Session 802

"Reasonable Accommodations" – What's Reasonable These Days?

Robert B. Hall, PhD
Director, Work and Health Technologies Center
San Diego State University

Christopher G. Bell
Managing Partner
Jackson Lewis Schnitzler & Krupman

Pamela S. Poff
Deputy General Counsel, Senior Vice President
PaineWebber, Inc.

Kathleen Mulligan
Legal Counsel
Equal Employment Opportunity Commission

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).
Materials may not be reproduced without the consent of ACCA.
Reprint permission requests should be directed to James Merklinger at ACCA: 202/293-4103, ext. 320; merklinger@acca.com

REASONABLE ACCOMMODATION UNDER THE ADA

by

Christopher G. Bell

and

Mary L. Senkbeil

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

TABLE OF CONTENTS

1. **INTRODUCTION**
II. **WHAT IS REQUIRED TO REQUEST AN ACCOMMODATION?**
  A. **How Specific Must the Notice and Request Be?**
  B. **Who is Eligible?**
III. **WHAT DOES "REASONABLE" MEAN?**
  A. **EEOC's View: Reasonable = Effective**
  B. **Cost Benefit Analysis**
  C. **What is "Reasonable" vs. What the Employee Requests**
IV. **INTERACTIVE PROCESS**
  A. **Is it Required?**
  B. **Must Both Parties Participate if There is an Interactive Process?**
V. **DIFFERENT TYPES OF ACCOMMODATION**
  A. **Job Restructuring**
    1. Elimination of Job Duties
    2. Assignment of Duties to Co-Workers
    3. Light Duty
    4. Working at Home vs. Presence at Work as Essential Function of Position
  B. **Leave**
    1. Generally
    2. Whether the Employer Must Hold the Employee's Job Open
    3. Definite v. Indefinite Time Periods
    4. Unpredictable Attendance
    5. No-Fault Attendance Policies
    6. Consideration of Employer's Leave Policies
  C. **Modified or Part-time Schedule**
  D. **Modified Workplace Policies**
    1. Change of Supervisor
    2. Misconduct
  E. **Reassignment**
    1. Employer's Duty to Assist Employee in a Finding Position
    2. How Far Must the Search Go?
    3. Preference Given to Qualified Individuals with a Disability
    4. Whether the Individual Must be Qualified for the Position they Currently Hold to be Eligible for Reassignment.
    5. Reassignment to Equivalent or Lower Level Position
    6. Collective Bargaining Agreements
VI. **UNDUE HARDSHIP**
  A. **Cost**
  B. **Non-Cost**
    1. Collective Bargaining Agreements
    2. Other Non-Cost Accommodations

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

I. INTRODUCTION

When Congress enacted the Americans with Disabilities Act, employers' greatest fear was reasonable accommodation. Employers did not know what was exactly required of them including when they had to accommodate, how to accommodate, to what extent they would have to change business practices and policies to accomplish accommodation and how much that would cost. The process of identifying whether, and to what extent, a reasonable accommodation is required has been the source of much litigation partly because the terms "reasonable accommodation" and "undue hardship" were largely undefined by Congress and required case-by-case analysis. In answering these questions through litigation, courts have generally been quite pro-employer, granting employers summary judgment in the vast majority of disability cases.

Courts have consistently ruled employees must request an accommodation before an employer is obligated to determine whether one can be provided, accommodations are not required if they do not help the employee perform the essential functions of the position, and the essential functions of the position need not be transferred to co-workers to accommodate the individual. While the courts and the EEOC agree in some areas as to who is entitled to accommodation and to what extent, there are also areas of controversy. Failure to provide reasonable accommodation made up 31% of the charges filed with the EEOC last year. There is no reason to believe this percentage would not also apply to ADA lawsuits. This article examines the current positions of the courts and the EEOC with respect to when an employee is entitled to accommodation and to what extent employers must accommodate qualified individuals with disabilities.

II. WHAT IS REQUIRED TO REQUEST AN ACCOMMODATION

A. How Specific must the Notice and Request be?

An employer is entitled to sufficient notice of a disability and the need for specific accommodation, including medical documentation of both. Courts agree that knowledge of the disability alone is not enough to trigger an employer's duty to reasonably accommodate an

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

employee's disability. Rather, employees must request accommodation for their disabilities. Even the EEOC agrees and has stated "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." Appendix to 29 C.F.R. § 1630.9 and EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, March 1, 1999 (referred to throughout as 'the Guidance').

The employee need not formally inform the employer of his or her disability and the need for accommodation. It is enough that the employer knows of the disability, and the employee requests accommodation related to the disability. Circuits who have addressed the issue support this position. In Taylor v. Phoenixville School Dist., --- F.3d --- (3rd Cir. August 18, 1999) the employee became psychotic work and the employer knew she was immediately hospitalized. Over the ensuing months, Taylor, the employee, provided information regarding continuous need for medication and the employer requested information from Taylor to which she responded. Further Taylor's son informed Taylor's supervisor some accommodation may be necessary. The Third Circuit held the employer had enough information to put it on notice that Taylor may be disabled and may need accommodation.

As previously stated, knowledge of the disability alone is not enough to trigger the employer's duty to accommodate, rather, the disabled employee must request accommodation related to the disability. The Fifth Circuit found summary judgment for the employer where the employee did not specifically request accommodation, even where the employer knew of the disability. In Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 164 (5th Cir. 1996) the employee informed his supervisor during his review that he was 'bipolar' and asked if he knew what that meant. The supervisor responded that he did not know what the condition was or how it affected the employee and the employee requested the supervisor find out more about it. The Court granted summary judgment for the employer because the employee did not request accommodation to improve his poor performance. The court stated that merely disclosing the diagnosis of a disability without explaining its functional limitations does not trigger the duty to accommodate, rather the employee must expressly request accommodation. In a more recent

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

decision, the court ruled that even where an employee told his employer of his "belief that he suffered from bipolar disorder", "might need time off to see a doctor", collapsed in the store and provided employer with a letter from his doctor stated he was "emotionally and physically exhausted" and demonstrated "clinical criteria for a Major Depressive Reaction" prior to asking for vacation time, he failed to show his employer knew of his disability and its resulting limitations and thus the employer was entitled to summary judgment. Seaman v. CSPH, Inc., 179 F.3d 297, 1999 WL 414230 *3 (5th Cir. 1999).

The Sixth Circuit has also held that ADA plaintiffs must inform the employer of the disability and the need for reasonable accommodation resulting from the disability. In Hammon v. DHL Airways, Inc., 165 F.3d 441, 450 (6th Cir. 1999), the employee informed his supervisors he "lost his confidence" but never suggested his emotional problems stemmed from a disability. The court ruled the employer was not on notice that the employee was disabled and was asking for accommodation. Similarly, even if the employer knows about an employee's injury because it is paying disability benefits, a request for accommodation is not assumed where the employee never specifically states s/he needs accommodation as a result of the disability. Gantt v. Wilson Sporting Goods Co. 143 F.3d 1042, 1047 (6th Cir. 1998). The Fourth Circuit ruled similarly. See, Steinacker v. National Aquarium in Baltimore,, 114 F.3d 1177 (4th Cir. 1996)(unpublished) (summary judgment granted employer where employee did not show he made a request for accommodation).

However, the Seventh Circuit has held that if an employer has knowledge of a disability and the need for accommodation, the employer may have a duty to provide accommodation even though the employee never requests specific accommodation. For example, in Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996), a janitor with a known history of psychological problems was being assigned to a hectic school. The janitor was unable to articulate a direct request for accommodation of his disability to his employer, but instead communicated through his physician that he wanted a less stressful position. The court ruled this communication put the employer on notice of the request and obligated the employer to

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

engage in the interactive process. Similarly, in Miller v. Illinois Department of Corrections, 107 F.3d 483, 486-87 (7th Cir. 1997) the court found the employer had a duty to ascertain if an employee could be reassigned when the employee asked 'I want to keep working for you – do you have any suggestions?' However, the employee must communicate that some accommodation is needed for his or her disability before an employer has a duty to accommodate. See Hunt-Golliday v. Metropolitan Water Reclamation District, 104 F.3d 1004, 1013 (7th Cir. 1997)(where employee does not request any accommodation and never indicates her mental condition needs to be considered a disability that needs accommodation, employer cannot be said to have enough basis to be responsible for further inquiry).

