



ADA And Reasonable Accommodation

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Americans With Disabilities Act of 1990

- ◆ Initially much litigation over whether person is disabled (“40 million Americans” – the trouble caused by legislative findings)
- ◆ 2008 – ADA Amendments Act (AD3A)
 - ◆ “The question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis”
 - ◆ “Broad coverage”
- ◆ Covers: (i) actual disability; (ii) record of disability; or (iii) regarded as having a disability



What is a Disability?

- ◆ Physical or mental **impairment** that **substantially limits** one or more **major life activities**
 - ◆ Impairment includes a wide array of items
 - ◆ Does **not** include eye color, hair color, left-handedness or “normal” weight and height or pregnancy or “personality traits” like quick temper or poor judgment that are not symptoms of a mental or psychological disorder
 - ◆ Does **not** include environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record
 - ◆ Does **not** include advanced age by itself



What is a Disability?

- ◆ “**Substantially limits**” is not demanding and does not mean significant or severe and doesn’t require extensive analysis (more than trivial)
 - ◆ No longer relevant for “**regarded as**” claims
 - ◆ EEOC rationale for not defining it
 - ◆ It doesn’t cover **every** impairment
 - ◆ Compare to “**most people**” in the general population
- ◆ Major life activities include caring for oneself, performing manual tasks, seeing, hearing, bending, speaking, sleeping, walking, standing, lifting, bending, concentrating, speaking, breathing, thinking, communicating, working (EEOC regs say will be used only in “**very targeted situations**”)



What is a Disability?

- ◆ Also includes major bodily functions
 - ◆ Immune system
 - ◆ Normal cell growth
 - ◆ Digestive
 - ◆ Bowel
 - ◆ Bladder
 - ◆ Neurological & brain
 - ◆ Respiratory
 - ◆ Circulatory
 - ◆ Endocrine
 - ◆ Reproductive
- ◆ Must consider person without mitigating measures like medication
- ◆ Episodic and remission count





What is a Disability?

◆ **Otherwise qualified**

- ◆ The individual must be otherwise qualified for the job in experience, license, education, skills
- ◆ Must be able to perform the essential functions of the job, either with or without reasonable accommodation
- ◆ Use of job descriptions, amount of time spent performing task, importance of task, actual experience



What is a Disability?

- ◆ Reasonable accommodation **unless** undue hardship
 - ◆ We'll cover more below
- ◆ **Direct threat** is a defense (to the person or others)
 - ◆ But don't play doctor!



Some Recent Cases

- ◆ *Cohen v. CHLN, Inc.* (Pa. 2011) – summary judgment denied (“by no means fleeting”)
- ◆ *Patton v. eCardio* (Tex. 2011) – summary judgment denied (two broken legs)
- ◆ *Seim v. Three Eagles* (Iowa 2011) – summary judgment denied (Graves’ disease - 6 major life activities affected – analysis over)
- ◆ *Meinelt v. P.F. Chang’s* (Tex. 2011) – summary judgment denied (P.F. Chang’s argued that the AD3A “did not render nearly two decades of case law extinct.” – court was unimpressed)



Washington Law Against Discrimination

- ◆ Disability is the presence of a sensory, mental or physical impairment that
 - ◆ Is medically cognizable or diagnosable; or
 - ◆ Exists as a record or history; or
 - ◆ Is perceived to exist whether or not it exists in fact
- ◆ Employer must reasonably accommodate if impairment substantially limits ability to perform the person's job **OR** medical documentation establishes a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect
- ◆ Temporary or permanent; mitigated or unmitigated





3 Categories of Reasonable Accommodation

- ◆ Changes to the job application process so that a qualified applicant with a disability can be considered for a job
- ◆ Modifications for the work environment – including how a job is performed
- ◆ Changes so that an employee can enjoy the equal benefits and privileges of employment



EEOC List of Types of Accommodations

- ◆ Job restructuring
- ◆ Part time work
- ◆ Modified work schedule
- ◆ Reassignment to a vacant position
- ◆ Modify or acquire equipment
- ◆ Change policies or practices



What is a Reasonable Accommodation?

- ◆ Removal of a workplace barrier
 - ◆ Employee asks Company to pay for a prosthetic limb as a reasonable accommodation. Yes or no?
 - ◆ Employee asks Company to provide a wheelchair to an employee who cannot walk. Yes or no? Does it matter if the condition is temporary or permanent?
 - ◆ Employee asks Company to pay for a refrigerator in their own office to store medicine. Do you provide the requested item? What if the refrigerator was to store breast milk for their disabled child?
 - ◆ Employee asks Company for a new office chair. What do you say?
- ◆ Physical obstacle or workplace rule (where/when work is performed, how it is performed)



Case Study – How About Getting to Work?

