



Welcome to the 2010 Legal Issues Webinar Series

The content and materials of this training are property of the DBTAC - Great Lakes ADA Center and cannot be distributed without permission.

This training is developed under NIDRR grant #H133A060097. For permission to use training content or obtain copies of materials used as part of this program please contact us by email at adaconferences@adagreatlakes.org or toll free 877-232-1990 (V/TTY).



Reasonable Accommodation Legal Update

Presented by:

Barry Taylor, Legal Advocacy Director &
Alan Goldstein, Senior Attorney, Equip for Equality.

Valuable assistance provided by
Attorneys Rachel Margolis and Dan Spira.

Overview – Reasonable Accommodation Legal Update



- I. The Interactive Process
- II. Accommodating Known Disabilities
- III. Preferred vs. Provided Accommodations
- IV. Reassignment
- V. Removing Job Functions/Accommodations
- VI. Creating New Positions
- VII. Undue Hardship
- VIII. Leave
- IX. Telework
- X. Direct Threat and Discipline Issues
- XI. Other Issues and Practical Tips

Reasonable Accommodation Legal Update

Interactive Process

Interactive Process: Background

- A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer.
 - ❖ When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and functional limitations.
 - ❖ An employer should “respond expeditiously” to an accommodation request as “unnecessary delays can result in a violation of the ADA.”
- Evidence that the employer engaged in an interactive process can demonstrate a "good faith" effort which can protect an employer from having to pay punitive and certain compensatory damages. See 42 U.S.C. §1981a(a)(3).

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA

Interactive Process: Lack of good faith by employer

***Lowe v. Indep. School Dist. No. 1*, 2010 WL 258400 (10th Cir. 2010):**

- School planned to reassign counselor with post-polio syndrome and who uses leg braces to teach in a cramped science lab.
 - ❖ Requested a larger room in May – No response until 2 wks. before school.
- At meeting school district told teacher: “No accommodations.”
 - ❖ Superintendent admitted that he did not prepare, had not reviewed suggested accommodations, and unaware that all science classes were lab classes.
 - ❖ Teacher resigned - failure to accommodate & constructive discharge.
- **Court:** Denied Summary Judgment for the employer
 - ❖ Delay showed a lack of good faith.
 - ❖ “A question of fact as to whether an employer has failed to interact in good faith... will preclude summary judgment for the employer.”

Interactive Process: Failure not fatal to employer

Richardson v. Friendly Ice Cream Corp., 2010 WL 396388 (1st Cir. 2010)

Asst. manager at a restaurant had limitations after shoulder surgery:

- No lifting over 5 pounds or repetitive manual activity.
 - ❖ Duties included: lifting objects >10 pounds with one hand, cooking, & cleaning.
 - ❖ Before surgery, she had others do mopping, heavy lifting
 - ❖ Prior to injury, she was reprimanded for not delegating manual tasks.
- **Employee at deposition:** “I needed to be able to do everything.”
- **Court:** No violation for failure to engage in the interactive process
 - ❖ “An interactive process claim cannot succeed unless the employee can show there was a reasonable accommodation that would have been discovered.”
 - ❖ “An employer does not concede that a job function is ‘non-essential’ simply by voluntarily” reassigning it as “a temporary accommodation...”
 - ❖ Delegating essential functions is not reasonable.
 - ❖ “We give... substantial weight to the employer's view of job requirements,” although it is “not dispositive.”

Interactive Process: Failure not fatal to employer

Trout v. Aerospace Testing Alliance,

2008 WL 5233022 (6th Cir. 2008)

- For reassignment, an employer's good faith is irrelevant unless the employee shows there was a vacant position meeting qualifications.

McBride v. BIC Consumer Products Mfg. Co.,

583 F.3d 92 (2nd Cir. 2009)

- Alleged failure to engage in the interactive process is immaterial absent a showing that a reasonable accommodation was possible.

McKane v. UBS Financial Services, Inc.

2010 WL 227648 (11th Cir. 2010)

- Because employee did not identify accommodation that could resolve workplace problem, employer did not have an obligation to engage in the interactive process to try to find another accommodation

Interactive Process: Employer at fault for breakdown

***EEOC v. Chevron*, 570 F.3d 606 (5th Cir. 2009)**

- No interactive process where the employer only states, “This isn’t going to work,” without further discussion and did not consider transfer to another location as plaintiff had not specified a location.