Other Circuits also support the view that an employee must make a request for accommodation due to his known disability before the employer has a duty to accommodate. See, Bailey v. Amsted Ind. Inc., 1999 WL 222642 (8th Cir. 1999) (employer has no duty to accommodate employee's repeated absences when employee never requested accommodation) and Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363-64 (11th Cir. 1999) (employee who resigns and never requests accommodation cannot establish disability discrimination claim because the employer's duty to provide a reasonable accommodation is not triggered unless a specific demand for accommodation is made).

A request for accommodation need not be in writing and the individual requesting the accommodation need not use the magic words "I need reasonable accommodation" in order to put the employer on notice. See Miller v. Illinois Department of Corrections, 107 F.3d 483, 486-87 (7th Cir. 1997) (if employee says to the employer 'I want to keep working for you – do you have any suggestions?' the employer has a duty under the Act to ascertain whether he had some job he employee might be able to fill). Further, the employee may request accommodation through a family member, physician or close friend. See Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996) (where employee with history of psychological problems was unable to articulate a direct request for accommodation of his disability to his employer, but instead communicated to his employer through his physician that he wanted a less stressful

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

position, the employer was on notice of the request). But see, Miller v. National Casualty Co., 61 F.3d 627 (8th Cir. 1995) (notice by relative that plaintiff was falling apart and had "lost it" and was being hospitalized, without prior knowledge of disability or requested medical excuse was insufficient to constitute a request for reasonable accommodation). In its Guidance, the EEOC also takes the position that the request can come from the employee, a family member, friend, health professional or other representative. (Guidance at pp. 9-10).

Courts disagree on whether the employee must request a specific reasonable accommodation or whether notice that accommodation is necessary is enough to trigger the employer's duty to engage in an interactive process to determine what reasonable accommodations will allow the employee to continue working. Compare Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996) and Miller v. Illinois Department of Corrections, 107 F.3d 483, 486-87 (7th Cir. 1997) (discussed above) with Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 164-65 (5th Cir. 1996)(employee must expressly request accommodation "the initial burden rests primarily upon the employee, or his health-care provider, to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations. It simply stands to reason that the employee and his health-care provider are best positioned to know what type of accommodation is appropriate for the employee") and White v. York Int'l, 45 F.3d 357 (10th Cir. 1995) (employee cannot rely on statutory list of examples of accommodation but must provide evidence of specific accommodation available that will enable employee to perform essential job functions).

B. Who Is Eligible?

Generally, only individuals who are otherwise qualified for the position they seek may request a reasonable accommodation. If an accommodation would not assist the employee in performing the essential functions of the position, the accommodation need not be provided. If the employee cannot perform the essential functions with or without accommodation, the employee is not a "qualified individual with a disability" under the Act.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Employers have argued that employees seeking reassignment must be qualified to perform the essential functions of their existing position with or without reasonable accommodation. However, most courts agree with the EEOC that employees seeking reassignment as a reasonable accommodation are "qualified" if they can perform the essential functions of the position for which reassignment is considered. See Feliciano v. Rhode Island, 160 F.3d 730 (1st Cir. 1998); Stone v. City of Mount Vernon, 118 F.3d 92 (2nd Cir. 1997); Gaul v. Lucent Technologies, Inc., 134 F.3d. 576 (3rd Cir. 1998); Monette v. Electronic Data Systems Corp., 90 F.3d 1173 (6th Cir. 1996); Dalton v. Suabru-Isuzu Automotive, Inc., 141 F.3d 667 (7th Cir. 1998); Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995); Zulkle v. Regents of Univ. Of California, 166 F.3d 1041 (9th Cir. 1999); Smith v. Midland Brake, Inc., --- F.3d ---, 1999 WL 387498 (10th Cir. June 14, 1999); Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C.Cir. 1998)(en banc). Only the Fourth Circuit has determined that "the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position." Myers v. Hose, 50 F.3d 278 (4th Cir. 1995).

III. WHAT DOES "REASONABLE" MEAN?

A. EEOC's View: Reasonable = Effective.

The term "reasonable" has created a great deal of controversy among the courts in determining whether the employer had a duty to provide the accommodation. The EEOC's view is that "reasonable" means "effective", in other words, a reasonable accommodation is one that enables the individual to perform the essential functions of the job. (Guidance at p. 5). Some district courts have adopted this view. See, e.g. Dutton v. Johnson County Bd. Of County Com'rs., 859 F.Supp. 498, 507 (D.Kan 1994) and Bryant v. Better Business Bureau of Maryland, 923 F.Supp. 720, 736 (D.Md. 1996).

B. Cost Benefit Analysis.

A growing number of appellate court are focusing on the reasonableness of 'reasonable accommodation' requests and applying a balancing test between the costs and benefits of a

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

particular accommodation. These courts view "reasonable" as a modifier to "accommodation" and have found particular accommodations should be evaluated not only according to whether it allows disabled employee to perform the essential functions of the job but the related costs as well. See Borkowski v. Valley Central School District, 63 F.3d 131 (2nd Cir. 1995) (the concept of reasonable accommodation and undue hardship require a 'common sense balancing' of the benefits of the accommodation in relation to its costs); Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995) (the concept that an accommodation be reasonable is clearly meant to avoid placing employers in an untenable position); Monette v. Electronic Data Systems, 90 F.3d 1173, 1183 (6th Cir. 1996) (reasonableness means the accommodation is both efficacious and proportional to costs); Buckles v. First Data Resources, Inc., 176 F.3d 1098, 1101-02 (8th Cir. 1999) (accommodations are limited to the reasonableness requirement and accommodation is not reasonable if it "either imposes undue financial or administrative burdens, or requires a fundamental alteration in the nature of the program." (quoting DeBord v. Board of Educ., 126 F.3d 1102, 1106 (8th Cir. 1997)); Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 542-43 (7th Cir. 1995) (reasonable accommodation and undue hardship both require a cost benefit analysis; an accommodation is not reasonable if it does not permit an employee to perform all essential job functions or its cost is disproportionate to its benefit); Woodman v. Runyon, 132 F.3d 1330, 1344 (10th Cir. 1997) (ADA plaintiffs have the burden of showing "the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits."); Terrell v. USAir, 132 F.3d 621, 626 (11th Cir. 1998) ("The ADA's use of the word reasonable as an adjective for the word accommodate connotes that an employer is not required to accommodate an employee in any manner in which that employee desires"); Barth v. Gelb 2 F.3d 1180, 1187 (D.C.Cir. 1993) cert. denied 114 S.Ct. 1994, ("a grey area will arise where a proposed accommodation is so costly or of such a nature that it would impose an undue burden on the employer's operations. Thus, an accommodation would be both unreasonable and impose an undue burden 'if it either imposes undue financial and administrative burdens on [an agency] or

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

requires a fundamental alteration in the nature of [its] program.'") (quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987).

The EEOC criticizes this view, stating the cost of the accommodation is more appropriately considered in the "undue hardship" analysis. However, the Vande Zande court separated the two analyses opining that the employee had the burden of proving the accommodation was reasonable, in the sense of whether the benefits outweighed the costs of the requested accommodation, without regard to whether the employer could afford the accommodation. The court applied the meaning of "reasonable" to "accommodation" as it has been applied to "care" in negligence cases.

Courts, however, have not refined this vague cost/benefit analysis for "reasonable." What is significant is that employers are provided with a defense separate from undue hardship. Not all courts have determined which party has the burden of proof that an accommodation is "reasonable". However, the Sixth, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits have held that the employee has the burden of proof to show that an accommodation is reasonable. Monette v. Electronic Data Systems Corp.. 90 F.3d 1173, 1183 (6th Cir. 1996) ("[T]he disabled individual bears the initial burden of proposing an accommodation and showing that *that* accommodation is objectively reasonable.") (emphasis original); Vande Zande v. State of Wisconsin Dept of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (Employees "must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs."); Barnett v. U.S. Air, Inc., 157 F.3d 744, 749 (9th Cir. 1998) ([The] "prima facie burden on the plaintiff-employee includes the burden of showing the existence of a reasonable accommodation. This holding is dictated by the plaintiff's burden to show that an accommodation is reasonable.") Woodman v. Runyon, 132 F.3d 1330, 1344 (10th Cir. 1997) (ADA plaintiffs have the burden of showing "the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits."); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1286 (11th Cir. 1997) ("[T]he burden of identifying an accommodation that would allow a qualified individual to perform the job rests with that individual, as does the ultimate burden of persuasion

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

with respect to demonstrating that such an accommodation is reasonable."); Barth v. Gelb, 2 F.3d 1180, 1186 (D.C.Cir. 1993), cert. denied, 114 S.Ct. 1538 (1994) (plaintiffs have the initial burden of showing the accommodation allows them to perform the essential functions of the job and that accommodation is reasonable in terms of the burdens it places on employers).