- ◆ Michelle is a wine steward for Fred Meyer. She has a vision impairment that affects her ability to safely drive and walk outside after dark.
- ◆ She wants to work a modified schedule that will allow her to leave work before it gets dark
- ◆ What questions do you ask?
- ◆ Do you have a duty to accommodate an employee's limitations in getting to and from work if it prevents them from working their normal shift?
- ◆ What other options could you suggest?
- ◆ What if Michelle wanted transportation to and from work?





Do You Have to Accommodate by Giving a Preference?

- ◆ Yes, sometimes – the United States Supreme Court has stated that “by definition, any special accommodation requires the employer to treat an employee with a disability differently, i.e. preferentially.”
- ◆ Comment on the following:
 - ◆ Sorry, all of our administrative assistants have to start at 8 a.m.
 - ◆ We don’t allow anyone to work from home
 - ◆ Our budget gives \$200 for desk furniture per employee, so we cannot spent any more on you
 - ◆ All of our scientists must have degrees
 - ◆ All of our drivers must have a license





Who Does Reasonable Accommodation Apply to?

- ◆ Consider the following:
 - ◆ An employee asks for a reasonable accommodation to take her daughter, who has cerebral palsy, to therapy? Do you grant that accommodation?
 - ◆ If not, what do you do next?
 - ◆ Are there other leaves available?
 - ◆ Does it matter if the employee is taking her spouse to therapy? How about to the emergency room?
 - ◆ Or staying at home to take care of son while husband takes daughter for treatment?



Accommodation Must Relate to the Disability

- ◆ Consider the following:
 - ◆ An employee has disclosed that she has cancer. She wants to apply for a vacant position, but she misses the deadline; employee asks Company to extend the deadline, but acknowledges that it had nothing to do with her cancer. Should you grant the request?
 - ◆ What if the employee said she missed the deadline because she was on vacation?
 - ◆ What if the employee said she was undergoing chemotherapy and that's why she missed the deadline?



What Does “Reasonable” Mean?



- ◆ The law says that the accommodation must be “reasonable on its face”
- ◆ How would you define reasonable?
- ◆ Do you think cost should ever be a factor?
- ◆ Do you have to modify an essential function of the job?
- ◆ Do you have to bump an existing person from a job?
- ◆ How many times do you have to try to accommodate before you are done?
- ◆ Consider the corner pub vs. MegaCorp.



Requesting an Accommodation

- ◆ An employee must request an accommodation
 - ◆ But consider “how can we/I help you” when in doubt
- ◆ Mary seems to be having performance problems. One employee reports that Mary might be suffering low blood sugar. Do you ask Mary if she needs a reasonable accommodation?
- ◆ John returns to work after a one month leave following a workplace injury. He submits a return to work form. Do you ask him if he needs any reasonable accommodation?



Requesting an Accommodation

- ◆ A job requires keyboarding at 60 wpm
 - ◆ One applicant says, I can't keep up that speed. Do you ask if he needs an accommodation?
 - ◆ Another applicant says, "I can only type for 2 hours at a time and then I must rest." What do you say?
 - ◆ A third applicant says, "I have cancer." What do you say?
- ◆ A job requires travel
 - ◆ One applicant says, "I have restrictions on travel." Do you ask if she needs an accommodation?
 - ◆ Another applicant says, "My OCD means I need to leave a day early for all trips." What do you say?
 - ◆ A third applicant says: "I'm afraid of flying so I need to take a train all 48 contiguous states, and I'll need to take a cruise ship to Alaska."



Requesting an Accommodation

- ◆ There are no magic words. Do you start the interactive process in the following circumstances:
 - ◆ Employee says, “I’m having difficulty doing my job” – Manager knows the employee has MS
 - ◆ Employee says, “I need six weeks off to get treatment for a back problem”
 - ◆ Employee says, “I need some time off because I’m starting not to feel well”
 - ◆ Employee says, “I need to leave – I need to leave right now!”
 - ◆ Employee says, “If I’m diagnosed with cancer, would I be eligible for accommodate? Can you pre-approve one?”
- ◆ Can you say: “All accommodation requests must be in writing?”



What Does the Interactive Process Look Like?

