

Reasonable Accommodation Under The Rehabilitation Act

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Definition of Disability

- Basic Definition
 - An **impairment** that **substantially limits** one or more **major life activities**
 - A **record** of such an impairment
 - Being **regarded as** having such an impairment
- ADA Amendments Act of 2008 makes it much easier to meet definition
- Focus after ADAAA should be on need for accommodation rather than on whether someone has a covered disability.

“Qualified”

- Has not changed as result of ADA Amendments Act
- To be qualified, an individual must:
 - Meet the basic skill, education, training, and other job-related requirements; and
 - Be able to perform the **essential** (or fundamental) functions of a position with or without reasonable accommodation

What is Reasonable Accommodation?

- A change in the workplace or in the way things are customarily done that provides an individual with a disability with equal employment opportunities
- Accommodations are available for
 - the application process
 - to enable an individual with a disability to perform essential job functions
 - to provide equal **benefits and privileges** of employment.

Reasonable Accommodation for Application Process

- *Jones v. Soc. Sec. Admin.*, EEOC Appeal No. 0720070002 (August 2, 2011)
 - agency should have provided applicant with head injury questions in writing that applicants were expected to respond to as part of test intended to simulate job duties requiring responding to calls from the public
 - Complainant could have performed job itself by using a telephone that enable him to see text while listening to caller questions

“Benefits and Privileges” of Employment

- Access to portions of facility used by employees (e.g., cafeterias, break rooms, etc.)
- Access to information communicated in the workplace
- Employer-sponsored social events
- Employer-sponsored training, whether by the employer or a third party

Requests for Reasonable Accommodation

- Generally, an individual with a disability must request reasonable accommodation.
- Request for some **change in the workplace or in the way things are done** that is needed because of a **medical condition**. Do not have to be in writing.
- Do not have to use “magic words.”
- May come from a third party (e.g., an employee’s family member or doctor).

When May Employer Ask About Need for Accommodation?

- May ask all job applicants if accommodation is needed for application process.
- May ask applicants with obvious disabilities that employer reasonably believes will require accommodation whether they will need accommodation, and if so, what type.
- After making job offer, may ask all entering employees in the same job category to answer disability-related questions or take medical exams.

When May Employer Ask About Need for Accommodation?

- During employment, employer may only ask disability-related questions if it has reasonable belief employee (1) will be unable to do essential functions because of medical condition; or (2) will pose a direct threat due to a medical condition
- If one of these conditions is met, employer could ask about need for accommodation

Timing of Requests

- May be made at any time during the application process or during employment
- Employee does not lose right to request an accommodation because he did not do so during the application stage
- Employees may make more than one request for reasonable accommodation

Interactive Process

- Employer should engage in an interactive process with the individual asking for the accommodation.
- May involve determining whether the requester has a disability, what accommodations are possible, or both.

Undue Delay May Be Denial of Reasonable Accommodation

- Valle-Arce v. Puerto Rico Ports Auth., 651 F.3d 190 (1st Cir. 2011)
 - Took 17 months to provide employee with modified work schedule

Documenting Disabilities

- An employer may obtain **reasonable documentation** that an employee has a disability and needs an accommodation if the disability and/or need for accommodation are not obvious.
- Employer may require that documentation of the existence of an impairment come from a health care professional.
- Documentation must be **sufficient**, but the amount of documentation required must be **reasonable**.

Documenting disability After ADA Amendments Act

- Documentation will probably be different:
 - Will focus on limitations individual would experience **without** mitigating measures
 - May include more information about how **major bodily functions** (e.g., endocrine functions for someone with diabetes) are substantially limited

Diagnosis Sufficient to Establish Disability for Following Kinds of Impairments

- Blindness, deafness, mobility impairment requiring use of a wheelchair, partly or completely missing limbs, intellectual disability
- Autism, cancer, cerebral palsy, diabetes , epilepsy, HIV infection/AIDS, multiple sclerosis, muscular dystrophy
- Major depression, bipolar disorder, PTSD, OCD, schizophrenia

Effect of GINA on Requests for Documentation

- Title II of GINA prohibits employers from requesting, requiring, or purchasing genetic information (which includes family medical history) of applicants and employees
- Inadvertent acquisition of genetic information does not violate Title II of GINA
- If request for documentation for accommodation indicates that genetic information should not be provided, any genetic information employer gets will be deemed inadvertent

GINA Notice – Model Language

- The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Choosing an Accommodation