The Second Circuit divided the burden of production and persuasion on the issue of whether an accommodation is reasonable. In Borkowski v. Valley Central School District, 63 F.3d 131, 138 (2nd Cir. 1995), the court held an ADA plaintiff has the burden of production, i.e., the plaintiff must show an accommodation exists, the costs of which do not facially exceed the benefits. However, the defendant employer then has the burden of persuasion to show the accommodation is unreasonable because it imposes an undue hardship. Similarly, the Eighth Circuit has stated that an ADA plaintiff need only make a facial showing that reasonable accommodation is possible and the burden of *production* then shifts to the defendant employer to show it is unable to accommodate the plaintiff. Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995).

C. What is "Reasonable" vs. What the Employee Requests.

The ADA requires only that the accommodation be reasonable. It does not require that the employer provide the accommodation specifically requested by the employee. Thus, where the employer provides an accommodation that allows the employee to perform the essential functions of the position, courts will find the employer provided reasonable accommodation, even if the accommodation is not the one preferred by the employee. See, Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996)(employer need not provide the accommodation the employee requeests, so long as employer offers effective accommodation); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285-86 (11th Cir. 1997) (a disabled employee is only entitled to a reasonable accommodation, not a preferred accommodation); Fink v. New York City Dept. of Personnel, 855 F.Supp. 68, 72 (S.,D.N.Y. 1994)(in promotion examination, the court held "[t]here is no provision requiring the employer to take account of the disabled individual's

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

preferences in choosing the means of accommodation. So long as the means a chosen allow the individual to fairly compete, the employer satisfies his legal obligation.").

In Corder v. Lucent Technologies, Inc., 162 F.3d 924, 928 (7th Cir. 1998), the plaintiff, who needed leave as an accommodation, also requested to work at a specific site close to her home. However, the site she requested was a very small, with only one other person in the same position as the employee. The employee's requested accommodation of taking unpredictable and extensive leaves could not be accommodated if she worked at the smaller facility. To accommodate the employee's leave requests, the employer offered the employee work at a larger facility that could absorb the employee's need for time off. The employee refused the accommodation stating that she could not commute to the larger facility because of her disability. The court granted summary judgment for the employer finding that it fulfilled its obligation under the ADA by providing some type of reasonable accommodation, even though it was the plaintiff's requested or preferred accommodation.

In Barnett v. U.S. Air, Inc., 157 F.3d 744, 751 (9th Cir.1998) the disabled employee requested his employer purchase a robotics machine to assist him in lifting required by his job. Because the employee could not show that this equipment would have provided him with any accommodation not already provided by the employer with forklifts, the court found the employer did not have to provide the requested accommodation. It stated an employer does nto have to provide the most technologically advanced equipment "if it provided the employee with a less expensive or more readily available device that enabled the employee to perform the essential functions of the job." (quoting 29 C.F.R. pt. 1630 app. § 1630.9). The EEOC agrees and has stated "if there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the **employer** may choose the less expensive or burdensome accommodation as long as it is effective." (Guidance at p. 17) (emphasis added).

IV. INTERACTIVE PROCESS

The EEOC has suggested the preferred way to determine whether a reasonable accommodation can be made and what that accommodation may be is to engage in an "interactive

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

process". See 29 C.F.R. 1630.2(o)(3). The process, the EEOC states, should identify the limitations resulting from the disability and what reasonable accommodations could overcome those limitations. Id.

A. Is it Required?

Appellate courts are reviewing the totality of circumstances including the employer's efforts at providing accommodations to determine whether those efforts are sufficient. If an accommodation is obvious, courts agree that there is no obligation to engage in an interactive process to determine what accommodations are necessary. However, if the accommodation is not obvious, Courts are finding both parties have a good faith obligation to participate in the interactive process to determine what reasonable accommodations could assist the employee in performing the essential functions of the job.

The First, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits have held that there is no "per se" violation of the ADA for failure to initiate the interactive process. In Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019 (7th Cir. 1997), the court dismissed the plaintiff's ADA claim that the employer failed to engage in the interactive process stating the interactive process "is not an end in itself" but rather a means to determine what reasonable accommodations are available to assist the employee in performing the job. In Smith v. Midland Brake, Inc., --- F.3d ---, 1999 WL 387498 (10th Cir. 1999) an en banc panel agreed there is no cause of action for failing to engage in the interactive process in and of itself, but inherent in the statute is a good faith obligation to engage in the process to determine if reasonable accommodation is feasible.

The only case to reach a jury verdict on the issue arose from the First Circuit. In Jacques v. Clean-Up Group, Inc., 162 F.3d 617 (1st Cir. 1996) the employee sued under the theory that his former employer had a duty to engage in the interactive process by suggesting "additional options" so that he could make it to work on time at a new location. The First Circuit upheld the jury verdict for the employer on the grounds that while the employer may not have initiated the interactive process, a reasonable jury could find that the employee did not need reasonable accommodation. However, the court cautioned "[t]here may well be situations in which the

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of the ADA", these cases "turn heavily upon their facts and an appraisal of the reasonableness of the parties behavior." Id. at 515.

In Barnett v. U.S. Air, Inc., 157 F.3d 744, 752 (9th Cir. 1998), the court stated 29 C.F.R. § 1630.2(o)(3) does not make the interactive process mandatory or create independent liability for the employer for failing to engage in ritualized discussions with the employee to find a reasonable accommodation." The Ninth Circuit recognized the permissive language of the regulation that warns employers that although such a process is not mandatory, failure to engage in it may expose them to liability for failing to reasonably accommodate. The Eighth and Eleventh Circuits followed similar logic. The Eighth Circuit opined that although there is no per se liability for failing to engage in the interactive process, it may be prima facie evidence that the employer acted in bad faith in attempting reasonable accommodation and precludes summary judgment for the employer. Fjellestad v. Pizza Hut of America, Inc., --- F.3d ---, 1999 WL 391911 (8th Cir. 1999). In Willis v. Conopco, Inc., 108 F.3d 282 (11th Cir. 1997) the Eleventh Circuit held there is no independent cause of action for "failure to investigate" possible accommodations under the ADA and such a requirement would not comport with the ADA's remedial nature.

However, the Third Circuit ruled employers MUST engage in the interactive process and set forth the elements for a cause of action when an employer fails to do so. Taylor v. Phoenixville School District, --- F.3d --- (3rd Cir. August 18, 1999). In Taylor, the court held that employers have a good faith obligation to participate in the interactive process. Even if the employee does not request a particular accommodation, the employer still has a duty to assist the employee in identifying reasonable accommodations because the employer "may have more information than the employee about what adjustments are feasible in the employee's current position." Id. at 162. The court then laid out the elements of a cause of action stating an ADA plaintiff may show an employer failed to participate in the interactive process by demonstrating:

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

1) the employer knew of the employee's disability; 2) the employee requested accommodation for the disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

B. Must Both Parties Participate If There Is an Interactive Process?

Although an employer's failure to engage in the interactive process does not provide a cause of action for the employee, it may preclude summary judgment on the reasonable accommodation issue for the employer. On the other hand, if the employee fails to engage in the interactive process, the employer may be entitled to summary judgment. In Beck v. University of Wisconsin, 75 F.3d 1120 (7th Cir. 1996), the court ruled that the interactive process **requires** participation by both parties and responsibility falls on the party who causes the breakdown in the interactive process. Id. at 1134-35. In Beck, the employee refused to provide medical records and specify the accommodation requested from her disability. The court held neither the employee or employer should be able to cause a breakdown in the interactive process for the purpose of avoiding or inflicting liability. Courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary to determine who is responsible for the breakdown and whether the party is acting in bad faith.

Where the employee is responsible for the breakdown in the interactive process, courts will not hold the employer liable for failure to accommodate under the ADA. See, Loulseged v. Akso Nobel Inc., 178 F.3d 731 (5th Cir. 1999)(directed verdict properly granted where employer was not responsible for the breakdown in the interactive process because the employee resigned before the work change affected her); Stewart v. Happy Herman's Cheshire Bridge, 117 F.3d 1278, 1287 (11th Cir. 1997) (employer who made efforts at reasonable accommodation through the interactive process could not be liable under the ADA where the employee's actions caused the breakdown in the process). The Tenth Circuit also granted summary judgment for the employer where the employee failed to provide medical information needed by the employer to

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

assess the employee's ability to return to work. Templeton v. Neodata Services, inc., 162 F.3d 617 (10th Cir. 1998).