- ◆ What is the interactive process?
 - ◆ How many meetings should there be?
 - ◆ Face to face?
 - ◆ How many efforts need to be undertaken?
- ◆ How would you react to the following:
 - ◆ An employee requests an accommodation. You set up a meeting and the employee doesn't show up. You follow up and the employee says: "I refuse to meet with you, you are just going to reject my request anyway."
 - ◆ An employee sends you a note indicating that she needs an accommodation (4 weeks off). She says that "you don't need to know any details – just trust me, it's covered by the ADA."



Telling Others

- ◆ You make an accommodation for an employee and a co-worker asks you, “Why does Doug get to work a later shift than me? That’s not fair.” What do you say?
- ◆ Should you address the entire work group to explain the need for the accommodation?



The “Best” Accommodation?

- ◆ Does an accommodation need to be the best one or the one preferred by the employee?
 - ◆ Betty wants to work from home so that she can rest every 3 hours. You offer her the opportunity to rest every 3 hours in a quiet room. She declines. What next?
 - ◆ Zelda has Irritable Bowel Syndrome. She wants to work from home so that she is near a private rest room. You offer her an office that is located near a rest room that is not private, but has a lock on the door. She declines. What next?
 - ◆ Vera has hyper sensitivity to scents and her cubicle is near a desk with flowers. She asks for a reassignment to a new job in a different office. What do you say?





Unpaid Leave

- ◆ Jeff wants 5 months of leave for a medical condition. What questions do you ask?
- ◆ Bill wants 9 months of leave to get in-patient treatment for alcoholism. OK? Can you ask for documentation?
- ◆ Larry wants 1 year of leave to travel to churches in Italy in search of a cure for a rare disease. OK?
- ◆ Barbara needs 12 months of leave from her position. Other workers can fill in. Do you have to keep her job open? Bring her back at the end of leave? What if temporary replacements were unavailable? How about 18 months?





Unpaid Leave/Unreliable Attendance

- ◆ Paul says he needs leave for an indefinite period. OK?
- ◆ Bob tells his manager that he will need as an accommodation to be absent at unpredictable times and dates – maybe up to 3 a week for the foreseeable future. OK? What if Bob says he may need to leave work at any time during the work day for 30 minutes to one hour. OK?
- ◆ Lara is on intermittent leave. Her FMLA expires. Can she continue on ADA leave? She is a no-call, no-show one day, later she is seen by a co-worker working out at the gym. What do you do?





Unpaid Leave/Unreliable Attendance

- ◆ An employee asks for an accommodation of periodic absences for symptoms of MS. You agree. The employee is absent, but calls in properly to report the absence. The manager wants to issue discipline because the employee is out of PTO/sick leave. OK?
- ◆ An employee, Carla, has obsessive compulsive disorder. The employee works at a retail chain as a regional coordinator. She wants to be able to arrive at work “any time without reprimand.” Is this reasonable?
- ◆ How about if Carla is a flight attendant?
- ◆ What about a lawyer?





Job Restructuring

- ◆ An employee does not want to have to talk to people anymore because she has bipolar and is afraid that she might yell at someone. What questions do you ask? Is this reasonable?
- ◆ The employee asks if Company could hire someone to help her when she is talking to third parties. OK?
- ◆ A senior executive does not want to attend meetings in the afternoon as his depression makes him ineffective. OK?
- ◆ Company expects 97% accuracy. An employee asks for the standard to be lowered as an accommodation. OK?



Transitional Duty

- ◆ An employee wants a light duty job. Must you accommodate the request?
- ◆ The employee says the light duty job is really good and he wants it permanently. OK?
- ◆ What if an employee wants to work part time?



Discrete Requests

- ◆ I want a new supervisor
- ◆ I want a job coach
- ◆ I want you to rescind discipline that was issued to me recently
- ◆ I want to smoke at work to help my nicotine addiction
- ◆ I'd like to drink at work as it helps me relax and helps my depression
- ◆ I'd like a reserved parking space
- ◆ I'd like to take time off to pray for recovery from cancer
- ◆ I'd like an irritant free workplace





Work at Home/Modified Work Schedule

- ◆ Jerry has allergies to strong scents, he requests to work at home. What questions do you ask?
- ◆ Pat has depression and would like to work shorter hours when the days are shorter and longer hours in the summer because he hates working in the dark. OK?
- ◆ Velma wants to work from home because her depression is better when she can be around familiar surroundings.



Reassignment

- ◆ An employee is having a hard time coming to work on time. She asked to be reassigned to a different position. What questions do you ask?
 - ◆ Does the position need to be vacant?
 - ◆ Does the employee need to be the most qualified for the position, or only meet the minimum qualifications?





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