



Welcome to the ADA Legal Webinar Series

A collaborative program between the
**Southwest ADA Center, Great Lakes ADA Center and members of the
ADA National Network**

The Session is Scheduled to begin at 2:00pm Eastern Time
We will be testing sound quality periodically

Audio and Visual are provided through the on-line webinar system. This session is closed captioned. Individuals may also listen via telephone by dialing 1-712-432-3066 Access code 148937 (This is not a Toll Free number)

The content and materials of this training are property of the presenters and sponsors and cannot be used without permission. For permission to use training content or obtain copies of materials used as part of this program please contact us by email at webinars@ada-audio.org or toll free (877)232-1990 (VTTY)



Listening to the Webinar



- The audio for today's webinar is being broadcast through your computer. Please make sure your speakers are turned on or your headphones are plugged in.
- You can control the audio broadcast via the Audio & Video panel. You can adjust the sound by "sliding" the sound bar left or right.
- If you are having sound quality problems check your audio controls by going through the Audio Wizard which is accessed by selecting the microphone icon on the Audio & Video panel



2

Listening to the Webinar, *continued*



If you do not have sound capabilities on your computer or prefer to listen by phone, dial:

712-432-3066

Pass Code:
148937

This is **not** a Toll Free number

3

Listening to the Webinar, *continued*



MOBILE Users (iPhone, iPad, or Android device (including Kindle Fire HD))

Individuals may listen** to the session using the Blackboard Collaborate Mobile App (Available Free from the Apple Store, Google Play or Amazon)



**Closed Captioning is not visible via the Mobile App and limited accessibility for screen reader/Voiceover users

4

Captioning



- Real-time captioning is provided during this webinar.
- The caption screen can be accessed by choosing the icon in the Audio & Video panel.



- Once selected you will have the option to resize the captioning window, change the font size and save the transcript.

5

Submitting Questions



- You may type and submit questions in the Chat Area Text Box or press Control-M and enter text in the Chat Area
- If you are connected via a mobile device you may submit questions in the chat area within the App
- If you are listening by phone and not logged in to the webinar, you may ask questions by emailing them to webinars@ada-audio.org



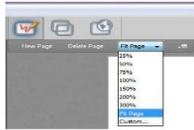
Please note: This webinar is being recorded and can be accessed on the www.ada-legal.org within 24 hours after the conclusion of the session.

6

Customize Your View



- Resize the Whiteboard where the Presentation slides are shown to make it smaller or larger by choosing from the drop down menu located above and to the left of the whiteboard. The default is “fit page”



7

Customize Your View *continued*



- Resize/Reposition the Chat, Participant and Audio & Video panels by “detaching” and using your mouse to reposition or  “stretch/shrink”. Each panel may be detached using the icon in the upper right corner of each panel.

8

Technical Assistance



- If you experience any technical difficulties during the webinar:
 1. Send a private chat message to the host by double clicking “Great Lakes ADA” in the participant list. A tab titled “Great Lakes ADA” will appear in the chat panel. Type your comment in the text box and “enter” (Keyboard - F6, Arrow up or down to locate “Great Lakes ADA” and select to send a message); or
 2. Email webinars@ada-audio.org; or
 3. Call 877-232-1990 (V/TTY)

9



Reasonable Accommodations Under the ADA

Presented by Equip for Equality
Barry C. Taylor, VP for Civil Rights and Systemic Litigation
Rachel M. Weisberg, Staff Attorney / Employment Rights Helpline Manager

Valuable assistance provided by:
Colby Alexis, Jake Gordon, Karen Klass – PILI Fellows
Gianna Gizzi, Aima Mori, Legal Intern, James Naughton – Legal Interns

September 20, 2017



Continuing Legal Education Credit for Illinois Attorneys



- This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.
- Illinois **attorneys** interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
- Participants (non-attorneys) looking for continuing education credit should contact 877-232-1990 (V/TTY) or webinars@ada-audio.org
- This slide will be repeated at the end.



Outline of Today's Webinar

- The Fundamentals
 - ◊ Who Is Entitled to Accommodations
 - ◊ Requesting Accommodations
 - ◊ Interactive Process
 - ◊ Confidentiality
 - ◊ Undue Hardship
- Categories of Accommodations
- Common Accommodations: Leave, Job-Restructuring, Telework, Light Duty, Scent-Free Workplace, Rotating Shifts, Supervisor Changes, Reassignment
- Retaliation
- Resources
- Questions



Reasonable Accommodations

- ADA defines discrimination to include the failure to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." 42 U.S.C. § 12112(b)(5)(A)
- Generally, three categories: 29 C.F.R. § 1630.2(o)(1)
 - ◊ Changes to the **job application process** to enable applicants to be considered for a position
 - ◊ Changes to the workplace to enable employees to enjoy equal **benefits and privileges** of employment
 - ◊ Changes to the work environment or the way a job is typically performed to enable an individual to perform the **essential functions of the position**
- Important; complex; requires creative thinking and problem solving

Who Is Entitled To Accommodations?