***Timmons v. UPS, Inc.*, 2009 WL 249655 (9th Cir. 2009)**

- No interactive process when the employer denied a driver’s accommodation request for a vehicle with power steering and brakes, found the employee “unqualified,” and did not demonstrate the unavailability of a possible accommodation or explore reassignment.

***Lafata v. Church of Christ Home* , 325 Fed. Appx. 416 (6th Cir. 2009)**

- Offering a lesser position on a “take it or leave it” basis without further discussion of possible accommodations may indicate a failure to participate in the interactive process in good faith.

Interactive Process: Employee at fault for breakdown

Winbush-Jones v. Potter

2009 WL 497637 (W.D.N.Y. 2009)

- Postal worker was responsible for the breakdown in the interactive process when she refused a proposed reassignment within her physical job restrictions and refused to provide additional medical information as she preferred reassignment to a different position.

Nugent v. St. Lukes-Roosevelt Hospital Center,

2008 WL 5341379 (2d Cir. 2008)

- Employee lost her reasonable accommodation claim when the court found she failed to follow up with the employer on her reasonable accommodation request and therefore was at fault for the breakdown of the interactive process.

Reasonable Accommodation Legal Update

Requesting a Reasonable Accommodation: Accommodating Known Disabilities

Accommodating Known Disabilities: Background

General Rule: When an individual decides to request an accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition.

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA

Accommodating Known Disabilities: recent case law

Smith v. Grattan Family Enterprises, LLC, 2009 WL 3627953 (E.D. MI 2009)

Employee mentioned leg pain & he “couldn't stand on it much longer.”

- **Court:** An “employer cannot be deemed to be on notice of a ‘disability’ every time an employee complains.”
 - ❖ “Where a plaintiff does nothing more than complain of having difficulties with his or her job, but never tells the employer that those difficulties stem from a condition of disability, no claim for failure to accommodate will lie.”
 - ❖ Especially when diagnosis of hip impairment is after the alleged request.
 - ❖ “It is difficult to discern exactly what Plaintiff alleges his disability is and the Complaint does little to clarify his claim.”

Note: Did not assert a “regarded as” – may have helped with termination issue.

Accommodating Known Disabilities: recent case law

Moore v. Wal-Mart Stores East, L.P., 2009 WL 3109823 (M.D. Ga. 2009)

Employee sought to return to work with restrictions including 5 hrs/day.

- **Wal-Mart:** Claimed lack of knowledge of disability, noting that she never specifically mentioned a disability and no staff ever mentioned an alleged disability.
- **Court: General Rule:** “Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice...”
 - ❖ In this case, oral request for reduced hours and medical info with job restrictions showed actual knowledge of need for accommodation.
 - ❖ Ultimately, court found Wal-Mart had a non-discriminatory reason for termination.

See, DBTAC: Great Lakes ADA Center Webinar on Disparate Treatment and Disparate Impact

Reasonable Accommodation Legal Update

Preferred

vs.

Provided Accommodations

Preferred vs. Provided Accommodations: Background

General Rule: an employer need not provide an employee's *preferred* accommodation as long as the employer provides an *effective* accommodation. However, employers should give primary consideration to the employee's preference.

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA

Preferred Accommodation Generally Not Required

Elkins v. North Seattle Community College,

2009 WL 3698516 (W.D. Wash. 11/3/2009)

- To accommodate employee, employer attempted to provide requested schedule change for 5 weeks, but it did not work as he missed important meetings.
- Employer transferred plaintiff to a lower paying night shift job.
- Employee sued for failure to provide preferred accommodation
- Court: Summary judgment for the employer. Employer's accommodation was sufficient; no need to provide employee with preferred accommodation

See also, *Robinson v. Bodman*, 2009 WL 1639184 (9th Cir. 2009)

(flexible work schedule was a reasonable accommodation; employer did not violate ADA when refusing employee's preferred accommodation of telework)

Preferred Accommodation Generally Not Required

Edwards v. Tacoma Public School, 2008 WL 1817379 (9th Cir. 2008)

Employer's decision not to provide preferred accommodation was OK

- Teacher with a pulmonary and lung condition requested a full time assistant to help perform admitted essential job functions.
- Had been able to do job previously without an aid but with these provided other accommodations:
 - ❖ Part-time assistant, electric scooter, set-up help, assistance moving students to recess, assistance transporting books & objects
- School offered to continue accommodations or PT work w/ no asst.
- **Court:** Acknowledged that a full-time assistant may be “more efficient,” but stated that, “an employer is not obligated to provide an employee the accommodation [s]he requests or prefers, the employer need only provide some reasonable accommodation.”