- Primary consideration should be given to the employee's choice
- Employer may ultimately choose from among accommodations, as long as the one provided is effective

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Types of Accommodations

- Physical modifications
- Sign language interpreters and readers
- Assistive technology and modification of equipment or devices

Assistive Technology

- *Wagner v. Dep't of Transp.*, EEOC Appeal No. 0120103125 (December 1, 2010)
 - Agency accommodated employee with hearing loss by providing him telephone that converted speech into text
 - But agency failed to accommodate employee when managers and co-workers would not assist in the use of a hearing device the agency had provided for meetings by using a microphone as required

Types of Accommodations

- Job restructuring
- Modified work schedules
- telework
- Leave (where employee needs more time off than provided for by leave policy, or time off for reasons not covered by policy)
- Changing supervisory methods
- Job coach

Modified Work Schedule

- *Harden v. Soc. Sec. Admin.*, EEOC Appeal No. 0720080002 (August 12, 2011) – employee should have been given modified work schedule (extended time band for arrival due to effects of depression and generalized anxiety disorder)
- *Valle-Arce v. Puerto Rico Ports Auth.*, 651 F.3d 190 (1st Cir. 2011) – modified work schedule for employee with fibromyalgia and chronic fatigue syndrome

Reassignment

- Accommodation of **last resort**
- Position must be **vacant**
- Must be **equal** in terms of pay, status, etc., or as close as possible
- Is not limited **geographically**
- Employee must be **qualified** for the new position, but does not have to be best qualified

Reassignment (cont.)

- **Vacant** means that the position is available or will become available within a reasonable time
- Does not have to be a **promotion**
- Agency does not have to **bump another employee** to create a vacancy
- Reassignment that would violate seniority system **generally is not reasonable**
- Agency does not have to pay cost of relocation, unless it does so for other employees who transfer voluntarily

Reassignment (cont.)

- Bartron v. Dep't of Defense, EEOC Appeal No. 0720100054 (March 3, 2011) – employer should have considered availability of lower level position for GS-13 auditor who could no longer do her job due to cognitive limitations resulting from chemotherapy
- Bowers v. Department of Defense, Appeal No. 0720070012 (March 22, 2010) – employee not required to compete for

Actions Not Required

- Lowering production or performance standards
- Excusing violations of conduct rules that are job-related and consistent with business necessity
- Removing an essential function
- Monitoring use of medication
- Providing personal use items
- Actions that would result in undue hardship

Undue Hardship

Consider the following factors:

- Nature and cost of the accommodation
 - Agency will probably not be able to assert cost as a defense
- Resources available to the agency
- Impact of the accommodation on the operation of the agency

Confidentiality

- Information about an employee's reasonable accommodation must be kept confidential
- **Exceptions:** Information may be disclosed
 - To supervisors and managers for necessary work restrictions or reasonable accommodations
 - To individuals involved in making decisions about reasonable accommodations
 - Where necessary for emergency treatment;
 - To officials investigating compliance with Rehabilitation Act;
 - For workers' compensation and insurance purposes

Confidentiality

- Many agencies have someone other than employee's immediate supervisor review documentation supporting accommodation request
- Where this is done, supervisor will receive only information necessary to provide accommodation
- Agencies should be careful not to have individuals review reasonable accommodation requests who may also be involved in any EEO complaint related to the request

Going Beyond Legal Obligations

- Agency may take actions not required as reasonable accommodations
- Agency will not be deemed to have regarded an individual as disabled just because it exceeded its legal obligations
- An agency may inform an employee that it is taking an action beyond what the Rehabilitation Act requires

What if an Employee Will Not Accept Accommodation?

- Employer may not require someone to accept a reasonable accommodation.
- Someone who does not accept an accommodation and, as a result, cannot do the job or would pose a “direct threat” will not be considered qualified.

Accommodation Tips

- Know the requirements of your agency’s reasonable accommodation procedures and follow them
- Respond to requests promptly, as undue delay may constitute a denial of accommodation
- Engage in good faith in the interactive process
- Construe “disability” broadly
- Clearly communicate reasons for denying any reasonable accommodation
- Individualized assessment: Do not assume that individuals with the same disability need the same accommodation

Resources

- EEOC Website: www.eeoc.gov
- Job Accommodation Network (JAN):
 - www.jan.wvu.edu
- My contact information:
 - Chris Kuczynski
 - Office of Legal Counsel, EEOC
 - (202) 663-4665
