Dealing With Workplace Disabilities Under The ADA (Part 2)

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D. What Makes An Accommodation Reasonable?

1. A "reasonable accommodation" includes any change in the work environment or in the way things are usually done that enables an individual with a disability to enjoy equal opportunities. 29 C.F.R. §1630.2(o). Although the employee or applicant bears the burden of requesting a reasonable accommodation, the individual need not mention the ADA or the phrase "reasonable accommodation," nor must he or she even make the request, in order to trigger the employer's obligations under the Act. *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999) (son's message to employer that his mother had been diagnosed with bipolar disorder and that she "would require accommodations when she returned to work" was sufficient to constitute a request for reasonable accommodation); *but see Warren v. Volusia County, Fla.*, 188 Fed. Appx. 859 (11th Cir. 2006) *cert. denied*, 127 S.Ct. 1268 (2007) (holding that even though the employer was aware of plaintiff's need for an accommodation through doctor's notations, the doctor was not the plaintiff's representative, and therefore there was no request for a reasonable accommodation).

2. Notwithstanding these well-established principles, the concept of a "reasonable accommodation" remains a complex issue. Once again, the issue is complicated by the fact that accommodation requires a highly individualized assessment, not only of the needs of the individual requesting the accommodation, but also of the needs of the employer who will be providing it. Thus, what was a "reasonable

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accommodation" for one employee or employer might be a wholly unreasonable accommodation for another.

3. It should be noted that a failure to accommodate may be actionable even without an adverse employment action. The court in *Nawrot v. CPC International* stated that, under the ADA, discrimination includes "not making reasonable accommodation" and allowed the employee, who suffered no adverse action following his request for breaks to monitor his diabetes, to pursue his claim for failure to accommodate. 259 F. Supp. 2d 716 (N.D. Ill. 2003).

4. Conversely, an adverse employment action taken following an employee's requests for accommodation may be actionable even if an employee is not disabled. The plaintiff in *Shellenberger v. Summit Bancorp, Inc.* claimed she had numerous allergies to fragrances contained in hand creams, deodorants, cleaning chemicals, and carpeting, among other things, and asked her employer to accommodate her by adopting a perfume-free policy or providing her an enclosed workspace with a special air filtration system. 318 F.3d 183 (3d Cir. 2003). A few days after this request, the plaintiff was terminated. *Id.* at 186. The Third Circuit, referencing the Act's provision that "protects any individual who has opposed any act or practice made unlawful by the ADA or who has made a charge under the ADA," held that "the absence of a disability does not translate into an absence of protection under the ADA." *Id.* at 190; *see also Smith v. Wynfield Dev. Co.*, 451 F. Supp. 2d 1327, 1344 (N.D. Ga. 2006) ("Because Plaintiff is not disabled, the Court finds that Defendants were not required to provide her with accommodation and that the alleged denial of such does not constitute an actionable adverse employment action. Accordingly, the only adverse action necessitating an explanation to satisfy Defendants' burden at this stage is the decision to terminate Plaintiff's employment.").

   a. *Common Reasonable Accommodations*. Although courts undertake "highly individualized" inquiries, certain accommodations informally have become the "standard" accommodations for employees under the ADA: job restructurings, leaves of absence, modified work schedules, and reassignments.

      i. *Leaves Of Absence*. Leaves of absence generally are reasonable accommodations. Although an employer is not required to provide paid leave beyond that which is provided to similarly situated employees, the employer may have to provide unpaid leave after paid leave has been exhausted, absent undue hardship. Courts typically hold that a request for indefinite leave (*i.e.*, where an employee cannot provide an expected date of return) is not a "reasonable" accommodation request, nor is an employer required to hold an employee's position open while the employee is on such indefinite leave. However, where an employee exhibits a willingness to explore options during or following leave that has been granted as a first accommodation, an employer is wise to evaluate subsequent requests for accommodation.

         (1) *Crano v. Graphic Packaging Corp.*, 65 Fed. Appx. 705 (10th Cir. 2003): Employer did not violate the ADA by failing to rehire employee whose position had been eliminated and who had been on medical leave due to a liver disease for nearly two years. The court held that maintaining a job opening for an employee on indefinite leave "is not a reasonable obligation to be imposed on employers under the ADA."

         (2) *Fogleman v. Greater Hazleton Health Alliance*, 122 Fed. Appx. 581 (3d Cir. 2004): An indefinite leave of absence was not a reasonable accommodation for a hospital employee who suffered

a back injury resulting in constant pain, because the employee could not show that the leave of absence would have enabled her to perform the essential functions of her job in the near future. "'[T]he federal courts that have permitted a leave of absence as a reasonable accommodation under the ADA have reasoned, explicitly or implicitly, that applying such a reasonable accommodation at the present time would enable the employee to perform his essential job functions in the near future.'" *Id.* at 585 (quoting *Conoshenti v. Public Svc. Elec. & Gas Co.*, 364 F.3d 135, 151 (3d Cir. 2004).