Courts have denied an employer summary judgment, however, where they failed to engage in the interactive process to determine whether reasonable accommodation was feasible. See Taylor v. Phoenixville School District, --- F.3d --- (3rd Cir. August 18, 1999) ("When an employee has evidence that the employer did not act in good faith in the interactive process, however, we will not readily decide on summary judgment that accommodation was not possible and the employer's bad faith could have no effect.") In Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996), the court denied summary judgment for the employer because it did not engage in the interactive process. The court stated when the employer learned through the employee's psychiatrist that the employee wanted a less stressful position, the employer had a duty to allow the employee to demonstrate he could perform the essential functions of the position with a reasonable accommodation and engage in the interactive process to determine what reasonable accommodations would have allowed the employee to return to work. The court also stated the employer may have an additional responsibility in the interactive process to open up the inquiry if the employee suffers from mental problems. In two more recent decisions, the Seventh Circuit reiterated its policy that employers who fail to respond to an employee's request for accommodation or otherwise engage in the interactive process are not entitled to summary judgment. Hendricks-Robinson v. Excel Crop., 154 F.3d 685, 669-700 (7th Cir. 1998); Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677 (7th Cir. 1998).

V. DIFFERENT TYPES OF ACCOMMODATION

A. Job Restructuring

The statute, regulations and guidance make clear that job restructuring is a form of accommodation required under the ADA. 42 U.S.C. § 12111(9)(B)(1994); 29 C.F.R. pt. 1630 app. §§ 1630.2(o) and 1630.9 (1997); Guidance at pp. 25-26. Job restructuring includes reallocating or redistributing marginal job functions an employee is unable to do because of a

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

disability or altering when and/or how a function of the job must be performed, whether it is an essential or marginal function.

1. Elimination of Job Duties

Both the courts and the EEOC agree job restructuring does not include reallocating the **essential** functions of a position because a qualified individual with a disability must show s/he can perform the essential functions with or without accommodation.

Courts that have ruled on this issue include the following: Barnett v. U.S. Air, Inc., 157 F.3d 744, 751 (9th Cir. 1998) (where employee's position required lifting and moving cargo, employer was not required to eliminate or reassign that essential job function as a reasonable accommodation); White v. York Int'l Corp., 45 F.3d 357, 362 (10th Cir. 1995) (employer need not eliminate essential functions of a job, in this case lifting and standing, where express purpose of the position requires employee to fulfill this function with or without accommodation); Nicholson v. Boeing Co., 176 F.3d 489, 1999 WL 270406, *7 (10th Cir. 1999) (the ADA does not require an employer to reallocate job duties to change the essential function of a job); Soto-Ocasio v. Federal Exp. Corp., 150 F.3d 14 (1st Cir. 1998)(job restructuring does not include reallocation of job duties to change the essential functions of a job); Miller v. Illinois Dept. Of Corrections, 107 F.3d 483 (7th Cir. 1997) (where essential function of job required guards to rotate through various duty positions, and disabled employee could only perform one or two of the positions with or without accommodation, she was not qualified and employer need not excuse her from all other duty rotations as a reasonable accommodation); Jones v. Alabama Power Co., 3 AD Cases 1717, 1729 (N.D. Ala. 1995), aff'd, 77 F.3d 498 (11th Cir. 1996) (reallocating essential functions of 'heavy lifting duties' compromising 40% of the employee's tasks is 'likely not a reasonable accommodation"); Bolstein v. Reich 3 AD Cases 1761, 1764 (D.D.C. 1995) (government need not provide employee with depression with additional supervision since essential function of position was to work independently); Durning v. Duffens Optical, Inc., No. 95-1093, 1996 U.S. Dist. LEXIS 1683 (E.D. La. 1996) (employer not required to eliminate requirement of driving to in person sales appointments for sales person impaired by

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

stroke and could not drive long distances); Reigel v. Kaiser Foundation Health Plan of North Carolina, 859 F.Supp. 963 (E.D.N.C. 1994) (employer not required to limit internal medicine physician's duties to supervisory/administrative work because this would eliminate essential functions of her job); McDonald v. Department of Corrections, 880 F. Supp. 1416 (D. Kan. 1995) (employer had no duty to eliminate essential functions by creating a new rotating position for a correctional officer with severe obesity and a bad heart who could no longer perform physically demanding tasks); Kuehl v. Wal-Mart Stores, 909 F. Supp. 794 (D. Colo. 1996) (employer was not required to modify essential job function of standing for store greeter who wanted to sit because of 'tibula tendinitis'); Zevator v. Methodist Hospital, 4 AD Cases 1043 (S.D. Tex. 1995) (employer was not required to reallocate physically demanding essential functions of nurse's job or to create a new sedentary nursing position); Volk v. Pribonic, 5 AD Cases 535, 542 (W.D. Pa. 1996) (although the plaintiff argued that he could perform the essential functions of his maintenance supervisor position with the assistance of others, the court found "no authority . . . which would tend to demonstrate that the reasonable accommodation requirement entails hiring or 'beckoning' other people to perform [essential] duties"); Haysman v. Food Lion, Inc., 893 F.Supp. 1092 , 1102 (S.D.Ga. 1995) (the fact that a job function can be delegated to other employees "has minimal bearing on whether it is essential.. . . The ADA specifically does not require an employer to reallocate essential functions.")

2. Assignment of Duties to Co-workers

Generally, courts have rejected the argument that an employer must hire other employees or require co-workers to perform the essential functions for an individual with a disability. This is demonstrated in the following sample of cases:

Gilbert v. Frank, 949 F.2d 637 (2nd Cir. 1991) (employer not required to assign co-worker to do physically demanding tasks employee is no longer able to do); Bratten v. SSI Services, Inc., --- F.3d ---, 1999 WL 529409 (6th Cir. 1999)(employer is not required to assign essential tasks constituting 20% of employee's job to co-workers as a reasonable accommodation); Cochrum v. Old Ben Coal Co., 102 F.3d 908 (7th Cir. 1996) (coal company did

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

not have to provide co-worker to assist roof bolter with heavy overhead lifting tasks which were essential functions); Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983) (under Rehabilitation Act, assigning additional employees to cover plaintiff's physically demanding duties was an undue hardship); Volk v. Pribonic, 5 AD Cases 535, 542 (W.D. Pa.1996) (although the plaintiff argued he could perform the essential functions of his maintenance supervisor position with the assistance of others, the court found "no authority . . . which would tend to demonstrate that the reasonable accommodation requirement entails hiring or 'beckoning' other people to perform [essential] duties"); Reigel v. Kaiser Found. Health Plan of North Carolina, 859 F. Supp. 963 (E.D.N.C. 1994) ("[R]equiring the Medical Group to either permanently assign an existing physician assistant to work with plaintiff to perform the physical aspects of her position, or hire a new assistant to do the same, cannot be considered a reasonable accommodation. The [ADA] does not require an employer to hire two individuals to do the tasks ordinarily assigned to one"); Johnston v. Morrison, Inc., 849 F. Supp. 777, 780 (N.D. Ala. 1994) (restaurant not required to assign another employee to help food server during her panic attacks as this would eliminate essential job functions).

However, it is important to note, that it may be an accommodation to provide a personal assistant such as a reader or sign language interpreter as these are statutory examples of accommodation. 29 C.F.R. § 1630.2(o). See also, EEOC v. Wal-Mart Stores, Inc., --- F.3d ---, 1999 WL 638210 (10th Cir. August 23, 1999) (punitive damage award upheld on appeal where supervisor refused to provide hearing impaired employee with sign language interpreter at mandatory training sessions and performance counseling meetings).