Preferred Accommodation May Be Required if Medically Necessary

Ekstrand v. School District of Somerset,
583 F.3d 972 (7th Cir. 2009)

- Teacher, who developed seasonal affective disorder, was assigned to a noisy 1st grade classroom without outside windows.
- As a result, teacher requested assignment to a quieter room with natural light and better ventilation.
- School worked to remedy noise distractions and ventilation problem, but did not reassign teacher to a room with natural light, despite repeated requests.
- Depression and anxiety worsened, requiring medical leave.
- During leave period, teacher repeated her requests for a room switch.

Preferred Accommodation May Be Required if Medically Necessary

- Dr. provided a note to the school district indicating the importance of natural light for an individual with seasonal affective disorder, and the link between teacher's room location and symptoms.
- **Court:** *Prior* to Dr.'s note, the school took accommodating steps to resolve teacher's concerns. Because school had no evidence that natural light was crucial to alleviating symptoms, it acted reasonably and was not required to provide the *preferred* accommodation of a room with natural light.
- **Court:** *After* Dr.'s note, the school district had notice of the importance of natural light, and had an obligation to "provide the specifically requested, medically necessary accommodation," (or preferred accommodation) absent undue hardship.

Reasonable Accommodation Legal Update

Reassignment

Reassignment & Seniority Policies: Background



U.S. Airways v. Barnett, 535 U.S. 391 (2002)

- **General Rule:** It would be an undue hardship for an employer to violate a consistently enforced seniority policy in order to place an individual in an open position as a reasonable accommodation.
- **Exception:** Reassignment may be available if an individual can show the seniority provision was not strictly followed.

See, DBTAC: Great Lakes ADA Center Webinar on Impact of the Supreme Court's ADA Decisions

Reassignment & Seniority Policies: Recent case law

***King v. City of Madison*, 550 F.3d 598 (7th Cir. 2008)**

- City is not required to violate its CBA nor displace someone for a bus driver who was restricted from driving where the policies were applied in a neutral, non-discriminatory manner and accommodation was attempted by letting her apply for other positions.

***Gamez-Morales v. Pacific NW Renal Services*, 304 Fed.Appx. 572 (9th Cir. 2008)**

- Employer may rely on a neutral policy prohibiting transfer within 6 months of a disciplinary action absent a showing of special circumstances.

Reassignment & Seniority Policies: Recent case law

***Tobin v. Liberty Mutual Insurance Co.*, 553 F.3d 121 (1st Cir. 2009)**

Accommodation request should NOT have been barred by company policy

- Employee with bipolar disorder requested more support staff and assignment to a “mass marketing” account to increase business.
 - ❖ Jury found for employee and the company appealed.
 - **Employer:** Request was unreasonable as mass marketing accounts were awarded to the highest performing agents, citing *Barnett*.
 - **Court:** Jury award upheld - *Barnett* exceptions were applicable.
 - ❖ Mass marketing accounts were not awarded solely for sales performance.
 - ❖ Given to new or low-producing sales reps to aid their business.
 - ❖ Mgrs. Admitted had discretion to assign Tobin a mass marketing acct.
- See, DBTAC: Great Lakes ADA Center Webinar on Employer Defenses

Reassignment: Who Must Identify Vacant Positions?

- **Query:** Who must identify appropriate vacant positions?
- **EEOC:** The employer is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time.
 - ❖ The employer, as part of the interactive process, should ask the employee about his/her qualifications and interests.
 - ❖ Based on this information, the employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment. See *Lane v. Bremner Food Group*, 2010 WL 145113 (W.D. Ky. 2010)
 - ❖ However, some courts have put the onus on the employee to identify appropriate vacancies. See *McBride v. BIC Consumer Products Mfg. Co.*, 583 F.3d 92 (2d Cir. 2009); *Manning v. General Motors*, 529 F. Supp. 2d 1282 (D. Kan. 2008); *Batlidze v. Harris Beach*, 2010 WL 27648 (2d Cir. 2010)

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA

Reassignment: Is Competing for Position an Accommodation?

- **EEOC Position:** The employee does not need to be the best qualified individual for the position.
- “Reassignment means that the employee gets the vacant position if s/he is qualified for it.”
- Otherwise, “reassignment would be of little value and would not be implemented as Congress intended.”
- **Split in Circuits:** Some Courts follow the EEOC’s position (10th and D.C.) and others do not (7th and 8th). Supreme Court was set to resolve conflict in lower courts in *Huber v. Wal-Mart*, but the case settled.
- **Query:** Does ADAAA language regarding EEOC Guidance change how reassignment will be examined?

