.

2000)(unpublished)(where the employee turned down an objectively reasonable accommodation that she needed, she was not considered “qualified”). Likewise, in Pugliese v. Arizona, 1999 U.S. App. LEXIS 30145 (9th Cir. 1999)(unpublished), the court held that the plaintiff’s failure to accept a reassignment negated her ADA claim for the period after the offer. However, the court noted that the plaintiff might still have an ADA claim for the period during which she was forced into disability leave before being offered reassignment or some other accommodation.

It is important to remember, however, that an individual may have the right to turn down an accommodation if it is ineffective or if a more effective one exists. For example, in Architect of the Capitol v. Office of Compliance, 361 F.3d 633 (Fed. Cir. 2004), the court held that the employee had a right to refuse reassignment to a vacant elevator operator position in favor of a vacant subway operator position because the elevator position would have aggravated her asthmatic condition (because of the fumes in an elevator). In Hoskins v. Oakland County Sheriff’s Department, 227 F.3d 719 (6th Cir. 2000), the court noted that the plaintiff’s refusal to accept a lower-level position would not preclude her from being covered under the ADA if she could demonstrate that an equivalent position for which she was qualified had been available. Likewise, in Hall v. Claussen, 2001 U.S. App. LEXIS 3404 (10th Cir. 2001)(unpublished), the court noted that “if the employee rejects an offer of reassignment that is consistent with an employer’s duties of reasonable accommodation under the ADA, the employer is not required to offer additional reassignment.” However, in this case, the court held that the plaintiff was not precluded from claiming a right to be reassigned where the offered positions were either demotions or jobs that the individual was unable to perform because of other functional limitations.

### Reasonable Accommodations for Temporary Workers

In the case of temporary workers, several issues arise concerning reasonable accommodation. One common question is whether the temporary agency or the client company has the obligation to provide accommodations. According to the EEOC, during the application process, the staffing firm is the applicant’s prospective employer “because it has not yet identified the client for which the applicant will work.” Therefore, the staffing firm has the obligation to provide accommodations for the application process. EEOC Enforcement Guidance on the Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms

(12/22/00), at C(6). **This Guidance is available on the internet at [www.eeoc.gov](http://www.eeoc.gov).** Once a worker has been referred to a client, both the staffing firm and the client may have the obligation to accommodate if both qualify as joint employers. *Id.*, at C(7). The EEOC recommends that, from a practical perspective, the two companies specify in their contracts with each other who will provide accommodations for referred workers. Importantly, the EEOC also has stated that if a reasonable accommodation cannot be provided quickly enough to allow the temporary assignment to be completed in a timely manner, the staffing agency and/or client may have a good undue hardship claim. *Id.* at C(8). In addition, the EEOC has stated that, from a cost perspective, if an accommodation would be too expensive for one company to provide, that entity must show that it “made good faith, but unsuccessful, efforts to obtain contribution from the other entity.” *Id.* at C(9). If an accommodation cannot be provided by one entity because it is completely in the control of the other entity, the first entity may show undue hardship by showing that it “made good faith, but unsuccessful efforts to obtain the other’s cooperation in providing the reasonable accommodation.” *Id.* at C(10).

## **Types of Reasonable Accommodation**

### Unpaid Leave as a Reasonable Accommodation

#### *Whether Leave is a Reasonable Accommodation*

Most authority indicates that unpaid leave *is* a form of reasonable accommodation. Unpaid leave may be an appropriate reasonable accommodation when an individual expects to return to work after getting treatment for a disability, recovering from an illness, or taking some other action in connection with his/her disability, such as training a guide dog.

The EEOC has consistently taken the position that unpaid leave can be a reasonable accommodation. Appendix to 29 C.F.R. § 1630.2(o); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 16. In addition, a number of courts have held that leave is a form of reasonable accommodation in particular circumstances. For example, in Rascon v. U.S. West Communications, Inc., 143 F.3d 1324 (10th Cir. 1998), the court stated that leave of a specific duration is a form of reasonable accommodation. In that case, the court noted that the employer should have provided four



months leave so that the employee could be treated for his post-traumatic stress disorder. In Basith v. Cook County, 241 F.3d 919 (7th Cir. 2001), the court noted that providing the employee with a medical leave of absence “qualifies as a reasonable accommodation.” Similarly, in Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998), the court found that temporary leave for the employee's physician "to design an effective treatment program" for her depression was a possible accommodation. In Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999), the court noted that unpaid medical leave may be a reasonable accommodation for an employee who experienced fainting episodes. In Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001), a case involving an employee with obsessive compulsive disorder, the court similarly noted that a leave of absence could be required where the leave “would reasonably accommodate an employee’s disability and permit him, upon his return, to perform the essential functions of the job.” Similarly, in Wells v. IAM, 2001 U.S. App. LEXIS 3150 (9th Cir. 2001)(unpublished), the court found that extending medical leave was a reasonable accommodation for an employee undergoing cancer treatments. Likewise, in Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996), the court stated that an employer may have to provide an employee with a leave of absence so he could get treatment for alcoholism. Likewise, in Hudson v. MCI Telecommunications Corp., 87 F.3d 1167 (10th Cir. 1996), the court observed that "a reasonable allowance of time for medical care and treatment may, in appropriate circumstances, constitute a reasonable accommodation."

Another question that arises is how much leave an individual must be given as a reasonable accommodation. This is likely to be fact-specific -- depending on whether a particular amount of time imposes an undue hardship on the employer and on whether the individual is still considered “qualified.” For example, in Cleveland v. Federal Express Corp., 2003 U.S. App. LEXIS 24786 (6th Cir. 2003)(unpublished), the court held that there is no “bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation” and, therefore, the plaintiff’s requested six-month leave could be a reasonable accommodation for her lupus. In Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999), the court suggested that it might not be an undue hardship for an employer to hold a job open for a lengthy period of time where its own benefits policy allowed employees to take up to one year of leave and it regularly hired seasonal employees to fill positions. Similarly, in Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000), the court noted that it may not have been an undue hardship for the employer to hold the employee’s secretarial job open for a lengthy period in light of the company’s ability to fill the position with individuals hired from a temporary

agency. The court noted that the situation may have been different if the employer had been able to show that temporary replacements were “unavailable or unsuited to the position,” or that the cost of a temporary employee was greater than the cost of a permanent employee. In Haschmann v. Time Warner Entertainment Co., 151 F.3d 591 (7th Cir. 1998), the court held that it would not have been an undue hardship for the employer to hold the employee's job open for 2-4 weeks, in light of the evidence that the job had been vacant for a number of months before the employee was hired, it took six months to fill the position after the employee was discharged, and other employees were able to handle the job's duties on an interim basis. Interestingly, in Smith v. Diffie Ford-Lincoln-Mercury, 298 F.3d 955 (10th Cir. 2002), the court noted that where the employee “had requested and taken no more leave than the FMLA already required that she be given, we cannot conclude that the length of time was unreasonable or that the leave unduly burdened” the employer.

On the other hand, in Epps v. City of Pine Lawn, 353 F.3d 588 (8th Cir. 2003), the court held that a six-month leave of absence was not a required reasonable accommodation for a policeman with a small municipality which could not reallocate his job duties among its small staff of fifteen to twenty-two police officers. The court noted that “an employer is not required to hire additional people or assign tasks to other employees to reallocate essential functions that an employee must perform.” In Oestringer v. Dillard Store Services, 2004 U.S. App. LEXIS 2375 (7th Cir. 2004)(unpublished), the court held that “a request for medical leave is reasonable only if it is for a short amount of time,” noting one lower court decision which held that two months would not be reasonable. Using a slightly different analysis, in Byrne v. Avon Products, Inc., 328 F.3d 379 (7th Cir. 2003), the court noted that although “time off may be an apt accommodation for intermittent conditions,” the “inability to work for a multi-month period” means that the individual is not “qualified” under the ADA. In this case, the plaintiff claimed to be unable to work for approximately two to three months because of a mental disorder.

The EEOC has stated that if holding a position open for the needed leave period would pose an undue hardship:

the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 18.

Importantly, the EEOC has stated that an individual cannot be penalized for work missed during leave which was taken as a reasonable accommodation. For example, the EEOC has written that a salesperson cannot be penalized for below-average sales if that lower performance was the result of ADA-required leave. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 19. Supporting this point, in Parker v. Sony Pictures Entertainment, Inc., 260 F.3d 100 (2d Cir. 2001), the court stated that an employer's argument that an employee was unable to perform a job "is not a legitimate basis for discharge when that inability stems from the employer's unjustified failure to provide a reasonable accommodation." However, as noted later in this paper, in Matthews v. Commonwealth Edison Co., 128 F.3d 1194 (7th Cir. 1997), that same court earlier held that the employer could retain its most productive employees in a RIF, even if an employee was less productive since he had a reduced work schedule because of his disability.

#### *Whether Employee's Job Must be Held Open During Leave*

Although there is general agreement that unpaid leave is a form of reasonable accommodation, there is *disagreement* on what this means -- specifically, whether it means that an employee's job must actually be held open. The EEOC takes the position that unpaid leave means holding the employee's job open, unless doing so would cause an undue hardship. See EEOC Fact Sheet: "The FMLA, the ADA, and Title VII of the Civil Rights Act of 1964" at p. 7 (question 14), and EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 18.

However, some management attorneys have argued that unpaid leave does *not* mean holding the job open, but simply means putting the individual in an unpaid leave *status*. It is unlikely that many courts will adopt this position because, in reality, it would give the individual very little as a reasonable accommodation. In fact, in both Schmidt v. Safeway and Corbett v. National Products Co., the courts implied that the job must be held open; the courts stated that the employer is required to provide the leave if it is likely that the employee will be able to *perform the duties of the job* after the treatment. Schmidt, 3 AD Cases at 1146, Corbett, 4 AD Cases at 990. Moreover, from a management perspective, the argument is risky; if an employer is only

putting the individual in an unpaid leave *status*, it will be nearly impossible for the employer to ever argue that providing unpaid leave imposes an undue hardship.

### *Leave for a Definite vs. Indefinite Time*

Another question regarding unpaid leave is whether an employer has to hold the job open for an *indefinite* period of time. This situation arises when an employee says s/he simply doesn't have any idea when s/he can come back. The situation also arises if an employee continually requests more and more leave after the expiration of prior leave; this pattern arguably reflects a request for indefinite leave.

The EEOC has been somewhat inconsistent on the issue of indefinite leave as a reasonable accommodation. In an amicus brief to the Ninth Circuit, the EEOC stated that, "[t]he mere fact that an individual with a disability does not know exactly how long his recovery will take does not automatically render his leave request unreasonable." See EEOC Amicus Curiae Brief in Sanders v. Arneson Products, Inc., No. 95-15349 (N.D. Ca. 1995) at 11. In addition, the EEOC stated that the fact that someone might ask for more than one leave of absence to accommodate his disability also does not render the proposed accommodation unreasonable as a matter of law. Id. at 12. Significantly, however, the EEOC acknowledged that "there may be some situations in which an employee's chances of returning to work after a leave of absence are so remote or the amount or number of leaves needed is so extensive or open-ended that an individual cannot be said to be a qualified individual with a disability as a matter of law." Id. at 12. In fact, the EEOC stated that "the duty to provide reasonable accommodation under the ADA 'does not require [an employer] to wait indefinitely for [a disabled employee's] medical conditions to be corrected.'" EEOC's Amicus Curiae Corrected Brief in Hindman v. Greenville Hospital System, No. 96-2784 (Brief filed with Fourth Circuit, 5/13/97) at 41 (citation omitted; brackets in EEOC brief). Most recently, the EEOC has stated that if an employee cannot "provide a fixed date of return," the employer can deny such leave only if it can show undue hardship because of this uncertainty (for example, "disruption to the operations of the entity that occurs because the employer can neither plan for the employee's return nor permanently fill the position"). EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 44.

Most courts have been clearer on the issue, holding that an employer does *not* have to provide *indefinite leave* as a reasonable accommodation. For example, in Fogleman v. Greater Hazleton Health Alliance, 2004 U.S. App. LEXIS 26861 (3d Cir. 2004)(unpublished), the court held that although leave is an accommodation when it would enable the individual to perform essential functions “within a reasonable amount of time,” leave “for an indefinite and open-ended period of time” does “not constitute a reasonable accommodation.” In Vice v. Blue Cross and Blue Shield of Oklahoma, 2004 U.S. App. LEXIS 21375 (10th Cir. 2004)(unpublished), the court held that the employer was not required to keep the employee on indefinite leave as an accommodation, where she never indicated when, if ever, she would be able to return to work. Likewise, in Lara v. State Farm Fire & Casualty Co., 2005 U.S. App. LEXIS 1341 (10th Cir. 2005)(unpublished), the court held that a leave for an indefinite duration is not a reasonable accommodation. The court noted that where the employee requested leave for a particular time period but did not give “an expected duration of the impairment,” the leave is not required because the employer “cannot determine whether the employee will be able to perform the essential functions of the job in the near future and therefore whether the leave request is a ‘reasonable’ accommodation.” In Wood v. Green, 323 F.3d 1309 (11th Cir. 2003), the court held that it is not a reasonable accommodation to provide indefinite leave to an employee (suffering from cluster headaches) who did not know when he could return to work. The court noted that the ADA does not require “an employer to wait for an indefinite period for an accommodation to achieve its intended effect.” Instead, reasonable accommodation “is by its terms most logically construed as that which, presently, or in the immediate future, enables the employee to perform the essential functions of the job in question.” Likewise, in Crano v. Graphic Packaging Corp., 2003 U.S. App. LEXIS 11286 (10th Cir. 2003)(unpublished), the court held that the plaintiff was not entitled to an exception to the company’s leave policies as an accommodation where he sought indefinite leave. The court noted that “maintaining an employee on indefinite leave while reserving a job opening for his possible return is not a reasonable obligation to be imposed on employers under the ADA.” In Oestringer v. Dillard Store Services, 2004 U.S. App. LEXIS 2375 (7th Cir. 2004)(unpublished), the court held that a leave request cannot be indefinite. In this case, where the plaintiff asked several times for short periods of leave, but did not know when she could return to work, the court held that the request was for indefinite leave. In Mack v. State Farm Mutual Automobile Insurance Co., 2000 U.S. App. LEXIS 1012 (7th Cir. 2000)(unpublished), the court noted that the employer did not have to provide “an indefinite leave of absence” where the plaintiff’s “own physician stated that it was ‘unknown’” when he

would be able to return to work. In Nowak v. St. Rita High School, 142 F.3d 999 (7th Cir. 1998), the court stated that "coming to work on a regular basis" is essential to a school teacher's job and an employer need not "accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence." In Mitchell v. Washingtonville Central School District, 190 F.3d 1 (2d Cir. 1999), the court noted that the School Board was not required to grant indefinite leave to a janitor who could not perform his essential, non-sedentary duties. Similarly, in Parker v. Columbia Pictures Industries, 204 F.3d 326 (2d Cir. 2000), the court stated that "the duty to make reasonable accommodations does not, of course, require an employer to hold an injured employee's position open indefinitely while the employee attempts to recover." In Walsh v. United Parcel Service, 201 F.3d 718 (6th Cir. 2000), the court considered whether it was a reasonable accommodation to provide the plaintiff with additional leave so that he could obtain more information about his disability and recuperation period. In this case, the employee had already been given one year of paid disability leave, and more than six months of unpaid leave. The court noted that his medical statements "only contained a vague estimate of the date that plaintiff could return to his job as a pilot, placing it at one to three years in the future." The court found that this amounted to a request for indefinite leave, and that "when the requested accommodation has no reasonable prospect of allowing the individual to work in the identifiable future, it is objectively not an accommodation that the employer should be required to provide." The court noted that where "an employer has already provided a substantial leave, an additional leave period of a significant duration, with no clear prospects for recovery, is an objectively unreasonable accommodation." Likewise, in Harris v. Circuit Court, 2001 U.S. App. LEXIS 23772 (6th Cir. 2001)(unpublished), the court held that an employer does not need "to give an employee an indefinite leave of absence when the employee cannot provide the expected duration of her impairment." In this case, the employer held the employee's position open for one year and the employee was not able to give a date when she would be able to return following her breast cancer (even though she was released to return to work soon after her termination). In Cisneros v. Wilson, 226 F.3d 1113 (10th Cir. 2000), the court stated that although leave is a possible reasonable accommodation, "a request for indefinite leave cannot constitute 'reasonable' accommodation" because such a request "does not allow the employee to perform the essential functions of the job in the near future." In this case, the employee claimed that she did not request indefinite leave since her request was for a specific 3-month time period (November 1995 - January 1996). However, the court held that the request was still indefinite because the employee did not provide information about the expected duration of her impairment. In addition, her doctors' notes stated that the duration of her leave was unknown

but that she should be excused “from any and all work until January of 1996.” The court concluded that since the plaintiff had provided no firm date of return to work, her request was indefinite. The court also stated that the plaintiff’s own statement that she “expected to recover by January 1996” was insufficient evidence in light of the apparently conflicting doctors’ statements. Similarly, in Smith v. Blue Cross/Blue Shield of Kansas, Inc., 102 F.3d 1075 (10th Cir. 1996), cert. denied, 118 S. Ct. 54 (1997), the court noted that an employer “is not required to wait indefinitely” for an employee to return to work. In Smith, the employee was out of work because of her severe panic disorder and, according to the court, “presented no evidence of the expected duration of her complete disability.” Likewise, in Taylor v. Pepsi-Cola Co., 196 F.3d 1106 (10th Cir. 1999), the court stated that the employee “failed to present evidence of the expected duration of his impairment,” and that “an indefinite period of medical leave is not a reasonable accommodation.” In Johnson v. Foulds, Inc., 1997 U.S. App. LEXIS 3386 (7th Cir. 1997)(unpublished), the court held that an indefinite leave “is neither an ‘accommodation,’ because it does not ‘enable a disabled individual to work,’ nor ‘reasonable,’ because the cost to the employer is so clearly disproportionate to the benefit.” Likewise, in Duckett v. Dunlop Tire Corp., 120 F.3d 1222 (11th Cir. 1997), the court agreed that indefinite leave is not a required reasonable accommodation. In that case, the employee had been on medical leave for ten months and stated that he needed two additional months. However, the court noted that the leave request was still indefinite where the individual did not present any evidence that he would actually be able to return to work in two months.

In Watkins v. J&S Oil Co., Inc., 164 F.3d 55 (1st Cir. 1998), the court held that the employer did not need to hold the employee’s job (as a gas station manager) open for an indefinite amount of time. In Rawlings v. Runyon, 1997 U.S. App. LEXIS 5346 (4th Cir. 1997)(unpublished), the court stated that reasonable accommodation does not require providing indefinite leave while the employee processes his disability retirement application. In Tubbs v. Formica Corp., 2004 U.S. App. LEXIS 16467 (6th Cir. 2004)(unpublished), the court noted that reasonable accommodation does not include indefinite leave. The court held that the employee’s “repeated medical leaves of absence are not reasonable” in light of the fact that she had taken 14 medical leaves in her 23 years of employment, and had worked no longer than seven months before needing another leave. In Teague v. Las Vegas Sands, Inc., 1997 U.S. App. LEXIS 7618 (9th Cir. 1997)(unpublished), the court held that the employer was not required to grant an employee “additional, possibly indefinite, leave” after giving him “several extensions of his leave.” Similarly, in Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001), the

court noted that an employee cannot “repeatedly invoke[]” leave as an accommodation “where there are plausible reasons to believe” that leave would not be effective, such as “the fact that a prior leave was granted and was unsuccessful.” Along these lines, in Walton v. Mental Health Association of Southeastern Pennsylvania, 168 F.3d 1228 (3rd Cir. 1999), the court noted that although unpaid leave can be a reasonable accommodation, an employer is not required to provide repeated extensions of such leave. Similarly, in Myers v. Hose, 50 F.3d 278 (4th Cir. 1995), the court held that an employer had no obligation to provide indefinite leave to a bus driver who had diabetes, a heart condition, and hypertension. Likewise, in Rogers v. International Marine Terminals, Inc., 87 F.3d 755 n.2 (5th Cir. 1996), the court held that the employer was not required “to make reasonable accommodation in the form of an indefinite leave of absence.” In Hudson v. MCI Telecommunications Corp., 87 F.3d 1167 (10th Cir. 1996), the court considered the reasonable accommodation claim of an individual whose doctor's reports and notes indicated that the impairment was not permanent, but did not indicate *when* the employee would be able to return to her job. The court considered this to be a request for “unpaid leave of indefinite duration” and held that an employer does not have to provide such leave as a reasonable accommodation. In Monette v. Electronic Data Systems, 90 F.3d 1173 (6th Cir. 1996), the court noted that “employers are under no duty to keep employees on unpaid leave indefinitely.”

Importantly, if an employer is going to claim that the employee needed indefinite leave, it should evaluate whether the extent of leave is truly open-ended. In Haschmann v. Time Warner Entertainment Co., 151 F.3d 591 (7th Cir. 1998), the court noted that the employer could not claim that the employee needed indefinite leave where the employer did not even call the employee's doctor or ask an independent physician to evaluate the employee.

At least one Court of Appeals has suggested that indefinite leave might sometimes be a reasonable accommodation. In Cleveland v. Federal Express Corp., 2003 U.S. App. LEXIS 24786 (6th Cir. 2003)(unpublished), the court suggested that indefinite leave could be a reasonable accommodation unless the employer can show that it causes an undue hardship. Likewise, in Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775 (6th Cir. 1998), the court stated that it was “not sure that there should be a per se rule that an unpaid leave of indefinite duration (or a very lengthy period, such as one year) could never constitute a ‘reasonable accommodation.’” Another court has suggested that employers should not require absolute definiteness in a return date. In Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638



(1st Cir. 2000), the court stated that “some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite.” The court suggested that the situation could be different “where the employee gave no indication as to when she might be able to return to work, and, instead, she simply demanded that her job be held open indefinitely,” or where the absences were “erratic” and “unexplained.”