(3) *Shafnisky v. Bell Atlantic Inc.*, 2002 U.S. Dist. LEXIS 21829 (E.D. Pa. Nov. 6, 2002): Customer service worker diagnosed with mental illness who was terminated rather than reinstated or granted an extended leave had no claim under the ADA. Plaintiff was unable to work after leave under employer's policy expired and she was thus not a qualified individual with a disability. The employer was not obliged to vary the terms of its benefit plan to provide open-ended leave.

(4) *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000): A clerical employee suffering from breast cancer who had been on leave requested two more months of leave and that her job be held open. The company refused. During her absences and following her separation from employment when she went on long-term disability, the plaintiff's position was filled by a number of temporary workers. Although the court acknowledged that the ADA does not impose an obligation on a company to grant leave beyond the company's own policy, because the leave requested was for less than two months and the company demonstrated no business need to replace the plaintiff with a permanent hire, there was no financial burden on the company to grant the leave request.

ii. *Job Restructuring*

(1) Job restructuring is a form of reasonable accommodation that includes reallocating marginal job functions and altering when or how an essential or marginal function is performed. An employer never has to reallocate essential functions as a reasonable accommodation. If an employer reallocates marginal functions that a disabled employee cannot perform, it may require the employee to take on other marginal functions that he or she can perform.

(2) The Third Circuit Court of Appeals admonished employers not to reject an employee's requested accommodation merely because it was "inconvenient." *Skerski*, 257 F.3d 273. In *Skerski,* the plaintiff, a cable television installer, after 10 years on the job, developed panic attacks that were prompted by working at heights. The plaintiff's original employer, New Channels, had modified his job requirements so that the plaintiff did not have to climb as part of his job. However, after New Channels was acquired by Time Warner Cable, the plaintiff was forced to take a lower-paying position in the warehouse as an alternative to termination. The plaintiff sued Time Warner alleging that it failed to accommodate his disability. Finding that there was a material issue of fact as to whether climbing was an essential function of the job, the court addressed the question of reasonable accommodation. After Time Warner told him that he would no longer be allowed to work on his modified no-climbing schedule, the employee requested the use of a "bucket truck," which does not require climbing. The employer

rejected the request, stating that no trucks were available, and continued to do so, even after Skerski stated that he believed that one was available. The court characterized Time Warner's defense as claiming that it would have been "inconvenient" for it to make the requested accommodation. Holding that "the ADA was enacted to compel employers to look deeper and more creatively into the various possibilities suggested by an employee with a disability," the court rejected Time Warner's assertion that it had reasonably accommodated Skerski. *Id.* at 285.

(3) The court in *Alexander v. Northland Inn* rejected a hotel housekeeping supervisor's argument that she could have been reasonably accommodated by transferring her vacuuming duties to another employee. 321 F.3d 723 (8th Cir. 2003). The employee could not vacuum because of chronic neck and back pain. The court held that vacuuming was an essential function of the job and her request for accommodation was not reasonable since it would have required the hotel to assign essential duties to other employees for an indefinite period.

iii. *Modified or Part-Time Schedule*. Absent an undue hardship, an employer must provide a modified or part-time schedule when doing so would be effective, even if the employer does not provide such schedules for other similarly situated employees. This accommodation may involve adjusting arrival or departure times or providing periodic breaks. However, courts may not find it "reasonable" to require an employer to create an entirely new work schedule not already available under the company's existing policies or practices. Moreover, an employer is not required to modify a work schedule when doing so would affect the employer's services or prevent other employees from doing their jobs.

(1) *Matthews v. Village Center Community Dev. Dist.*, 2006 WL 3422416 (M.D. Fla. Nov. 28, 2006): The plaintiff, a senior accountant, requested that her employer place her on a part-time schedule as a reasonable accommodation to avoid excessive eye strain while she recovered from eye surgery. Instead, the employer offered her 12 weeks of unpaid leave. The court held that an employer is not required to create a part-time position for an employee where none exists, particularly where the employer has never hired part-time employees for a position, and where hiring a part-time employee would force the employer to pay for part-time help in addition to continuing the plaintiff's full salary.