EEOC Enforcement Guidance on Reasonable Accommodation

Reasonable Accommodation Legal Update

Removing Job Functions As An Accommodation

Removing Job Functions as an Accommodation: Background

Generally, employers must remove marginal job functions as a reasonable accommodation. Employers do not have to reallocate essential functions as a reasonable accommodation.

Therefore – when determining whether an employer is required to remove a particular job function to accommodate an employee, the question is: is it essential?

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA

Removing Job Functions as an Accommodation: Background

The following factors are used to determine if a job function is essential:

- The position exists to perform that function;
- Limited # of employees available to perform the task;
- Employee hired for expertise or ability to perform a particular function;
- The employer's judgment;
- Written job descriptions prepared before interviewing applicants;
- The amount of time spent performing the function;
- Consequences of not requiring the employee to perform the function;
- The terms of a collective bargaining agreement; and/or
- The work experience of past and current incumbents in the job;

See 29 C.F.R. § 1630.2(n)

Removing Job Functions as an Accommodation: Recent Cases

Lane v. Bremner Food Group, Inc., 2010 WL 145113 (W.D. Ky. 2010)

Employer may have violated the ADA when it did not consider removing a possibly non-essential job function.

Court: No summary judgment for the employer - question of fact whether replacing a caser operator was an essential function for a D-utility line job.

- ❖ Also, position posted 4/10/06 may have been vacant on 4/7/06 (term. date.)
- ❖ “Consideration shall be given to the employer's judgment...” but Bremner has not provided a sufficient explanation or proof.

Removing Job Functions as an Accommodation: Consequences

Hennagir v. Utah Dept. of Corrections, 587 F.3d 1255 (10th Cir. 2009)

- DOC denied physician's assistant accommodation request that she not be required to undergo a newly required emergency training because of her physical disabilities

Court:

- Training is an essential function that does not have to be removed as an accommodation
- Consequences of not having training were significant
- Deferential to employer's judgment - "Provided that any necessary job specification is job-related, uniformly enforced, and consistent with business necessity, the employer has a right to establish what a job is and what is required to perform it."

But see, Johnston v. Morton Plant Mease Healthcare, Inc., 2008 WL 191026 (M.D. Fla. 2008) (Question of fact whether ability to perform "takedowns" was essential function for a nurse in a psych. unit).

Removing Job Functions as an Accommodation: Rotating Shifts

Reville v. Niagara Frontier Transp. Auth., 2009 WL 5167645 (W.D.N.Y. 2009)

Temporarily allowing a manager to work only day shifts “merely shows the job could be restructured, not that [the function of working rotating shifts] was non-essential.”

- **Job description & CBA:** Working rotating shifts is essential function.
- **Court:** Requested accommodation violated CBA - unreasonable *per se*
 - ❖ Since prior accommodation, the number of management representatives has decreased, thereby limiting the impact on other employees.

See also, Rehrs v. Iams Co., 486 F.3d 353 (8th Cir. 2007) (Working flexible schedules was an essential function for a warehouse tech. with diabetes as providing a permanent exception would create more work for other employees, causing an undue hardship.)

Removing Job Functions as an Accommodation: More shift issues

Rohr v. Salt River Project..., 555 F.3d 850 (9th Cir. 2009)

- Where some functions (overtime) only occurred 12x over 23 yrs. and others, (out-of-town field work), had not occurred for several years, summary judgment precluded for a technical support specialist w/ Type I diabetes restricted from working rotating shifts or >9 hrs./day.
 - ❖ **Co. Dr.:** Could perform job with restrictions (mostly office work).

Tjernagel v. Gates Corp., 533 F.3d 666 (8th Cir. 2008)

- Working OT is essential where noted in job description and required of all in same position.

Gorney v. Siemens Med. Sol'ns..., 2009 WL 1543660 (S.D. IN 2009)

- Overnight travel, being on-call, and working >8hrs. were essential for an engineer returning from FMLA leave.

Related Issue: Removing Accommodations

***Pagonakis v. Express LLC*, 2009 WL 541266 (3d Cir. Mar. 5, 2009)**

- Employee was given accommodations: No work at night, no work >4 days in a row, periodic breaks, no climbing, and occasional telework
- Accommodations were then taken away – no “special scheduling”
- **Court:** Removing accommodations without a legitimate business reason may violate the ADA.