### *Leave for Unreliable/Unpredictable Attendance*

Yet another related issue is whether unpaid leave must be provided for someone whose attendance is unreliable and/or unpredictable. There is broad agreement that reliable attendance is required to perform most jobs. Therefore, most courts say that an employer does *not* have to provide leave for an employee who will be unable to maintain predictable attendance. For example, in Buckles v. First Data Resources, Inc., 176 F.3d 1098 (8th Cir. 1999), the employee had rhinosinusitis, and experienced wheezing and other problems when he was exposed to perfumes, nail polish and other irritants; he left work when he thought he would be exposed to an irritant. The court noted that “[u]nfettered ability to leave work at any time is certainly not a reasonable accommodation” because reliable, predictable attendance is required for the job. Likewise, in Jovanovic v. In-Sink-Erator, 201 F.3d 894 (7th Cir. 2000), the plaintiff, a factory tool and tie worker, argued that he was qualified despite his erratic attendance. The court noted that this worker could be considered qualified for such a job only if the ADA required employers to provide an open-ended schedule, where the worker could “come and go as he pleased.” The court found that such a schedule is not required for a factory worker. Along the same lines, in Amadio v. Ford Motor Company, 238 F.3d 919 (7th Cir. 2001), where the plaintiff had taken 23 medical leaves in three years, the court stated that an employer is not required to give an “open-ended schedule that allows the employee to come and go as he pleases.” In Hibbler v. Regional Medical Center at Memphis, 2001 U.S. App. LEXIS 13323 (6th Cir. 2001)(unpublished), when the plaintiff did not feel well on a number of occasions, she arrived at work late (an hour or more) without calling her supervisor. The court held that the employer was “not required to overlook or accommodate frequent unscheduled -- and unapproved -- absences.” Similarly, in Earl v. Mervyns, Inc., 207 F.3d 1361 (11th Cir. 2000), as noted earlier, the court held that

punctuality was an essential function of the plaintiff's job as a Store Area Coordinator; the plaintiff could not arrive at work on time because of her Obsessive Compulsive Disorder. The court held that the employer was not required to permit the plaintiff "to arrive at work at any time without reprimand." In Keoughan v. Delta Airlines, Inc., 1997 U.S. App. LEXIS 12232 (10th Cir. 1997)(unpublished), the court held that "show[ing] up for work on a regular and predictable basis" is an essential function of a flight attendant's job. The airline therefore did not have to accommodate the plaintiff's bi-polar disorder "by increasing the number of times she may miss work without being disciplined." In Deal v. Candid Color Systems, 1998 U.S. App. LEXIS 15018 (10th Cir. 1998)(unpublished), the employee "was able to work so infrequently and sporadically" that a "second employee would be required" to perform her duties "on all but those rare occasions when [she] could come to work." The court held that the employer was not required to permit her to "work whenever she was able, with little or no notice of her absences." Likewise, in Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994), the court said that an employee is not qualified if he has prolonged, frequent, and unpredictable absences. Similarly, in Jackson v. Veterans Admin., 22 F.3d 277 (11th Cir.), reh'g denied en banc, 30 F.3d 1500 (11th Cir.), cert. dismissed, 513 U.S. 1052 (1994), the court said that a housekeeper who had very unpredictable and sporadic attendance due to severe arthritis was not qualified. In Price v. S-B Power Tool, 75 F.3d 362 (8th Cir.), cert. denied, 117 S. Ct. 274 (1996), the court agreed with the employer that the plaintiff had been lawfully terminated because she was absent more than three percent of her scheduled work time. In that case, the court specifically analyzed the nature of the work -- an assembly line where each person had specific duties -- in determining that the employee was not qualified based on her unpredictable attendance.

### Modifying No-Fault Attendance Policies as a Reasonable Accommodation

Many employers have a "no-fault" attendance policy, where employees get a certain amount of leave (for example, three months or six months) and then they are fired -- regardless of the reason for the absence. This no-fault policy should not *itself* be considered an ADA violation. For example, in Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998), the court held that a uniformly-applied one-year leave policy does not violate the ADA.

However, an employer should be prepared to give an employee additional unpaid leave *if* s/he is covered under the ADA, s/he requests such leave, and the additional leave would not impose an

undue hardship. For example, in Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000), the court expressly stated that “the company’s apparent position that the ADA can never impose an obligation on a company to grant an accommodation beyond the leave allowed under the company’s own [one year] leave policy is flatly wrong.” Likewise, in Gantt, the court suggested that additional leave would have been appropriate if the individual had requested such leave. However, the court noted that the employer did not have to speculate about the need for extended leave simply because it knew the employee was being paid disability benefits and the employee told the personnel director that she intended to return to work whenever her doctor released her. The court noted that “[t]he last thing the Company heard” from the employee “was that she did not know” when she would be able to return to work, and reasonable accommodation does not require indefinite leave. Similarly, in EEOC v. Sisters of Providence Hospital, 1999 U.S. App. LEXIS 21541 (9th Cir. 1999)(unpublished), the hospital had a six-month leave of absence policy. The court stated that the employer was not liable for failing to provide reasonable accommodation where the employee exhausted his leave and never requested an extension to the hospital’s policy. See also EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 17 (“employer must modify its ‘no-fault’ leave policy” to provide additional leave unless another accommodation “would enable the person to perform the essential functions of his/her position” or “additional leave would cause an undue hardship”).

If an employee requests additional leave, it may -- as a practical matter -- be difficult to show that providing additional short periods of leave (for example, two or three more weeks) would pose an undue hardship. However, as noted above, if an employee requests an indefinite amount of leave, an employer has an excellent argument that this is not an ADA-required reasonable accommodation.

### Job Restructuring as a Reasonable Accommodation

The statute and regulations clearly state that an employer must "restructure" an employee's job as a reasonable accommodation. This generally means modifying the job to reallocate or redistribute nonessential job functions, or altering when and/or how a function is performed. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii), Appendix. For example, in Benson v. Northwest Airlines, 62 F.3d 1108 (8th Cir. 1995), the court noted that reallocating marginal

functions *is* a reasonable accommodation. Of course, if an employer gives an employee's marginal functions to a second employee, the employer can give the second employee's marginal functions to the employee with the disability.

A related issue is whether an employer has the *right* to restructure marginal functions, rather than provide an accommodation so the employee can perform the marginal functions. In Hoffman v. Caterpillar, Inc., 256 F.3d 568 (7th Cir. 2001), the court held that the employer could assign other employees to run a high-speed scanner (a marginal function) instead of providing an accommodation to an employee with a disability so that she could operate the scanner. The court noted that “nothing in the statute requires an employer to accommodate the employee so that she may perform any nonessential function that she chooses.” Likewise, in Kiel v. Select Artificials, Inc., 169 F.3d 1131 (8th Cir. 1999), a deaf employee asked for a TDD so that he could make client telephone calls (a marginal function of his job). The court noted that “if more than one accommodation would allow the individual to perform the essential functions of the position,” the employer can choose whichever accommodation it wishes to provide. The court found that the employer could choose to simply give someone else the client calling duty, rather than provide a TDD so the employee could make his own calls.

It is important to remember that an employer never has to reallocate essential functions as a reasonable accommodation. For example, in Ammons v. Aramark Uniform Services, Inc., 368 F.3d 809 (7th Cir. 2004), the court held that the employer was not required to reallocate the heavy labor essential functions of the plaintiff’s boiler engineer job. In Eshaya v. Boeing Co., 2004 U.S. App. LEXIS 24525 (9th Cir. 2004)(unpublished), the court held that the employer was not required to reallocate the flight mechanic’s essential cargo bay responsibilities to others in the employee’s department. Similarly, in Hummel v. County of Saginaw, 2002 U.S. App. LEXIS 14684 (6th Cir. 2002)(unpublished), the court held that an employer need not require other employees to help a court security guard perform her essential function of apprehending suspects. In Basith v. Cook County, 241 F.3d 919 (7th Cir. 2001), the court held that the employer was not required to reallocate the “delivery of medications” function for a “Pharmacy Technician II” job because this was essential. In Phelps v. Optima Health, Inc., 251 F.3d 21 (1st Cir. 2001), the court held that since lifting was an essential function of a nurse’s job, the employer did not need to reallocate this to other employees by allowing the employee to engage in “job-sharing” with other employees. Likewise, in Lucas v. W.W. Grainger, Inc., 257 F.3d 1249 (11th Cir. 2001), the court held that an employer is not required to restructure essential

functions; the court stated that the difference between a required accommodation and restructuring essential functions “is the difference between saddling a camel and removing its hump.” In Bratten v. SSI Services, Inc., 185 F.3d 625 (6th Cir. 1999), the court considered whether the employer was required to assign certain tasks -- such as draining oil, replacing starters, installing tires, and additional duties -- to other employees when an automobile mechanic could not do these tasks because of his disability. The court held that an employer is “not required to assign existing employees or hire new employees to perform” an individual’s essential functions.

Similarly, in Wilson v. County of Bernalillo, 2000 U.S. App. LEXIS 7752 (10th Cir. 2000)(unpublished), the court held that restraining inmates was an essential function of a staff training manager’s job at a juvenile detention center. As a result, the employer did not need to eliminate this function for the employee who had a hip replacement and could not restrain inmates. In Webb v. Choate Mental Health and Development Center, 230 F.3d 991 (7th Cir. 2000), the court found that working with violent and/or infectious patients is an essential function of a staff psychologist’s job. Therefore, the employer did not have to accommodate the plaintiff by letting him avoid this type of contact. The court stated that the employee’s request was tantamount to asking the employer “to change the type of patients the facility serves.” Likewise, in Ingerson v. Healthsouth Corp., 1998 U.S. App. LEXIS 3133 (10th Cir. 1998)(unpublished), the court held that lifting was an essential function of a nurse’s job and that the nurse could not perform this function due to her 20-pound lifting restriction. The court noted that “although job restructuring is a possible accommodation, it is limited to reallocating only the marginal functions of a job. We have consistently held that it is not a reasonable accommodation to require the employer to eliminate an essential function of the job, in effect creating a new job for a plaintiff.” Similarly, in McGregor v. Amtrak, 1999 U.S. App. LEXIS 12021 (9th Cir. 1999)(unpublished), the court held that baggage handling was an essential function of an Amtrak ticket agent. Therefore, the employer was not required to reallocate this function to other employees because of the plaintiff’s arm impairment. In Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, rehearing denied, 1999 U.S. App. LEXIS 25675 (8th Cir. 1999), the employee could not work the required hours needed for the restaurant manager position because of injuries sustained in a car accident. The court stated that the employer was not required to create a “co-manager” position, which would reallocate essential functions of her job. Likewise, in Bolstein v. Reich, 3 AD Cases 1761 (D.D.C. 1995), the court considered whether the government had to accommodate a plaintiff with severe depression by providing more

supervision and simpler assignments. The court concluded that the ability to work independently was an essential function of the plaintiff's GS-14 position, and did not have to be reallocated as a reasonable accommodation. In Gonzagowski v. Widnall, 115 F.3d 744 (10th Cir. 1997), the court noted that an employer is not required to restructure a computer specialist's job because of his anxiety disorder to create "a work environment free of stress and criticism." Likewise, in Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723 (8th Cir. 1999), the court stated that an employer does not need to provide "an aggravation-free environment" for an employee with depression and stress syndrome. In Turner v. Turriss Coal Co., 2002 U.S. App. LEXIS 12015 (7th Cir. 2002)(unpublished), the court held that the coal company was not required to restructure a job for an individual with a disability by "reassign[ing] two part-time employees" to perform many of his duties "and creat[ing] make-shift work to fill his remaining time."

A number of other courts have stated that the ADA does not require an employer to reallocate essential functions as a reasonable accommodation. Some of the more interesting cases include: Frazier v. Simmons, 254 F.3d 1247 (10th Cir. 2001) (employer is not required to eliminate the essential parts of a corrections investigator job, which involve carrying a firearm, running, and engaging in violent activity); Jones v. Alabama Power Co., 3 AD Cases 1717 (N.D. Ala. 1995), aff'd, 77 F.3d 498 (11th Cir. 1996)(reallocating essential functions of "heavy lifting duties" is "likely not a reasonable accommodation"); Brown v. Chase Brass & Copper Co., 2001 U.S. App. LEXIS 15726 (6th Cir. 2001)(employer was not required to create a new rotation system which would redistribute essential functions of the other rotational workers); Conklin v. Englewood, Ohio, 1996 U.S. App. LEXIS 26173 (6th Cir. 1996)(unpublished)(City was not required to reallocate essential functions of police officer's job); and Piziali v. Grand View College, 2000 U.S. App. LEXIS 1823 (8th Cir. 2000)(unpublished)(eliminating essential functions of professor's job is not "reasonable").

Along these lines, courts have held that an employer does not need to lower productivity standards. For example, in Hoffman v. Caterpillar, Inc., 256 F.3d 568 (7th Cir. 2001), the court noted that the employer would not have to "tolerate a drop in productivity" if an employee could not operate a high-speed scanner as quickly as needed.

One interesting question is whether an employer who has (in the past) given away essential functions must continue to restructure the job in this manner. In Scanlon v. Boeing Co., 2002 U.S. App. LEXIS 21126 (9th Cir. 2002)(unpublished), the court held that climbing ladders was

an essential function of a “Confined Space Monitor” because, among other reasons, the employee had to respond to emergency situations reachable only by ladders. The court rejected the plaintiff’s claim that climbing was not essential since she had always been able to find someone who could do the climbing for her, noting that “the fact that, at one point, an employer accommodated an employee in a manner that is not required by federal law does not mean that the accommodation then somehow becomes mandated by federal law.” In addition, the employer’s “decision to continue to over-accommodate three employees with the same disability” was considered irrelevant as to the essential functions of the plaintiff’s job. In Ozowski v. Henderson, 237 F.3d 837 (7th Cir. 2001), the court noted that even if the Postal Service had, in the past, hired a helper to perform the essential functions for a prior employee, it was not required to do so under the federal disability law. Similarly, in Basith v. Cook County, 241 F.3d 919 (7th Cir. 2001), the plaintiff, a Pharmacy Technician, claimed that delivering medications was not essential because the employer created a temporary position for him that did not require such delivery. The court, however, concluded that the employer went beyond the ADA’s reasonable accommodation requirements, and noted that it would not “punish” the employer for such a deed. In Phelps v. Optima Health, Inc., 251 F.3d 21 (1st Cir. 2001), the plaintiff claimed that lifting was not an essential function of her nursing job since the employer let co-workers perform the employee’s lifting duties. The court disagreed, noting that lifting was an essential function of her job and that “to find otherwise would unacceptably punish employers from doing more than the ADA requires, and might discourage such an undertaking on the part of employers.” In Winfrey v. City of Chicago, 259 F.3d 610 (7th Cir. 2001), the City allowed a blind Ward Clerk to perform modified, limited duties, such as making and answering phone calls to wards and drivers, and logging drivers’ arrival and departure times. Because of the vision impairment, the City did not assign him other duties which were routinely required of Ward Clerks, such as picking up mail, completing forms, managing payroll functions, and collecting tickets. The employee claimed that his modified duties were the only essential functions of his job since he was excused from the other tasks. However, the court noted that the City had gone beyond its ADA obligations by excusing the plaintiff from performing certain essential functions, and it would not punish the employer for its generosity. Likewise, in Holbrook v. City of Alpharetta, 112 F.3d 1522 (11th Cir. 1997), the court determined that although the essential functions of a police detective's job included collecting evidence at a crime scene, the employer had excused these duties for a detective with a vision impairment. The court rejected the detective's argument that the employer had to continue to excuse these duties, noting that the employer had gone *beyond* the ADA's requirements and the court did not want "to discourage

other employers from undertaking the kinds of accommodations of a disabled employee" as those provided by the employer. Similarly, in Laurin v. The Providence Hospital, 150 F.3d 52 (1st Cir. 1998), the employee claimed that a "rotating shift" was not an essential function of her nursing position since the hospital had allowed her to work for eight weeks on a straight shift. The court held that the rotating shift was essential, noting that "[a]n employer does not concede that a job function is 'non-essential' simply by voluntarily assuming the limited burden associated with a temporary accommodation." The court further stated that "it would be perverse to discourage employers from accommodating employees with a temporary breathing space during which to seek another position with the employer."

On the other hand, in Brown v. City of Tucson, 336 F.3d 1181 (9th Cir. 2003), the court noted that the employer's "apparent willingness to allow" the plaintiff (a detective) "to avoid night-time call-out" because of her mental disorder "indicate that it was not an essential function" of her job. Similarly, in Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001), the court considered whether climbing was an essential function of a cable repairman's job, where the company had excused him from climbing because of his panic disorder. The court found that although the employee might have climbed 50% of the time before his diagnosis, he did not have to climb for 3-1/2 years after his diagnosis with "no adverse consequences for his employer." Therefore, the court held, climbing might not be an essential function of his job.

#### Transitional Duty as a Reasonable Accommodation

Since an employer never has to reallocate essential functions, it never has to *create* a new job -- such as a transitional or light duty job in which the employee is no longer performing his/her essential functions. For example, in Norsworthy v. The Kroger Company, 2000 U.S. App. LEXIS 497 (6th Cir. 2000)(unpublished), the court noted that the employer was not required to create a temporary, work-hardening position for an injured production worker. Likewise, in Hoskins v. Oakland County Sheriff's Department, 227 F.3d 719 (6th Cir. 2000), the court held that the employer did not need to create a permanent job encompassing only the duties of its temporary light-duty control booth operator positions for an injured prison security guard. These control booth positions were available on a rotating basis for guards who had had particularly grueling days. In Burch v. City of Nacogdoches, 174 F.3d 615 (5th Cir. 1999), the court held



that the employer did not have to create a light duty non-firefighting position for a firefighter who was injured and could no longer perform his job. Similarly, in Sutton v. Lader, 185 F.3d 1203 (11th Cir. 1999), the court noted that an employer was not required to create a light duty job for an employee who had heart problems. In Stephenson v. United Airlines, 2001 U.S. App. LEXIS 11400 (9th Cir. 2001)(unpublished), the court noted that “employers need not create special light duty positions” under the ADA. The EEOC has agreed that an employer does *not* have to create light duty jobs unless the "heavy duty" tasks were only marginal functions which can be reallocated to other workers as a reasonable accommodation. In most cases, the "heavy duty" tasks are not marginal functions; therefore, the employer is not required to restructure the job to reallocate the functions. See EEOC Technical Assistance Manual, Ch. 9.4. In Haines v. Bethlehem Lukens Plate Steel, 2001 U.S. App. LEXIS 24678 (3d Cir. 2001)(unpublished), the court similarly noted that “an employer is not required to create a light duty position for the disabled employee.” However, the court held that “assignment to an existing permanent light duty position is a reasonable accommodation.”

Of course, if the employer has existing light duty jobs -- as many employers do -- it may have to consider *reassigning* the employee with a disability (as discussed below) to one of those jobs if that is needed as a reasonable accommodation. For example, in Howell v. Michelin Tire Corp., 860 F. Supp. 1488 (M.D. Ala. 1994), the court stated that reassignment to an existing vacant light-duty job is a reasonable accommodation for someone who cannot perform his original job anymore because of a disability. Likewise, the EEOC has taken the position that "if an employer already has a vacant light duty position for which an injured worker is qualified, it might be a reasonable accommodation to reassign the worker to that position." EEOC Technical Assistance Manual, Ch. 9.4.

One common question is whether an employer can create a light duty job for only a temporary period. The EEOC has stated that "an employer is free to determine that a light duty position will be temporary rather than permanent." EEOC Enforcement Guidance: Workers' Compensation and the ADA, No. 915.002 (9/3/96), at p. 22. Courts have agreed with this position. For example, in Norsworthy v. The Kroger Company, 2000 U.S. App. LEXIS 497 (6th Cir. 2000)(unpublished), the employer created a temporary, light-duty “Quality Assurance” position for an injured production worker until she could return to her former job. When it became clear that she would never be able to perform her former job, she was terminated. In her ADA lawsuit, the employee claimed that she should have been permitted to remain in the light-

duty position. The court held that employers are not “required to keep an employee in a specially-created, temporary position indefinitely.” Therefore, Kroger was not required “to transform the created, temporary Quality Assurance position into a full-time position in order to reasonably accommodate” the employee. Otherwise, according to the court, employers would be deterred from creating such positions at all. In Breier v. ITT Automotive, 2004 U.S. App. LEXIS 10002 (6th Cir. 2004)(unpublished), the court stated that the employer “was not legally required to transform a transitional, light-duty position into a permanent position in order to accommodate the plaintiff’s physical limitations.” These jobs, noted the court, “were reserved for workers with temporary disabilities who were being transferred from disability status back into their jobs.” Likewise, in Watson v. Lithonia Lighting and National Service Industries, Inc., 304 F.3d 749 (7th Cir. 2002), the employer temporarily exempted injured assembly workers from its “rotation” system (which was designed to help reduce repetitive motion injuries). Although an employee claimed that she must be kept in one of these “limited-task” positions indefinitely, the court disagreed, noting that this would “close the positions to other workers who might have been able to use them during recovery - and it would increase the frequency of repetitive motion injuries in the workplace.” The court noted that “once the positions are permanently assigned,” the “rotation system is foiled and its benefits lost.” In Buskirk v. Apollo Metals, 307 F.3d 160 (3d Cir. 2002), the court noted that an employer is not “required to transform a temporary light duty position into a permanent position.” In Cobb v. Jones Apparel Group, Inc., 2001 U.S. App. LEXIS 26040 (6th Cir. 2001)(unpublished), the plaintiff claimed that she should have been permanently assigned to a transitional duty job, which the employer maintained for temporarily-impaired workers. The court held that an employer need not convert a temporary light-duty job used for recovering employees into a full-time position for a permanently disabled employee. In Malabarba v. Chicago Tribune Co., 149 F.3d 690 (7th Cir. 1998), the court noted that “the ADA does not require that employers transform temporary [light-duty] work assignments into permanent positions.” Similarly, in Champ v. Baltimore County, 884 F. Supp. 991 (D. Md. 1995), affd, 91 F.3d 129 (4th Cir. 1996), the court held that the employer does not need to permanently keep an injured police officer in a temporary light duty position -- despite the fact that he had been in the position for nearly sixteen years. In Shiring v. Runyon, 90 F.3d 827 (3d Cir. 1996), an injured mail carrier could not physically deliver the mail; the Postal Service created a temporary job for him which involved simply sorting the mail, but not delivering it. Later, after it became clear that the employee would not be able to return to a job involving delivery, the plaintiff claimed (among other things) that the employer had to allow him to continue performing the light-duty job. The court disagreed with

the plaintiff, noting that the employer did *not* have to create a permanent job simply because it created the light-duty job "to give [the plaintiff] something to do on a temporary basis." Likewise, in Mengine v. Runyon, 114 F.3d 415 (3d Cir. 1997), the court stated that the Postal Service "was not required to transform its temporary light duty jobs into permanent jobs" in order to accommodate the employee.