(2) *Varone v. New York City*, 2003 U.S. Dist. LEXIS 13604 (S.D.N.Y. Aug. 1, 2003): The court ruled that the plaintiff could proceed to trial under state law (he failed to meet the 300-day statute of limitations under the ADA) with his claim that the employer failed to accommodate his sleep disorder with a flexible schedule. The court cited the employer's informal policy of permitting the plaintiff to work flexible hours in the past because of his condition.

(3) *Breen v. Dep't of Transp.*, 282 F.3d 839 (D.C. Cir. 2002): An alternative work schedule whereby an employee with obsessive-compulsive disorder would work "one hour past normal business hours every day for eight days, in exchange for one day off every two-week pay period" may be a reasonable accommodation. The employee's requested schedule would not have given her more time off of work, and the employer previously had allowed persons in

similar jobs to work schedules that allowed them to be out of the office during normal business hours.

(4) *Ward v. Mass. Health Research Inst.*, 209 F.3d 29 (1st Cir. 2000): A work schedule allowing an arthritic lab/data entry assistant to begin work after prescribed hours could be a reasonable accommodation, because the nature of the job did not require constant supervision. Rather, plaintiff's job required only that she complete her work before the next day.

iv. *Reassignment*. When there is no existing job vacancy, reassignment is not required. Reassignment usually is a last resort, and in order for it to be a reasonable accommodation, the courts generally require that the employee be qualified for the new position. *Warren v. Volusia County, Fla.*, 188 Fed. Appx. 859, 863 (11th Cir. 2006) ("If an employee must be retrained in order to fulfill the job requirements, the employee is not 'qualified' under the ADA….The ADA does not require the [employer] to reassign [the plaintiff] to a position for which she was not qualified.")

(1) *Thompson v. E.I. DuPont de Nemours & Co.*, 2003 U.S. App. LEXIS 14816 (6th Cir. 2003): The court rejected employee's argument that the employer should have placed him in a temporary position because he was no longer able to perform in his previous position due to his disability. The employee wanted to be placed in the temporary position while other alternatives were investigated, but the court stated that such a flexible, open-ended approach would require employers to constantly assess newly vacant positions for unknown, and possibly indefinite, periods of time.

(2) *E.E.O.C. v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000): The EEOC argued that an employer is required to select an employee with a disability seeking a position as a reasonable accommodation over more qualified applicants provided the employee is at least minimally qualified for the position. Rejecting the EEOC's position, the court reasoned that the agency's position would establish a hierarchy of protections that placed individuals with disabilities above members of other protected categories. In addition, the court noted that a decision "based on the merits" is not discriminatory.

(3) *Hoskins v. Oakland County Sheriff's Dep't*, 227 F.3d 719 (6th Cir. 2000): "Vacant positions" include not only those that are currently available, but also those that will become vacant within a reasonable amount of time. However, employer was not required to consider "reassigning" plaintiff to a position created more than a year after it terminated her.

(4) An employer is not required to change supervisors as a reasonable accommodation, although nothing in the ADA prohibits such action. *Kennedy v. Dresser Rand Co.*, 193 F.3d 120 (2d Cir. 1999), *cert. denied*, 528 U.S. 1190 (2000) (although there is no per se rule against the replacement of a supervisor as a form of reasonable accommodation, it is presumptively unreasonable and plaintiff has burden of overcoming the presumption). However, an employer may be required to alter supervisory methods when doing so would provide an effective accommodation. In addition, an employee with a disability is protected from disability-based discrimination by a supervisor, including disability-based harassment.

v. *Working At Home As An Accommodation*

(1) Given the ease with which many employers can accommodate telecommuting, the EEOC has concluded that telecommuting is, in fact, a reasonable accommodation where it would be effective and would not impose an undue hardship upon the employer. At least some courts, however, continue to hold that allowing an employee to work from home is not a "reasonable" accommodation. The court for the Northern District of Illinois stated that "[o]nly in extraordinary cases can an employee create a triable issue from the employer's failure to allow the employee to work at home." *Cruz v. Perry*, No. 01 C 5746, 2003 U.S. Dist. LEXIS 4933 (S.D. Ill. Mar. 28, 2003); *see also Phillips v. Farmers Ins. Co.*, No. Civ. 3:04-CV-1113N, 2006 WL 888095, at *2 (N.D. Tex. Feb. 9, 2006) (holding that "employers are not required to permit telecommuting as a part of reasonable accommodation," particularly when an employee fails to perform satisfactorily from home"). *But see Humphrey v. Memorial Hospitals Ass'n*, 239 F. 3d 1128, (9th Cir. 2001), *cert. denied*, 535 U.S. 1011 (2002) (denying the employer summary judgment because the plaintiff's obsessive-compulsive disorder, which interfered with her leaving her home in the mornings, might have been accommodated with a work-from-home arrangement).