But see, Hill v. Verizon Maryland, Inc, 2009 WL 2060088 (D. Md.2009), if an employer provides more than what is required by the ADA, the employer should not be punished for its generosity, and employer’s actions should not necessarily be deemed a reasonable accommodation.

Reasonable Accommodation Legal Update

Creating a New Position as a Reasonable Accommodation

Creating New Positions: Background

General Rule: to comply with the reasonable accommodation provisions of the ADA, an employer does not have to bump an employee from a job in order to create a vacancy; nor does it have to create a new position.

See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA

Creating New Positions as an Accommodation: Recent Cases

Mize v. Centura Financial Services

2009 WL 3419586 (S.D. Ala. 2009)

- Employee requested to work teller station in basement rather than main floor.
 - ❖ High barstools at main level prevented her from keeping feet on ground.
 - Also requested that another employee inventory safety deposit boxes.
 - **Court:** ADA does not require creating a new position: basement teller as position did not exist for eight months prior to the request.
 - **Court:** Inventorying safety deposit boxes was an essential function as Mize was one of the few employees who could perform this task.
- Query:** Was a lower main floor teller station a possible accommodation?

Creating New Positions as an Accommodation: Recent Cases

Johnson v. Cleveland City School, 2009 WL 2610833 (6th Cir. 2009)

- Teacher developed cervical myelopathy
 - ❖ **Medical restrictions:** No standing for more than 1 hr./day; No continuous speaking; Alternate sitting, standing, and walking with minimal use of stairs; Ambulatory aids and an electric scooter as needed.
- As an accommodation, one school created a new position
- New deputy chief at school district didn't like this.
 - ❖ Reassigned teacher to a different school where the position did not exist.
 - ❖ Teacher was not able to continue and went on extended leave.
 - ❖ As no small classroom or counseling positions available, teacher was terminated.
- **Court:** Creating a new position is not a reasonable accommodation.
 - ❖ Even though first school created a position, the district is not required to continue to go beyond ADA requirements.

Reasonable Accommodation Legal Update

**Leave as a
Reasonable Accommodation**

Leave as an Accommodation: Recent Case Law

Clinkscales v. Children's Hosp. of Phil., **2009 WL 1259104 (E.D. Pa. 2009)**

- Employee requested leave until medically able to return – employer refused.
- **Court:** Found for employee - request was for limited amount of leave, not indefinite leave
 - ❖ “While... a request to stay home from work indefinitely is not a reasonable accommodation, ‘there are situations in which extended leave is allowed under the ADA, such as where the leave will enable an employee to perform the essential functions of the job in the near future.’”
 - ❖ Acknowledged that many courts find requests for indefinite leave unreasonable, but this determination is improper on a motion to dismiss.

Leave as an Accommodation: Recent Case Law

Colby v. Pye and Hogan, LLC, 602 F. Supp. 2d 365 (D. Conn. 2009)

- Employee with cancer was granted 6 days/month for chemotherapy treatments, as long as he provided notice of dates.
 - ❖ Terminated for unreliability in giving notice & unpredictable attendance.
- **Court:** Reasonable notice can be required when granting leave.

Verrocchio v. Federal Express Corp., 2010 WL 610339 (N.D.N.Y. 2010)

- Employee on leave for 9 months may be entitled to additional leave as a reasonable accommodation.

Mayhew v. T-Mobile USA, Inc., 2009 WL 5125642 (D. Or. 12/22/2009)

- ADA leave is not available to care for another person (FMLA only).

100% Healed Policies and 1 Year Leave Policies

EEOC v. Sears, Roebuck & Co., 2005 WL 2664367 (N.D. Ill. July 22, 2005) (Settlement in Feb. 2010)

- Court approved a \$6.2M distribution for 235 former employees who were terminated at the end of Workers' Compensation leave.
- Inflexible leave policies are inconsistent with the interactive process and individualized assessment components of the ADA

<http://www.eeoc.gov/eeoc/newsroom/release/2-5-10a.cfm>.

EEOC v. Supervalu, Inc., 2009 WL 4824697 (N.D. Ill. Dec. 15, 2009)

- The EEOC filed suit claiming, 'One Year and You're Out' and 'No Accommodation, No Restrictions' rules violates ADA.

<http://www.eeoc.gov/eeoc/newsroom/release/9-11-09.cfm>.