In Beaver v. Titan Wheel International, 2001 U.S. App. LEXIS 7634 (7th Cir. 2001)(unpublished), the plaintiff claimed that he was permanently reassigned to a lighter wheel assembly job because of his leg amputation, while the employer claimed that the assignment was only temporary. Although the court stated that it would not punish an employer for doing a good deed such as a temporary placement, the facts indicated that the assignment was not clearly temporary. Specifically, the court noted that the plaintiff had been assigned to the lighter job for nearly 1-1/2 years, and "there were no meaningful discussions" between the employer and the employee as to whether the new job was temporary or permanent. Therefore, the employer lost its motion for summary judgment on this point. Accordingly, if an employer wants the light duty job to be temporary, it should make this fact clear during the interactive process.

Along these lines, some employers limit the period of light duty jobs to the employee's "maximum medical improvement" or limit the jobs to employees who eventually will be able to return to their jobs. Employers have a good argument that this practice is lawful since the employer did not have to even create the positions at all. For example, in Collins v. Yellow Freight System, 2004 U.S. App. LEXIS 6158 (6th Cir. 2004)(unpublished), the court suggested that limiting a modified work program to employees who were "temporarily" disabled from an on-the-job injury does not violate the law. In this case, the employee had a permanent, non-work-related back injury. Similarly, in Marcum v. Consolidated Freightways, 2000 U.S. App. LEXIS (6th Cir. 2000)(unpublished), the court held that the employer did not violate the ADA by terminating the employee from its light duty program after he reached maximum medical improvement. Likewise, in Watson v. Lithonia Lighting and National Service Industries, Inc., 304 F.3d 749 (7th Cir. 2002), noted above, the court held that "the ADA does not require an employer that sets aside a pool of positions for recovering employees to make those positions available indefinitely to an employee whose recovery has run its course without restoring that worker to her original healthy state." However, in Hendricks-Robinson v. Excel Corp., 154 F.3d 685 (7th Cir. 1998), the court provides a major caution. In this case, although the employer said the light duty was for the period of recuperation, the plaintiffs claimed that the light duty

positions were permanent. The court stated that if the positions were truly temporary, the employer "was not required to convert them into permanent ones for the permanently restricted employees." However, the court noted that there was "a question of fact" since the employer had not made it clear that the positions were only temporary. Specifically, the court said it was unclear "whether the injured employees knew that the jobs in which they initially were placed were truly temporary or whether they could consider the jobs a reasonable accommodation for their impairments."

Another difficult -- and controversial -- question is whether an employer can reserve light-duty jobs for on-the-job injuries. A strong argument can be made that this does not violate the ADA because it does not discriminate *based on* disability. Rather, it discriminates based on *where* someone was injured, but anyone with any type of disability can get the light duty job if s/he has a workplace injury. Employers should keep in mind that disability-rights advocates are likely to challenge these policies using a disparate impact argument (*i.e.*, the policy has a disparate impact against certain types of disabilities that are not typically workplace injuries, such as cancer and AIDS). In addition, the policies might be challenged under Title VII of the Civil Rights Act of 1964 using the theory that they discriminate against pregnant women.

The EEOC has taken the position that an employer *cannot* reserve existing light duty jobs for on-the-job injuries; rather, the employer must consider reassigning *any* disabled employee (*e.g.*, including those without on-the-job injuries) to such an existing job if it is vacant and if it is needed by the employee as a reasonable accommodation. EEOC Enforcement Guidance: Workers' Compensation and the ADA, No. 915.002 (9/3/96), at p. 22. **This Guidance is available on the internet at [www.eeoc.gov](http://www.eeoc.gov).** Interestingly, however, the EEOC also has stated that an employer *may* create light duty positions solely for employees who are injured on the job. EEOC Enforcement Guidance: Workers' Compensation and the ADA, No. 915.002 (9/3/96), at p. 20. More recently, however, the EEOC has further confused the issue by suggesting that this later approach might itself be illegal. In an informal guidance letter, the EEOC has stated that "[w]hether a policy of creating light duty positions for employees who are injured on the job while not creating the same for employees with disabilities that are not caused by work-related injuries would have an adverse impact on employees with disabilities must be determined on a case-by-case basis."<sup>11</sup>

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<sup>11</sup> 1/28/00 Informal Guidance letter from Christopher J. Kuczynski, Assistant Legal Counsel.

One federal court of appeals to address the issue did not adopt the approach taken by the EEOC. In Dalton v. Subaru-Isuzu, 141 F.3d 667 (7th Cir. 1998), the court considered whether the employer could reserve light-duty positions for employees recuperating from recent injuries who had temporary disabilities. The court stated these positions could be reserved for such employees, noting that "[n]othing in the ADA requires an employer to abandon its legitimate, nondiscriminatory company policies defining job qualifications, prerequisites, and entitlements to intra-company transfers." On the other hand, although not directly analyzing the issue, in Stephenson v. United Airlines, 2001 U.S. App. LEXIS 11400 (9th Cir. 2001)(unpublished), the court suggested that such a policy – limiting light-duty jobs to work-related injuries – might be illegal. The court stated that United's "argument that its light or modified duty was non-discriminatory because it applied equally to all employees neglects to consider its duties under the ADA. An employer may not unilaterally adopt a policy exempting it from its obligations under the ADA even if the policy is otherwise uniformly applied to all employees."

#### Changing an Employee's Supervisor as a Reasonable Accommodation

The EEOC has stated an employer is not required to change an employee's supervisor as a reasonable accommodation. However, a supervisor might be required to change certain supervisory methods as a reasonable accommodation. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 33. Along these lines, in Kennedy v. Dresser Rand Co., 193 F.3d 120 (2d Cir. 1999), the employee claimed that her depression was triggered by interaction with her supervisor. The court held that it was not a required reasonable accommodation for the employer to reassign the employee to a different supervisor and to protect the employee from any "interaction" with the supervisor. Similarly (although with a slight twist), in Coulson v. Goodyear Tire & Rubber Co., 2002 U.S. App. LEXIS 4623 (6th Cir. 2002) (unpublished), the employee wanted to be reassigned away from his co-workers. The court noted that although reassignment "is within the realm of possible reasonable (and therefore required) accommodation," an employer is not required to transfer an employee so that he does not have to work with certain employees, since courts "are not meant to act as a super-bureau of Human Resources." Likewise, in Bradford v. City of Chicago, 2005 U.S. App. LEXIS 573 (7th Cir. 2005)(unpublished), the court held that an employee, whose mental condition was allegedly aggravated by working with specific co-

workers (whom he believed were afraid of him), was not entitled to an accommodation of reassignment away from those workers.

### Providing Assistant or Job Coach as a Reasonable Accommodation

Reasonable accommodation can include providing a qualified reader, interpreter, or other assistant so that the employee can perform his/her job. 29 C.F.R. § 1630.2(o)(2)(ii). For example, in Lovejoy-Wilson v. Noco Motor Fuel, Inc., 2001 U.S. App. LEXIS 19511 (2d Cir. 2001), the plaintiff, a sales clerk, claimed that she was qualified to be an assistant manager despite the employer's claim that she could not drive herself to the bank to make bank deposits. The court held that the plaintiff's suggested accommodations, which included hiring a driver for her so that she could make the deposits, might be required since driving was not an essential job function.

However, an employer would not have to provide someone to actually *perform* the essential functions of the job for the employee with a disability. For example, in Siekaniac v. Columbia Gas Co., 2002 U.S. App. LEXIS 21091 (6th Cir. 2002)(unpublished), the court found that regular attendance was an essential part of the job of an employee responsible for dispatching emergency responses to gas leak calls. Where the employee could not maintain predictable attendance because of her debilitating headaches, the employer was not required to accommodate the employee by providing another employee who could be "on-call" whenever the plaintiff was unable to work. In Miller v. Santa Clara County Library, 2001 U.S. App. LEXIS 26639 (9th Cir. 2001)(unpublished), the court held that the employer did not violate the ADA by failing to hire a job coach for a library employee with Down's Syndrome. Finding that the employee could not "perform without a job coach at his elbow" and that "he does not have the basic, rudimentary knowledge required for library work," the court noted that reasonable accommodation "does not encompass within its meaning the use of an additional person to help the clearly unqualified who cannot perform on their own." In Merrell v. Icee-USA Corp., 2000 U.S. App. LEXIS 33327 (9th Cir. 2000)(unpublished), the court found that lifting heavy machinery was an essential function of the plaintiff's job as an ice machine serviceman. The court therefore concluded that the employer did not have to assign another employee to accompany the plaintiff on his servicing calls in order to perform the lifting. Likewise, in Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019 (7th Cir. 1997), the court noted that the plaintiff could not perform some of the essential job functions of a sales clerk's position, such as stocking and pricing certain merchandise. The

court concluded that Wal-Mart did not, as a reasonable accommodation, have to hire someone else to perform these duties.

The EEOC also has taken the position that an employer may be required to provide a "temporary job coach to assist in the training of a qualified individual with a disability" as a reasonable accommodation. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (3/25/97), at p. 27.

Interestingly, in an informal guidance letter, the EEOC has written that "communicating through notes is an effective accommodation that would enable people who are deaf to perform many kinds of jobs." The EEOC further stated that "many employers may prefer this accommodation to a sign language interpreter because it involves little or no expense."<sup>12</sup>

An employer may be required to provide a personal attendant in certain situations. For example, in Roberts v. Progressive Independence, Inc., 183 F.3d 1215 (10th Cir. 1999), the court indicated that a personal care attendant can be a reasonable accommodation for an individual with mobility impairments who is required to travel on a business trip.

### Reassignment as a Reasonable Accommodation

#### *Whether Reassignment is a Reasonable Accommodation*

Although courts have been inconsistent on whether an employer must reassign someone as a reasonable accommodation, it is important to remember that the *statute* specifically mentions it as a form of accommodation. 42 U.S.C. § 12111(9)(B). This is one of the provisions that makes the ADA different from the Rehabilitation Act (prior to the 1992 amendments to the Rehabilitation Act which made it consistent with the ADA). Under the pre-amendment Rehabilitation Act, some courts said that reasonable accommodation did not include reassignment. See, e.g., Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987). In Bratten v. SSI

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<sup>12</sup> 8/13/99 Informal Guidance letter from Peggy R. Mastroianni, Associate Legal Counsel.

Services, Inc., 185 F.3d 625 (6th Cir. 1999), the court, in holding that reassignment is a required accommodation, noted that although “the [pre-amendment] Rehabilitation Act did not include reassignment to a vacant position as a reasonable accommodation,” the ADA “explicitly lists” reassignment as an accommodation. The court stated that cases holding that reassignment is not an accommodation “are no longer good law.”

Most courts now say that reassignment -- in one form or another -- *is* a form of reasonable accommodation. For example, in Haines v. Bethlehem Lukens Plate Steel, 2001 U.S. App. LEXIS 24678 (3d Cir. 2001)(unpublished), the court noted that reassignment to an existing position is a reasonable accommodation. In this case, the plaintiff alleged that a vacant, permanent light duty position existed at the employer. In Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999), the court held that reassignment is a required accommodation for an employee who can no longer perform his position because of disability. The court stated that reassignment should be considered if an employee has indicated “a desire to remain with the company despite his or her disability and limitations,” even if the employee did not formally request “reassignment.” In Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999), the court held that reassignment is a reasonable accommodation (unless it causes an undue hardship) even if it conflicts with the City’s civil service rules prohibiting reassignment between the “Classified Service” system and the “Career Service” system. In Gile v. United Airlines, 213 F.3d 365 (7th Cir. 2000), United argued that it did not have to reassign an employee who claimed she needed a shift transfer because of her mental disability. The court, however, stated that “United had the affirmative obligation” to work with the employee to “craft a reasonable accommodation.” The court stated that United “flunked its obligations under the ADA,” by simply refusing her request for a shift change and doing “nothing to engage with Gile in determining alternative accommodations that might permit Gile to continue working.” In fact, the court pointed out, the company doctor merely suggested that she “resign and stay home.” Although the airline protested that reassigning the employee outside of the bidding process would have constituted “affirmative action,” the court disagreed. Specifically, the court held that “the ADA required that United transfer Gile to a vacant daytime position.” The court held that an employer must “identify the full range of alternative positions for which the individual satisfies the employer’s legitimate, nondiscriminatory prerequisites” and consider “transferring the employee to any of



these other jobs.” The court also noted, however, that “the ADA does not require the employer to abandon its legitimate policies regarding job qualifications and entitlements to company transfers.” In Burns v. Coca-Cola Enterprises, Inc., 222 F.3d 247 (6th Cir. 2000), the employer apparently argued that reassignment was not a required reasonable accommodation. Finding “no merit” to this argument, the court noted that when an employee, because of his disability, can no longer perform his/her job, the employer must consider transferring that employee to another job for which s/he is qualified. However, the employer can require the employee to comply with its legitimate transfer policies, such as a policy requiring the employee to request a transfer. The court concluded that in this case, the employee failed to request a transfer (as required by the company’s transfer policy). Although the court therefore held that the employee could not claim that the company failed to reassign him, it noted that the situation would have been different if the employee had alleged that “he requested and was denied some specific assistance in identifying jobs for which he could qualify.” The court stated that “although employers have a duty to locate suitable positions for disabled employees, such employees may not recover unless they propose, or apply for, particular alternative positions for which they are qualified.” Likewise, in EEOC v. United Parcel Service, 249 F.3d 557 (6th Cir. 2001), the court noted that the employer needed to consider transferring a Texas truck driver to another state when he could no longer work in Texas because he was severely allergic to plants in the state. In this case, working in Texas caused “severe nasal and bronchial congestion, swollen eyes and nose, rashes and fever blisters, fatigue, fever, and depression.” In Norville v. Staten Island University Hospital, 196 F.3d 89 (2d Cir. 1999), the court held that “where a comparable position is vacant and the disabled employee is qualified for the position, an employer’s refusal to reassign the employee to that position -- absent some other offer of reasonable accommodation -- constitutes a violation of the ADA.” In Aka v. Washington Hospital Center, 156 F.3d 1284 (D.C. Cir. 1998), the court expressly held that the ADA requires an employer to reassign an employee as a reasonable accommodation. Likewise, in Benson v. Northwest Airlines, 62 F.3d 1108 (8th Cir. 1995), the court specifically noted that reassignment to a vacant position is a possible reasonable accommodation under the ADA. In Braunling v. Countrywide Home Loans Inc., 220 F.3d 1154 (9th Cir. 2000), the court stated that “reassignment to another position is generally considered a reasonable accommodation.” In this case, however, the court found that the employee could not show that she was qualified to perform a reassigned position (in light of her performance problems). Likewise, in McLean v. Runyon, 222 F.3d 1150 (9th Cir. 2000), a Rehabilitation Act case, the court stated that the Rehabilitation Act now applies the ADA standards and that under the ADA, “reasonable accommodation includes reassignment to a vacant position.” Similarly, a

number of other courts have stated that reassignment is available as a reasonable accommodation, such as Jackan v. New York Department of Labor, 205 F.3d 562 (2d Cir. 2000)(asbestos inspector with back impairment was entitled to reassignment to “a vacant position into which he could have been transferred pursuant to then-existing civil service rules whose duties he could have performed;” employee has duty to identify such a position in litigation); Bristol v. Board of County Commissioners of the County of Clear Creek, 281 F.3d 1148 (10th Cir. 2002)(“reasonable accommodation may include reassignment to a vacant position if the employee is qualified for the job and it does not impose an undue burden on the employer”); Hall v. Claussen, 2001 U.S. App. LEXIS 3404 (10th Cir. 2001)(unpublished)(reassignment is a reasonable accommodation for an employee who cannot be accommodated in his current position and who requested to be reassigned); Nicholson v. The Boeing Company, 1999 U.S. App. LEXIS 8506 (10th Cir. 1999)(unpublished)(“reassignment to a vacant position whose essential functions [plaintiff] could perform is another possible means of accommodation,” but the plaintiff “must first notify Boeing of her desire to be reassigned”); Aldrich v. The Boeing Company, 146 F.3d 1265 (10th Cir. 1998)(analyzing whether a vacant position existed to which the plaintiff could have been transferred as a reasonable accommodation); Gonzagowski v. Widnall, 115 F.3d 744 (10th Cir. 1997)(applying ADA standards to Rehabilitation Act case, court noted that reasonable accommodation can include “transfer[] to other work which could be done with or without accommodation); Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, rehearing denied, 1999 U.S. App. LEXIS 25675 (8th Cir. 1999)(reassignment of restaurant manager to vacant shift manager position could be a reasonable accommodation); Wellington v. Lyon County School District, 187 F.3d 1150 (9th Cir. 1999)(reassignment of maintenance man with carpal tunnel to safety position may have been a reasonable accommodation); McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999)(reassignment may be an accommodation unless it poses an undue hardship for the employer); in Mustafa v. Clark County School District, 157 F.3d 1169 (9th Cir. 1998)(reassignment of a teacher to a non-classroom environment can be a possible accommodation); McGregor v. Amtrak, 187 F.3d 1113 (9th Cir. 1999)(reassignment is a possible accommodation and the relevant question is whether there were vacancies for which plaintiff was qualified in light of lifting restrictions); Monette v. Electronic Data Systems, 90 F.3d 1173 (6th Cir. 1996)(“it is true that employers may be required, as a reasonable accommodation, to transfer a disabled employee to a vacant position for which he or she is qualified”); Arnold v. Stark County District Library, 1998 U.S. App. LEXIS 31469 (6th Cir. 1998)(unpublished)(“reasonable accommodations include transfers to vacant positions”); EEOC

v. Stowe-Pharr Mills, Inc., 216 F.3d 373 (4th Cir. 2000)(reassignment can be a required reasonable accommodation); Williams v. Channel Master Satellite Systems, Inc., 101 F.3d 346 (4th Cir. 1996), cert. denied, 117 S. Ct. 1844 (1997)(reassignment can be a reasonable accommodation); Gilday v. Mecosta County, 124 F.3d 760 (6th Cir.), amended, 7 AD Cases 1268 (6th Cir. 1997)(non-insulin dependent diabetic may have been able to perform his job “if he had been moved to a less-busy station [where] he could have better followed his regimen” and therefore “not have suffered from the blood-sugar fluctuations that made him rude”); Shiplett v. Amtrak, 1999 U.S. App. LEXIS 14004 (6th Cir. 1999)(unpublished)(locomotive engineer who was not qualified for his job because of the side effects of medication may have been entitled to reassignment; however, there must have been a vacant position for which he was qualified); Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996), cert. denied, 117 S. Ct. 1318 (1997)(“the ADA does expressly recognize 'reassignment to a vacant position' as an expected form of reasonable accommodation, thereby rejecting a line of precedent under the Rehabilitation Act holding that reassignment of a disabled employee was never required”); Williams v. United Insurance Company of America, 253 F.3d 280 (7th Cir. 2001)(reassignment can be a reasonable accommodation, including reassignment “to a job closer to the employee’s home if she has difficulty getting to work”); Dalton v. Subaru-Isuzu, 141 F.3d 667 (7th Cir. 1998)(it is “well established” that reasonable accommodation “includes reassignment of the employee to a vacant position for which she is qualified. . . . The option of reassignment is particularly important when the employee is unable to perform the essential functions of his or her current job. . . . The employer must first identify the full range of alternative positions for which” the individual may be qualified. . . .); Mack v. State Farm Mutual Automobile Insurance Co., 2000 U.S. App. LEXIS 1012 (7th Cir. 2000)(unpublished)(“an employer may be required to reassign a disabled employee to a different position if the employee can no longer perform the essential functions” of his job); Gonzales v. City of New Braunfels, 176 F.3d 834 (5th Cir. 1999)(reassignment to a vacant position “can be a reasonable accommodation” if a position is vacant and the employee is qualified for that position); Burch v. City of Nacogdoches, 174 F.3d 615 (5th Cir. 1999)(suggesting that reassignment is a possible accommodation, but noting that plaintiff: (1) did not show he was qualified for an opening; and (2) did not request such an accommodation merely by saying that he was not ready to retire); Donahue v. Consolidated Rail Corporation, 224 F.3d 226 (3d Cir. 2000)(“an employer may be required to transfer an employee to an existing position” if the employee is qualified and the position is vacant); Mengine v. Runyon, 114 F.3d 415 (3d Cir. 1997)(Rehabilitation Act, as amended in 1992, incorporates the ADA standards, which require reassignment as a reasonable accommodation)].