- Three pronged definition of disability
 - ◊ Actual disability = Entitled to accommodations
 - ◊ Record of = Entitled to accommodations
 - ◊ Regarded as = Not entitled to accommodations
 - ◊ 29 C.F.R. § 1630.2(O)(2)(ii)(4) (ADAAA clarified no accomm)
- **Ryan v. Columbus Regional Healthcare System**
2012 WL 1230234 (E.D.N.C. Apr. 12, 2012)
- Nurse with degenerative joint disease and arthritis requested accommodations (limited standing, stooping, kneeling, crouching)
- Request denied – brought lawsuit only under "regarded as" disabled
- **Court:** Dismissed case - no requirement to accommodate

Who Is Entitled To Accommodations?

- Associated with an individual with a disability = Not entitled
- Milchak v. Carter**
2016 WL 6248074 (E.D. Mo. Oct. 26, 2016)
- Employee requested to work the second shift so he could be available to care for his wife, who had a disability
 - Request denied and employee brought ADA case
 - **Court:** No requirement to accommodate nondisabled employees based on their association with an individual with a disability
- But consider:
- Would FMLA assist employee?
 - Would ADA's disparate treatment protections help?

Initial Request for Accommodations Who Initiates Request

General rule: Employee must request accommodation

- **Exception:** Employers must engage in interactive process *if* they have knowledge of an employee's disability, know employee is experiencing workplace problems, and know disability prevents making the request www.eeoc.gov/policy/docs/accommodation.html

Doresy v. CHS

2017 WL 1356093 (D. Colo. April 13, 2017)

- Salesman with Parkinson's disease and difficulty with speech
- Fired after clients complained that he difficult to understand
- Employer argued no obligation because employee made no request
- **Court:** Found for employee: Salesman's "obvious manifestation" of his disability put company on notice, triggered interactive process



16

Initial Request for Accommodations Additional rules

• Request can come from someone else

- ***Feldman v. Law Enforcement Associates Corp.***, 779 F. Supp. 2d 472 (E.D.N.C. 2011) (employee's spouse and lawyer could initiate accommodation request)

• No requirement to make requests in writing or use "magic words"

- ***Floyd v. Lee***, 85 F.Supp.3d 482 (D.D.C. 2015) (no need to use the "magic words" of "reasonable accommodations")

• Employee must disclose disability and request a change

- ***Ness-Holyoak v. Wells Fargo Bank Nat'l Association***, 2017 WL 2257339 (D. Utah May 22, 2017) (employee's complaint was not an accommodation request, despite fact that the employee had a disability, as employee failed to tie complaint to disability)

Tips: Use magic words and make (or memorialize) request in writing



17

Initial Request for Accommodations

Rule: Employees do not need to use employer-created forms

Best Practice (employee): User employer-created forms

Best Practice (employer): Train staff to recognize requests

Jones v. Clark County School District

2017 WL 1042463 (D. Nev. Mar. 17, 2017)

- Bus driver with depression asked supervisor to transfer to new job
- Supervisor referred driver to ADA coordinator
- Driver told ADA coordinator his doc wanted him to retire from driving
- **District argued:** Driver never requested a reasonable accommodation from ADA coordinator
- **Court:** Request to supervisor was sufficient – not driver's fault that one administrator failed to communicate with another



18

Interactive Process

- Dialogue between employer and employee whereby parties work together to find an effective and reasonable accommodation
- **Not** an independent claim under the ADA
- **But** courts examine interactions to pinpoint which party is responsible for the breakdown in communication
 - Employee responsible? Employer typically prevails
 - Employer responsible?
 - Some courts deny summary judgment **Snapp v. United Trans. Union**, 547 Fed. Appx. 824 (9th Cir. Nov. 5, 2013)
 - Some courts examine whether breakdown prevented parties from finding accommodation and if so, deny summary judgment **Stern v. St. Anthony's Health Center**, 788 F.3d 276 (7th Cir. 2015)

Interactive Process: Employee Responsible for Breakdown

- Common reasons courts find employee responsible for breakdown
- Employee fails to provide medical documentation or undergo medical exam or fitness for duty eval (**discuss soon...**)
 - Employee is unwilling to discuss alternative accommodations
 - **Romero v. Cty. of Santa Clara**, 666 Fed.Appx. 609 (9th Cir. 2016) Employee called employer's attempt to initiate interactive process "harassment" and demanded only indefinite leave
 - Employee does not give employer chance to respond to concerns
 - **EEOC v. Kohl's Dept. Stores**, 774 F.3d 127 (1st Cir. 2014)
 - Employee requested accommodation of steady schedule instead of swing shifts (late or early). Employer agreed to take her off swing shifts, but could not guarantee steady schedule.
 - Employee "put her keys on the table, walked out of [the] office, and slammed the door." She refused to stay and discuss options.