3. Light Duty

Courts and the EEOC agree an employer is not required to provide light duty work for a disabled employee and may limit light duty work. Nor is an employer required to permanently assign a disabled worker to a light duty job s/he can perform where assignment to that job is on a temporary basis. See, Turco v. Hoechest Celanese Chemical Group, Inc., 101 F.3d 1090, 1094 (5th Cir. 1996); (light duty is not required because the ADA does not mandate affirmative

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

action, "but merely prohibits employment discrimination against qualified individuals with disabilities, no more and no less."); Champ v. Baltimore County, Maryland, 91 F.3d 129 (4th Cir. 1996) (assignment to a light duty position for sixteen years before County decided to enforce temporary assignment provision, which stated a temporarily disabled person could only remain on light duty for 251 days, did not obligate County to continue reassigning the employee to light duty positions); Nguyen v. IBP., Inc., 905 F. Supp. 1471, 1486 (D.Kan. 1995) (light duty is not mandated by ADA and if provided by an employer voluntarily, can be temporary. "Reasonable accommodation .. . does not require that an employer create a light-duty position or a new permanent position); Vaughan v. Harvard Industries, 926 F. Supp. 1340 (W.D. Tenn. 1996): (employer who exceeds requirements of ADA by providing light duty is not estopped from arguing that employee is not a qualified individual with a disability); Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 680 (7th Cir. 1998) (the ADA does not require employers to reduce the number of bona fide temporary jobs set aside in conjunction with light duty programs contemplated by the state workers' compensation statute and convert them into permanent positions for disabled employees); but see, Hendricks-Robinson v. Excel Corp., 154 F.3d 685 (7th Cir. 1998) (an employer who creates temporary light-duty assignments for injured employees may have an obligation to permanently assign the employee to that position if the position is not designated "temporary" in the CBA, has no end-date, no specified period for holding the job and they remain in the job until a medical decision regarding the permanent nature of their injury is rendered).

4. Working at Home vs. Presence at Work as Essential Function of Position

Whether an employer must allow an employee to work at home as a reasonable accommodation has been the matter of some controversy. Some courts view working at the work site an essential function of the position. Other courts and the EEOC see working at home as a workplace policy that may have to be modified to accommodate the individual.

The Fourth, Sixth and Seventh Circuits view attendance at the work site an essential function of the job. In Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538 (7th Cir. 1995),

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

the court considered and rejected the employee's claim that her employer should have provided her with full time work at home while she recuperated from a side affect of her disability. The court reasoned that most jobs "involve team work under supervision rather than solitary unsupervised work" which "generally cannot be performed at home without a substantial reduction in the quality of the employee's performance" and ruled "[a]n employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced." Id. at 544-45. However, the court noted there may be exceptional circumstances where the employee could create a triable issue of fact regarding her employer's refusal to allow her to work at home. The Fourth and Sixth Circuits agree that it is an "unusual" case where an employee can effectively perform all job duties at home and have absolved employers from liability on this issue. See, Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209 (4th Cir. 1994) and Smith v. Ameritech, 129 F.3d 857 (6th Cir. 1997).

Other courts considering the issue analyze whether the essential functions of the employee's particular position could be performed at home. Where they cannot, work at home is an unreasonable accommodation. Even if the functions can be performed at home, the court will then determine whether such an accommodation poses an undue hardship for the employer. Thus, only when the employee can perform all essential functions at home, and it does not create an undue hardship for the employer, courts will find work at home a reasonable accommodation.

The EEOC prefers this individualized analysis and courts following it state work at home can be a reasonable form of accommodation . For example, in Langon v. Department of Health and Human Services, 959 F.2d 1053, 1060 (D.C. Cir. 1992), the court ruled working at home may be a reasonable accommodation and to avoid liability for failure to accommodate the employer must come forth with evidence that the accommodation poses an undue hardship. In Anzalone v. Allstate Ins. Co., 5 AD Cas. 455, 458 (E.D. La. 1995), the court similarly ruled that a request to work at home is not unreasonable per se where the employer allowed others in the same position to work out of their houses.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Courts considering and rejecting the employee's requested accommodation to work at home first analyze whether being at the work site is an essential function of the particular employee's position. For example, in Whillock v. Delta Air Lines, 926 F.Supp. 1555, 1564 (N.D.Ga. 1995, aff'd 86 F.3d 1171 (11th Cir. 1996), the court found a reservation's agent's request to work at home due to multiple chemical sensitivity syndrome unreasonable since the essential functions of the job included in-person interaction and supervisors could not properly monitor or evaluate the employee's performance. Further the security of the employer's information could not be maintained in the employee's home. In Misek-Falkoff v. IBM Corp., 854 F.Supp. 215, 227-28 (S.D.N.Y. 1994) aff'd 60 F.3d 811 (2nd Cir. 1995) the court found that while work at home might appear to be a reasonable accommodation because the employer's business is computer research and development, continued training and work on projects requiring interaction with supervisors and co-workers were essential functions of the job making that accommodation unreasonable. In Hypes v. First Commerce Corp., 134 f.3d 721 (5th Cir. 1998), the Fifth Circuit considered a bank loan review analyst's requested accommodation to work at home and found that because the job required review of confidential documents which could not be taken out of the office and one of the essential function of the job required him to work as part of a team which required presence by all team members, the accommodation was not reasonable.

B. Leave

1. Generally

Most courts and the EEOC agree that unpaid leave is a form of reasonable accommodation when it is necessitated by an employee's disability. Unpaid leave may be appropriate when a disabled employee needs time off to get treatment or recover from a disability related illness, or take some type of other action needed because of the disability, such as learning braille or training a guide dog. Unless an employer can show the leave would create an undue hardship, most courts will view it as a reasonable accommodation. Significant leave is not generally required except where employer's own policies provide otherwise. (See section on

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

"Employer's Leave Policies" below). Likewise, most courts have held indefinite is not a reasonable accommodation. (See "Definite v. Indefinite Time Periods" below).

While the EEOC has constantly taken the position that leave is always an accommodation absent undue hardship, a number of courts have held leave is an appropriate accommodation only in certain circumstances - the need for leave must at least be related to the disability. See Bailey v. Amsted Industries, Inc., 172 F.3d 1041 (8th Cir. 1999) (Where employee's absenteeism not related to disability, employee not entitled to leave as a reasonable accommodation under the ADA and did not qualify under the FMLA). Though leave itself may be a reasonable accommodation, the amount of leave that is reasonable is fairly fact specific depending on the position the employee holds, the needs of the employer and the amount of time requested.

For example, in Haschmann v. Time Warner Entertainment Co., 151 F.3d 591 (7th Cir. 1998) the employer denied a leave request from an employee who had flare-up of lupus and instead terminated employee for poor performance. The court found the employer failed to show that leave would cause undue hardship or that leave was an unreasonable request. However, the court in Walton v. Mental Health Ass'n. Of Southeastern Pennsylvania, 168 F.3d 661 (3rd Cir. 1999) found a two and a half month leave was excessive and caused undue hardship where employee's presence was essential at the time due to fear the program she headed would fail for lack of funding and leadership. Thus, where the employer can show the leave would create undue hardship, it will not be liable for failing to accommodate.

However, any examination of leave should take into account the employer's obligations under the FMLA. For example, in Cehr v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775, 783 (6th Cir. 1998), the court noted that by enactment of the FMLA, Congress has determined "uninterrupted attendance in the face of a family medical emergency is not a necessary job requirement and does not unduly burden employers." It could fairly be said leave under the FMLA is now a floor on the amount of absence an employer must tolerate for an employee's disability under the ADA. However, the FMLA does not create a ceiling on leave under the ADA.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

2. Whether the employer must hold the employee's job open.

The EEOC takes the position that the employer must hold the employee's job open as a reasonable accommodation, unless doing so would create an undue hardship. (Guidance at p. 27). Leave would hardly be an accommodation if the employee could not come back to his former position. However, if keeping the position open is an undue hardship, the EEOC states the employer must then consider whether it has a vacant, equivalent position for which the employee is qualified to be reassigned. (Guidance at p. 28). The employee is then still accommodated and the employer's needs are met while the employee is out on leave.

Courts that have dealt with the issue have insinuated that keeping the employee's job open while s/he is out on an leave to deal with a disability is reasonable absent undue hardship. In Monette v. Electronic Data Systems, 90 F.3d 1173 (6th Cir. 1996), the court intimated that if the employee expressed a desire to return to work through his words and actions, the employer may have a duty to keep the employee's job open. Id. at 1187-88. See also, Schmidt v. Safeway, 864 F.Supp. 991 (D. Ore. 1994) and Corbett v. National Products Co., 4 AD Cas. 987 (E.D. Pa. 1995).