Some employers have argued that reassignment is not available as a reasonable accommodation because the individual is not "qualified" -- and, therefore, not protected under the ADA -- if s/he cannot perform the essential functions of the original job. Generally, courts have not accepted this argument. For example, in Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011 (8th Cir. 2000), the court held that reassignment is a reasonable accommodation, despite the employer's claim that the employee was not "qualified" if she could not perform her current position. Likewise, in Hall v. Claussen, 2001 U.S. App. LEXIS 3404 (10th Cir. 2001)(unpublished), the court noted that an individual is "qualified" under the ADA if he is able to perform a reassigned position when he can no longer perform his original job. See also Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000), vacated on other grounds, 535 U.S. 391, 122 S. Ct. 1516 (2002) (to be considered "qualified," the individual must be able to perform his job or the "essential functions of another position in the company which he 'desires'"); Smith v. Midland Brake, 180 F.3d 1154 (10th Cir. 1999)("qualified" means that the employee can perform his original job or another job within the company that he "desires"); Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999)(to be qualified, an individual "need only be able to perform the essential functions of the job to which he or she desires to be reassigned, and not of the position which he or she holds").

Although most courts say reassignment can be required as a reasonable accommodation, it is important to note that some cases suggest that employers do *not* have such an obligation under the ADA. For example, in Motley v. New Jersey State Police, 196 F.3d 160 (3d Cir. 1999), the court noted (in passing) that an employer is not required to find another job for an employee "who is not qualified for the job he or she was doing" (citation omitted). In Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997), cert. denied, 1998 U.S. LEXIS 963 (1998), the court specifically stated that the ADA does not require an employer to reassign an employee to a new position. In Foreman, a manufacturing plant "expeditor" said he needed to be reassigned because he could not work near certain equipment because of his pacemaker. In Wernick v. Federal Reserve Bank of New York, 91 F.3d 379 (2d Cir. 1996), the court stated that "one of the essential functions" of the plaintiff's job "was to work under her assigned supervisor," and "nothing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy." Therefore, according to the court, "the Fed did not have an affirmative duty to provide Wernick with a job for which she was qualified; the Fed only had an obligation to treat her in the same manner that it treated other

similarly qualified candidates." Similarly, in Schmidt v. Methodist Hospital, 89 F.3d 342 (7th Cir. 1996), the court stated that reassignment is simply "one among many alternative accommodations that an employer reasonably may offer." Importantly, although "[e]mployers cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies," employers "are not required to find another job for an employee who is not qualified for the job he or she was doing." In Joe v. West, 1998 U.S. App. LEXIS 2969 (4th Cir. 1998)(unpublished), the court stated that the employer was not required to "reassign" a data technician -- who could not type due to eye strain -- to a job that did not require typing. Likewise, in Taylor v. Food World, Inc., 133 F.3d 1419 (11th Cir. 1998), the court held that "the district court did not err in denying [plaintiff's] motion for summary judgment" when it held that the "proposed accommodation of reassignment was not reasonable as a matter of law." In Duckett v. Dunlop Tire Corp., 120 F.3d 1222 (11th Cir. 1997), the court, although declining to express an opinion on whether reassignment is a reasonable accommodation, stated that an employer need not violate its own transfer policies. In that case, a salaried supervisor asked for reassignment back to a production position. The court stated that the employer would not be required to violate its policies prohibiting salaried workers from "rolling back" to production positions.

In one interesting decision, Shannon v. New York City Transit Authority, 332 F.3d 95 (2d Cir. 2003), the court considered whether a bus driver, who had worked for the City for six weeks, was entitled to reassignment to another job as a "cleaner" when he could no longer drive buses since the City learned he was color blind. The court stated that "it is not at all clear that the ADA requires reassignment to another job altogether, rather than to a vacant position doing the same job (at other shifts or locations, or in different capacities)."

Although there are legitimate questions about the scope of an employer's reassignment obligation, some points are clear.

**First**, reassignment is available only to current employees, not to applicants or former employees.<sup>13</sup> See Bender v. Safeway Stores, Inc., 1997 U.S. App. LEXIS 22449 (9th Cir.

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<sup>13</sup> Whether "probationary" employees are entitled to reassignment has been hotly debated. The EEOC has taken the position that the "probationary" designation is irrelevant. Rather, an employee -- including a probationary employee -- is entitled to reassignment if s/he "adequately performed the essential functions of the position, with or without reasonable accommodation, before the need for a reassignment arose." If the probationary employee "never adequately performed the essential functions . . . then s/he is not entitled to reassignment because s/he was

1997)(unpublished) (applicants are not entitled to “reassignment”); Crano v. Graphic Packaging Corp., 2003 U.S. App. LEXIS 11286 (10th Cir. 2003)(unpublished)(where the plaintiff was no longer an employee since his need for indefinite leave exceeded the company’s leave standards, he was not entitled to “reassignment” as an accommodation; rather, he was entitled to be considered for openings in the same manner as any non-employee applicant because reassignment is a right extended only to existing employees).

**Second**, an employer does not have to bump any employee from a job in order to create a vacancy. See Eshaya v. Boeing Co., 2004 U.S. App. LEXIS 24525 (9th Cir. 2004)(unpublished)(employer was not required to accommodate flight mechanic by allowing him to replace a co-worker in oxygen lab or in ground support); Cassidy v. Detroit Edison Co., 138 F.3d 629 (6th Cir. 1998)(reassignment will not require "moving another employee"); Pond v. Michelin, 183 F.3d 592 (7th Cir. 1999)(the ADA does not require employer to bump less senior employee in order to reassign more senior employee with a disability; the union contract may, however, require this action); Ceglarek v. Crane, Inc., 1999 U.S. App. LEXIS 9062 (7th Cir. 1999)(unpublished)(employer need not bump employee so plaintiff could be reassigned back to her former position because of her progressive vision impairment); Dalton v. Subaru-Isuzu, 141 F.3d 667 (7th Cir. 1998)("employer is not required to 'bump' other employees to create a vacancy so as to be able to reassign the disabled employee"); Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011 (8th Cir. 2000)(employer is not required to "bump" another employee in order to reassign a disabled employee to that position); Smith v. Midland Brake, 180 F.3d 1154 (10th Cir. 1999)(bumping is not required); Lucas v. W.W. Grainger, Inc., 257 F.3d 1249 (11th Cir. 2001)(bumping is not required).

**Third**, an employer does not have to promote an employee as a reassignment. See, e.g., Hedrick v. Western Reserve Care System and Forum Health, 355 F.3d 444 (6th Cir. 2004)(since the ADA “does not require an employer to offer an employee a promotion as a reasonable accommodation,” the hourly, bargaining unit employee was not entitled to a salaried, non-bargaining unit position); Thompson v. E.I. Dupont Denemours and Co., 2003 U.S. App. LEXIS 14816 (6th Cir. 2003)(unpublished)(employer need not transfer a

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never ‘qualified’ for the original position.” EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at Question 25.

production worker to a laboratory position with higher earning potential and greater authority because that would have been a promotion); Emerson v. Northern States Power Co., 256 F.3d 506 (7th Cir. 2001)(employer need not transfer employee into full-time position “because it would have been a promotion from part-time status to full-time status”); Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011 (8th Cir. 2000)(“employer may reassign an employee to a lower grade and paid position if the employee cannot be accommodated in the current position and a comparable position is not available”); Martin v. Lockheed Martin Missiles and Space Co., 1999 U.S. App. LEXIS 15190 (9th Cir. 1999)(unpublished)(although reassignment is a possible accommodation, employer does not need to promote an hourly employee to a salaried position); White v. York International Corp., 45 F.3d 357 (10th Cir. 1995)(reassignment does not include promoting an employee, bumping another employee, or creating a new position); Lucas v. W.W. Grainger, Inc., 257 F.3d 1249 (11th Cir. 2001)(employers do not need to promote employees under the ADA). Compare Architect of the Capitol v. Office of Compliance, 361 F.3d 633 (Fed. Cir. 2004)(reassigning the employee, a custodian, to a higher-graded subway operator position would not be a “promotion” where her pay was not increased and the employer had been “fluid and flexible” (*i.e.*, inconsistent) in classifying the subway position).

**Fourth**, an individual must only be reassigned to a job for which s/he is qualified (with an accommodation if necessary). *See, e.g., Bratten v. SSI Services, Inc.*, 185 F.3d 625 (6th Cir. 1999)(ADA does not require reassignment of a mechanic to a position which has physical requirements “strikingly similar” to those requirements the employee could not meet in his current job).

#### *When Reassignment May be Appropriate*

In general, reassignment is considered when the employee cannot be accommodated in his/her current job, or if both the employer and the employee agree that reassignment is desired. *See* EEOC Enforcement Guidance: Workers' Compensation and the ADA, No. 915.002 (9/3/96), at p. 17; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at “Reassignment.” Courts seem to agree with the EEOC on this point. For example, in Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001), the employer

offered to reassign a cable installer (who could not climb because of panic disorder) to a warehouse position, while the employee wanted an accommodation so that he could continue to perform his installer job. The court held that if the employee could be accommodated in his installer job (for example, with a “bucket truck” so that he could reach high cable without climbing), then reassignment to the warehouse would “not satisfy the requirements of the ADA.” Similarly, in Vollmert v. Wisconsin Dept. of Transportation, 197 F.3d 293 (7th Cir. 1999), the employer installed a new computer system and reassigned the plaintiff to an allegedly lesser job when it appeared she could not master the new skills because of her learning disability. The court noted that reassignment is appropriate only if an individual with a disability could not remain in her current position with accommodation. In this case, the court noted that the reassigned employee might have remained qualified for her former position if she had been given her requested accommodation of more intensive training. In McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159 (7th Cir. 1997), the court noted that the ADA requires reassignment “when the employee is no longer able to perform the essential functions of her employment even with a reasonable accommodation.” See also Smith v. Midland Brake, 180 F.3d 1154 (10th Cir. 1999)(the “preferred option” is to accommodate the employee in his/her current position, before reassignment is considered); Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011 (8th Cir. 2000)(reassignment is “an accommodation of last resort,” considered only after the individual cannot be accommodated in his/her current position); and Cassidy v. Detroit Edison Co., 138 F.3d 629 (6th Cir. 1998)(“transfer or reassignment of an employee is only considered when accommodation within the individual's current position would pose an undue hardship”).

Some courts have dealt with the question of whether an employer can refuse to reassign someone who could perform the current job with an accommodation. In Burchett v. Target Corp., 340 F.3d 510 (8th Cir. 2003), the court held that the employer was not required to reassign the employee where it appeared that the employee could perform her job given the employer’s accommodations to her depression (e.g., restructuring her work load, allowing her to work diminished hours,” and providing a flexible schedule so that she could attend medical appointments and other scheduled meetings). The court stated that if an employee requests reassignment as a reasonable accommodation, she must “demonstrate that she cannot be accommodated in her current position because reassignment is ‘an option to be considered only after other efforts at accommodation have failed.’” In curious reasoning, the court stated that an employer “need not reassign an employee unless accommodation within her current position



would impose an undue hardship on her.” [Author’s Note: With near unanimity, however, courts have held that proving “undue hardship” is always the employer’s burden when it claims it cannot provide a reasonable accommodation.] Likewise, in Schmidt v. Methodist Hospital, 89 F.3d 342 (7th Cir. 1996), the court held that the employer may refuse to reassign an employee when that employee could have remained in his current job if he had accepted his employer's offer of additional training.

Reassignment may be required even in cases where the employee *could* perform his functions, but would get better treatment for his disability if he were reassigned to another location. See, e.g., Buckingham v. U.S., 998 F.2d 735 (9th Cir. 1993)(reassignment is a reasonable accommodation when treatment is better in another location).

Some courts seem to have held that an individual must actually request reassignment to trigger the employer’s reassignment obligations. In Hines v. Chrysler Corp., 2000 U.S. App. LEXIS 11338 (10th Cir. 2000)(unpublished), the court stated that, when analyzing the reassignment duty, “the interactive process between the employer and employee generally begins with notification to the employer of the employee's disability and limitations along with the employee's desire for reassignment if no reasonable accommodation in the existing job is possible.” Likewise, in Thompson v. E.I. Dupont Denemours and Co., 2003 U.S. App. LEXIS 14816 (6th Cir. 2003)(unpublished), the court stated that an employee who desires reassignment “must show that he requested, and was denied, reassignment to a position for which he was otherwise qualified.”

#### *Reassignment to a Position that is "Vacant" and "Equivalent"*

The EEOC has said that when reassigning an employee, the reassignment must be to a vacant position that is equivalent in terms of pay, status, geographic location, etc. if the employee is qualified for the position. In Norville v. Staten Island University Hospital, 196 F.3d 89 (2d Cir. 1999), the court noted that “the law is clear that an offer of an inferior position does not constitute a reasonable accommodation where a position with salary and benefits comparable to those of the employee’s former job is available.” Similarly, in Dilley v. Supervalu, Inc., 296 F.3d 958 (10th Cir. 2002), a truck driver wanted reassignment to another truck-driving position that he could perform within his lifting restrictions. The court rejected the employer’s argument

that it attempted to accommodate the employee with a nonunion dispatch position which paid substantially less, since there may have been more equivalent truck driving positions available.

"Vacant" means that the position is available when the employee asks for reasonable accommodation, or that it will soon be available (for example, it will be available within the next month). In Doner v. City of Rockford, 2003 U.S. App. LEXIS 20761 (7th Cir. 2003)(unpublished), the court held that a position must be open in order for the employer to have an obligation to reassign the employee. In this case, the court noted that although the plaintiff (a police officer with multiple sclerosis) "pointed to numerous positions with the City that he claimed a person in a wheelchair could perform," he did "not show that any of these positions were vacant."

The EEOC has stated that an employer does not have to offer a job that it knows will open in six months because "six months is beyond a 'reasonable amount of time.'" EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at "Reassignment." Arguably, this rule does not require an employer to keep an individual on leave while waiting for an opening; rather, the employer would look at what was vacant (or what it knew would become vacant) *at the time* the individual needed the reassignment. Along these lines, in Bristol v. Board of County Commissioners of the County of Clear Creek, 281 F.3d 1148 (10th Cir. 2002), the court held that the determination of whether a position is vacant is made as of the time of the request for reasonable accommodation. In this regard, a position is vacant "only if the employer knows, at the time the employee asks for a reasonable accommodation, that the job opening exists or will exist in the fairly immediate future." As a result, a position is not vacant if "the employer did not know at the time the employee asks for a reasonable accommodation that the position would become vacant in the fairly immediate future, even if it did in fact open up a reasonable time after the employee's request had been made." In this case, the court rejected the plaintiff's claim that he should have been reassigned from his "jailor" position to a "dispatcher" position which unforeseeably opened up soon after his request for reassignment. Likewise, in Hedrick v. Western Reserve Care System and Forum Health, 355 F.3d 444 (6th Cir. 2004), the court held that the employer was not required to offer a "case manager" job to a nurse (even though it was an equivalent position) where it was not vacant at the time she required reassignment and the employer did not know that it would become available three months later. In Lara v. State Farm Fire & Casualty Co., 2005 U.S. App. LEXIS 1341 (10th Cir. 2005)(unpublished), the court noted that although reassignment to a vacant

position is a required accommodation, the employer must be shown to have known of the upcoming opening. In this case, the court held, the employer did not know or reasonably anticipate an appropriate vacancy. Similarly, in Thompson v. E.I. Dupont Denemours and Co., 2003 U.S. App. LEXIS 14816 (6th Cir. 2003)(unpublished), the plaintiff, who could not perform his heavy labor paint production position, claimed he should have been reassigned to a light-duty position that opened up three months later. The court held that this position was not open (or anticipated) at the time it reviewed its open jobs for availability. The court rejected the plaintiff's claim that if the employer had properly engaged in the interactive process, the position would have become vacant during that process. The court reiterated earlier holdings that an employer is not "required to keep an employee on staff indefinitely in the hope that some position may become available some time in the future." On the other hand, the court agreed with the plaintiff's claim that a different job was "vacant" where the plaintiff had a right to bump a less senior employee from a particular position.

In Albert v. Smith's Food & Drug Centers, Inc., 356 F.3d 1242 (10th Cir. 2004), the court noted that generally, an employer has no duty to inform an employee of positions that open after the employee's last day of work. The court agreed that, most of the time, "an employer's duty to identify vacant positions arises when the employee requests reassignment and ends after the employer determines that no positions are available or will become available in the fairly immediate future." The situation is different, however, if the interactive process is still on-going (as it was in this case). Similarly, in Emerson v. Northern States Power Co., 256 F.3d 506 (7th Cir. 2001), the court dismissed the plaintiff's claim that the employer -- which had been attempting to reassign the employee as an accommodation -- had a continuing duty to notify her of available positions even after she was discharged. However, in Boykin v. ATC/Vancom of Colorado, 247 F.3d 1061 (10th Cir. 2001), the court stated that:

The determination of exactly how long an employer should retain an employee on indefinite or medical leave pending the availability of a position that would accommodate the employee's disability, or how long after termination an employee should continue to be entitled to immediate placement when a position he can fill becomes vacant, must be made on a case-by-case basis.

In this case, the court held that the employer did not need to keep the employee on indefinite leave while waiting for a vacancy, and did not need to offer him (non-competitively) a vacancy after he was terminated. However, the decision suggests that in some cases, an employer may need to continue searching for a vacancy.

If there is no vacant, equivalent position, the employer must reassign the employee to a vacant, lower level position for which the individual is qualified. 29 C.F.R. § 1630.2(o)(2)(ii), Appendix. However, an employer does not need to create a new position for the individual, including recreating a discontinued position previously held by the employee. For example, in Spraggs v. Sun Oil Co., 2000 U.S. App. LEXIS 10694 (10th Cir. 2000)(unpublished), the court held that although reassignment may be a required accommodation, the employer was not required to recreate the employee's former locksmith job when the employee could no longer perform his heavy labor job because of an injury. Similarly, in Turner v. Turriss Coal Co., 2002 U.S. App. LEXIS 12015 (7th Cir. 2002)(unpublished), the court held that the coal company did not have to re-create a previously eliminated administrative position for an injured coal worker. In addition, in Ozowski v. Henderson, 237 F.3d 837 (7th Cir. 2001), the court held that a position is not vacant for purposes of reassignment simply because it is unfilled; rather, a position is vacant when the employer intends to fill the job. In another interesting case, Vitale v. Georgia Gulf Corp., 2003 U.S. App. LEXIS 24855 (5th Cir. 2003)(unpublished), the court held that the plaintiff was not entitled to an indefinite light-duty assignment simply because the employer had moved other individuals with similar conditions into temporary light-duty positions. Specifically, the court held that the plaintiff did not show that such a position existed and was vacant, since "reassignment is not equivalent to creating a new position." The court noted that an employer is "not required to give what it does not have."

#### *Whether Employer Must Modify Seniority Policies in Reassigning an Employee*

In U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 122 S. Ct. 1516 (2002), the U.S. Supreme Court held that it would "ordinarily be unreasonable" for an employer to be required to modify its seniority policies so that an employee with a disability could be reassigned. The Court noted that "it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system." The Court stated that seniority systems provide "important employee benefits by creating, and fulfilling employee expectations of fair, uniform treatment." Importantly, the Court noted that "the relevant seniority system advantages, and related difficulties that result from violations of seniority rules, are not limited to collectively bargained systems." In deferring to seniority, however, the Court simply created a rebuttable presumption in favor of these policies. Specifically, the Court held that a plaintiff might be able to show "special circumstances" demonstrating that an accommodation which trumps seniority is still

“reasonable.” This would include situations where seniority is not such an expected right, such as systems where an employer retains “the right to change the seniority system unilaterally [and] exercises that right fairly frequently, reducing employee expectations that the system will be followed,” or seniority systems which already contain exceptions so that “one further exception is unlikely to matter.”

Post-U.S. Airways cases have, of course, followed these guidelines. For example, in Stamos v. Glen Cove School District, 2003 U.S. App. LEXIS 21956 (2d Cir. 2003)(unpublished), the court held that the plaintiff, a teacher, was not entitled to reassignment to a middle school position where she could not show she was entitled to such a position “on the basis of her seniority and qualifications.” The court stated that an employer is generally not required to violate a seniority system. In Dilley v. Supervalu, Inc., 296 F.3d 958 (10th Cir. 2002), the employer refused to reassign an individual to a position because of the possibility that another employee with greater seniority might later want that position. The court held that although an employer is not required “to provide an accommodation that would violate a bona fide seniority system under the terms of a collective bargaining agreement,” there must be a “direct violation of a seniority system,” not just a “a potential violation.”

This U.S. Airways decision validates a number of lower court holdings that an employer need not modify seniority policies, whether or not these policies were pursuant to collective bargaining agreements. See e.g., Hall v. Claussen, 2001 U.S. App. LEXIS 3404 (10th Cir. 2001)(unpublished)(in considering reassignment, an employer “is not required to violate important business policies,” such as “a well-entrenched seniority system”); EEOC v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001)(although the employee wanted exemption from the non-collectively bargained seniority policy when another employee with greater seniority bumped her from her job, the court held that an employer does not have to modify a seniority policy, whether or not it is part of a collective bargaining agreement); and Feliciano v. Rhode Island, 160 F.3d 780 (1st Cir. 1998)(reassignment does not require an employer to violate “the rights of the person who received the position under the selection process outlined in the collective bargaining agreement and departmental policies”).

If an employee with seniority is automatically entitled to a position (that is, s/he does not even have to “bid” for the position), an employer can argue that the position is not “vacant” and, therefore, not even available for reassignment. See, e.g., U.S. Airways, Inc. v. Barnett, 535 U.S.