Interactive Process: Employer Responsible for Breakdown

- Common reasons courts find employer responsible for breakdown
- Employer responds without any deliberation
 - **Jacobs v. N.C. Admin. Office of the Courts**, 780 F.3d 562 (4th Cir. 2015). Employee requested accommodation from immediate supervisors, who said only Clerk could decide, but she was on a three-week vacation. When Clerk return, she terminated employee's job without any discussion of the request.
 - Employer does not give employee chance to respond to concerns
 - **Keith v. County of Oakland**, 703 F.3d 918 (6th Cir. 2013). Deaf lifeguard cleared to work by County doc but told that he needs "constant accommodation." County asked "expert" and revoked offer. County caused breakdown by cutting communications short and not giving lifeguard the opportunity to respond.

Effective v. Preferred Accommodation

Rule: ADA requires effective accommodation, not employee's preferred

Noll v. International Business Machines Corp.
787 F.3d 89 (2d Cir. 2015)

- Deaf software engineer at IBM for 30+ years w/ accommodations
- Requested on-screen captioning for internal video database (46,000 video files). IBM offered video transcripts and live interpreters.
- Employee said ineffective because it was tiring for him to move his eyes between the video and the interpreter or transcript
- **Court:** Found for IBM
 - The "reasonable accommodation requirement does not require the perfect elimination of all disadvantage that may flow from the disability." - Almost any accommodation for deafness will "involve some degree of visual taxation"

Effective v. Preferred Accommodation

Best practice (employer): Always consult with employee and defer to employee's request, when possible

EEOC v. UPS Supply Chain
620 F.3d 1103 (9th Cir. 2010)

- Deaf employee requested ASL interpreters for weekly meetings
- Employer provided agendas, notes, and written summaries
- Employee said – not effective (cursory and incomplete info, no Q&A)
- **9th Cir:** Found for employee
 - An "employer has discretion to choose among effective modifications, and need not provide the employee with the accommodation he or she requests or prefers, but an employer cannot satisfy its obligations under the ADA by providing an ineffective modification."

Medical Documentation

- Employers **can** seek medical support if the employee's disability or need for accommodation is not obvious
- Employers **cannot** request complete medical files or additional records if employee has already provided sufficient information

Ortiz-Martinez v. Fresenius Health Partners, PR, LLC
853 F.3d 599 (1st Cir. 2017)

- Healthcare worker requested accommodations for her sprained arm
- Provided a note about injuries but not about accommodation
- Employer asked for more information and employee did not respond
- **1st Cir:** Found for employer
 - Employee caused breakdown in the interactive process
 - Requested additional details were "not unreasonable" as the employee must show how request was related to her disability

Medical Documentation

Rule: Employer may require documentation to come from an "appropriate health care or rehabilitation professional"

Heit v. Aerotek, Inc

2016 WL 6298771 (W.D. Wash. Oct. 27, 2016)

- An employee was unable to produce urine for a drug test so requested another test for "shy bladder syndrome"
- Provided support from a doctor at a drug testing clinic who was not an expert in this condition, did not examine/diagnose the employee and instead just documented what the plaintiff reported
- Employee had no primary care doctor so could not get other note
- **Court:** Sympathetic to employee, but it was reasonable to request medical documentation from a professional with expertise in the condition or at the very least who had examined the employee

Medical Documentation

It may be a reasonable accommodation to provide leave (or leave extension) for purpose of obtaining medical clearance

Schneider v. Works

223 F. Supp. 3d 308 (E.D. Pa. 2016)

- Personnel supervisor had previously provided medical support that he was not healthy enough to work
- Requested a ten-day extension of his previously approved leave so that his doctor could examine him and he could provide medical clearance, at least to return in a light duty capacity
- **Court:** Found for employee
 - Leave extension for purpose of obtaining medical documentation may have been a reasonable accommodation

Confidentiality

- Disability-related information must be maintained in a file separate from the employee's personnel file
- Disclosure is permitted only to employee's supervisor or managers in certain circumstances, safety personnel, or the government when it is investigating the employer's compliance with the ADA
- Voluntary disclosures are generally not required to be confidential
- Breach of confidentiality is an independent cause of action
 - ***Gascard v. Franklin Pierce Univ.*, 2015 WL 1097485 (D.N.H. Mar. 11, 2015)** ("The statute itself does not limit its prohibition on such disclosures to those that are done in furtherance of some act of disability discrimination, and the defendants provide no authority for reading the statute that way. The court declines to do so.")

