

How to Seek Reasonable Accommodation in the Workplace for a Physical or Mental Disability

An important and novel feature of the Americans with Disabilities Act is the requirement that employers provide reasonable accommodations to disabled employees. This article examines the specific steps an employee must take to obtain accommodation. The legal hoops are formidable. The author gives some practical advice and offers helpful guidance for avoiding the legal pitfalls awaiting the applicant.

By Archibald J. Thomas, III

Various state and federal laws require employers to provide a reasonable accommodation to employees and applicants for employment with disabilities unless to do so would cause undue hardship. The primary federal laws requiring employers to provide a reasonable accommodation are the Americans with Disabilities Act (ADA)¹ and the Rehabilitation Act.² The ADA applies to employers in the private sector with 15 or more employees and to nonfederal public sector employees other than state employees. The Rehabilitation Act provides essentially the same protection to federal employees as the ADA provides to nonfederal employees. In addition, there are various state and local laws that may prohibit discrimination on the basis of disability and that may also require the

employer to provide a reasonable accommodation when necessary.

From a practical point of view there are many situations in which an employee may find it necessary and desirable to seek an accommodation in the workplace regardless of whether the employer is legally obligated to provide one. There are many legal questions surrounding an employer's obligation to provide a reasonable accommodation to a particular employee. The intricate legal issues sometimes raised in these cases can take years to resolve and, aside from being very complex, are frequently not so clear as to enable anyone to predict the outcome with certainty. For these reasons, the employee in most cases should probably just assume coverage and move forward with the request for accommodation as if there were no question regarding the em-

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ployer's obligation to provide it; however, in cases where a reasonable accommodation is legally required and the employer fails to provide one, the possibility of subsequent litigation makes it important for the employee to understand the legal issues involved and the remedies available.

What Is Reasonable Accommodation?

An accommodation is a change in the work environment or in the way things are customarily done at work that enables an individual with a disability to enjoy equal employment opportunities. There are three categories of reasonable accommodations:

1. Changes to the job application process that enable an individual with a disability to be considered for hire;
2. Changes to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability to perform the essential functions of the job; and
3. Changes that enable an individual with a disability to enjoy benefits and privileges of employment equal to those enjoyed by similarly situated employees without disabilities.³

Reasonable accommodations that an employer may have to provide include making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training material, or policies; providing qualified readers or interpreters; and reassignment to a vacant position. In addition, there are several changes or modifications that are not considered forms of reasonable accommodation, such as elimination of an essential function of the job, lowering production standards, and providing personal-use items needed in accomplishing daily activities both on and off the job.

The employer's obligation to provide a reasonable accommodation in any given situation is limited by the concept of undue hardship. This means that an employer is not required to provide accommodations that are unreasonably expensive, unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. The issue of undue hardship must be assessed on a case-by-case basis.

Knowledge Is Power

The prudent employee or applicant will seek information regarding the obligation of the employer to provide a reasonable accommodation and information regarding the types of accommodations possible before actually making the request of the employer. The employee needs to understand the functions of the job at issue and should try to determine what the essential functions of the job are, since no duty to provide reasonable accommodation exists unless the employee can perform the essential functions of the job, with or without reasonable accommodation. There are numerous sources available regarding the employer's obligation under the law. The Equal Employment Opportunity Commission (EEOC) is an excellent source for materials and information regarding the employer's duty to provide a reasonable accommodation. The EEOC's *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act III*⁴ is an excellent reference. This manual provides an overview of the ADA and specifically incorporates the EEOC regulations and interpretive guidance regarding the regulations. The manual also contains a resource directory with a listing of various groups and organizations that can provide assistance. Another excellent resource promulgated by the EEOC is its Enforcement Guidance on Reasonable Accommodation and Undue Hardship

Under the Americans with Disabilities Act. Other EEOC documents that are helpful include Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, and Small Employers and Reasonable Accommodation.