391, 122 S. Ct. 1516 (2002)(O'Connor, J., concurring); Nowlin v. Kmart Corp., 2000 U.S. App. LEXIS 26820 (10th Cir. 2000)(unpublished)(Kmart was not required to place an employee into a "checker" position to which someone else had greater seniority by virtue of the employee handbook; if other employees "have a legitimate contractual or seniority right to a vacant position, it is not considered vacant for reassignment to the disabled employee")(citation omitted); Smith v. Midland Brake, 180 F.3d 1154 (10th Cir. 1999)("if other employees with the company have a legitimate contractual or seniority right to a vacant position, it is not considered vacant for reassignment to the disabled employee"); Willis v. Pacific Maritime Association, 244 F.3d 675 (9th Cir. 2001)(a position is not "vacant" if employees with greater seniority are entitled to the position); and Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996), cert. denied, 117 S. Ct. 1318 (1997)(if an employee with seniority is entitled to a position over a less senior employee, the position would not be a "vacant" position available to the less senior employee; "[w]ithin such a framework a "vacant" position would essentially be one that an employee could acquire with his seniority and for which he could meet the job requirements").

The Supreme Court's decision in U.S. Airways v. Barnett rejected the EEOC's former position that an employer must always modify a non-collectively bargained seniority policy.<sup>14</sup> In light of U.S. Airways v. Barnett, the EEOC's most recent position on modifying seniority is that it is generally "unreasonable" to "reassign an employee with a disability if doing so would violate the rules" of a collectively-bargained or non-collectively-bargained seniority system. This is because such seniority systems "give employees expectations of consistent, uniform treatment" which "would be undermined if employers had to make the type of individualized, case-by-case assessment required by the reasonable accommodation process." However, the EEOC has stated that "if there are 'special circumstances' that 'undermine the employees' expectations of consistent, uniform treatment,'" an employer may be required to reassign an employee despite

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<sup>14</sup> Specifically, in the past, the EEOC stated that where a "seniority policy is not part of a collective bargaining agreement," an employer "is under no legal obligation to observe the terms of its seniority policy." Therefore, according to the EEOC's old position, an employer was required to make "an exception" to its seniority policy unless that would cause an undue hardship. EEOC Amicus Curiae Brief in Barnett v. U.S. Air, Inc., No. 96-16669 (Brief filed in Ninth Circuit, 12/11/98) at pp. 13-14. The EEOC also stated (in another unsuccessful litigation) that an employer may need to modify non-CBA seniority policies in order to allow an employee with epilepsy to remain in her day-shift job, rather than allowing another employee to bump her from that job because of seniority. EEOC Brief in EEOC v. Sara Lee Corp., No. 00-1534 (Brief filed in Fourth Circuit, 6/12/00).

the seniority system. Such circumstances include cases “where an employer retains the right to alter the seniority system unilaterally, and has exercised that right fairly frequently, thereby lowering employee expectations in the seniority system” (in which case, one more exception “may not make a difference”), cases where a system contains exceptions “such that one more exception is unlikely to matter,” or cases where the seniority system “might contain procedures for making exceptions, thus suggesting to employees that seniority does not automatically guarantee access to a specific job.” EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at Question 31.

*Whether Employer Must Ask for Volunteers in Order to Create a Vacancy*

A strong argument can be made that an employer does not need to create a vacancy, *either* by bumping employees or by seeking volunteers who are willing to relinquish their positions. For example, in Thomsen v. Romeis, 198 F.3d 1022 (7th Cir. 2000), the court noted that the employee, an injured police officer, suggested that the employer try to accommodate him “by reassigning employees or at least inviting other employees to consider moving into different positions.” The court stated that the employer “did nothing improper by declining to undertake Thomsen's proposed changes.” However, some authority indicates that an employer may in fact have to allow employees to change jobs in order to create a vacancy. For example, in Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393 (E.D. Tex. 1995), the court stated that an employer may have to consider employees' offers to voluntarily relinquish their positions to create a vacancy for an employee with a disability. This, of course, raises the issue of whether an employer must *solicit offers* from employees to voluntarily switch jobs. In addition, in a little noticed footnote in a litigation brief, the EEOC also seems to have taken the position that employers must consider employee offers to switch positions with an individual who needs reasonable accommodation. In a Memorandum in Support of its Motion for Partial Summary Judgment in Union Carbide Chemicals and Plastics Co., Civ. Act. No. 94-103 (E.D. La.)(Settled: 3/96), the EEOC argued that an employer had an obligation to reassign an employee to a straight shift because he could not perform his rotating shift because of a disability (bi-polar disorder). In a footnote in the brief, the EEOC took the position that the employer could have put the employee on a straight shift by, among other things, "using volunteer shift trades." Memorandum in Support of Motion for Partial Summary Judgment, at p. 25, n.10.

### *How Widely Must Employer Look for Position for Reassignment*

The next question is how widely the employer must search for a vacant position and whether the employer can limit its search to those jobs for which an employee has expressed interest. It is possible that a court could say that only a limited search is "reasonable" from a cost/benefit perspective under Vande Zande v. Wisconsin Department of Administration, 44 F.3d 538 (7th Cir. 1995) and Borkowski v. Valley Central School District, 63 F.3d 131 (2d Cir. 1995) (looking at whether an accommodation is "reasonable" by using a cost/benefit analysis).

The statute does not, however, expressly provide support for such limitations. In fact, the EEOC has specifically stated that an employer's reassignment obligation is not limited to vacancies within a particular office, branch, agency, department, facility, personnel system, or geographical area. Rather, the only limitation on how widely the employer must look is whether such a search causes an undue hardship.<sup>15</sup> EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 27. In addition, some courts have specifically held that reassignment is not limited to an employee's particular department or to jobs the employee happens to know about. In Gile v. United Airlines, Inc., 213 F.3d 365 (7th Cir. 2000), the court rejected United's argument that it must only consider reassigning the plaintiff inside her department or to positions to which she had previously requested transfer. In Hendricks-Robinson v. Excel Corp., 154 F.3d 685 (7th Cir. 1998), the court stated that the employer was "required to identify 'the full range of alternative positions' available and 'to consider transferring the employee to any of these other jobs, including those that would represent a demotion.'" In this case, the court held that the employer may have violated the ADA by automatically considering disabled production workers only for production jobs. Although the employer claimed that employees were not *prohibited* from seeking non-production jobs, employees were told that they were already being considered for all available

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<sup>15</sup> The EEOC has stated, however, that "if an employee is being reassigned to a different geographical area, the employee must pay for any relocation expenses unless the employer routinely pays such expenses when granting voluntary transfers to other employees." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at Question 27. See also Internal EEOC "Procedures for Providing Reasonable Accommodation for Individuals with Disabilities" (2/2001) at V ("Reassignment may be made to a vacant position outside the employee's commuting area if the employee is willing to relocate. As with other transfers not required by management, EEOC will not pay for the employee's relocation costs.").



positions, and postings for non-production jobs were generally not seen by disabled employees. Similarly, in Aka v. Washington Hospital Center, 156 F.3d 1284 (D.C. Cir. 1998), the court noted that although the employee “had an obligation to demonstrate that there existed some vacant position to which he could have been reassigned,” the employer “had a corresponding obligation to help him identify appropriate job vacancies (since plaintiffs can hardly be expected to hire detectives to look for vacancies).” In Shapiro v. Township of Lakewood, 292 F.3d 356 (3d Cir. 2002), the court held that in a case where an employee needed reassignment as an accommodation, the employer could not refuse to reassign him simply because he did not follow the employer’s standard policy requiring employees to formally apply for specific openings. In this case, the court suggested that the employer should have itself considered the employee for vacancies for which he was qualified.

To be safe, an employer would certainly want to demonstrate that it engaged in a good faith effort to identify a position. For example, in Malabarba v. Chicago Tribune Co., 149 F.3d 690 (7th Cir. 1998), the court noted that the employer “clearly fulfilled its obligation” to attempt reassignment of a plant packager. The court stated that the company had “committ[ed] significant time and effort to finding him a job” for which he was qualified (even though it was ultimately unsuccessful in doing so) and had engaged in “a conscientious and thorough intra-company search to find him a position.” Again, the EEOC has stated that the employer “is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment” and the employee “should assist the employer in identifying appropriate vacancies to the extent that the employee has access to information about them.” EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 28.

A related issue is whether the employer can limit its search to jobs for which the employee meets pre-established qualification standards. Courts have stated that employers can indeed limit the search to these jobs. For example, in Dalton v. Subaru-Isuzu, 141 F.3d 667 (7th Cir. 1998), the court stated that “[n]othing in the ADA requires an employer to abandon its legitimate, nondiscriminatory company policies defining job qualifications, prerequisites, and entitlements to intra-company transfers.” For example, the court noted that an employer may have a policy of preferring full-time employees over part-time employees for internal transfers, may have an “up-or-out” policy (where employees who do not advance in their jobs are terminated), may have a “non-demotion” policy (where employees are not entitled to demotion),

or may have a policy that light-duty jobs are reserved for individuals recuperating from recent injuries. In Dalton, the court also stated the in order to avoid "an infinite regression on the accommodation issue," reassignment does not include "transfer to yet a third job" for an employee who has been reassigned to a second job as a reasonable accommodation. See also Aka v. Washington Hospital Center, 156 F.3d 1284 (D.C. Cir. 1998)(“An employer is not required to reassign a disabled employee in circumstances ‘when such a transfer would violate a legitimate, nondiscriminatory policy of the employer’” (citing Dalton)).

In a curious opinion, Thompson v. E.I. Dupont Denemours and Co., 2003 U.S. App. LEXIS 14816 (6th Cir. 2003)(unpublished), the plaintiff claimed that he should have been reassigned to a position which the employer claimed was temporary (for purposes of inputting certain data to computerize its inventory). The court held that employers are not required to reassign permanently disabled employees to such temporary positions. The court noted that these input positions were “temporary” since employees were told that the positions would be temporary and the job description stated that these positions were temporary, even though two years later, the positions were made permanent. The court rejected that plaintiff’s argument that even if the employer did not need to convert these to permanent positions, it should have placed him in the “temporary” position while investigating other alternatives. The court noted that “such a flexible, open-ended approach would require employers to constantly assess newly vacant positions for an unknown and possibly indefinite period of time.”

#### *Whether Training is Required for Reassigned Employee*

An employee must be qualified to perform the job to which s/he is reassigned. Therefore, it does not appear that an employer would have to train an employee for the new job. In fact, the EEOC has specifically stated that “there is no obligation for the employer to assist the individual to become qualified. Thus, the employer does not have to provide training so that the employee acquires necessary skills to take a job.” EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at “Reassignment.” Courts seem to agree with this position. For example, in Williams v. United Insurance Company of America, 253 F.3d 280 (7th Cir. 2001), the court held that an employer is not required to “offer special training to disabled employees” which is “not offered to nondisabled employees” so they can perform reassigned jobs. Therefore, the employer did not have to train an insurance salesperson to be a sales manager when the employee could no longer perform her job because of a leg

impairment. The court noted that reasonable accommodation “may require the employer to reconfigure the workplace to enable a disabled worker to cope with her disability, but it does not require the employer to reconfigure the disabled worker.” For example, the court stated that although an employer might have to provide materials in Braille, it would not have to teach the employee to read Braille.

Oddly, in litigation, the EEOC has taken the position that an employer may be required to provide training for an individual who needs reassignment “unless the required training was unusually difficult or expensive” so that it constituted an undue hardship. EEOC’s Amicus Curiae Brief in *Gelabert-Ladenheim v. American Airlines, Inc.*, No. 00-2324 (Brief filed in First Circuit, 1/30/01), at 19. Of course, if the employer trains employees without disabilities for reassignments, it should do the same for employees with disabilities.

Federal courts have held that additional training may be required if an individual needs such training to continue to perform his/her *original* job. In *Gonzagowski v. Widnall*, 115 F.3d 744 (10th Cir. 1997), the court noted that “additional training might be a reasonable accommodation” for an employee who can no longer perform his job because of a disability. In *Vollmert v. Wisconsin Dept. of Transportation*, 197 F.3d 293 (7th Cir. 1999), the court noted that it may be an accommodation to provide more intensive training to an employee with a learning disability so that she could continue to perform her job when the employer installed a new computer system.

Of course, it could be disparate treatment to deny an individual with a disability the right to additional training which is available to others. For example, in *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568 (7th Cir. 2001), the court held that it would be illegal to deny training to an individual *because of* his/her disability if that individual is eligible for the training, unless the employee would ultimately be unable to perform the task.

#### *Requiring Employee to Compete for New Position*

Another common question is whether, in carrying out its reassignment obligation, an employer can simply allow the employee to *compete* for a vacant position. The EEOC takes the position that reassignment means that the employee *gets* the vacant position if s/he is qualified for the

position. See Appendix to 29 C.F.R. § 1630.2(o) ("[e]mployers should reassign the individual to an equivalent position . . . if the individual is qualified, and if the position is vacant within a reasonable amount of time.") In a nationwide training conducted throughout 1996, EEOC headquarters trained EEOC investigators that, in providing reassignment, "[t]he employee with the disability need not be the most qualified individual for the vacant position. The ADA only requires that the employee be qualified. Furthermore, if the employee is qualified for the position s/he is entitled to get the position without competing for it." EEOC ADA Case Study Training (1996) C.S.1 at p. 4. See also EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 29 ("reassignment would be of little value" if it just meant that an employee could "compete" for a vacant position). Similarly, courts that have held that reassignment is a required reasonable accommodation have expressly held -- or suggested -- that reassignment does not mean simply allowing the employee to compete for an open position. For example, in Smith v. Midland Brake, 180 F.3d 1154 (10th Cir. 1999), the court held that "reassignment" means more than "merely allowing a disabled person to compete equally with the rest of the world for a vacant position." The court stated that requiring the disabled employee "to be the best qualified employee for the vacant job" is incorrect under the statute. See also Hines v. Chrysler Corp., 2000 U.S. App. LEXIS 11338 (10th Cir. 2000)(unpublished)(reiterating that non-competitive reassignment may be required under the ADA) and Hall v. Claussen, 2001 U.S. App. LEXIS 3404 (10th Cir. 2001)(unpublished)(a disabled person may be entitled to reassignment even though he may "not be able to establish that he is the most qualified person whom the employer could have selected"). In Aka v. Washington Hospital Center, 156 F.3d 1284 (D.C. Cir. 1998), the court specifically noted that:

the word "reassign" must mean more than allowing the employee to apply for a job on the same basis as anyone else. An employee who on his own initiative applies for and obtains a job elsewhere in the enterprise would not be described as having been "reassigned"; the core word "assign" implies some active effort on the part of the employer. Indeed, the ADA's reference to reassignment would be redundant if permission to apply were all it meant; the ADA already prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures.

Likewise, in Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000), vacated on other grounds, 535 U.S. 391, 122 S. Ct. 1516 (2002), the court expressly stated that "if there is no undue hardship, a disabled employee who seeks reassignment as a reasonable accommodation, if

otherwise qualified for a position, should receive the position rather than merely have an opportunity to compete with non-disabled employees.” Similarly, other courts have suggested that "reassignment" means that the individual is "transferred" to the vacant position for which s/he is qualified. For example, as noted above, in Gile v. United Airlines, Inc., 213 F.3d 365 (7th Cir. 2000), the court rejected United’s argument that simply transferring a disabled employee outside of the bidding process to another position would constitute “affirmative action.” In McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159 (7th Cir. 1997), the court again noted that the ADA “requires reassignment to a vacant position when the employee is no longer able to perform the essential functions of her employment even with a reasonable accommodation, and the employee is qualified for the vacant position.”

Interestingly, in EEOC v. Dillon Companies, Inc., 310 F.3d 1271 (10th Cir. 2002), the court noted that the EEOC, in its litigation brief, conceded that in analyzing the obligation to reassign, an employer need not alter its policy preferring incumbents of a particular facility over others (including the individual with a disability) for vacancies at that facility. See EEOC’s Brief in EEOC v. Dillon Companies, Inc., No. 01-1478 (Brief filed in 10th Cir., 12/18/01).

On the other hand, in EEOC v. Humiston-Keeling, 227 F.3d 1024 (7th Cir. 2000), the court stated that requiring non-competitive reassignment would be “affirmative action with a vengeance,” and held that employers can require employees to compete for reassigned positions. The court disagreed with the EEOC’s contention that reassignment means little if employees are simply required to compete with the others for vacant positions. Specifically, the court stated that employees with disabilities still receive “plenty,” since without reassignment as an accommodation, an employer “might plausibly claim that ‘reasonable accommodation’ refers to efforts to enable a disabled worker to do the job for which he was hired, or for which he is applying, rather than to offer him another job.” The court noted that “[t]he reassignment provision makes clear that the employer must also consider the feasibility of assigning the worker to a different job in which his disability will not be an impediment to full performance, and if the reassignment is feasible and does not require the employer to turn away a superior applicant, the reassignment is mandatory.” Similarly, in Williams v. United Insurance Company of America, 253 F.3d 280 (7th Cir. 2001), the court stated that an employer “is not required to give the disabled employee preferential treatment, as by giving her a job for which another employee is better qualified.” In Mays v. Principi, 301 F.3d 866 (7th Cir. 2002), the court noted that even though the plaintiff, a nurse, might have been qualified for an alternative sedentary

nursing job, she was not entitled to the job over better qualified applicants. The court stated that its decision “is bolstered” by the Supreme Court’s decision in U.S. Airways v. Barnett, “which holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer's seniority system.” The court explained that “if for ‘more senior’ we read ‘better qualified,’ for ‘seniority system’ we read ‘the employer's normal method of filling vacancies,’ and for ‘superseniority’ we read ‘a break,’ U.S. Airways becomes our case. Even more recently, in Craig v. Potter, 2004 U.S. App. LEXIS 3443 (7th Cir. 2004)(unpublished), the court held that the plaintiff, a temporary postmaster, was not entitled to non-competitive reassignment to a postmaster position. The court held that the Postal Service was not required to “leap-frog” the plaintiff over better-qualified candidates because “forcing the Service to abandon its policy of hiring the best-qualified applicant in order to accommodate a disabled employee would be unreasonable.” Similarly, in Hedrick v. Western Reserve Care System and Forum Health, 355 F.3d 444 (6th Cir. 2004), the court held that the plaintiff, a nurse who could no longer perform her job’s physically-demanding tasks, was not entitled to “preferential treatment” in reassignment.

Courts that have held that reassignment is *not* required have stated that employees can be required to compete with others for open positions. For example, in Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995), cert. denied, 516 U.S. 1172 (1996), the court held that an individual who could no longer perform his job because of disability was not entitled to "priority in hiring or reassignment over those who are not disabled."

Of course, some courts have simply not reached the issue of whether reassignment is non-competitive. See, e.g., Norville v. Staten Island University Hospital, 196 F.3d 89 (2d Cir. 1999).

#### *Salary/Benefits of Reassigned Employee*

Employers frequently ask whether they must continue paying an employee's original salary and benefits if the employee is reassigned to a lower level position. There appears to be general agreement that the employer does not have to pay an employee's original salary or maintain the original benefits if the new position pays a lower salary. Of course, if the employer pays employees without disabilities their higher salary or benefits when they are reassigned to lower-

level positions (for example, in connection with a plant closing), it should do the same for employees with disabilities (or risk a disparate treatment lawsuit). Indeed, even the EEOC has said that in cases of reassignment to lower-level positions, an employer is not required to maintain the reassigned individual at the salary of the higher graded position if it does not so maintain reassigned employees who do not have disabilities. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 30. Courts have reached this same result. For example, in Cassidy v. Detroit Edison Co., 138 F.3d 629 (6th Cir. 1998), the court specifically noted that if a comparable position is not available, the employer may reassign the employee to "a lower grade and paid position." In Voytek v. University of California, 1996 U.S. App. LEXIS 3531 (9th Cir. 1996)(unpublished), the court held that when an employee was reassigned (because of his mental disability) to a job with fewer responsibilities and less stress, he could receive the reduced salary of the new position.

*Whether Reassignment is a Required Reasonable Accommodation in Case of Reduction-in-Force (RIF)*

One important question -- given the common practice of corporate downsizing -- is whether an employer must provide reassignment as a reasonable accommodation when an employee's position is eliminated as part of a workforce restructuring. Certainly, an employer *can* restructure its workforce for reasons unrelated to disability. There is a strong argument that if -- in the restructuring -- the job of an individual with a disability is eliminated, the employer simply needs to treat the individual the same way it treats other individuals whose jobs are lost. For example, if displaced employees must compete for new positions, the individual with a disability can be required to compete for a new position. In Sharpe v. AT&T, 66 F.3d 1045 (9th Cir. 1995), the court specifically noted that when the plaintiff lost his job as part of a corporate restructuring, he could be forced to compete for available positions in the same manner as other employees. The rationale for this argument is that reassignment is available as a reasonable accommodation when an individual can no longer perform his/her job because of disability; an employee who is displaced as a result of downsizing is unable to perform his job because of the restructuring, *not* his/her disability. Other decisions support this position, such as Wohler v. Toledo Stamping & Manufacturing Co., 1997 U.S. App. LEXIS 27183 (6th Cir. 1997)(unpublished)(employee was not entitled to alternative position when his position as quality engineer was phased out); and Milton v. Scrivner, Inc., 53 F.3d 1118 (10th Cir.

1995)(employer is free to alter job functions in order to improve competitiveness). But see Crawford v. Union Carbide Corp., 1999 U.S. App. LEXIS 32483 (4th Cir.

1999)(unpublished)(as noted earlier, when the employee lost her job due to a reorganization and the employer offered her an alternative position, the court held that the employer “satisfied any duty it may have had to accommodate Crawford by offering her the records clerk position”).