42 U.S.C. § 12112(d)(3)(B)

Confidentiality

EEOC v. Ford Motor Credit Co.

531 F.Supp.2d 930 (M.D. Tenn. 2008)

- An employee with HIV requested a schedule modification so that he could participate in an HIV-study that paid for his medication
- Employee disclosed to another manager instead of his direct supervisor because she was a "gossip."
 - Employee tried not to disclose HIV specifically but manager demanded to know diagnosis and eventually shared information with employee's supervisor... who then told others.
- **Employer:** No violation because employee voluntarily disclosed
- **Court:** Found for employee – disclosure was not voluntary
 - Employee disclosed because he was requesting medical leave
 - Supervisor continuing to press the employee
 - Tangible injury = Shame, embarrassment and depression

Undue Hardship

Undue hardship = An action requiring significant difficulty or expense

- Employer defense
- No specific formula, but four factors to consider
 - Nature and cost of the accommodation needed
 - Overall financial resources of the facility, number of employees, effect on expenses/resources, impact on operations
 - Overall financial resources, size, number of employees, and type and location of facilities of employer, if the facility involved in the reasonable accommodation is part of a larger entity
 - Type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative/fiscal relationship of the facility.

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

Undue Hardship

Irrelevant factor = Budget for accommodations

Reyazuddin v. Montgomery County, Maryland

789 F.3d 407 (4th Cir. 2015)

- County opened a consolidated call center with inaccessible software
- Information and referral aide, who is blind, was not transferred
- One issue = Whether software could be made accessible as a reasonable accommodation through either a workaround widget or changing the configuration of the software
- Experts estimated cost ranging from \$129,000 to \$648,000
- County's budget was \$3.73 billion
- **4th Cir:** Cost did not constitute undue hardship as a matter of law
 - Budget allocated for accommodations was an irrelevant factor
 - "[T]aken to its logical extreme, the employer could budget \$0 for reasonable accommodations and thereby always avoid liability."

Undue Hardship

Irrelevant factor = Employee salary

Searls v. Johns Hopkins Hospital 158 F.Supp.3d 427 (D. Md. 2016)

- Nurse given offer of employment contingent on a health screening
- Requested a full-time ASL interpreter and her offer was rescinded
- Hospital defense: Interpreter would pose an undue hardship
 - Nurse's salary = \$40,000 - \$60,000
 - Interpreter cost = \$120,000
- **Court:** Found for employee (granted summary judgment)
 - Undue hardship: Compare cost of accommodation to overall budget—not nurse's salary or department's resources
 - Here, cost was only .007% of the hospital's overall budget



31

Undue Hardship

May be an undue hardship to violate a *well-established* seniority system or collective bargaining agreement

- But system must be bona fide with no exceptions

Hill v. Clayton County School District 619 Fed. Appx. 916 (11th Cir. 2015)

- Bus driver with difficulty breathing asked for air conditioned bus
- District said it had to delay request for several months because an immediate assignment would "upset its seniority-sensitive bus-allocation process."
- **Court:** Found for employee
 - Sparse assertion of merely upsetting an equipment allocation process is insufficient to establish undue hardship
 - Employee previously assigned an air conditioned bus



32

Categories of Accommodations Pre-Employment Process

Includes job application, interview, **all** pre-employment procedures

EEOC v. Kmart Corporation (2015)

www.eeoc.gov/eeoc/newsroom/release/1-27-15b.cfm

- Applicant required to provide urine sample for drug test
- Request for alternative test due to kidney disease was denied
- EEOC sued – settled for \$102,048, policy changes and training

EEOC v. Creative Networks, LLC 912 F. Supp. 2d 828 (D. Ariz. 2012)

- Employer failed to provide ASL interpreter for mandatory pre-employment training program
- **Court:** ADA violation (granted summary judgment to EEOC)
 - Failure to accommodate "foreclosed" plaintiff's job opportunity "by preventing" her from "proceeding" in the application process



33

Categories of Accommodations Pre-Employment Process

Accommodations to eligibility criteria not job-related and consistent with business necessity that screens out individuals with disabilities

Toole v. Metal Services LLC 17 F. Supp. 3d 1161 (S.D. Ala. 2014)

- Company required all applicants to take a DOT test that automatically disqualified plaintiff because of his monocular vision
- Plaintiff: Passing the DOT medical exam was not essential to job
- Requested alternative, standard non-DOT medical examination
- **Court:** Found for employee (denied summary judgment)
 - “[H]ad he been allowed to take a standard non-DOT medical examination, he would not have been automatically disqualified on the basis of monocular vision.”