Reasonable Accommodation Legal Update

Telework

Work at Home / Telework: Background



- The ADA does not require that employers create a teleworking policy if none exists.
- If a telework program does exist, people with disabilities should be able to participate.
- If there is no teleworking policy, employers must still consider it as a possible reasonable accommodation.
- Some courts have found working at home is a reasonable accommodation
- Other courts have strictly interpreted these types of reasonable accommodation requests.

EEOC Fact Sheet: Work At Home/Telework as a Reasonable Accommodation, <http://www.eeoc.gov/facts/telework.html>.

Work at Home / Telework: Recent case law

Kiburz v. England, 2010 WL 165139 (3rd Cir. Jan. 19, 2010) **Accommodation of working from home was unreasonable**

- Information Technology specialist for Navy requested that he work from home due to arthritis in his spine based on Dr.'s advice.
- Essential functions, based on job description and testimony, included: providing technical support to customers/colleagues, attending meetings and trainings, achieving effective working relationships with customers and coworkers.
- Navy denied the requested accommodation, and terminated the employee for absenteeism and inability to complete his work
- **Court:** Summary judgment granted for the Navy, because working from home would prevent the employee from performing a substantial portion of essential job functions, and was therefore unreasonable.

See also, *Page v. Liberty Central School District, 2010 WL 176791 (S.D.N.Y. 2010)*, telework not a reasonable accommodation for librarian with multiple chemical sensitivity because being physically present was an essential function.

Reasonable Accommodation Legal Update

Undue Hardship

Undue Hardship: Background



Employers do not need to provide a reasonable accommodation if it would be an **undue hardship**, defined as “significant difficulty or expense.” 29 C.F.R. § 1630.2(p).

Factors to determine whether an accommodation is an undue hardship include:

- (1) the employer's type of operation;
- (2) the employer's overall financial resources;
- (3) the [cost] of the reasonable accommodation; and
- (4) the impact of such accommodation upon operations...”

See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA

Undue Hardship: Recent Case Law

Moore v. Computer Assoc. International, 2009 WL 2870213 (D. Ariz. 2009)

- Instructional Consultant provided in-person training for products.
- Developed major depression, paranoid schizophrenia, and bipolarity.
 - ❖ Went on leave and was eventually terminated
 - ❖ Prior to termination, requested various accommodations including extended leave

Court:

- Extended indefinite leave would cause an undue hardship –required hiring expensive independent contractors or canceling classes.
- To support undue hardship argument, defendant presented memo analyzing economic impact on company to provide the requested accommodation

Undue Hardship: Recent Case Law



Frumusa v. Zweigle's, Inc., 2010 WL 175159 (W.D.N.Y. 2010)

- **Court:** Summary judgment for the employer, because moving employee to 1st floor would cause an undue hardship.
 - ❖ No available offices on 1st floor & employee could not perform some essential functions from 1st floor.

Friends v. Astrue, 2007 WL 1954420 (D.D.C. Jul. 5, 2007)

- **Court:** SSA failed to show that providing ASL interpreter would be an undue hardship
 - ❖ SSA asserted it would increase interview time and cost too much, but the court looked at SSA's financial resources.

Grubb v. Southwest Airlines, 2008 WL 4538313 (5th Cir. Oct. 10, 2008)

- **Court:** Accommodation of working only on PM shifts would be undue hardship as all other flight instructors would have to work longer hours and SWA would have to fundamentally alter its schedule and policies.

Undue Hardship: Case Law About a Scent-Free Workplace

Monterroso v. Sullivan & Cromwell, LLP, **591 F.Supp. 2d 567 (S.D. N.Y. 2008)**

- Secretary had asthmatic reactions to fumes and cleaning solutions.
- Requested “no propellant” policy as an accommodation
- **Company:** No duty to “provide a bubble for [plaintiff] to work in” and cited cases supporting that scent-free policy poses an undue hardship. (see *Kaufman v. GMAC Mortg.*, 229 Fed. Appx. 164 (3d Cir. 2007))

Court:

- Employee did not ask for scent-free policy, but instead a “propellant free” policy.
- Question of fact as to whether such a policy would be an undue hardship – and therefore no summary judgment for company.

Undue Hardship: Case Law About a Scent-Free Workplace

McBride v. City of Detroit, 2008 WL 5062890 (E.D. Mich. 2008)

- Court refused to dismiss ADA case brought by employee with chemical sensitivity who sought policy on scents in the workplace – recognized that scent-free policy would be an undue hardship, but employee was not seeking scent-free workplace
- Agreement recently reached in case
 - Employee awarded \$100,000
 - Notices placed in city buildings asking employees to refrain from wearing scented products such as colognes, aftershave lotions, perfumes, deodorants and use of scented candles, perfume samples in magazines and air fresheners
 - Other notices will go in new employee handbook and ADA trainings
- **Query:** Trend toward more acceptance of scent-free policies?