3. Definite v. Indefinite Time Periods.

Most courts have stated significant, indefinite and unpredictable leaves are not reasonable accommodations under the ADA. For example, in Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998) the employee was terminated for failure to return to employment after one year leave of absence. The court ruled the employee was not discriminated against because reasonable accommodation does not require to employer to wait indefinitely for an employee's medical condition to be corrected. Similarly, in Monette v. Electronic Data Systems, 90 F.3d 1173, 1187-88 (6th Cir. 1996) the court ruled the employer could assume the employee was asking for indefinite leave not required under the ADA where the employee never expressed a desire to return to work and applied for permanent disability benefits.

The Fourth, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits have agreed. See, for example, Myers v. Hose, 50 F.3d 278 (4th Cir. 1994); Rogers v. International Marine Terminals,

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Inc., 87 F.2d 755, 759-60 (5th Cir. 1996); Nowak v. St. Rita High School, 142 F.3d 999, 1004 (7th Cir. 1998); Corder v. Lucent Technologies, Inc., 162 F.3d 924, 928 (7th Cir. 1998); Teague v. Las Vegas Sands, Inc., 1997 U.S. App. LEXIS 7618 (9th Cir. 1997)(unpublished); Hudson v. MCI Telecommunications Corp., 87 F.3d 1167 (10th Cir. 1996); Duckett v. Dunlop Tire Corp., 120 F.3d 1222 (11th Cir. 1997)(indefinite leave not required under the ADA).

However, where an employer's policies regarding leave are generous, some courts have ruled that leave up to and including a year is not unreasonable. See "Consideration of Employer's Leave Policies" below and Rascon v. US West Communications, Inc., 143 F.3d 1324 (10th Cir. 1998) (39 partially paid weeks available and 52 weeks unpaid leave available under employer's disability plans); Ralph v. Lucent Technologies, Inc., 135 F.3d 166 (1st Cir. 1998) (52 weeks paid leave available); Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998) (52 weeks paid leave available); and Cehr v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775, 783 (6th Cir. 1998) (180 days unpaid leave available). Further, at least one court has determined that indefinite leave is not per se unreasonable under the ADA. See, Norris v. Allied Sysco Food Services, Inc., 948 F.Supp. 1418 (N.D.Cal. 1996). The EEOC's position on this issue, as well as other accommodations, is that the reasonableness should be determined on a case-by-case basis.

4. Unpredictable Attendance.

Most courts agree that reliable attendance is required to perform most jobs and therefore, an employer need not provide leave for employees taking unpredictable absences. For example, in Waggoner v. Olin Corp., 169 F.3d 481, 484 (7th Cir. 1999) the court stated "the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability. The fact is that in most cases, attendance at the job site is a basic requirement of most jobs." Similarly, in Nowak v. St. Rita High School, 142 F.3d 999, 1003 (7th Cir. 1998) the court found an employee who was unable or unwilling to perform essential function of the job - regular attendance - for a period of eighteen months was not a "qualified individual with a disability". Likewise, in Jackson v. Veterans Admin., 22 F.3d 277, 280 (11th Cir. 1994) the court stated employers under the Rehabilitation Act are not required to

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

accommodate periodic, unanticipated absences of a probationary employee and the employee was not qualified when he missed six days in three months. In Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994) the court also found the employee not qualified when she could not appear for work regularly. In Deal v. Candid Color Systems, 1998 U.S. App. LEXIS 15018 (10th Cir. 1998)(unpublished)the court found the employer did not have to reasonably accommodate an employee with leave where the employee could work so sporadically and infrequently that a "second employee would be required to perform her duties". Likewise, in Nesser v. Trans World Airlines, Inc., 160 F.3d 442 (8th Cir. 1998) where the employer considered attendance to be an essential function of the employee's position and the employee could not show that reasonable accommodation was possible with respect to his attendance, the employer was entitled to summary judgment. See also Price v. S-B Power Tool, 75 F.3d 362 (8th Cir. 1996) (employer may adhere to strict attendance policy requiring not more than 3% absenteeism as business necessity). Finally, in Kennedy v. Applause, Inc., 3 AD Cas. 1734, 1737 (C.D. Cal. 1994), aff'd on other grounds, 90 F.3d 1477 (9th Cir. 1996) the employee's own physician indicated she could not maintain regular attendance. The court therefore found that the employee was not qualified and the employer need not provide the employee with an open-ended schedule.

Other courts leave the issue for the jury to decide whether or the degree to which attendance is an essential part of the job in question. The court in Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 602 (7th Cir. 1998) ruled the question is one of fact for the jury and said "We do not dispute that a business needs its employees to be in regular attendance to function smoothly; the absence of employees is disruptive to any work environment. However, it is not the absence itself but rather the excessive frequency of an employee's absences in relation to that employee's job responsibilities that may lead to a finding that an employee is unable to perform the duties of his job. Consideration of the degree of excessiveness is a factual issue well suited to a jury determination."

The EEOC does not see attendance as an essential function of any job under the ADA, because it is not a job duty. This position has found support in at least a couple decisions where

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

the focus is on the amount of attendance missed and the belief that uninterrupted attendance is never an essential function of any position. For example, in Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775, 783 (6th Cir. 1998) the court ruled no presumption should exist that uninterrupted attendance is an essential job requirement (particularly in light of FMLA) and medical leave of absence can be a reasonable accommodation, especially where company routinely granted medical leave of absence to employees. Similarly, in Dutton v. Johnson County Bd. of County Commissioners, 859 F. Supp. 498 (D.Kan. 1994) the court found that failure to permit an employee to use accrued leave violated ADA. The court reasoned that if the employer were willing to accept an employee's use of unscheduled leave by allowing him to use his vacation time, the employee could perform the essential functions of his job.

5. No-Fault Attendance Policies.

Employers who have a 'no-fault' attendance policy where all employees get a certain amount of leave, after which they are terminated, may still employ the policy as it is not in itself an ADA violation.. In Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998), the court ruled that an employer's policy of terminating employees who have been on leave for over one year did not violate the ADA. Similarly, a uniformly applied attendance policy requiring not more than 3% absenteeism has been found not to violate the ADA. Price v. S-B Power Tool, 75 F.3d 362 (8th Cir. 1996). However, in its guidance, the EEOC states an employer may not apply a "no fault" leave policy to employees who need leave beyond the stated time because of their disability. The policy must be modified to provide the employee with additional leave unless the employer can show another effective accommodation would allow the employee to perform the essential functions of the position or granting additional leave would cause undue hardship.

The EEOC also states an employer may not discipline an employee for work missed during a leave that is taken as a reasonable accommodation. This means an employee's non-performance during leave cannot be used against him when the employer makes performance based termination decisions. Examples given by the EEOC include application of an employer

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

policy that terminates poor performing employees when the employee's poor performance was due to a leave for disability reasons. .considering a disabled employee for using leave for his or her disability when leave is a necessary accommodation.

6. Consideration of Employer's Leave Policies.

Some Courts consider the employer's leave policies in determining whether or not the requested leave would pose an undue hardship. For example, the First Circuit reviewed an employer's leave policies in Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998) and stated the employer could not claim undue hardship where its manager testified the company's 52 week disability leave policy "did not financially burden [the employer] because it recognized that it was always more profitable to allow an employee time to recover than to hire and train a new employee." Similarly, in Rascon v. U S West Communications, Inc., 143 F.3d 1324 (10th Cir. 1998) the court found a four month leave of absence to attend inpatient treatment program for post traumatic stress disorder was a reasonable accommodation where employee requested leave of a specific duration, kept his employer appraised of his status, and the employer had generous leave policies available to the employee which the employer did not communicate when leave was requested. Additionally, in Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775 (6th Cir. 1998), the court considered the amount of time an employer allows under a leave policy may be proof that leave of a lesser amount would not cause undue hardship. Finally, in Ralph v. Lucent Technologies, Inc., 135 F.3d 166 (1st Cir. 1998), the court found where an employer has a policy allowing employees 52 weeks of paid leave, an additional four weeks of part-time work was a reasonable accommodation.

C. Modified or Part-time Schedule

An employer may have to modify an employee's work schedule as a reasonable accommodation. This includes modifying when things get done, the length and number of breaks, and the employee's starting or departure times. The key in these cases is whether the change is needed **because of** the disability, that is, whether it will assist the employee in performing the

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

essential functions of the job, and whether the requested accommodation would cause an undue hardship to the employer.