The EEOC has taken the position that if someone is being RIF'd as a result of his/her disability, the employer must show that the reason for the termination is job-related and consistent with business necessity. For example, in an amicus curiae brief, the EEOC noted that a particular employee received a lower performance rating because of heart attack-related absences. As a result, he was among the low-rated employees who were laid off in the RIF. The EEOC stated that, in cases where discharge "was directly tied to the consequences of his disability or his need for reasonable accommodation," the employer has acted "because of disability." EEOC Amicus Curiae Brief in Matthews v. Commonwealth Edison, Co., No. 96-3665 (Brief filed in Seventh Circuit, 1/21/97) at pp. 10-13. Importantly, in that case, the court rejected the EEOC's position. In Matthews v. Commonwealth Edison Co., 128 F.3d 1194 (7th Cir. 1997), the court held that the employer could retain its most productive employees in a RIF, even if an employee was less productive since he had a reduced work schedule because of his disability.

Interestingly, the EEOC has, in the past, taken the controversial position that if an employee with a disability is bumped from her job because of a RIF elsewhere in the company, the employer might still be required to provide an accommodation so the employee with a disability could remain in the original position. In EEOC v. Sara Lee Corp., the EEOC claimed that an employee with epilepsy was bumped from her shift job by someone with greater seniority (when that employee lost her job due to a RIF). The EEOC sued Sara Lee, arguing that the company should have modified its seniority policy to allow the employee with epilepsy to avoid being bumped from her job. EEOC Brief in EEOC v. Sara Lee Corp., No. 00-1534 (Brief filed in Fourth Circuit, 6/12/00). The EEOC noted that the employee “was asking for a relatively minor adjustment in her work schedule, one that would permit her to continue working in a shift that accommodated her disability.” In U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 122 S. Ct. 1516 (2002), the Supreme Court seems to have rejected this view that seniority policies must be modified.



Of course, if a company has a RIF, it cannot disparately treat an individual with a disability. In EEOC v. J.R. Tobacco of North Carolina, No. 5:96-CV-183-H(1) (E.D.N.C., Complaint Filed: 3/96), the EEOC claimed that the company treated an employee with spina bifida in a disparate manner. Specifically, the EEOC argued that the company failed to offer this particular worker alternative employment when he was laid off, even though other similarly situated workers were offered such employment.

### Whether Employer Must Rescind Discipline as a Reasonable Accommodation

There is widespread agreement that reasonable accommodation does not include rescinding discipline. Rather, an employer may uniformly impose discipline, *even if* the employee later reveals that the misconduct was the result of a disability. This is because an employer may hold all employees (those with and without disabilities) to the same performance and conduct standards. See 56 Fed. Reg. 35,733 (1990); EEOC Compliance Manual § 915.002 at 11, 12 fts. 11 & 12 (3/14/95). **This section of the EEOC's Compliance Manual is available on the internet at [www.eeoc.gov](http://www.eeoc.gov).** For example, in nationwide training conducted throughout 1996, EEOC headquarters trained EEOC investigators that reasonable accommodation does *not* include "[w]aiving warranted discipline, even if disability played a role in causing the conduct that is worthy of discipline." EEOC ADA Case Study Training (1996) C.S.1 at p. 5.

Courts appear to agree that reasonable accommodation does not include waiving discipline. For example, in Davila v. QWest Corp., 2004 U.S. App. LEXIS 19020 (10th Cir. 2004)(unpublished), the employee claimed that the employer was required to “retroactively excuse” misconduct (threats of violence) related to his bi-polar condition. The court rejected this claim, noting that “excusing workplace misconduct to provide a fresh start/second chance to an employee whose disability could be offered as an after-the-fact excuse is not a required accommodation under the ADA.” Among other things, the court pointed out that the EEOC’s position is that “since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.” In Hill v. Kansas City Area Transportation Authority, 181 F.3d 891 (8th Cir. 1999), the employee, a bus driver, twice fell asleep in her bus (while she was not driving). After she was fired for this misconduct, she alleged that her drowsiness was caused by her hypertension medication. In rejecting the employee’s ADA claims, the court stated that she “did not request a disability

accommodation, she asked for a second chance to better control her treatable medical condition. That is not a cause of action under the ADA.” Similarly, in Caniano v. Johnson Controls, Inc., 1999 U.S. App. LEXIS 20648 ((9th Cir. 1999)(unpublished), the court rejected the claim of a former employee fired for absenteeism, who informed his employer of his disability after the termination and requested reinstatement as a reasonable accommodation. The court noted that “[h]ad Caniano informed Johnson Controls of his disability during his employment there, Johnson Controls would have been required under the ADA to determine whether or not Caniano could perform his job with reasonable accommodations for his disability.” However, the court stated that the ADA does not require an employer “to rehire a legitimately terminated employee upon the employee's demonstration that he could perform the job with reasonable accommodations for his newly-diagnosed disability.” In Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1995), the employee (a police officer with insulin-dependent diabetes) failed to correctly monitor his insulin and, as a result, became disoriented while driving his police car. He was stopped by other officers while driving at a high speed through a residential area forty miles outside of his jurisdiction. The court said reasonable accommodation does not include giving an employee a "second chance" when he has broken the employer's conduct or safety rules. Similarly, in Flynn v. Raytheon Co., 868 F. Supp. 383 (D. Mass. 1994), aff'd, 1996 U.S. App. LEXIS 20837 (1st Cir. 1996)(unpublished), the lower court noted that an employee who broke the company's policy on being under the influence of alcohol in the workplace cannot "belatedly avail himself of the reasonable accommodation provisions" of the ADA to escape discipline for his misconduct. The First Circuit also noted that the "ADA does not require an employer to rehire a former employee who was lawfully discharged for disability-related failures to meet its legitimate job requirements."

Although an employer does not need to forgive an employee for breaking rules, it may have to provide reasonable accommodation so that the employee does not break those rules in the future. For example, suppose an employee has been disciplined for tardiness, and s/he later reveals that she has been tardy because she gets morning treatments for her disability. The employer does not need to rescind the past discipline, but may have to modify the employee's future work schedule so s/he can get her treatments without being tardy.

### Work-at-Home as a Reasonable Accommodation

There has been some controversy over whether an employer must consider allowing an employee to work-at-home as a reasonable accommodation. Some courts and the EEOC take the position that *where* the work is performed is just another policy that may have to be modified for certain jobs. For example, in Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001), the court expressly stated that “working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship.” In this case, the court concluded that work-at-home might be a reasonable accommodation for a medical transcriptionist who could not reliably attend work at the employer’s worksite because of her obsessive compulsive disorder. In Lalla v. Consolidated Edison Company of New York, Inc., 2002 U.S. App. LEXIS 6519 (2d Cir. 2002)(unpublished), the court held that although work-at-home could be a reasonable accommodation, the plaintiff’s job – requiring “on-site inspection and other work on electric lines” – could not be performed at home. In Waggoner v. Olin Corp., 169 F.3d 481 (7th Cir. 1999), the court stated that “in some jobs-- though almost certainly not in production jobs such as Waggoner's -- working at home for a time might be an option. However, in evaluating any requested accommodation, the issue will be whether the hardship imposed on the employer by it is "undue." Similarly, in Langon v. Dept. of Health & Human Services, 959 F.2d 1053 (D.C. Cir. 1992), the court stated that work-at-home can be a form of reasonable accommodation.

In EEOC v. Spectacor Management Group, Civ. Act. No. 95-2688 (E.D. Pa., Settled: 6/95), the EEOC took the position that the employer was obligated to provide -- as a reasonable accommodation -- the opportunity to work at home. In that case, the employee allegedly needed to be able to work at home because of the medical treatment he was getting for AIDS. The EEOC has argued a “home office” may be a required accommodation for an employee whose doctor suggested that it would be “advisable” because of complications from her cancer surgery, even though the employee could perform the job’s essential functions in the office. See EEOC's Brief in Rau v. U.S. Tobacco, No. 01-3973 (Brief filed in Seventh Circuit, 8/9/02). In addition, the EEOC has stated in its “EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002” (10/17/02) at Question 34, that an employer “must modify its policy concerning where work is performed” to allow an employee to work at home if this accommodation is effective and would not cause an undue hardship.

Of course, even if a court were to conclude that work-at-home can be a reasonable accommodation, it is still important to look at the actual job at issue in order to determine

whether the person can *do* that job at home. The EEOC has acknowledged that certain jobs (a food server, a cashier) can only be performed at a work site, while other jobs (a telemarketer, a proofreader) may be able to be performed at home. The EEOC stated that certain considerations will be relevant to whether a job can be performed at home, such as “the employer’s ability to adequately supervise the employee and the employee’s need to work with certain equipment or tools that cannot be replicated at home.” EEOC Guidance at pp. 46-47. The EEOC has also written that “other critical considerations include whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace.” EEOC Fact Sheet “Work-At-Home/Telework as a Reasonable Accommodation” (2/3/03). Along these lines, in Nanette v. Snow, 2003 EEOPUB LEXIS 1215 (EEOC 2003), a case against the Department of the Treasury, the EEOC (in a formal agency decision) held that Treasury did not have to let a Program Analyst work at home, where her job’s essential functions included participating in office meetings and conducting field visits which could “not be performed from home.”

Courts agree that an employer has a right to look at the requirements of the job in determining whether work-at-home can be provided. For example, in Mason v. Avaya Communications, Inc., 357 F.3d 1114 (10th Cir. 2004), the court held that work-at-home was not a required accommodation for a service-call coordinator who claimed that she could perform her job through use of a computer, telephone and fax machine. The court held that physical attendance at the workplace was an essential function of her job because the evidence showed that service coordinators had always been required to be at the workplace, these employees could not be properly supervised if working from home, and team work (including covering for other employees as needed) required working at the employer’s facility. The court held that it will be an "unusual" or "extraordinary" case where attendance at the workplace is not an essential function of the job and work-at-home may be a reasonable accommodation. In Heaser v. The Toro Company, 247 F.3d 826 (8th Cir. 2001), the plaintiff, a marketing services coordinator with multiple chemical sensitivities, claimed that she could be reasonably accommodated by allowing her to work at home and without exposure to carbonless paper. The court disagreed, noting that the company had shown that its computer system could not be used through remote access. In Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001), the court held that the plaintiff, an unemployment insurance Claims Adjudicator, could not perform his job at home. The court

noted that even if the plaintiff could conduct interviews by telephone and write decisions at home, he could not perform his other essential functions such as training and advising other office workers. In Moore v. Walker, 2001 U.S. App. LEXIS 26402 (10th Cir. 2001)(unpublished), the court held that even a “model employer” such as the federal government, does not have to provide full-time work-at-home as an accommodation for an employee whose work duties require being in the office. In this case, the court noted that the plaintiff, an evaluator for the General Accounting Office, needed to be in the office because he had to interview people, gather data, attend team meetings, and collaborate with co-workers in performing audits. In Misek-Falkoff v. IBM Corp., 854 F. Supp. 215 (S.D.N.Y. 1994), aff'd, 60 F.3d 811 (2d Cir.), cert. denied, 516 U.S. 991 (1995), the court concluded that the employer properly denied the plaintiff's request to work at home, given that the job required personal interaction. In Hypes v. First Commerce Corporation, 134 F.3d 721 (5th Cir. 1998), the court concluded that a bank loan review analyst could not perform his job at home because the job required him to review confidential loan documents which could not be taken out of the office, and because he worked as part of a team and "the efficient functioning of the team necessitated the presence of all members." Similarly, in Whillock v. Delta Air Lines, 926 F. Supp. 1555 (N.D. Ga. 1995), aff'd, 86 F.3d 1171 (11th Cir. 1996), the court held that work-at-home was not a reasonable accommodation for an airline reservations agent because, among other things (such as concerns about the airline's proprietary information), the "need for in person training, monitoring, evaluating, and counseling" make actual attendance essential for the job. In Smith v. Ameritech, 129 F.3d 857 (6th Cir. 1997), the court concluded that the employer did not have to allow a collections agent to work at home if his “productivity inevitably would be greatly reduced.” The court noted that the plaintiff had not presented “facts indicating that his was one of those exceptional cases where he could have ‘performed at home without a substantial reduction in quality of [his] performance.’” (Citation omitted). See also Mears v. Gulfstream Aerospace Corp., 905 F. Supp. 1075 (S.D. Ga. 1995), aff'd, 87 F.3d 1331 (11th Cir. 1996)(court noted that "working at Gulfstream's facilities" was an essential function of the employee's job in pricing or accounts receivable).

In addition, it is legitimate to ask whether work-at-home is truly needed as an accommodation, or whether another accommodation might work for the individual. For example, in Black v. Wayne Center, 2000 U.S. App. LEXIS 17567 (6th Cir. 2000)(unpublished), the plaintiff (who had multiple sclerosis) wanted to work at home for up to five hours each week as an accommodation. The court noted, however, that the employer “has the ultimate discretion to

choose between effective accommodations, and may choose the less expensive accommodation or the accommodation which is easier to provide.” In this case, the court noted that the employer provided the employee with medical leave and paid time off. According to the court, the plaintiff was able to perform the job after having been given these accommodations. The court stated that if the employee “wanted further accommodations, such as a place to lie down during exacerbations, she could have requested that Wayne Center provide a bed or couch in a private room.” The court concluded that there “was no need in this case to require Wayne Center to change its policy of onsite employment in order to satisfy a single employee's request to work at home.” The EEOC has written that an employer *may* choose to make an accommodation that would enable the employee to work full-time in the workplace rather than granting a work-at-home request. EEOC Fact Sheet “Work-At-Home/Telework as a Reasonable Accommodation” (2/3/03).

It can be argued that if an employer has non-discriminatory policies for employees to be able to work at home, and if an employee does not meet the standards for these policies, the employee can be denied the ability to work at home. For example, in Spielman v. Blue Cross and Blue Shield of Kansas, 2002 U.S. App. LEXIS 6523 (10th Cir. 2002)(unpublished), a nurse who performed compliance reviews asked to be able to work at home because her deteriorated condition required twelve hours of intravenous feeding per day. The court agreed with the employer’s denial of this request since the employee’s poor “case closure” rate (prior to the request for accommodation) disqualified her from work-at-home under the employer’s policies. The EEOC, however, has written that an employer might be required “to waive certain eligibility requirements” for an employee to be able to work at home (such as a seniority requirement) so that an employee can be given such work as a reasonable accommodation. EEOC Fact Sheet “Work-At-Home/Telework as a Reasonable Accommodation” (2/3/03).

Some courts have simply held that employers generally do not have to provide "work-at-home" as a reasonable accommodation. For example, in Rauen v. U.S. Tobacco, 319 F.3d 891 (7th Cir. 2003), the plaintiff claimed that because of her cancer, it would be a reasonable accommodation to allow her to perform her Software Engineer job at home except for those times when she felt she needed to come to the workplace. The court disagreed, noting that a “home office” is “almost never” a required accommodation and that the plaintiff’s situation did not present the "very extraordinary case" where a home office would be reasonable. The court noted that the employee’s job required her to be at the office to monitor contractors’ work, answer contractors’

questions, and handle problems requiring immediate resolution. In addition, the court noted that “hers is the kind of job that requires teamwork, interaction, and coordination of the type that requires being in the work place.” Similarly, in Vande Zande v. Wisconsin Department of Administration, 44 F.3d 538 (7th Cir. 1995), the court said that work-at-home is generally *not* a form of reasonable accommodation. In Johnson v. Foulds, Inc., 1997 U.S. App. LEXIS 3386 (7th Cir. 1997)(unpublished), the court even more definitively stated that "as a matter of law," work-at-home "is not a reasonable accommodation."

An employer's safest approach is to consider whether a job *can* be done at home -- assuming there is no accommodation so the employee can do the job at the employer's facility.

### Modified Work Schedule as a Reasonable Accommodation

An employer may, in certain circumstances, have to modify an employee's work schedule if this is needed as a reasonable accommodation. 42 U.S.C. 12111(9); 29 C.F.R. § 1630.2(o)(2)(ii). There seems to be general agreement that a modified work schedule can include a number of modifications, such as altering arrival/departure times, providing periodic breaks during the day, or changing when certain functions are done. The key -- in *all* cases -- is whether there is a nexus between the disability and the requested schedule; in other words, whether the modified schedule is truly needed *because of* the disability. For example, as noted earlier, in Gaines v. Runyon, 107 F.3d 1171 (6th Cir. 1997), a Rehabilitation Act case, the court held that the plaintiff's requested schedule change was not needed *because of* his epilepsy; rather, the employee's medical documentation showed that he simply needed a straight shift (which he already *had*) because of his need for a consistent sleep pattern.

A modified work schedule also can include letting an employee arrive late, leave early, or take breaks during the day because of incapacitation resulting from the disability. For example, in EEOC v. Kinney Shoe Corp., 917 F. Supp. 419 (W.D. Va. 1996), *aff'd*, Martinson v. Kinney Shoe Corp., 104 F.3d 683 (4th Cir. 1997), the court -- although finding that the plaintiff had *not* been the victim of discrimination -- noted that allowing an employee to "take breaks during brief periods of incapacitation" because of epilepsy can be a reasonable accommodation. The court stated that it will depend on the facts of each particular case "to determine if temporary incapacitation renders an individual unqualified for the position at issue." In Conneen v. MBNA

America Bank, N.A., 334 F.3d 318 (3d Cir. 2003), the employer argued that arriving at work at 8:00 a.m. was an essential function of the job of a Marketing Production Manager, since managers must set a good example for other employees. The employer argued that the employee was not qualified where she could not report to work until 9:00 a.m. because of her depression. The court held that “setting a good example” was not enough to make the 8:00 schedule essential; therefore, a modified schedule would be a reasonable accommodation. In Breen v. Department of Transportation, 282 F.3d 839 (D.C. Cir. 2002), the employee had a mental disorder which caused her to be unable to complete her filing because she could not perform this task with the normal workplace disruptions. She claimed that she needed a modified schedule under which she would work one extra hour at the end of each day (without disruptions) and then take one compensatory day off every other week. The court held that such a modified schedule should be considered as a possible reasonable accommodation.

Of course, if an employee is given additional breaks from work, the ADA generally would not require that the employer pay the employee for that time. [Note: There could, however, be FLSA issues to consider in this regard.] In McCarthy v. Potter, 2003 EEOPUB LEXIS 1306 (EEOC 2003), a case against the U.S. Postal Service, the EEOC (in a formal agency decision) held that the Postal Service did not violate the ADA by providing the employee 7-minute breaks every half hour (as she requested), but then requiring her to make up lost time by working additional hours or by using leave.

It can be argued that, for certain jobs, an employee’s assigned schedule is an essential function and need not be modified. In its “EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002” (10/17/02) at Question 22, the EEOC acknowledged that “for certain positions, *the time during which an essential function is performed may be critical.*” The EEOC stated that employers should therefore “carefully assess whether modifying the hours could *significantly disrupt* their operations -- that is cause undue hardship -- or whether the essential functions may be performed at different times with *little or no impact* on the operations or the ability of other employees to perform their jobs.” Guidance at p. 33 (emphasis in original). For example, the EEOC has written that it might be essential that a newspaper printing press operator work during the specific hours when the newspapers are printed. Guidance at p. 34.

Courts have generally held that an employer is not required to provide an "open-ended" work schedule as a reasonable accommodation. For example, in Pickens v. Soo Line Railroad Co.,



2001 U.S. App. LEXIS 19333 (8th Cir. 2001), the court held that although a part-time or modified schedule might be a required accommodation, “we view Pickens’ suggested method -- that he should be able to work only when he feels like working -- as unreasonable as a matter of law.” In Palotai v. University of Maryland, 2002 U.S. App. LEXIS 12757 (4th Cir. 2002)(unpublished), the court held that even if the plaintiff had a disability, it was not a reasonable accommodation to eliminate the time constraints and deadlines from his job as a technician in a University greenhouse. The court noted that the rigid scheduling of tasks (such as spraying plants and ventilating the greenhouse) was essential since the plants would not properly grow unless the tasks were done in a timely manner. Likewise, in Martinez v. Pacificorp, 2000 U.S. App. LEXIS 8542 (10th Cir. 2000)(unpublished), the court determined that working a specific schedule was an essential function of the job of an employee with Chronic Fatigue Syndrome. As a result, the court held that the employee’s “requested accommodation of flexible hours and less intellectually demanding work during the early hours of the day does not meet defendant's requirement of punctual arrival.” Likewise, in Kennedy v. Applause, 3 AD Cases 1734 (C.D. Cal. 1994), aff'd on other grounds, 90 F.3d 1477 (9th Cir. 1996), the lower court stated that employers are not required to provide an "open-ended 'work when able' schedule" for time-sensitive jobs.

On the other hand, as noted earlier, in Ward v. Massachusetts Health Research Institute, 209 F.3d 29 (1st Cir. 2000), the plaintiff was a data entry assistant/lab assistant, working under a flex-time schedule which required him to work 7-1/2 hours, starting anytime between 7:00 and 9:00 a.m. The plaintiff frequently showed up later because of his arthritis which allegedly caused severe pain and stiffness in the morning. After the plaintiff was fired for excessive tardiness, he claimed that he would be qualified if he had an open-ended schedule. The court concluded that although a “regular and reliable schedule may be an essential element of most jobs,” it might not be an essential function of this job, because there was no “evidence that the nature of Ward’s position requires that he be present during specific hours of the day.” Rather, the evidence showed that he simply had to complete his work before the lab opened the following day. As a result, the court stated that it is possible that an “open schedule” might be a reasonable accommodation in this job.