(2) However, as telecommuting and working from home become more prevalent—for disabled as well as non-disabled individuals—it is likely that the courts' positions will adapt to the changing realities of the workplace. In *Davis v. Lockheed Martin Operations Support Inc.* the court explained:

> Certainly, as employers increase their reliance on telecommuting, working at home will often be a reasonable accommodation for employees with disabilities. However, the ADA does not require an employer to allow an employee to telecommute where no comparable employee does so, and when the essential functions of that employee's position require her presence in the office. Employers do not risk liability for discrimination when they decline to take "cutting edge" approaches to workplace innovations.

84 F. Supp. 2d 707, 713 n.2 (D. Md. 2000). Accordingly, if an employer already provides arrangements for working from home without undue hardship or burden, it would not be wise to deny a request for the same in the context of a reasonable accommodation.

v. *Accommodations That Conflict With Seniority Systems*. In *US Airways, Inc. v. Barnett*, the Supreme Court addressed the conflict between the interests of an employee who requests a particular job position as a reasonable accommodation, and the interests of other employees who have superior rights to bid for the position under the employer's seniority system. 535 U.S. 391 (2002). The Court held that employers are entitled to a rebuttable presumption that an accommodation requested by a disabled employee under the ADA is unreasonable if it conflicts with job assignment seniority rules. Unless an employee can prove otherwise, the Court stated, an accommodation that would force an employer to violate seniority rules is presumed unreasonable. An employee may, however, be able to establish that violation of a seniority system is not an unreasonable accommodation, for instance, if the seniority rules in question are not consistently applied. For example, the employee might show that the employer retained the right to unilaterally change the seniority system, and does so frequently, thus reducing the expectations of employees that the system will be followed. In addition, the plaintiff might show that the seniority system already contains exceptions, and

that one more exception would make little difference. *See Office of the Architect of the Capitol v. Office of Compliance*, 361 F.3d 633 (Fed. Cir. 2004) (holding that due to numerous exceptions to the employer's seniority policy, one more exception was unlikely to matter).

b. *Undue Hardship*. An employer is not required to undertake an accommodation that would pose an undue hardship to the operation of the employer's business, in terms of difficulty or expense. 42 U.S.C. §12112(b)(5)(A). To determine whether an accommodation poses an "undue hardship," an employer may consider the following factors, among others:

i. Nature and cost of accommodation;

ii. Overall financial resources of the employer;

iii. The number of persons employed by the employer at the facility in question and in the employer's entire business;

iv. The type of operation at the facility involved.

E. Successfully Engaging In The Interactive Process

1. The interactive process is an essential substantive component of the ADA. Specifically, courts have recognized that the breakdown of the interactive process significantly affects the overall reasonable accommodation analysis. Both parties have the obligation of engaging in the interactive process. *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999) ("Participation is the obligation of both parties, however, so an employer cannot be faulted if after conferring with the employee to find possible accommodations, the employee then fails to... answer the employer's request for more detailed proposals."); *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997) ("We agree that both parties have a duty to assist in the search for appropriate, reasonable accommodation and to act in good faith").

2. The courts have carefully and specifically monitored the interactive process between employers and employees and have been willing to find against the party that refused to engage in discussions to determine the best way to accommodate a disability. For example, in *Angelone v. Seyfarth Shaw LLP*, a legal secretary developed a form of arthritis that limited her ability to stand at work. 2007 WL 1033458 (E.D. Cal. Apr. 3, 2007). The employer law firm granted the plaintiff various accommodations, including a part-time schedule and the assignment of another employee to assist the plaintiff. However, plaintiff's job required her to make limited trips to the offices of her assigned attorneys. Plaintiff complained about these trips, and the law firm offered to move her workstation so that she could be closer to those offices. Plaintiff refused to move her workstation, and instead requested that one of her assigned attorneys switch offices. The court held that this refusal to move her workstation, without explanation, caused the breakdown of the interactive process, and granted the law firm's motion for summary judgment. *Id.* at *15-16.