Categories of Accommodations Benefits & Privileges

Includes access to programs, such as employment-related trainings, as well as perks, such as access to a workplace cafeteria or gym.

Feist v. Louisiana Department of Justice 730 F.3d 450 (5th Cir. 2013)

- Former employee with osteoarthritis in her knee requested a free on-site parking space
- **District court:** Found for employer – parking did not limit her ability to perform the essential functions of her job
- **5th Circuit:** Found for employee
 - Accommodation requirement is broader than just essential job functions

Categories of Accommodations Benefits & Privileges

Tip: Remember accommodations may be needed *even if* an employee can perform the essential functions of her job

Merrill v. McCarthy 184 F. Supp. 3d 221 (E.D.N.C. 2016)

- Federal employee requested to telework due to migraines and pains
- Employee conceded that she *could* perform the essential functions of her position without a reasonable accommodation
- **Court:** Employee established claim
 - Relied on the benefits and privileges of employment provision

See also Glead v. AT&T Mobile Services, LLC, 614 Fed.Appx. 535 (6th Cir. 2015) (finding that plaintiff's request for a chair so that she can work without great pain and a heightened risk of infection was an accommodation to allow employee to enjoy equal benefits and privileges of employment).

Categories of Accommodations Enable Performance of Essential Functions

Leave: Unpaid leave and extensions of FMLA, workers' comp and other leaves may be a reasonable accommodation

Rentz v. Hospital

195 F. Supp. 3d 933 (E.D. Mich. 2016)

- Clinical clerk used FMLA and paid time off for various medical issues, including treatments for breast cancer
- After FMLA expired, experienced two medical issues and disciplined for taking time off
- **Court:** Additional leave (only a handful of additional days) could have been a reasonable accommodation under the ADA
 - "a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances."

Common Accommodations Leave

Rule: No bright-line rules about how much leave is reasonable.

Walker v. NF Chipola, LLC

2016 WL 1714871 (N.D. Fla. March 28, 2016)

- Certified nursing assistant worked at a nursing facility
- She requested six months of leave for shoulder surgery
- Provided 12 weeks under FMLA – then fired/forced to resign
- Court previously denied MSJ; Jury found for employee
- **Court:** Upheld verdict - 6 month leave was reasonable in this case
 - Rejected request to find that 6 month leave was unreasonable
 - Bright line rules conflict w/ reasonable accommodation concept
 - Here, many CNAs employed due to high turnover – employer "easily" could have left her on the roster w/o pay or benefits

Common Accommodations Leave

Questions

- Is the request for indefinite and open-ended leave?
 - If so – not required
 - ***Echevarria v. AstraZeneca Pharmaceutical***, 856 F.3d 119 (1st Cir. 2017) "[Plaintiff] was seeking indefinite leave—an accommodation that is not reasonable under the ADA."
- Will leave enable an employee to return in near future?
 - If no, not required
 - ***Moss v. Harris Cty. Constable Precinct One***, 851 F.3d 413 (5th Cir. 2017) Employee requested leave until definite date. However, also planned to retire on that date. **Court:** Leave was not reasonable because it "would never enable him to perform the essential functions of his job."

Common Accommodations Leave

What is indefinite leave? No anticipated date of return

Some courts say that a projected "aspirational" date is indefinite

- **Maat v. County of Ottawa**, 657 Fed.Appx. 404 (6th Cir. 2016)
 - Court reporter requested leave until specific date, but date just signified the date she/doctor "hoped" she "might" be able to return and doc did not know "probable duration"

Other courts understand the need to provide an estimated return date

- **Sharbaugh v. West Haven Manor, LP**, 2016 WL 6834613 (W.D. Pa. Nov. 21, 2016)
 - Plaintiff provided projection of date to return from leave (2-6 wks)
 - **Court:** Found for employee (denied Employer's MSJ)
 - No medical professional can foresee the exact day a patient will recover – that does not make request indefinite or open-ended

Common Accommodations Leave

Tip for employers: Consider specific facts and circumstances

Hunter v. BASF Corporation 2017 WL 958382 (N.D. Ala. Mar. 13, 2017)

- Machine operator with psychiatric disabilities took short-term disability and could not provide anticipated return-to-work date
- **Court:** Found for employee
 - Under normal circumstances, failure to provide a return-to-work date may have rendered her request unreasonable
 - But here, policy entitled her to return to job within 6 months
 - Job was not specialized and employer had the personnel, organizational infrastructure, and financial resources to accommodate leave

Common Accommodations Leave

Employers need not provide leave if it poses an **undue hardship**

Ventura v. Hanitchak 719 F. Supp. 2d 132 (D. Mass. 2010)

- Exec ass't asked for leave extension (after FMLA) for depression
- Then sought one month to be tested for sleep apnea and narcolepsy
- Absences were causing severe disruption to the office
 - Employer hired four temps but all were ineffective because they lacked familiarity with ongoing projects and team members
- Told employee it could no longer keep job open – permitted her to remain on leave
- **Court:** Keeping position open = undue hardship
 - Employer had held the employee's job open for 17 weeks and this had caused a severe disruption to the workplace

Common Accommodations Job Restructuring

Issue: Would job restructuring remove an essential or marginal task?