The Job Accommodation Network is another excellent resource for information regarding the possible accommodations that can be made and the cost of making them. The Job Accommodation Network is a service of the U.S. Department of Labor, Office of Disability Employment Policy, and may be reached at 1-800-526-7234.

If the disability is a mental impairment, it is essential to obtain a copy of the EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities. This is available on the EEOC Web site and is an invaluable source for the analysis of ADA issues in the context of mental impairments. This EEOC enforcement guidance also contains a helpful section on selected types of reasonable accommodation.

There are many other resources available through the Web. The Job Accommodation Network can be found at <http://www.dol.gov/dol/odep/public/jan.htm>. The Office of Disability Employment Policy can be found at <http://www.dol.gov/dol/odep>. The EEOC can be located at <http://www.eeoc.gov>. Any Web search using the words *reasonable accommodation* will produce a myriad of resources that will be of assistance in understanding the legal concepts involved and thus will help in determining the most effective way to approach the issue with an employer. A particularly useful resource can be found at the Web site for the International Association of Machinists Center for Administering Rehabilitation and Employment Services. An excellent article, entitled *Understanding Your Rights Under the Americans with Disabilities Act—A Guide for Individuals with Dis-*

abilities in Reasonable Accommodation, can be found there at <http://www.Iamcaresdc.org/ADA%Guides/reasonableaccommodation.htm>.

Finally, consideration should be given to seeking legal advice at an early stage of the quest for accommodation. A lawyer conversant with these issues can provide advice regarding the options available and can suggest ways to approach the employer. There are a number of accommodations that the courts have determined are not reasonable as a matter of law. In addition, many courts have held that the act of requesting reasonable accommodation is a protected activity for which retaliation or reprisal is prohibited. Consulting a lawyer to discuss these and related questions is helpful in formulating a proper approach to seeking a desired accommodation. Understanding the legal issues involved at the outset can be valuable in many circumstances. The employer is likely to be knowledgeable about the legal issues and ideally the employee should approach the matter on an equal footing. On the other hand, if the employer is not particularly knowledgeable about the issues involving its obligation to provide reasonable accommodation, a knowledgeable employee can provide assistance and direction to a receptive employer in this regard.

Just Ask for It

Since many cases have held that an employer is not obligated to provide a reasonable accommodation⁵ unless a specific request for accommodation is made, the first critical step in the process of seeking an accommodation is to ask for it. The law is clear that an employer must know an employee has a disability before any duty to provide accommodation arises. The request should be as specific as possible but it should also be as broad and open-ended as possible in the event that there are a number of accommodations that can be made. Ideally, the request for

accommodation should be made in writing and directed to the place or person assigned by the employer to deal with these issues, such as the human resources department or a company official. Although it is permissible to make the request for accommodation verbally to a supervisor or other appropriate person, if the employer shows any reluctance or substantial hesitation to provide the accommodation desired, the employee would do well to follow up with a written request to the responsible official. Doing so ensures that the person responsible for making the decision is apprised of the request for accommodation and, in the event of subsequent litigation, provides the employee with written evidence to establish that he or she made a specific request for a reasonable accommodation.

Although several courts have indicated that the request for a reasonable accommodation may be made using plain English without specifically using the term *reasonable accommodation*, it is desirable to request the accommodation in the words of the statute. Using the term *reasonable accommodation* not only serves to make it clear that the employee is fulfilling his or her obligation under the law to make a specific request but also serves to let the employer know that the employee is aware of the law and the obligation imposed on the employer. The law generally does not require the employee to make the request for a reasonable accommodation at the beginning of employment or at any particular time. In fact, because of the limited inquiry that employers are allowed to make regarding impairments before employees are hired, in many cases it may be advisable not to request accommodation until some time after commencement of employment. Obviously this situation will vary from case to case depending on the impairment and job involved. The timing of the request for accommodation should be determined in most cases by reference to the ability of

the employee to perform the job at issue. In other words, accommodation should in most cases be requested before the point at which the employee's work performance appreciably deteriorates or before conduct problems become apparent.