Reasonable Accommodation Legal Update

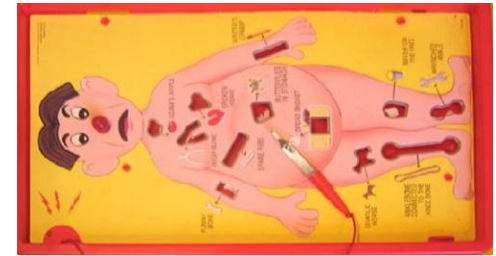
Discipline and Direct Threat Issues

Creating New Positions: Background

Generally, because reasonable accommodation is always prospective, an employer is not required to excuse *past misconduct* as an accommodation even if it is the result of the individual's disability.

See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA

Interaction Issues in Case Law



***Jarvis v. Potter*, 500 F.3d 1113 (10th Cir. 2007) (Rehab Act)**

- USPS worker's request that his co-workers be instructed, "not to startle him or approach him from behind" was unreasonable as it would not be effective in assisting the employee act appropriately in the workplace.

***Jakubowski v. Christ Hospital*, 2009 WL 2407766 (S.D. Ohio 2009)**

- The limited communication skills of a resident with Asperger's Syndrome posed a direct threat to the health and safety of patients.
 - ❖ Requested accommodation of "knowledge and understanding" by the hospital's staff, did not adequately address legitimate safety concerns.

Rescinding Discipline: Background and Case Law

Calandriello v. Tenn. Processing Ctr.,

2009 WL 5170193, (M.D.TN 2009)

- Employee had Co.'s "Impact is Inspiration" poster (used to boost morale) with Charles Manson's face substituted for employee's pic.
- Then disclosed he had bi-polar disorder and asked to be "exempt from any disciplinary action"
- **Court:** Summary Judgment for employer - terminated due to "high risk" of continued employment; employer not required to "accommodate" disability by exempting from disciplinary action..
 - ❖ **Co.:** Did not discuss bipolar condition in making the decision and noted "increases in workplace violence being reported in the news media."

Rescinding Discipline: recent case law



***Canales Jacobs v. New York State Official of Court Administrators*, 640 F.Supp.2d 482 (S.D.N.Y. 2009)**

- Employee was being terminated for misconduct & incompetence, (3rd stage of disciplinary process), when disclosed depression.
 - ❖ Late 24X, absent 22X, failed to swipe his time card 7X, failed to follow proper procedures during a fire drill, and violated other rules (smoking).
- **Court:** Employers do not have to “excuse... misconduct and poor work performance” and a request to do so “is unreasonable as a matter of law.”
 - ❖ “The ADA does not excuse workplace misconduct because the misconduct is related to a disability.”
 - ❖ Particularly for an “undivulged psychiatric condition.”
 - ❖ **Note:** Unless the misconduct is due to failure to supply a requested reasonable accommodation.

Accommodating Conduct: Case law



***Bodenstab v. County of Cook*, 569 F.3d 651 (7th Cir. 2009)**

- Anesthesiologist at Stroger Hospital was terminated for stating that, if his cancer had spread, he intended to kill his supervisor & co-workers.
 - ❖ Mentioned possibility of dying in “ensuing gun battle with police.”
- **Court:** “[N]o legal obligation to ‘accommodate’ conduct, as opposed to a disability...” even if the misconduct is related to a disability.”
- **Query:** Does it matter if the threat was made outside of work?

***Turner v. The Saloon, Ltd., No.*, 2010 WL 424580 (7th Cir. 2010)**

- Company does not have to modify its “no nakedness policy” for a waiter with psoriasis who changed clothes in common areas as his underwear became uncomfortable.