- Essential → Not reasonable to restructure job
- Marginal → Reasonable to restructure job

- Factors used to determine whether a task is essential:
 - ◊ Employer's judgment
 - ◊ Written job descriptions
 - ◊ Amount of time spent on the job performing the function
 - ◊ Consequences of not performing the function
 - ◊ Terms of a collective bargaining agreement
 - ◊ Work experience of past employees and current employees

29 C.F.R. § 1630.2(n)(3)

Common Accommodations Job Restructuring

Consequences of not performing the function is often considered for employees in safety-sensitive positions and in the healthcare field

Swann v. Washtenaw County
221 F. Supp. 3d 936 (E.D. Mich. 2016)

- Vocational therapist assisted consumers with ADLs and physical help after unpredictable events like accidents, injuries or outbursts
- Restricted from lifting due to shoulder pain – asked to remove lifting
- Argued that she rarely had to lift so this function was not essential
- **Court:** Found for employer - lifting was essential
 - ◊ If the plaintiff could not lift and respond if a consumer had an accident or outburst, it would place the consumers in a "potentially dangerous situation."

Common Accommodations Job Restructuring

Tip for employers: Maintain accurate job descriptions

Henschel v. Clare County Road Commission
737 F.3d 1017 (6th Cir. 2013)

- Excavator operator was barred by state law from operating machinery required to "haul" due to amputation and prosthetic leg
- Asked for job restructuring so that he no longer needed to "haul"
- He said hauling was not essential because job description did not include task while other descriptions did
- Employer argued "hauling" was part of "other duties as assigned"
- **Court:** Found for employee
 - ◊ Not every duty in "other duties assigned" is essential – to find otherwise would render the job description meaningless
 - ◊ Also looked at other factors (consequences; incumbents; etc.)

Common Accommodations Telework

Some recent courts have been critical of telework, finding positions to require physical presence b/c they are "interactive" or "team-oriented"

Credeur v. State of Louisiana 860 F.3d 785 (5th Cir. 2017)

- Litigation attorney had complications after kidney transplant
- Request to telework granted on a temporary basis, then rescinded
- **5th Cir:** Regular work site attendance is an essential function of most jobs, especially when job is interactive and involves teamwork
 - State policy required regular office attendance
 - Exceptions were rare and temporary only

See also ***EEOC v. Ford Motor Co.***, 782 F.3d 753 (6th Cir. 2015) (en banc) (finding physical presence in the workplace essential)



46

Common Accommodations Telework

Tip for employers: Important to examine specific job duties

Bisker v. GGS Information Services, Inc 2010 WL 2265979 (M.D. Pa. June 2, 2010)

- Parts lister with multiple sclerosis requested to telework
- Employer denied request and argued it was *per se* unreasonable for employees who are expected to interact with others to meet tight deadlines to work from home
- **Court:** Permitted case to move forward
 - Even though job description required "frequent contact with employees" and occasional interfacing, it did not specify that such interactions needed to be face-to-face



47

Common Accommodations Telework

Compare:

- ***Fischer v. Pepper Hamilton LLP***, 2016 WL 362507 (E.D. Pa. Jan. 29, 2016)
 - **Court:** Telework may be reasonable
 - Project attorney's job involved reviewing documents, contracts and settlement agreements, which could be accessed online
- ***McNair v. D.C.***, 11 F.Supp.3d 10 (D.D.C. Jan. 23, 2014)
 - **Court:** Telework was not reasonable
 - Hearing officer conducted on-site administrative hearings, needed to access registration records for housing accommodations, meet and confer with rent administrators, and handle walk-in and scheduled appointments



48

Common Accommodations Telework

Employees may have stronger claims if there is a past practice of accommodating employees or telework is standard

Meachem v. Memphis Light, Gas and Water Div.
119 F.Supp.3d 807 (W.D. Tenn. 2015)

- Attorney asked to telework because she was on bed rest due to pregnancy-related impairment
- She reviewed job description and explained exactly how she could perform each task – request was denied
- **Court:** Telework may be reasonable
 - Employee needed only a telephone and remote access to her case files to do her job
 - No undue hardship based on the company's past practice of permitting another employee to telework