Where the requested accommodation is not because of the disability, courts will not hold employers liable for failing to provide it. For example, the Fifth Circuit rejected an employee's claim that his employer unreasonably failed to accommodate him by failing to provide a fixed daytime shift when the employer had only rotating shifts for those in the position the employee held. The court found no violation because the requested accommodation would not eliminate problems the employee had with concentration and it would require other employees to work harder or longer. Turco v. Hoechest Celanese Chemical Groups, Inc., 101 F.3d 1090 (5th Cir. 1996)(per curiam). Similarly, in Gaines v. Runyon, 107 F.3d 1171 (6th Cir. 1997), the court found an epileptic's request for a schedule change was not necessary for his disability because his medical records showed only that he needed a straight shift, which he already had.

The duty to accommodate an employee's disability by altering normal start and ending times is not absolute. In Guice-Mills v. Derwinski, 967 F.2d 794 (2d Cir. 1992) the employer required the head nurse to report to work at 8:00 a.m. At that time of day, the head nurse was in charge of the facility and was the only manager and non-union person on duty. Since attendance was an essential function of the position, the court found the nurse was not a qualified individual with a disability. Similarly in Buckles v. First Data Resources, Inc., 176 F.3d 1098, 1101 (8th Cir. 1999) the employer allowed the employee to leave his work area when he thought he would be exposed to an irritant. Instead of just leaving the work area, the employee left the building and went home. The court ruled that the "unfettered ability to leave work at any time is certainly not a reasonable accommodation".

Other than FMLA reduced leave, courts generally do not feel the ADA provides entitlement to part-time work. The EEOC states modification of a job to a part time position may be a reasonable accommodation, but its statement conflicts with other well founded principles. First, employers need not create new positions for disabled employees. Ostensibly, changing a position from full to part time would be creating a new position. Second, full-time

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

employment may be an essential function of the position, thus the employee would not be a qualified individual with a disability if s/he could not perform this function. Third, the ADA does not require that employers transfer essential functions of a position to other co-workers or hire someone to assist the disabled employee. If the job requires a full time person, the accommodation may not be reasonable because the employer is forced to hire someone to assist or transfer the disabled employee's duties to someone else when s/he is not there.

Most courts considering the issue suggest that part-time work is not a reasonable accommodation. For example, in Terrell v. US Air, 132 F.3d 621 (11th Cir. 1998) the court held that the employer was not obligated to create a part time position for a reservations agent with carpal tunnel syndrome. Similarly in Burch v. Coca-Cola, 119 F.3d 305 (5th Cir. 1997), the court found the employer was not required to create a part time position if the employee's position required full time duties. In Soto-Ocasio v. Federal Exp. Corp., 150 F.3d 14 (1st Cir. 1998) the court found the employee's job required six to nine hours of data entry every day. In that case, working part time was not a reasonable accommodation because it would reallocate the employee's job duties and create more work for other employees, neither of which is required by the ADA.

Finally, if the employee's requested accommodation would remove the essential functions of her position, it need not be provided because the employee is not a "qualified individual with a disability." In Miller v. Illinois Dept. Of Corrections, 107 F.3d 483 (7th Cir. 1997) a guard requested that her job be restructured so she would only rotate between the two positions she could perform. Because the essential function of the guard position required rotating through various duty positions and being able to assist other guards, the court found she was not a qualified individual with a disability.

D. Modified Workplace Policies.

In some instances, modifications of work place policies are reasonable accommodations that allow the individual to perform the essential functions of the position. These range from allowing a diabetic to maintain his or her blood sugar level, by eating at his or her workstation,

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

even though there is a policy against doing so. To be reasonable, the requested modification needs to be related to the disability and cannot eliminate an essential function of the position or create undue hardship. In Lyons v. Legal Aid, 68 F.3d 1512 (2nd Cir. 1995), the court found that an employee with a mobility impairment may be entitled to a paid parking space close to her work site, since she could no longer maneuver the stairs at the subway stations and the ability to appear for work is an essential function of the job. At least one court has found that an employer's legitimate production standards can be enforced equally and a reduction in the production standards is not a reasonable accommodation. Milton v. Scrivner, Inc., 53 F.3d 1118 (10th Cir. 1995). Similarly, where all employees are evaluated using the same criteria to determine who will be reassigned under a company wide program, the employer will not be liable for discriminatorily applying the policy. Sharpe v. AT & T Co., 66 F.3d 1045 (9th Cir. 1995).

1. Change of Supervisor.

Courts and the EEOC agree that a change of supervisor is not a reasonable accommodation and if that is the only requested accommodation, the employee is not a qualified individual with a disability. (Guidance at p. 46). Neither is an employee entitled to a stress free work environment. See, e.g., Gaul v. Lucent Technologies, Inc., 134 F.3d 576 (3rd Cir. 1998) (it is unreasonable and impractical to require an employer to provide a workplace without "prolonged and inordinate stress" as viewed in the eyes of the employee); Siemon v. AT&T, 113 F.3d 1175 (10th Cir. 1997) (inability to work under a few supervisors was not a disability because it did not prevent performance of class of jobs or broad range of jobs); Weiler v. Household Finance Corp., 101 F.3d 519, 524-25 (7th Cir. 1996)(employee with depression and TMJ not disabled if only accommodation needed is a new supervisor because "exclusion from one position of employment does not constitute a substantial limitation of a 'major life activity'") (quoting Byrne v. Board Of Educ., School of West Allis-West Milwaukee, 979 F.2d 560, 565 (7th Cir. 1992); Wernick v. Federal Reserve Bank of New York, 91 F.3d 379 (2d Cir. 1996) (ADA does not require reassignment to new supervisor); Carrozza v. Howard County, Maryland, 847 F. Supp. 365 (D. Md. 1994), aff'd without op., 45 F.3d 425 (4th Cir. 1995)

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

citing, Pesterfield v. Tennessee Valley Auth., 941 F.2d 437, 442 (6th Cir. 1991) (employer not required to provide a "stress-free environment" or immunize employee from legitimate job-related criticism); Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994) (federal anti-discrimination laws do not guarantee a stress free work environment); McVarish v. New Horizons Community Counseling and Mental Health Services Inc., 176 F.3d 489, 1999 WL 270411 at *2 (10th Cir. 1999) (unpublished) (plaintiff not a "qualified individual with a disability" when only requested accommodation is removal of new supervisor); Hatfield v. Quantum Chemical Corp., 920 F. Supp. 108 (S.D. Tex. 1996)(employee with depression and post-traumatic syndrome is not entitled to accommodation of transfer to new boss).

However, an employer may have an obligation to accommodate a psychiatric disability by changing supervisory methods. See, Taylor v. Phoenixville School District, --- F.3d --- (3rd Cir. August 18, 1999) (See also, The Guidance at p. 46 and EEOC Enforcement Guidance on the American with Disabilities Act and Psychiatric Disabilities, March 25, 1997 at p. 26).

2. Misconduct.

It is agreed that employers do not have to excuse violations of uniformly applied conduct rules when those rules are job-related and consistent with business necessity. Most courts have stated an employer can hold the disabled employee up to the same job related conduct standards as the non-disabled employee. See, for example, Williams v. Widnall, 79 F.3d 1003, 1006 (10th Cir. 1996) (employee with alcoholism entitled to leave for treatment but must still adhere to the employer's legitimate performance and behavior standards); Fuller v. Frank, 916 F.2d 558, 562 (9th Cir. 1990) (employee who had several relapses and was given a "last chance" agreement was not entitled to additional leave after he violated the last chance agreement by leaving his postal vehicle unlocked and unattended for 45 minutes with mail and alcohol in it).

The Tenth Circuit has recently noted a distinction in the law and stated that where a person's disability is due to alcoholism or illegal drug use, the employee can be held to the same conduct standards as non-disabled individuals. However, employee's with other types of disabilities cannot be held to the same conduct standards as other employees UNLESS such

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

conduct is job-related and consistent with business necessity. See, Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1 086 (10th Cir. 1997). The court reasoned that because the statute (42 U.S.C. § 12114(c)(4)(1994)) states an employer "may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that [it] holds other employees, even if any unsatisfactory performance or behavior is related to the alcoholism or drug use", Congress did not "intend to extend the same employer prerogative to employees with other disabilities."