Reasonable Accommodation Legal Update

Practice Tips

Practice Tips: Interactive Process

- Duty to interact applies to both employers & employees.
 - ❖ Employee Request (impairment, limitations, & preference, if known) →
 - For reassignment, identify vacant positions meeting qualifications.
 - ❖ Employer response (Request limited additional info if the disability or need for accommodation is not known or apparent) →
 - ❖ Employee providing necessary additional information →
 - If info is vague or contradictory, more info can be requested from employee.
 - ❖ Providing an “effective” accommodation (after giving employee’s preference “primary consideration.”) 29 C.F.R. pt. 1630 app. §1630.9 **OR**
 - ❖ A lawful basis for not providing one.
 - **Undue Hardship** – “Significant difficulty or expense.” 29 C.F.R. § 1630.2(p)
 - **Not Qualified** – “Can perform the essential job functions, with or without reasonable accommodation” 29 C.F.R. § 1630.2(m)
 - **Direct Threat** -- “A significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 USC § 12111(3)

Practice Tips: Interactive Process

- Be far-reaching in exploring reasonable accommodations
 - ❖ For example, if leave would cause an undue hardship, examine part-time work or working from home
- Employers should consider offering effective alternatives if the suggested accommodation is not reasonable.
- Employees should consider accepting offered effective accommodations even if it is not the preferred accommodation.
- Best practices include:
 - ❖ Having policies governing interaction and setting time frames
 - ❖ Centralized decision making
 - ❖ Consulting with JAN, EEOC, DBTAC
 - ❖ Having employee obtain med. Info rather than employer contacting Dr.
 - ❖ Providing appeal rights from denials
 - ❖ Regular ADA training and training for new staff

Practical Tips for Employers



- Engage in interactive process (see prior slides)
- Get limited medical documentation only when necessary.
- Document: job duties, discipline, performance improvement plans, and reasonable accommodation efforts.
- Be flexible - Avoid inflexible policies (e.g. 100% healed)
- Offer alternative “effective” accommodations
- Need objective evidence to support undue hardship and direct threat defenses

Practical Tips for Employers

- Be wary of recommending or forcing medical leave or treatment.
- Offer periodic ADA training for all & training for new hires.
- Make sure there are no reasonable accommodations available before terminating an employee.
- May have some responsibility to identify alternative jobs.
- Recognize the benefits of reasonable accommodation.
 - ❖ According to JAN, providing reasonable accommodations results in a \$10 benefit for every \$1 spent. *JAN Fact Sheet: Workplace Accommodations: Low Cost, High Impact (2007)*

Practical Tips for Employees

- Document reasonable accommodation requests and progress, providing a time frame for responses.
 - ❖ Putting the request in writing not required, but recommended.
 - ❖ Using the phrase “reasonable accommodation” not required, but recommended.
 - ❖ Know and follow procedures and policies.
 - ❖ Document any perceived retaliation or disparate treatment.
 - ❖ Suggest a preferred accommodation, if known.
- Provide medical information when appropriate.
- **Personnel Files:** Feel free to add information regarding performance issues or to request a copy of the file.

Practical Tips for Employees

- Vocational rehabilitation agencies may help pay for reasonable accommodations.
- Keep accommodation requests reasonable in scope and #.
- Be wary when requesting indefinite leave.
 - ❖ Try to set a time frame with your Dr., if possible.
 - ❖ Know and follow co. procedures and policies.
- Attempt offered accommodations, even if not the 1st choice.
- Try to utilize union resources, if possible.
- Contact JAN and other resources for assistance or info.

Resources

- **DBTAC: Great Lakes ADA Center:** www.adagreatlakes.org; 800/949 – 4232(V/TTY)
- **ADA Disability and Business Technical Assistance Center:** www.adata.org/dbtac.html
- **Equip For Equality:** www.equipforequality.org; 800/610-2779 (V); 800/610-2779 (TTY)
- **Job Accommodation Network:** www.jan.wvu.edu
- **Equal Employment Opportunity Commission (EEOC):** www.eeoc.gov



Thank you for Participating In
Today's Session

Please join us for the next session in this series:

June 2, 2010

“Invisible Disabilities” and the ADA

The logo for DBTAC great lakes ADA Center. It features the text "DBTAC" in a dark blue serif font, followed by "great lakes" in a dark blue script font, and "ADA Center" in a dark blue serif font. Below this, the text "A member of the ADA National Network" is written in a dark blue serif font. The logo is set against a light blue map of the Great Lakes region. In the bottom left corner, there are decorative green circles of varying sizes. In the bottom right corner, there is a decorative pattern of small grey squares.



Session Evaluation

Your feedback is important to us

Please fill out the on-line evaluation
form at:

<http://ada-conferences.April72010eval.sgizmo.com>



Reasonable Accommodation Legal Update

Presented by:

Barry Taylor, Legal Advocacy Director and
Alan Goldstein, Senior Attorney, Equip for Equality

Equip for Equality is providing this information under a subcontract with the DBTAC - Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability Rehabilitation and Research Award No. H133A060097.