Common Accommodations Light Duty

Typically analyzed as request for job restructuring or reassignment

- **Legal issue:** Are employees with non-work related injuries entitled to light-duty positions reserved for work-related injuries?
- **EEOC:** Yes, if there is a vacant light duty position.
 - If employer only has *temporary* positions, it is only required to provide *temporary* light duty to employee w/ disability

Gibson v. Milwaukee County
95 F. Supp. 3d 1061 (E.D. Wis. 2015)

- Correctional officer needed temporary job w/o contact with inmates
- Denied request - light duty positions reserved for employees who were pregnant or injured on the job
- **Court:** Employers must open temporary light-duty assignments to employees w/ disabilities who need temporary accommodations

Common Accommodations Scent/Irritant Restrictions

Issue: How restrictive is employee's request?

- Completely irritant free = may be unreasonable

Buckles v. First Data Resources, Inc.
176 F.3d 1098 (8th Cir. 1999)

- Employee's request for an irritant-free work environment unreasonable because the ADA did not require an employer "to create a wholly isolated work space for an employee that is free from numerous possible irritants"

But what is the actual request?

- ***Monterroso v. Sullivan & Cromwell***, 591 F. Supp. 2d 567 (S.D.N.Y. 2008) (no-propellant policy, unlike scent-free policy, was not unreasonable)

Common Accommodations Scent/Irritant Restrictions

McBride v. City of Detroit

2008 WL 5062890 (E.D. Mich. Nov. 25, 2008)

- City planner had life-long sensitivity to scents
- She had severe reaction to colleague's strong perfumes and oils and had to take FMLA and sick leave
- Asked HR to implement a policy restricting certain scents
- City argued that scent-free policy posed undue hardship
- **Court:** Employee's case can move forward
 - ◊ Employee did not seek complete elimination of all scents
 - ◊ Wanted to limit most egregious scents by policy and training
 - ◊ Suggested policy adopted by another state department that permitted mild scents but not "strong or offensive scents"



52

Common Accommodations Rotating Shifts

Analysis: Is rotating itself essential?

Gradek v. Horseshoe Cincinnati Management

2017 WL 2573256 (S.D. Ohio June 14, 2017)

- Table games supervisor had standing restriction
- Supervisors rotated among a different casino games
- Craps has a standing "floor person" and a sitting "box" person
- Supervisor requested permanent placement in sitting "box" position
- **Court:** Rotating was not essential
 - ◊ Job description was not conclusive; no serious consequences
 - ◊ Others have been accommodated informally
 - ◊ Casino argued it was an undue hardship because it would prevent others from maintaining skills – court rejected
 - ◊ Evidence that there were multiple craps tables open during shift



53

Common Accommodations Rotating Shifts

Similar analysis when request for rotating shift in terms of scheduling

Boitnott v. Corning Inc.

2010 WL 2465490 (W.D. Va. June 15, 2010)

- Maintenance engineer requested that he work only eight hours a day instead of his typical rotating shift schedule after a heart attack
- **Court:** Ability to work rotating shifts was an essential function
 - ◊ Employer had made a legitimate business decision
 - ◊ Shift rotation allowed for coverage of the 24-hour production process to repair any emergency situation
 - ◊ Credited employer's explanation that mandatory shift rotating created consistent work teams and greater flexibility



54

Common Accommodations Change of Supervisor

Change in supervisor = generally not reasonable

Cook v. Morgan Stanley Smith Barney 2014 WL 4064000 (S.D. Tex. Aug. 15, 2014)

- Employee with anxiety and a heart condition requested a change in supervisor as an accommodation when returning from medical leave
- **Court:** Quickly dismissed that aspect of the plaintiff's case,
 - "[G]enerally, a request for a change in supervisors is not a reasonable request for accommodation, and there is no evidence that a change in supervisors would be a reasonable request in this case."

But remember: Accommodations can include changes to managerial style, such as weekly meetings, instructions in writing, etc.



55

Common Accommodations Reassignment

Legal question: Does reassignment require employers to place an employee in a vacant position OR permit employees to compete?