Accommodations that may be requested in the job application process include receiving information in another format, provision for an interpreter, providing an accessible recruitment site, providing help to complete the application form, and providing additional time to complete any phase of the application process. Accommodations in a testing situation may include altering when or how the test is taken; providing readers or interpreters; providing more time, a different time, or a different location to take the test; allowing the use of a personal computer to communicate; and modifying examinations, training material, or policies. Accommodations on the job may include modified work schedules that involve time off, working a constant shift instead of rotating shifts, working at home part time, frequent breaks, unpaid leave, and late arrival to work. Accommodations regarding how a job is done may include changes in the method of performing a task, provision for an orientation aid, and a change in the time for doing a particular task. Reasonable accommodations are limited only by the imagination of the individual. For this reason, utilizing the services of an organization like the Job Accommodation Network (mentioned above) can be very helpful in identifying accommodations that may be effective in a particular situation.

Medical Documentation

If the need for an accommodation is not readily apparent, the employer is permitted to request medical documentation from the employee showing that the employee has a covered disability and that there is a need for reasonable accommo-

dation. Under some circumstances the employer may require the employee to be examined by a health care provider of the employer's choice for this purpose.

Although an accommodation should be requested directly by the employee, if the need for accommodation is not apparent and the employee is either required to document the request by providing a statement from a health care provider or the employee voluntarily provides such documentation, the employee should request the health care provider's assistance in seeking the accommodation desired. The physician or other health care provider may make a request for reasonable accommodation on the employee's behalf. For the employee to obtain the maximum benefit from getting the physician or other health care provider actively involved in the effort to obtain a reasonable accommodation, several steps must be taken by the employee to ensure that the health care provider understands the issues involved. The health care provider needs to understand the particular definition of disability under the ADA or other applicable law before communicating with the employer. This knowledge is absolutely critical.

Disability is absolutely a term of art. A clear understanding of how this term is defined under the ADA or other applicable law is essential. An actual disability under the ADA is defined by reference to whether the individual has a physical or mental impairment that substantially limits a major life activity. Thus, the health care provider should be conversant with the major life activities referred to in the EEOC regulations and enforcement guidance. The health care provider also needs to know what the law means by *substantially limits*. If the employee has a mental impairment, the health care provider should review the EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities. Of course, another critical part of the ADA is

that the health care provider must understand that to be a "qualified" individual with a disability, the employee must be able to perform the essential requirements of the job, with or without reasonable accommodation. This in turn requires knowledge of the job requirements and of what parts of the job are essential as opposed to peripheral. To assist the health care provider, the employee should provide a copy of the job description if one is available, or a detailed account of the required duties if a job description is not available. Only with this type of understanding can the health care provider assist the employee to the maximum extent possible with obtaining the desired accommodation. Obviously, because of the complex nature of some of these issues, it may again behoove the employee in many cases to seek the assistance of a lawyer to explain the issues to the health care provider and to monitor the process of requesting the reasonable accommodation.

Interactive Process

The EEOC regulations provide that an "interactive process" between the employer and employee may be necessary to determine the appropriate reasonable accommodation.⁶ The regulations further provide that "this process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."⁷ The EEOC interpretive guidance⁸ describes the "interactive process" as an informal process whereby the employer in consultation with the employee identifies an effective accommodation for the employee. The four steps of the interactive process require the employer to (1) analyze the job involved and determine its purpose and essential functions, (2) consult with the employee to ascertain the limitations imposed by the disability and how those limitations could be overcome with accommodation, (3) consult with the employee to identify