Although the EEOC has stated that an employer may have to allow an employee to work part-time as a reasonable accommodation,<sup>16</sup> federal court decisions have been conflicting. Some

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<sup>16</sup> However, if an employee is given a part-time schedule as a reasonable accommodation, the

decisions, such as Ralph v. Lucent Technologies, Inc., 135 F.3d 166 (1st Cir. 1998), are consistent with the EEOC's view that part-time work might be appropriate as a reasonable accommodation. Similarly, in both Parker v. Columbia Pictures Industries, 204 F.3d 326 (2d Cir. 2000) and Parnahay v. United Parcel Service, Inc., 2001 U.S. App. LEXIS 21487 (2d Cir. 2001)(unpublished), the courts stated that part-time work might be an accommodation for a full-time employee, as long as the employee “can demonstrate that he could perform the essential functions of his job while working part-time.” In Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495 (7th Cir. 2000), the court noted that allowing an employee to work part-time for a temporary period can be an accommodation. In this case, the plaintiff, a used car manager with muscular dystrophy, wanted to return to work initially on a part-time basis. The court noted that “[e]mployees who have experienced serious medical problems often return to work part-time and increase their hours until they are working full time.” Since another employee was available to fill in for the hours the plaintiff could not initially work, “gradual return to full-time work would have been a reasonable accommodation” under the ADA. Likewise, in Hatchett v. Philander Smith College, 251 F.3d 670 (8th Cir. 2001), the court stated that a part-time schedule can sometimes be a reasonable accommodation. In this case, however, the court did not require a part-time schedule because the employee could not perform the conflict-oriented essential functions of her Business Manager position even on a part-time basis because of her head injury. In Baumgart v. State of Washington, 1999 U.S. App. LEXIS 17738 (9th Cir. 1999)(unpublished), the court implied that part-time work may be a possible accommodation, by analyzing whether a particular employee’s proposed part-time schedule caused an undue hardship. The court found that it would have caused an undue hardship to allow the social worker to work only part-time because of the difficulty in recruiting other part-time social workers (to fill in), and because of the hardship caused by leaving part of the employee’s caseload unattended. Similarly, in Waggoner v. Olin Corp., 169 F.3d 481 (7th Cir. 1999), the court stated that “in some cases, even working part-time is an accommodation which can and often should be made.”

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EEOC has stated that the employee “is entitled only to the benefits, including health insurance, that other part-time employees receive.” EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 23.

Many courts, however, have suggested that creating a part-time position is not necessarily required as an accommodation. For example, in Lileikis v. SBC Ameritech, Inc., 2003 U.S. App. LEXIS 25405 (7th Cir. 2003)(unpublished), the court held that full-time work was an essential function of a full-time directory assistance position. Therefore, “part-time work is not a reasonable accommodation for a full-time job.” In Lamb v. Qualex, Inc., 2002 U.S. App. LEXIS 5982 (4th Cir. 2002)(unpublished), the court considered whether a customer support employee, working for a photo equipment leasing company, could be given part-time work as a reasonable accommodation. The court concluded that full-time work was an essential function because the employer only hired full-time employees for these positions, and employees consistently worked full time performing their duties (which included visiting retail stores within their territories, providing training and sales support, and immediately responding to field emergencies). As a result, the court held that the employer need not provide part-time work as an accommodation, noting that when “an employer has no part-time jobs available, a request for part-time employment is not a reasonable one.” In Treanor v. MCI Telecommunications Corp., 200 F.3d 570 (8th Cir. 2000), the court noted that although part-time work may be a reasonable accommodation, “the ADA does not require an employer to create a new part-time position where none previously existed.” In this case, the court found that MCI presented evidence that no part-time positions existed at the time the plaintiff claimed she needed such a position. Similarly, in Terrell v. USAir, 132 F.3d 621 (11th Cir. 1998), the court analyzed whether the airline should have allowed a reservations agent with carpal tunnel to work part-time. The court held that where USAir had no part-time reservations agent positions, it was not required to create one for the employee. Specifically, the court stated that “[w]hether a company will staff itself with part-time workers, full-time workers, or a mix of both is a core management policy with which the ADA was not intended to interfere.” In addition, the court noted that requiring an employer to create a part-time work force would subject “it to a new and complicated world of administrative and legal controls.” The court stated that the situation could have been different if the employer had part-time jobs “readily available.” The court also rejected the employee's claim that the part-time work was inherently reasonable merely because the employer had temporarily reduced the employee's hours on four prior occasions. In Burch v. Coca-Cola, 119 F.3d 305 (5th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998), the court stated that the employer was not required “to create a part-time position if the essential functions of the area service manager's position demanded a full-time manager.” Likewise, in Soto-Ocasio v. Federal Express Corp., 150 F.3d 14 (1st Cir. 1998), the court noted that the employee's job required her to enter data into a computer for six to nine hours per day. The court concluded that the company was

not required "to allow plaintiff to work on a part-time basis" because that would have meant reallocating portions of her data-entering duty (an essential function) to other employees. Similarly, in Millner v. Co-Operative Savings Bank, 1998 U.S. App. LEXIS 14887 (4th Cir. 1998)(unpublished), the court found that full-time work was an essential function of a staff real estate appraiser's job; therefore, the employer was not required to allow her to work in the job on a part-time basis. Importantly, in Tardie v. Rehabilitation Hospital of Rhode Island, 168 F.3d 538 (1st Cir. 1999), the court held that working *more* than 40 hours per week was an essential function of the individual's job as the hospital's Director of Human Resources; the hospital, therefore, was not required to limit the schedule to 40 hours per week.

### Shift Changes as a Reasonable Accommodation

There is a great deal of controversy over whether an employer has to offer an employee a shift change as a reasonable accommodation.

On the one hand, a shift change can be viewed as a schedule modification which must be done unless it causes an undue hardship. The EEOC has been inconsistent on this issue. On the one hand, it sued Union Carbide Chemicals and Plastics Co., Civ. Act. No. 94-103 (E.D. La., Settled: 3/96) because it failed to transfer an employee from a rotating shift to a straight shift when the employee could not perform the rotating shift because of his disability (bi-polar disorder). The EEOC took the position that the "shift" itself was not an essential function of the lab position. Specifically, the EEOC stated that the "function" of the lab position was to analyze samples, not "to run on a certain schedule." EEOC's Memorandum in Support of Motion for Partial Summary Judgment, at p. 21. Therefore, the shift had to be modified as a reasonable accommodation.

On the other hand, it can certainly be argued that, for many jobs, the shift -- or the *time* that the functions are performed -- is an *integral* part of the particular job. For example, a midnight security guard simply cannot guard the building during the nighttime if s/he is not at his/her station during the nighttime hours. Therefore, the employer should not be forced to modify the shift as a reasonable accommodation. In fact, as noted above, in its "EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at Question 22, the EEOC acknowledged that "for certain positions, *the time during which an essential function is performed may be critical.*" The EEOC stated that employers should

therefore “carefully assess whether modifying the hours could *significantly disrupt* their operations -- that is cause undue hardship -- or whether the essential functions may be performed at different times with *little or no impact* on the operations or the ability of other employees to perform their jobs.” Guidance at p. 33 (emphasis in original). Supporting this view, in Turco v. Hoechst Celanese Chemical Corp., 101 F.3d 1090 (5th Cir. 1996), the court held that there was no duty to create a "straight day-shift chemical operator position" for an employee with diabetes who could not work his rotating shift.

Despite the EEOC's position in Union Carbide, the EEOC's Technical Assistance Manual on Title I of the ADA seems to support the view that a shift change may not be required as a reasonable accommodation. In explaining "essential functions," the Manual states that if a company has a "floating" supervisor -- who substitutes for regular supervisors on various shifts -- then "the ability to work at any time of day is an essential function of the job." This is because "[t]he only reason this position exists is to have someone who can work on any of the . . . shifts in place of an absent supervisor." Technical Assistance Manual, Section 2.3(a). This example therefore suggests that the time a function is performed can itself be essential (based on the particular job) and would *not* have to be changed as a reasonable accommodation.

Even though an employer arguably does not need to modify the shift for certain workers, it might still be required to reassign the individual to another shift if there was a vacant position on the other shift.

#### “Irritant-Free” Environment as a Reasonable Accommodation

Employers must, of course, consider modifying a workplace as a reasonable accommodation. However, one difficult question is whether an employer is required to provide a workplace environment free of irritants, such as perfumes or other scents/irritants. At least one Court of Appeals has held that an employer does not have such an obligation. In Buckles v. First Data Resources, Inc., 176 F.3d 1098 (8th Cir. 1999), the employee had rhinosinusitis, and experienced wheezing and other problems when he was exposed to perfumes, nail polish and other irritants; he requested, as a reasonable accommodation, an “irritant-free” environment. The court held that the employer was not required to “create a wholly isolated work space for an employee that is free from numerous possible irritants.” It appears that the EEOC may agree with this analysis.

In Roberts v. Slater, 2000 EEO PUB LEXIS 6079 (EEOC 2000), an employee with Multiple Chemical Sensitivity asked the employer, the Department of Transportation, for a fragrance-free environment. The EEOC, in a formal agency decision, held that “an entirely fragrant free environment was not a reasonable request for accommodation, and would have imposed an undue hardship on the agency's operation.” The EEOC noted that “enforcing such an accommodation would be impractical, especially when considering the employer's obligation to limit and rid a large number of scent producing agents one finds in the workplace.”

Sometimes, an employee claims that he needs a workplace free of “irritating” management. In Mack v. State Farm Mutual Automobile Insurance Co., 2000 U.S. App. LEXIS 1012 (7th Cir. 2000)(unpublished), the plaintiff, an employee with obsessive compulsive disorder, wanted his employer to “‘leave him alone,’ and allow him to remain at his desk without interaction with management until he reaches retirement age.” The court found that this was not a required accommodation under the ADA.

#### Requiring Medication/Treatment/Assistive Devices or Monitoring Medication as a Reasonable Accommodation

An employer cannot *force* an employee to take medication or to get treatment as a reasonable accommodation. In Robertson v. The Neuromedical Center, 161 F.3d 292 (5th Cir. 1998), the court noted that “the decision to take or not take medication” is a “personal decision” for the individual, and is not “an accommodation option” for the employer. However, if an individual *wants* to take medication or get treatment, a reasonable accommodation can include providing the individual with time off for such medication or treatment. Along these lines, the EEOC has stated that an employer “cannot require an individual to learn sign language” since “[d]ecisions about medication, treatment, and assistive devices are complex and personal ones.”<sup>17</sup>

Although an employer cannot require medication or treatment, in some cases, an individual might not be qualified for a job (even with an accommodation) unless s/he takes medication or gets treatment. Of course, an employer *never* has to keep someone in a position for which s/he is not qualified.

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<sup>17</sup> 4/15/99 Informal Guidance Letter from Christopher J. Kuczynski, Assistant Legal Counsel.

The EEOC also has stated that monitoring medications would not be a reasonable accommodation. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (3/25/97), at p. 27-28; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 37. However, an employer may be *permitted* to monitor medications if this is job-related and consistent with business necessity.

#### Providing Parking Spaces/Commuting Assistance as a Reasonable Accommodation

Employers have an excellent argument that reasonable accommodation does *not* include providing commuting assistance for employees; the basis for this argument is that barriers in getting to work are not *workplace-created* barriers. For example, in Wade v. General Motors Corp., 1998 U.S. App. LEXIS 22626 (6th Cir. 1998)(unpublished), the court noted that an employer is not responsible for getting an employee to work. The court stated that if the plaintiff could not drive himself to work because of his vision impairment, "he should . . . find another means of transportation to and from work." In Webster v. Henderson, 2002 U.S. App. LEXIS 2877 (4th Cir. 2002)(unpublished), the postal service mail sorters claimed that the employer did not properly accommodate them by providing (among other things) parking spaces. The court disagreed, noting that "parking was not guaranteed for any postal employee," thereby implying that an employer need not provide parking as an accommodation. Even the EEOC -- in "Informal Guidance" letters -- has said that "an employer would not be required to provide transportation as a reasonable accommodation for an individual whose disability makes it difficult or impossible to commute to work."<sup>18</sup> EEOC's position is based on the rationale that an employer "is required to provide reasonable accommodations that eliminate barriers in the work environment, not ones that eliminate barriers outside of the work environment."<sup>19</sup> According to the EEOC's informal guidance, this also means that an employer is not responsible for

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<sup>18</sup> 4/17/95 Informal Guidance letter from Elizabeth M. Thornton, Deputy Legal Counsel. See also 6/15/93 Informal Guidance letter from Ms. Thornton ("it would not appear that an employer must provide an accommodation to assist the employee in getting to work. Unlike travel that is required during the workday as part of the job, commuting to or from an employee's home is not a function of the job."). Similarly, in a nationwide training program conducted throughout 1996, EEOC headquarters trained EEOC investigators that "[e]mployers generally are not required to provide transportation, as a reasonable accommodation, to enable a person to commute to work." EEOC ADA Case Study Training, 1996 at C.S.1, p. 2.

<sup>19</sup> 5/4/95 Informal Guidance letter from Elizabeth M. Thornton, Deputy Legal Counsel.

transferring someone from an automobile to a wheelchair upon arrival at the workplace because this "is part of the process of commuting to and from work." Id.

However, at least one Court of Appeals has taken a different position. For example, in Lyons v. Legal Aid, 68 F.3d 1512 (2d Cir. 1995), the court held that the employer *may* have to provide a paid parking space near the employer's facility for someone with a disability, even though no paid parking was provided for other employees. Similarly, in Smallwood v. Witco Corp., 1995 U.S. Dist. LEXIS 18106 (S.D.N.Y. 1995), the court followed Lyons, holding that reasonable accommodation can include providing commuting assistance to an employee who is unable to get to the employer's new facility because of her disability (obesity and respiratory problems). Most recently, in Gronne v. Apple Bank for Savings, 2001 U.S. App. LEXIS 533 (2d Cir. 2001)(unpublished), the court noted that "in narrow circumstances, 'employer assistance with transportation to get the employee to and from the job'" can be a reasonable accommodation. In this case, the court concluded that the employer met or exceeded its ADA requirements by offering to pay half the cost of a private car service for an employee who claimed that she would be unable to drive to work."

Certainly, *if* an employer offers commuting assistance to employees generally (such as a van pool or employer-provided parking), there is widespread agreement that the employer must make sure the perk is accessible to and usable by individuals with disabilities. For example, if the employer provides parking to employees, it would be a reasonable accommodation to provide a reserved space for someone with a mobility impairment who needs to park next to a curb cut. See Appendix to 29 C.F.R. § 1630.2(o); 6/29/98 Informal Guidance letter from Christopher J. Kuczynski, Assistant Legal Counsel (employer may have to provide a reserved, larger parking space for an employee who needs it because of disability). In Marcano-Rivera v. Pueblo International, Inc., 232 F.3d 245 (1st Cir. 2000), the court held that it would have been a reasonable accommodation to allow the employee, who had no legs, to park in the store's handicapped parking spaces. Although the employer claimed to be treating the employee the same as other employees by requiring her to park in the employee parking lot (which did not have accessible spaces), the court noted that reasonable accommodation may require giving the individual with a disability more than is given to other employees.

Although opinion is mixed on whether employers must provide parking or commuting assistance (where these are not provided to employees without disabilities), there is general agreement that



an employer may have to eliminate workplace-created barriers (such as requirements concerning scheduling or where work is performed) for someone who cannot get to work because of a disability. For example, as noted earlier, an employer may have to provide a modified work schedule. The EEOC, in informal guidance letters, has said that an employer must modify workplace policies -- such as work schedules -- if that is needed as a reasonable accommodation for someone who has difficulty in getting to work on time because of a disability.<sup>20</sup>

#### Providing TTY-Relay System as a Reasonable Accommodation

One interesting possible accommodation for an employee with a hearing impairment is a TTY-relay system. Using such a system, a customer talks to a relay operator, who types the customer's words to the hearing-impaired employee, who reads the words on a screen. Then, the employee types his/her communication to the operator, who voices the communication to the customer. In one case, the court held that an employer may have violated the ADA by failing to provide such a telephone relay device to a telephone operator with a hearing impairment. In Bryant v. Better Business Bureau of Maryland, 923 F. Supp. 720 (D. Md. 1996), the court held that the company failed to demonstrate that providing the device would have caused an undue hardship. The court dismissed the company's contentions that the employee would not be able to handle the flow of calls because of the slower pace needed to use the relay system, noting that the employer did not present sufficient factual evidence on this point. The court also suggested that the employee may have been able to perform her functions -- even if the pace was slower -- if some of her marginal functions were delegated to other employees.

#### Reasonable Accommodation for Employee with Alcoholism and Whether Federal Employers Must Provide "Firm Choice"

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<sup>20</sup> See 4/17/95 Informal Guidance letter from Elizabeth M. Thornton, Deputy Legal Counsel.

The primary reasonable accommodation for an employee with alcoholism would be a modified work schedule so the employee could attend Alcoholics Anonymous meetings, or a leave of absence so the employee could get treatment for the alcoholism. For example, in Schmidt v. Safeway, Inc., 3 AD Cases 1141 (D. Ore. 1994), the court said that a leave of absence to obtain medical treatment for alcoholism is a reasonable accommodation.<sup>21</sup> The court also said, however, that an employer would *not* be required to give a leave of absence for an alcoholic employee to get treatment if treatment would appear to be futile. For example, the court said that an employer would not be required "to provide repeated leaves of absence (or perhaps even a single leave of absence) for an alcoholic employee with a poor prognosis for recovery." *Id.* at 1146. In Evans v. Federal Express Corp., 133 F.3d 137 (1st Cir. 1998), the court held that the employer was not required to provide a second leave of absence to an employee for substance abuse treatment. The court noted that "[i]t is one thing to say that further treatment made medical sense, and quite another to say that the law required the company to retain [the employee] through a succession of efforts." Likewise, in Corbett v. National Products Co., 4 AD Cases 987 (E.D. Pa. 1995), the court agreed that an employer is not required to give "several leaves of absence for an alcoholic worker for whom a successful treatment is unlikely."

A common question by federal employers subject to the Rehabilitation Act is whether they must provide "firm choice" to an employee with alcoholism who has poor performance or who has engaged in misconduct because of his/her alcoholism. "Firm choice" generally entails a warning to the employee with employment problems that s/he will be disciplined if s/he does not receive

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<sup>21</sup> It should be noted, however, that the ADA's legislative history contains language suggesting that an employer does *not* have to provide, as a reasonable accommodation, an opportunity for rehabilitation for an employee who has violated workplace alcohol rules. In Senate proceedings, Senator Coats asked Senator Harkin (the ADA's chief sponsor), "Is the employer under a legal obligation under the act to provide rehabilitation for an employee who is using . . . alcohol?" In response, Senator Harkin stated, "No, there is no such legal obligation." 135 CONG. REC. S10777 (daily ed. Sept. 7, 1989). The Senate Report notes that reasonable accommodation "does not affirmatively require that a covered entity must provide a rehabilitation program or an opportunity for rehabilitation . . . for any current employee who is [an] alcoholic against whom employment-related actions are taken" for performance or conduct reasons. S. Rep. 101-116 (Senate Committee on Labor and Human Resources) (8/30/89) at pp. 41-42. See Adameczyk v. Baltimore County, 1998 U.S. App. LEXIS 1331 (4th Cir. 1998)(unpublished)(where employer fired police officer for misconduct allegedly caused by alcoholism, it was not required to permit him to seek treatment before taking adverse action).

alcohol treatment. The EEOC has stated that "federal employers are no longer required to provide the reasonable accommodation of firm choice under Section 501 of the Rehabilitation Act." Johnson v. Babbitt, Pet. No. 03940100, MSPB No. SF-0752-93-0613-I-1 (EEOC 3/28/96). The EEOC's rationale is that the Rehabilitation Act was amended in 1992 to apply ADA standards, and the ADA does not require an employer to excuse misconduct for poor performance, even if it is related to alcoholism. In its "EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at ft. 103, the EEOC reiterated that an employer "has no obligation to provide 'firm choice' or a 'last chance agreement' as a reasonable accommodation. However, at least one federal court has held the opposite. In Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996), the court held that "firm choice" is "consistent with the statutory requirement of a reasonable accommodation" under the ADA. See also Adamczyk v. Baltimore County, 1998 U.S. App. LEXIS 1331 (4th Cir. 1998)(unpublished)(court held that the county did not have to permit alcoholic employee to seek treatment before taking adverse action for misconduct; court specifically noted that the officer "is not a federal employee, so he cannot avail himself of those procedures designed to benefit alcoholic employees of federal agencies).

A related question, of course, is whether a "last-chance agreement" is lawful. In Brock v. Lucky Stores, Inc., 2001 U.S. App. LEXIS 24990 (9th Cir. 2001)(unpublished), the employee was terminated after testing positive for cocaine use, but was reinstated under an agreement requiring strict attendance at drug-addiction recovery meetings. After the employee was terminated for later violating the agreement, he claimed that the agreement itself was illegal because it imposed employment conditions which were different from those for employees without disabilities. The court rejected the argument, noting that "all return-to-work agreements, by their nature, impose employment conditions different from those of other employees," and it did not want to discourage such agreements. In Longen v. Waterous Co., 347 F.3d 685 (8th Cir. 2003), the employee was terminated after violating the terms of a last-chance agreement (to which the employee agreed in lieu of termination). Noting that "courts have consistently found no disability discrimination in discharges pursuant to such agreements," the court stated that the agreement was valid because, among other reasons, the ADA places "no restrictions on what type of further constraints a party may place upon himself." In Mararri v. WCI Steel, Inc., 130 F.3d 1180 (6th Cir. 1997), the court held that a last-chance agreement -- resulting from a grievance settlement after the plaintiff had been terminated -- was valid where there was "no evidence of overreaching or exploitation." Therefore, the employer could terminate the

employee with alcoholism for violating the terms of the agreement. In Livingston v. United States Postal Service, 1998 U.S. App. LEXIS 28344 (6th Cir. 1998)(unpublished), the Postal Service offered the employee who was about to be discharged “an opportunity to sign a ‘Last Chance/Firm Choice’ agreement that would have secured his continued employment if he agreed to enter an alcohol rehabilitation program.” The court held that the plaintiff had not demonstrated disability discrimination. At least one court has held that such an agreement may be acceptable in a case not involving drug or alcohol rules. In Keith v. Ashland, Inc., 2000 U.S. App. LEXIS 1940 (6th Cir. 2000)(unpublished), a depressed employee was required to go to an employee assistance program as a condition of continued employment, in light of his poor and erratic performance. The court held that the employer did not violate the ADA by conditioning his return to work “on completion of a professional treatment program and certification from the EAP that he was fit for duty.” See also Sena v. Weyerhaeuser Co., 1999 U.S. App. LEXIS 499 (9th Cir. 1999)(unpublished) (employer lawfully fired employee for violating his last-chance agreement); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at ft. 103 (“an employer may choose to offer an employee a ‘firm choice’ or a ‘last chance agreement’” although it is not legally required to do so); 7/19/00 Informal Guidance Letter from Christopher J. Kuczynski, Assistant Legal Counsel (“although it *may* do so, an employer does not have to offer a ‘firm choice’ or a ‘last chance agreement’ to an employee who has engaged in misconduct because of a disability”).