Majority Rule: Reassignment to a vacant position w/o competition is reasonable absent undue hardship or seniority system

- 7th Cir.: **EEOC v. United Airlines**, 693 F.3d 760 (7th Cir. 2012)
- 10th Cir. **Smith v. Midland Brake, Inc.**, 180 F.3d 1154 (10th Cir. 1999)
- D.C. Cir: **Aka v. Wash. Hosp. Ctr.**, 156 F.3d 1284 (D.C. Cir. 1998)

Minority Rule: Employers can make reassignment competitive

- 8th Cir.: **Huber v. Wal-Mart**, 486 F.3d 480 (8th Cir. 2007)
 - **Note:** Adopted reasoning in a now-reversed (pre-**United Airlines**) case "wholesale" and "without analysis"
 - Supreme Court agreed to review **Huber**, but dismissed the case before ruling after the parties settled



56

Common Accommodations Reassignment

EEOC v. St. Joseph's Hospital, Inc. 842 F.3d 1333 (11th Cir. 2016)

- Nurse in a psychiatric ward needed to use cane – hospital said she could not do job and gave her 30 days to apply/compete for new job
- **Jury found:** Employee was not accommodated
- **Issue:** Does the ADA require reassignment without competition?
- **11th Cir:** No. ADA does not mandate reassignment w/o competition
 - Called this "preferential treatment"
 - ADA says accommodation *may* include reassignment
 - Interpreted **U.S. Airways v. Barnett** to mean that it is not reasonable to violate a best-qualified hiring policy
 - Yet still affirmed jury holding that nurse was not accommodated



57

Common Accommodations Reassignment

Even under majority rule, reassignment has limitations

- Not required to violate well-established seniority system
 - **Henschel v. Clare Cnty. Rd. Comm'n**, 737 F.3d 1017 (6th Cir. 2013) (no requirement to reassign employee if it would require moving a more senior employee from a position and violate CBA)
- Required only if a position is vacant
 - **Fields v. Clifton T. Perkins Hosp**, 2014 WL 2802986 (D. Md. June 19, 2014) (no ADA violation when security attendant unable to do job had no evidence that any position was available at the time he sought to return from leave)

Common Accommodations Reassignment

Determining appropriate reassignment:

- Must reassign to most comparable position
 - **Simmons v. New York City Transit Authority**, 340 F. App'x 24 (2d Cir. 2009) (employee reassigned from train operator to bus cleaner as an accommodation. Jury found bus cleaner job was inferior in terms of hours, pay, benefits and that more comparable positions were available).
- Comparability includes more than just salary and benefits
 - **Harris v. Chao**, 2017 WL 2880827 (D.C. Cir. July 6, 2017) (reassignment to position with the same salary and benefits was still improper because the job "provided fewer opportunities to perform interesting and difficult work and reduced his promotion potential.")

Common Accommodations Reassignment

Employer tip: Broadly construe requests to continue working as some courts find all an employee with a known disability has to do is say:

- "I want to keep working for you—do you have any suggestions?"

Miller v. Ill. Dep't of Corr., 107 F.3d 483 (7th Cir. 1997)

- Employer tip:** Help employees identify vacant positions
- **Suvada v. Gordon Flesch**, 2013 WL 5166213 (N.D. Ill. Sept. 13, 2013).
 - Employer did not help employee with cancer find other jobs
 - Argued that the employee should have known about internal job postings based on an orientation training
 - **Court:** Employers have "an affirmative duty" to make reasonable accommodations and cannot simply rely on past provision of training or employment materials

Retaliation

Title V protects employees from retaliation. 42 U.S.C. §12203(a)

- Plaintiff must show
 - She engaged in a protected activity
 - She suffered an adverse employment action
 - A causal link between the two

"Adverse employment actions" = Broader in retaliation context

- **Crowley v. Vilsack, 236 F. Supp. 3d 326 (D.D.C. 2017)**
 - Technology specialist with multiple disabilities asked to telework
 - Two months later, he was placed on a PIP
 - Employer argued – no adverse action
 - **Court:** For retaliation claims, adverse action is anything that would "dissuade a reasonable worker from making or supporting a charge of discrimination." Can include PIPs

Resources

ADA Legal Webinars & Briefs (EFE/Great Lakes ADA Center)

- Interplay Between the ADA and FMLA
 - www.accessibilityonline.org/ada-legal/archives/110607
- Qualified: The New Legal Battleground After the ADA
 - www.accessibilityonline.org/ada-legal/archives/10340

EEOC Guidance Documents

- Reasonable Accommodation and Undue Hardship Under the ADA
 - www.eeoc.gov/policy/docs/accommodation.html
- Workers' Compensation and the ADA
 - www.eeoc.gov/policy/docs/workcomp.html
- Work At Home/Telework as a Reasonable Accommodation
 - www.eeoc.gov/facts/telework.html

Job Accommodation Network: <https://askjan.org/>

Continuing Legal Education Credit for Illinois Attorneys



- This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.
- Illinois **attorneys** interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
- Participants (non-attorneys) looking for continuing education credit should contact the Great Lakes ADA at 877-232-1990 (V/TTY) or webinars@ada-audio.org

Questions?



64

Session Evaluation

Your feedback is important to us

You will receive an email following the session with a link to the on-line evaluation



65



Next ADA Legal Webinar Session

November 15, 2017

Topic To Be Announced



66