4. Other decisions involving the interactive process are as follows:

a. *Liner v. Hosp. Svc. Dist. No. 1 of Jefferson Parish*, No. 06-30300, 2007 WL 1111565, at *3 (5th Cir. April 10, 2007): Employer failed to engage in the interactive process in good faith when it determined that the employee could not perform the essential functions of his existing position, terminated

him, and told him that he should look on the internet for other positions with the employer for which he could apply, instead of working with the employee to identify another position to which he could transfer.

b. *Davis v. Guardian Life Ins. Co. of Am.*, 2000 U.S. Dist. LEXIS 18166 (E.D. Pa. Dec. 14, 2000): The plaintiff's "out of hand" rejection of revised accommodation following years of successful accommodations constituted "a failure to comply with plaintiff's duty to cooperate in the interactive process so that defendant cannot be faulted for a failure on its part." The revised accommodation was never subject to the interactive process because plaintiff responded to the proposal by announcing, "[w]e should not talk anymore." Accordingly, defendant was entitled to judgment as a matter of law and reversal of the $1.5 million jury verdict.

c. *Dayoub v. Penn-Del Directory Co.*, 90 F. Supp. 2d 636, 640 (E.D. Pa. 2000): The employer's requirement that plaintiff could return to his job only at "100%" and "at full capacity," after employee requested reassignment as an accommodation of his disability, "is wholly inconsistent with an employer's obligation to engage in the interactive process." The mere fact that the employer documented "numerous calls" to check on the status of plaintiff's health is not indicative of engaging in the requisite interactive process because such communication does not serve to further any goal if the employer has already established that the employee can only return to his former position "at full capacity."

d. *Loulseged v. Akzo Nobel, Inc.*, 178 F.3d 731 (5th Cir. 1999): Employee's failure to participate in continuing talks with her employer over possible work accommodation precluded her from coverage under the ADA, for no employer can be expected to "negotiate with a brick wall."

5. In light of the obvious importance of engaging in the requisite interactive process, an important unresolved issue has become whether an employer is liable simply for failing to engage in the interactive process. In general, an employer will not be held liable for failing to engage in the interactive process if a reasonable accommodation was identified and implemented nonetheless. *See Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000) (employer's failure to discuss potential accommodations through an interactive process did not violate the ADA when reasonable accommodations were provided; "[t]he ADA seeks to ensure that qualified individuals are accommodated in the workplace, not to punish employers who, despite their failure to engage in an interactive process, have made reasonable accommodations"). However, employers who fail to engage in the interactive process and later argue that reasonable accommodation was not possible will have a more difficult time establishing that fact. For example, the Eighth Circuit Court of Appeals has stated that "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." *Cravens v. Blue Cross & Blue Shield*, 214 F.3d 1011, 1021 (8th Cir. 2000); *see also Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894 (8th Cir. 2006). *But see Donahue v. Consolidated Rail Corp.*, 224 F.3d 226, 235 (3d Cir. 2000) (failure to engage in good faith in the reasonable accommodation process does not guarantee that an employer will lose on summary judgment when the employee cannot show that there existed at least some potential reasonable accommodations).

6. The interactive process goes beyond the exchange of ideas. Rather, it appears that courts are expecting employers and employees to work together to determine, using a hands-on approach, which reasonable accommodation is most appropriate. Employers should take a proactive approach, as opposed to a defensive approach, for searching out and considering accommodations.

   a. *Practical Guidance*

      i. Fortunately for employers, the court in *Taylor* provided specific recommendations for meeting the interactive process obligation. Although this list is not intended to be exhaustive, employers who engage in the following activities show their good faith and thus can avoid—or at least limit—challenges to the adequacy of the interactive process:

         (1) Meet with the employee who requests an accommodation;

         (2) Request information about the employee's condition and what limitations the employee has (e.g., the type of impairment the individual has, how the impairment limits a major life activity (like sitting, standing, performing manual tasks, or sleeping), how an accommodation would enable the employee to perform job-related tasks);

         (3) Consider providing the employee's health care professional with a description of the job's essential functions to increase the likelihood that you will get accurate and complete information the first time you ask for it. If you don't get sufficient information in response to your initial request for documentation, explain what additional information you need and then allow the individual an opportunity to provide it. Note that you may not ask for an individual's entire medical record or for information about conditions unrelated to the impairment for which accommodation has been requested.

         (4) Ask the employee what he or she specifically wants;

         (5) Show some sign of having considered the employee's request; and

         (6) Offer and discuss available alternatives when the request is too burdensome.

      See Taylor, 184 F.3d at 317.

      ii. Clearly, communication is the priority of the interactive process. However, in order to be able to establish that an employer in fact made communication a priority, documentation is essential. Accordingly, an employer should consider the following throughout the interactive process:

         (1) Document the accommodations considered, offered, accepted, and declined, as well as the justification for the steps taken;

         (2) Set out in writing what each party has agreed to do. If appropriate, put a date on events that are to occur; and

         (3) Set a definite date at which the situation will be assessed.

      iii. By documenting the interactive process, defending against claims of failure to do so will be significantly easier. In addition, by documenting the process, the expectation is that future requests to engage in the interactive process can be guided by the processes of the past.