The ADA does *not* require any employer to provide an accommodation that "enables" the individual's addiction. For example, an employer never has to provide a flexible schedule to accommodate weekend drinking "binges." In addition, the employer does not have to excuse misconduct caused by the alcoholism (assuming the employer is uniformly enforcing its workplace conduct rules). Of course, the employer cannot disparately treat an alcoholic by more stringently enforcing workplace rules for that employee. For example, in Flynn v. Raytheon Co., 868 F. Supp. 383 (D. Mass. 1994), the court held that although an employer can enforce its rules against intoxication on the job, it cannot selectively enforce its rules in a way that treats alcoholics more harshly.

### Reasonable Accommodation for Smokers

Whether smokers are covered by the ADA -- and therefore potentially entitled to reasonable accommodation -- has been a very controversial issue. The mere fact that an individual smokes

does not mean s/he has a disability because many people who smoke do not even have a physical or mental impairment. However, *if* someone can show s/he is "addicted" to nicotine, this addiction might well be an impairment. The individual still would be required to show that s/he is substantially limited in a major life activity to be entitled to ADA protection.

Assuming an individual with nicotine addiction were covered under the ADA, an employer arguably would be required to provide reasonable accommodation (such as a flexible schedule so the employee could get treatment for the addiction). However, like the situation with alcoholism, the employer arguably would not have to provide a reasonable accommodation that simply "enables" the individual to stay addicted, such as providing smoking breaks or a smoking room. In addition, the ADA specifically says that the law does not prohibit an employer from restricting smoking in the workplace. 42 U.S.C. 12201(b).

#### Reasonable Accommodation as Part of Evaluation and/or Discipline Process

An employer's reasonable accommodation obligation is, of course, not limited to accommodations necessary to perform job functions. An employer also is required to provide accommodations necessary for an employee to effectively participate in performance evaluation meetings or discipline proceedings. For example, in Mohamed v. Marriott International Inc., 905 F. Supp. 141 (S.D.N.Y. 1995), a deaf employee was accused of stealing money and putting it in his locker. The employer investigated the matter, but did not provide an interpreter during its initial fact-finding meeting with the employee over the matter. The court held that the employer had an obligation to provide reasonable accommodation in such circumstances.

#### Reasonable Accommodation that Conflicts with a Collective Bargaining Agreement

For a discussion of this issue, see "Collective Bargaining Agreement as an Undue Hardship," below.

#### Whether Good Deeds Will Be Held Against An Employer in a Reasonable Accommodation Context

Employers frequently take actions that are more generous than required by the ADA. For example, an employer might choose to go beyond the ADA by reallocating essential job functions, by searching for alternative positions for an *applicant* who was not qualified for the position for which s/he applied, or by providing indefinite leaves of absence. In some cases, plaintiffs have attempted to use these acts as evidence that the employer had violated the ADA. However, most courts have refused to hold an employer liable because of its generous actions.

For example, in Amadio v. Ford Motor Company, 238 F.3d 919 (7th Cir. 2001), the plaintiff claimed that the employer was required to provide very extensive and unpredictable leave since it had, on rare occasions, given employees up to two years extended leave. The court noted, however, that it would not “punish” an employer for past generosity by deeming this generosity to be a concession of the “reasonableness of so far-reaching an accommodation.” In Lucas v. W.W. Grainger, Inc., 257 F.3d 1249 (11th Cir. 2001), the plaintiff (a laborer) claimed that, among other things, he was entitled to an office job because the employer had given him a temporary office position. The court noted, however, that the employer had displaced two other employees from their office duties to temporarily allow the plaintiff to perform that work, and that this action was “more than the ADA required.” The court stated that “good deeds ought not be punished, and an employer who goes beyond the demands of the law to help a disabled employee incurs no legal obligation to continue to do so.” Likewise, as discussed earlier, in Holbrook v. City of Alpharetta, 112 F.3d 1522 (11th Cir. 1997), the court determined that the employer had excused an employee from performing certain essential functions of his police detective's job (such as collecting evidence at a crime scene) since the employee had a vision impairment. The court rejected the detective's argument that the employer was required to continue to excuse these duties, noting that the employer had gone *beyond* the ADA's requirements and the court did not want “to discourage other employers from undertaking the kinds of accommodations of a disabled employee” as those provided by the employer. Similarly, in Laurin v. The Providence Hospital, 150 F.3d 52 (1st Cir. 1998), the court found that a “rotating shift” was an essential function of the plaintiff's nursing position, and the hospital did not concede otherwise by allowing her to work for eight weeks on a straight shift. The court stated that “it would be perverse to discourage employers from accommodating employees with a temporary breathing space during which to seek another position with the employer.” Likewise, as noted earlier, in Terrell v. USAir, 132 F.3d 621 (11th Cir. 1998), the court analyzed whether the airline should have allowed a reservations agent with carpal tunnel to work part-

time. The court held that where USAir had no part-time reservations agent positions, it was not required to create one for the employee. The employee claimed that the part-time schedule was reasonable because the employer had allowed her to work reduced hours on four prior occasions. The court responded that it would not "punish[]" an employer for its "generosity" by holding that such conduct concedes the reasonableness of an accommodation (citation omitted). In Smith v. Ameritech, 129 F.3d 857 (6th Cir. 1997), the court considered an individual's claim that the employer was required to allow him to work at home, since the employer had earlier allowed another employee to work at home. The court rejected this claim, noting that "[a]n employer who provides an accommodation that is not required by the ADA to one employee is not consequentially obligated to provide the same accommodation to other disabled employees." Otherwise, according to the court, this "would deter employers from providing greater accommodations than are required by law" and this would undermine the purposes of the ADA to eradicate discrimination.

Similarly, in Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019 (7th Cir. 1997), the court noted that the plaintiff was not qualified for the position he sought and that "there probably would have been no dispute" if Wal-Mart had simply rejected the applicant. However, the plaintiff's claims arose when Wal-Mart went beyond the ADA's requirements by looking "into additional job possibilities not contemplated or even available" when the plaintiff applied, ultimately determining that he was not qualified for these other jobs. The court rejected the plaintiff's claims, noting that "[e]mployers should not be discouraged from doing more than the ADA requires even if the extra effort that perhaps raises an applicant's expectations does not work out." Similarly, as noted earlier, in Evans v. Federal Express Corp., 133 F.3d 137 (1st Cir. 1998), the court held that the employer was not required to provide a second leave of absence to an employee for substance abuse treatment. In response to the employee's claim that the employer sometimes gave multiple leaves to employees, the court stated that the employer "was quite free to go beyond what the law requires, nor should it be discouraged from doing so."

On the other hand, as noted earlier, in Betts v. The Rector and Visitors of the University of Virginia, 2001 U.S. App. LEXIS 19982 (4th Cir. 2001)(unpublished), the court concluded that the plaintiff was regarded as having a disability where the school gave him additional time to take his tests after explicitly concluding that he had a disability under the ADA.

## Undue Hardship Issues

### General

The ADA and the EEOC's regulations provide a number of factors that are to be considered in determining whether an accommodation imposes an undue hardship on the employer. Relatively few cases have turned on whether a reasonable accommodation posed an undue hardship.

By way of background, the statute and regulations provide that the following factors are relevant to the undue hardship determination:

- the nature and net cost of the accommodation;
- the financial resources of the facility/facilities, the number of employees at the facility/facilities, the effect on expenses and resources, or other impact on the operation of the facility/facilities;
- the overall financial resources of the entity, the size of the business with respect to the number of employees; the number, type, and location of its facilities; and
- the type of operations of the entity, including the composition, structure, and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility/facilities in question to the covered entity.

42 U.S.C. 12111(10); 29 C.F.R. § 1630.2(p).

In an odd case, Cleveland v. Federal Express Corp., 2003 U.S. App. LEXIS 24786 (6th Cir. 2003)(unpublished), the court seemed to hold that an employer must present undue hardship evidence as to every factor from the statute and regulations. In this case, the employer claimed that giving the employee a six-month leave would cause an undue hardship because of the burden of covering her duties (scheduling, payroll, etc.) by reallocating an employee needed for other duties. The court held that this argument simply went to the “nature and net cost” of the accommodation and the “type of operations of the covered entity,” but did not address the factors “which pertain to the overall financial condition of the facility at which an employee



works and of an employer, as a whole.” The court held that the employer may be found to have “failed to carry its burden of showing undue hardship, because Defendant was silent” as to certain undue hardship factors.

The EEOC and some courts have stated that accommodations might pose an undue hardship specifically because of the adverse effect on other employees. For example, in its “EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002” (10/17/02), the EEOC stated that undue hardship may result where an accommodation “would be unduly disruptive to other employees’ ability to work.” For example, the EEOC stated that if modifying one employee’s schedule as an accommodation would so overburden another employee that he would not be able to handle his duties, the employer could show undue hardship. Guidance at “Undue Hardship Issues.” The EEOC has also stated that “relevant considerations” in showing undue hardship caused by modifying an employee’s schedule could include “the proportion of overtime that is voluntary versus involuntary, and how much additional involuntary overtime each co-worker would be assigned.” EEOC Amicus Curiae Brief in Davis v. Florida Power & Light Co., No. 99-4076 and 99-10524 (Brief filed in Eleventh Circuit, 6/11/99) at p. 14. In Mason v. Avaya Communications, Inc., 357 F.3d 1114 (10th Cir. 2004), the court noted that “an accommodation that would require other employees to work harder is unreasonable.” In Johnson v. Midwest City, 1999 U.S. App. LEXIS 473 (10th Cir. 1999)(unpublished), the court found that the City did not have to reallocate overhead lifting duties to other employees. Among other things, the court stated that an accommodation “that would result in other employees having to work harder or longer hours is not required.” Similarly, in EEOC v. United Airlines, 1999 U.S. App. LEXIS 13347 (10th Cir. 1999)(unpublished), the court found that the airline was not required to assign a co-worker to assist a Customer Service Representative with a back impairment to lift odd-sized baggage. The court noted that the employer was not required to provide an accommodation that would “increase the difficulty of [the plaintiff’s] coworkers’ jobs.” See also Turco v. Hoechst Celanese Chemical Corp., 101 F.3d 1090 (5th Cir. 1996), the court noted that “an accommodation that would result in other employees having to work harder or longer is not required under the ADA.” Similarly, in Mears v. Gulfstream Aerospace Corp., 905 F. Supp. 1075 (S.D. Ga. 1995), aff’d, 87 F.3d 1331 (11th Cir. 1996), the court held that if an accommodation “adversely impacts other employees’ ability to do their jobs,” it “is an undue burden on the employer.”

### Employer's Burden to Present Evidence of Undue Hardship

Just as courts require the plaintiff to present credible evidence on certain issues, the employer will be required to present credible evidence when arguing that an accommodation imposes an undue hardship. In Bryant v. Better Business Bureau of Maryland, 923 F. Supp. 720 (D. Md. 1996), the court specifically noted that the employer's undue hardship defense must have "a strong factual basis and be free of speculation or generalization about the nature of the individual's disability or the demands of a particular job" (citations deleted). The court suggested that the employer will be unable to rely on undue hardship as a defense unless it has specifically "conduct[ed] an analysis to determine" whether the accommodation presents an undue hardship. Similarly, in Flemmings v. Howard University, 198 F.3d 857 (D.C. Cir. 1999), the court stated that the employer has the burden of proving that an accommodation would pose an undue hardship.

### Distinction Between Undue Hardship Provisions of ADA and Title VII

Employers do not have to provide a religious accommodation under Title VII if the accommodation imposes an undue hardship. However, the ADA's undue hardship standards are *much* more difficult for employers to satisfy. Under Title VII, the employer does not have to provide a religious accommodation if it imposes a mere de minimis hardship. However, as the court noted in Bryant v. Better Business Bureau of Maryland, 923 F. Supp. 720 (D. Md. 1996), under the ADA, the regulations are much more onerous, and an employer must "'show substantially more difficulty or expense than would be needed to satisfy' the undue hardship requirement for religious accommodation" (citation omitted). See also Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996), cert. denied, 117 S. Ct. 1318 (1997)(the de minimis standard "does not apply under the ADA").

### Cost as an Undue Hardship

An employer could theoretically argue that an accommodation was simply too expensive. For example, in Ward v. Massachusetts Health Research Institute, 209 F.3d 29 (1st Cir. 2000), the court pointed out that an employer could argue that a modified schedule for a laboratory assistant might be an undue hardship because of the "significant cost" of keeping the laboratory open (e.g., extra hours for security personnel, janitors). However, as a practical matter, if an employer

plans to argue that the cost of an accommodation imposes an undue hardship, it might be required to open up its financial books during the course of discovery. In addition, in arguing such a defense, employers have found themselves in the uncomfortable position of being forced to justify to a jury why they pay certain expenses (for example, country club memberships) while claiming they cannot afford the reasonable accommodation.

When asserting *cost* as the reason for undue hardship, some employers have argued that the cost is too high relative to the employee's low salary. The EEOC has routinely said that the cost that must be spent on an accommodation depends on the employer's resources, not on the employee's salary, position, or status within the company. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 45. In addition, Congress considered and rejected an amendment that would have limited the cost of reasonable accommodation to ten percent of the particular employee's salary.<sup>22</sup> However, as noted earlier in this paper, a number of Courts of Appeals have potentially opened up the door to such arguments, by tying "reasonableness" to a cost/benefit determination.

It is important to remember that "cost" really means "net cost." The EEOC takes the position that the cost to be analyzed is the employer's *real* cost of providing the accommodation, after taking into account other offsetting resources, such as tax credits or deductions. See Appendix to 29 C.F.R. § 1630.2(p). The EEOC has further stated that if an employer believes that the accommodation's cost causes an undue hardship, it "should ask the individual with a disability if s/he will pay the difference." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at "Undue Hardship Issues."

It will be even more difficult to argue cost as an undue hardship if the employer has made the modification for other employees. For example, in Smith v. Henderson, 376 F.3d 529 (6th Cir. 2004), the court held that the employer had not shown undue hardship simply by asserting that it would cause "lower production and increased costs" to allow a Customer Service Supervisor to delegate accounting duties, especially when the employer had permitted other Supervisors to delegate this task.

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<sup>22</sup> 136 Cong. Rec. at H2475 (daily ed. May 17, 1990).

## Collective Bargaining Agreement as an Undue Hardship

As noted earlier, after U.S. Airways v. Barnett, if a collective bargaining agreement's (CBA's) consistently enforced seniority provisions conflict with a desired reasonable accommodation, an employer has an excellent argument that the accommodation is simply not "reasonable." However, if the conflicting CBA provisions do not involve seniority, a hotly-contested issue is whether an employer can demonstrate undue hardship just because the accommodation would cause the employer to violate the CBA. The EEOC's position -- at odds with most courts -- is that the CBA's provisions dealing with non-seniority issues are relevant, but not determinative. Therefore, the EEOC would likely say that an employer cannot demonstrate undue hardship *just* by showing that the reasonable accommodation violates the CBA. Specifically, the EEOC has written that the ADA requires unions and employers to negotiate a change to a collective bargaining agreement if no other accommodation exists and the proposed accommodation does not unduly burden the expectations of other workers.<sup>23</sup> At least one Court of Appeals seems to have agreed with EEOC. For example, in Cripe v. City of San Jose, 261 F.3d 877 (9th Cir. 2001), the court stated that modifying a collective bargaining agreement might be required where the modification does not implicate a seniority system. The court rejected the employer's argument that modifying the agreement would generate "resentment" by employees, noting that employee "morale" is "not a factor that may be considered in an undue hardship analysis."

Again, a CBA's seniority provisions will, under U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 122 S. Ct. 1516 (2002), generally trump ADA rights. Even prior to U.S. Airways, courts had reached this result. For example, in Davis v. Florida Power & Light Co., 205 F.3d 1301 (11th Cir. 2000), the court held that the employer was not required to contravene the seniority rights of other employees by excusing an injured worker from mandatory overtime which the collective

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<sup>23</sup> See EEOC Amicus Curiae Brief in Eckles v. Consolidated Rail Corp., No. 95-2856 (Brief filed in Seventh Circuit, 12/1/95) at p. 11; 11/1/96 Letter from Ellen J. Vargyas, Legal Counsel ("It is the Commission's position that, where no other reasonable accommodation exists, the employer and union are jointly obligated to negotiate with each other to provide a variance [to the collective bargaining agreement] if it will not impose undue hardship.").

bargaining agreement distributed by seniority. Similarly, in Fluty v. JH Rudolph & Co., 2000 U.S. App. LEXIS 8732 (7th Cir. 2000)(unpublished), the plaintiff, who could no longer drive a “tri-axle truck” (because he could not obtain a necessary medical certification) asserted that the employer could have assigned him to drive “a low-boy or pickup truck” as an accommodation. However, such an assignment would have contravened the seniority rights of others under the employer’s collective bargaining agreement. The court held that the ADA does not require an employer to violate seniority in order to accommodate an employee. In Winfrey v. City of Chicago, 259 F.3d 610 (7th Cir. 2001), the court held that “the duty to reassign does not require an employer to “abandon its legitimate, nondiscriminatory company policies,” including the terms of a collective bargaining agreement. In this case, a City Ward Clerk wanted reassignment to a Dispatcher job. However, the court held that the employer was not required to reassign the clerk to this position because it would violate the collective bargaining agreement, which required that only employees represented by the union were entitled to bid for the dispatcher job. In Cassidy v. Detroit Edison Co., 138 F.3d 629 (6th Cir. 1998), the court stated that “reassignment will not require . . . violating another employee's rights under a collective bargaining agreement.” See also Bratten v. SSI Services, Inc., 185 F.3d 625 (6th Cir. 1999)(the ADA “does not require an employer to reassign an employer with a disability to a position if such a reassignment would violate another employee’s collectively bargained rights). Similarly, in Willis v. Pacific Maritime Association, 244 F.3d 675 (9th Cir. 2001), the court held that “an accommodation that would compel an employer to violate” a collective bargaining agreement’s seniority provisions is unreasonable. See also Lujan v. Pacific Maritime Association, 165 F.3d 738 (9th Cir. 1999)(“the ADA does not require accommodations that contravene the seniority rights of other employees”). In Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997), the court held that “an accommodation to one employee which violates the seniority rights of other employees in a collective bargaining agreement simply is not reasonable.” The court noted that such an accommodation would expose the employer to potential union grievances and costly remedies since “neither the union nor the arbitrator hearing a grievance would be required to disregard violations of the collective bargaining agreement.” In Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997), cert. denied, 1998 U.S. LEXIS 963 (1998), the court stated that “the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement.” In Boersig v. Union Electric Co., 219 F.3d 816 (8th Cir. 2000), the court held that the ADA’s reasonable accommodation requirements do not force an employer to violate a CBA’s seniority provisions in reassigning an employee with a disability. See also Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995)(employer had no

obligation to violate a CBA by reassigning an employee with a disability). Similarly, in Milton v. Scrivner, 53 F.3d 1118 (10th Cir. 1995), the court said the employer was not required to reassign the plaintiffs as a reasonable accommodation because the CBA prohibited their transfer to any other job due to their lack of seniority. In Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996), cert. denied, 117 S. Ct. 1318 (1997), the court found that if, under a collective bargaining agreement, an employee with seniority is entitled to a position over a less senior employee, the position would not be a "vacant" position available to the less senior employee. Specifically, the court noted that "[w]ithin such a framework a "vacant" position would essentially be one that an employee could acquire with his seniority and for which he could meet the job requirements." Other courts have agreed that a collective bargaining agreement's seniority provisions supersede ADA rights, such as Feliciano v. Rhode Island, 160 F.3d 780 (1st Cir. 1998)(where vacant position was filled based on seniority, union membership, and current job classification, the duty to reassign does not require an employer "to violate the provisions of a collective bargaining agreement or the rights of other employees"); Boback v. General Motors Corp., 1997 U.S. App. LEXIS 297 (6th Cir. 1997)(unpublished)(employer is not obligated to violate CBA seniority provisions by reassigning employee with a disability; "the terms of the CBA control our determination of what accommodations . . . were reasonable in the present case"); and Cochrum v. Old Ben Coal Co., 102 F.3d 908 (7th Cir. 1996)("employer is not required to violate the provisions of a collective bargaining agreement to reassign a disabled employee pursuant to the ADA;" employee "has no right to superseniority").

Importantly, in Morton v. United Parcel Service, Inc., 2001 U.S. App. LEXIS 25903 (9th Cir. 2001), the court held that although it would not require an employer to provide an accommodation conflicting with a collective bargaining agreement's seniority provisions, it would closely analyze whether the accommodation truly resulted in such a conflict. In this case, the court concluded that allowing the employee to drive smaller vehicles (not requiring DOT certification) would not have conflicted with the agreement in place at the time the plaintiff requested a job driving such vehicles. Likewise, as noted earlier, in Dilley v. Supervalu, Inc., 296 F.3d 958 (10th Cir. 2002), the court held that although an employer is not required "to provide an accommodation that would violate a bona fide seniority system under the terms of a collective bargaining agreement," there must be a "direct violation of a seniority system," not just a "a potential violation."