potential accommodations, and (4) consider the preference of the employee and select the accommodation that is most appropriate for all concerned. Thus, a key component of the interactive process requires consultation with the employee regarding various issues surrounding the question of whether a reasonable accommodation is required. Several courts have embraced this principle and have imposed duties on both the employer and the employee in the context of the interactive process.⁹ Some courts have imposed a good-faith requirement on both the employer and employee to assist each other in the search for appropriate reasonable accommodation.¹⁰ Thus, the employee should take all appropriate steps to initiate the interactive process by inviting the employer to join in the effort to seek accommodation. Again, if the employer is hesitant or resistant to engaging in the interactive process, the employee should seriously consider making a written request directly to the appropriate department or individual inviting the employer to begin the interactive process. Although it is not required, it is better to employ the exact words and terminology used in the regulations.

The direct dialogue contemplated between the employer and the employee as part of the interactive process is crucial. If both parties are acting in good faith as suggested by some of the courts that have examined this issue, the result should be the selection of an accommodation that is effective. Since it is possible, however, to misuse the interactive process and to cause a breakdown in the process for the purpose of avoiding liability, the employee is well advised to document his or her participation in the process so that there will be evidence, if needed later, to show the employee's good faith. For example, the interactive process can break down when the employer requests medical evidence of whether the employee has a substantial impairment of a major life

activity. If the documentation from the physician fails to address this issue in the language of the statute and simply provides the employer with a diagnosis and prognosis, it may not be clear what limitations exist and whether they are substantial. If the individual's disability is not obvious, and the employee refuses to provide the medical documentation requested by the employer, then no reasonable accommodation is required. On the other hand, failure by the employer to participate in the interactive process with the employee after a request for accommodation has been made can result in liability on the part of the employer for failure to provide reasonable accommodation.

The interactive process is an important point in the search for reasonable accommodation where the employee can make known exactly how the impairment affects any major life activity. It bears repeating that this is the crux of the definition of disability under the ADA and the employee should take the time to become familiar with these issues before entering into the interactive process with the employer. Of course, to the extent the impairment is not readily apparent, such as may be the case with a mental impairment, the employee should take some time to review all symptoms resulting from the impairment. This aspect of dealing with the issue of whether an accommodation is required is critical. The EEOC regulations and interpretive guidance suggest a number of major life activities, such as sleeping and interacting with others, that need to be thoroughly considered along with any others that may apply. Depending on the level of cooperation the employee receives from the employer, this may be another issue that lends itself to some form of written documentation clearly reflecting the substantial nature of the impairment of any and all major life activities. Since the courts are not necessarily in full agreement regarding what activities are considered

major, the employee should list all impairments of any life activity. This is not the time to minimize the symptoms resulting from an impairment. The nature, extent, and duration or probable duration of any impairment of any life function should be clearly and thoroughly explained and delineated.

Conclusion

Although the EEOC interpretive guidance suggests that the employee's preference should be given primary consideration, it is ultimately the employer that decides which accommodation is provided in cases where there may be several effec-

tive accommodations. The employer has the discretion to choose the accommodation that is least expensive or the accommodation that is easiest for it to provide. If the interactive process is approached in the way contemplated by the EEOC regulations and the courts that have imposed a requirement on the employer and employee to engage in good-faith discussions regarding possible accommodations, the result will be an accommodation that will allow the employee to maintain employment and thus to help achieve the goal of the ADA to eliminate discrimination against individuals with disabilities.

Endnotes

1. 42 U.S.C. § 12101 *et seq.*
2. 29 U.S.C. § 791 *et seq.*
3. 29 C.F.R. § 1630.2(o)(1)(i)–(iii)(1999).
4. 8 Fair Empl. Prac. Man. (BNA) 405:6981 (1992).
5. *See, e.g.*, *Gaston v. Bellingrath Gardens & Home, Inc.*, 183 F.3d 1361 (11th Cir. 1999).
6. 29 C.F.R. § 1630.2(o)(3).
7. *Id.*
8. 29 C.F.R. pt. 1630 app. (1997).
9. *See, e.g.*, *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999).
10. *Id.* at 312.