E. Reassignment.

The ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation available to qualified individuals with disabilities. 42 U.S.C. § 12111(9)(B) (1994). Reassignment must be provided to employees who can no longer perform the essential functions of their current position, with or without accommodation, because of their disability. The EEOC states reassignment is a reasonable accommodation of "last resort" and is only required after determining no effective accommodations will enable the employee to perform the essential functions of his or her current position or all other reasonable accommodations would pose an undue hardship. Although controversy exists about the breadth of an employer's duty to reassign, some points are clear. First, employees are only entitled to reassignment to vacant positions. Second, the employee must be qualified for the position they seek, meaning they can perform the essential functions of the position they seek with or without accommodation. Third, the employer does not have any duty to promote the employee to a vacant position. Fourth, employers are not required to bump other employees from positions to accommodate the disabled employee. Fifth, only current employees, not applicants, are entitled to reassignment.

1. Employer's Duty to Assist Employee in Finding Position.

The EEOC states employers have a duty to assist qualified individuals with disabilities in locating vacant positions within their organization. At least the Third, Seventh and Tenth Circuits have agreed. In Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 695-96, 697-98 (7th Cir. 1998), the employer had a policy of placing injured workers in light duty positions until

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

they reached MMI. At that point, the employee either had to return to his former job, if he could, or obtain a new position. If no position was available, the employee was placed on medical leave for one year, during which the employee was to call in weekly to inquire about open positions for which they may be qualified. The employer automatically bid the injured worker for production jobs, but did not disclose non-production jobs unless the employee specifically asked. Further, the jobs were only posted at the plant for a period of two days, where the injured employee had no access. The court ruled Excel's policy violated the ADA because it did not identify the full range of alternative positions for which the individual may qualify. Similarly, in Mengine v. Runyon, 114 F.3d 415, 420 (3rd Cir. 1997) the court ruled an employer has a duty to make reasonable efforts to assist an employee in identifying a vacancy because an employee will not have the ability or resources to identify a vacant position absent participation by the employer. See also, Woodman v. Runyon, 132 F.3d 1330, 1334 (10th Cir. 1997)(under Rehabilitation Act, federal employers are far better placed than employees to investigate in good faith the availability of vacant positions).

2. How far must the search go?

Employers have successfully argued their obligation to reassign an employee is limited to a specific department or location. In Riley v. Weyerhaeuser Paper Co., 898 F.Supp. 324 (W.D.N.C. 1995), aff'd, 77 F.3d 470 (4th Cir. 1996) the court held that unless an employer regularly transferred employees to another company facility, it need not transfer a disabled employee to that facility. Similarly, in Emrick v. Libbey-Owens-Ford Co., 875 F.Supp. 393 (E.D. Tex. 1995), the court held an employer need only transfer a disabled employee to another facility if it is the employer's regular practice to do so. In other words, policies affecting an employee's ability to transfer must be applied uniformly to disabled and non-disabled employees and non-disabled employees will not be treated more favorably.

The EEOC disagrees with this analysis. In its Guidance, the EEOC states that because the ADA does not contain language limiting the duty to reassign to a particular area, and the ADA requires an employer to modify workplace policies as a reasonable accommodation, any

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

policy limiting transfers "cannot be a per se bar to reassigning someone outside his/her department or facility." (Guidance at p. 42). Further, it states the ADA "requires employers to provide reasonable accommodations, including reassignment, regardless of whether such accommodations are routinely granted to non-disabled employees." Id. Some courts agree with the EEOC.

In Buckingham v. U.S. Postal Service, 998 F.2d 735 (9th Cir. 1993) the employee sought a transfer from Mississippi to California for better medical treatment of HIV. The court ruled that because the government had an affirmative duty to make a reasonable accommodation under the Rehabilitation Act, and is obligated not to interfere with an handicapped employee's efforts to pursue a normal life, the employer must accommodate the employee unless doing so would cause undue hardship. In Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996), the court rejected the employer's argument that it was only obligated to consider reassigning the plaintiff to positions inside her department for which she previously requested transfer.

3. Preference Given to Qualified Individuals with a Disability.

The EEOC states an employee with a disability is given preference over others competing for the same position when reassignment is the only accommodation available. Some courts agree. In Smith v. Midland Brake, Inc. , --- F.3d ---, 1999 WL 3874978 (10th Cir. 1999)(en banc) the Tenth Circuit examined this issue and agreed with the EEOC. The court stated that the ADA gives disabled employees preferential treatment in reassignment over other candidates for the position because, reading the statute as a whole, reassignment is an accommodation, which is more than an opportunity to compete with others for the same position. Similarly, the court in Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304-05 (D.C. Cir. 1998), reasoned "[a]n employee who is allowed to compete for jobs precisely like any other applicant has not been 'reassigned'". The court in Wood v. County of Alameda, 5 AD Cas. 173, 184 (N.D. Cal. 1995) also stated an employee who can no longer perform the essential functions of her old job because of a disability is entitled to reassignment to a vacant position, not just an opportunity to compete.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

The Fifth Circuit ruled opposite in Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995), cert denied 516 U.S. 1122, 116 S.Ct. 1263, 134 L.Ed.2d 211 (1996). There, the court stated "we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled." Id. at 700.

4. Whether the Individual Must be Qualified for the Position they Currently Hold to be Eligible for Reassignment.

Some courts have ruled that the employee must be qualified for the position which they currently hold to be entitled to reassignment to another position. For example, in Schmidt v. Methodist Hosp. of Indiana, Inc., 89 F.3d 342 (7th Cir. 1996), the court held a nurse with hearing loss who could not perform the essential functions of position for which he was hired was not a qualified individual under the ADA and thus not entitled to reassignment.

The EEOC and most courts disagree and hold the individual must only be qualified for the position to which they seek to be reassigned. See, for example, Cassidy v. Detroit Edison Co., 138 F.3d 629, 634 (6th Cir. 1998) (employer has a duty to reassign when employee cannot be accommodated in current position); Monette v. Electronic Data Systems, 90 F.3d 1173, 1997 (6th Cir. 1996) (employers may be required to transfer a disabled employee to a vacant position for which he or she is qualified); Benson v. Northwest Airlines, 62 F.3d 1108 (8th Cir. 1995)(reassignment may be required under the ADA); DePaoli v. Abbott Laboratories, 140 F.3d 668, 675 (7th Cir. 1998) (the ADA compels consideration of job reassignment to a vacant position for which the employee meets the nondiscriminatory prerequisites); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 633 (7th Cir. 1998) (an employer must transfer a disabled employee to a position for which s/he is otherwise qualified); Gile v. United Airlines, 95 F.3d 492 (7th Cir. 1996) (the court rejected the employer's argument that because the employee could not perform the essential functions of her current position with or without accommodation, she was not 'qualified' under the ADA and thus not entitled to reassignment).

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

5. Reassignment to Equivalent or Lower Level Position.

An employee is not entitled to be reassigned to a position that would constitute a promotion, but rather only to a vacant position equivalent to the position they currently hold and for which they are qualified. If no such position is available, the employer must reassign the employee to a vacant lower level position if available. For example, in Fjellestad v. Pizza Hut of America, Inc., --- F.3d ---, 1999 WL 391911 (8th Cir. 1999), the unit manager of a restaurant could no longer perform the essential duties of her position due to restrictions on the amount of hours she could work. When her subordinate, the swing shift manager, was promoted to the disabled employee's position, the unit manager requested the demotion to swing shift manager, which she stated she could perform. The court ruled the employee may be entitled to reassignment to her subordinate's position if it was within her restrictions. See also, Cassidy v. Detroit Edison Co., 138 F.3d 629 (6th Cir. 1998) (reassignment to a lower job grade position appropriate if employee cannot be accommodated in current or comparable position).

6. Collective Bargaining Agreements.

With the exception of the D.C. Circuit,[1] courts agree that if reassignment violates a collective bargaining agreement, it poses an undue hardship on employers. The EEOC disagrees with this "per se" rule that an accommodation imposes an undue burden "simply because it violates a collective bargaining agreement.". Guidance at 59. In the EEOC's view, employers should first determine if it can provide a reasonable accommodation that would not violate the CBA. If no such accommodation can be made, according to the EEOC, the ADA requires the employer and the union to negotiate a variance to the CBA so the employer may provide a reasonable accommodation. Id. It is only when the accommodation unduly burdens the

[1]See Aka v. Washington Hospital Center, 156 F.3d 1284 (D.C. Cir. 1998)(en banc) (Reasonable accommodation in the form of reassignment need not necessarily conflict with the terms of the collective bargaining agreement and it a determination should be made as to whether a vacant position was available for which the employee is qualified and whether reassigning the employee would have been an undue hardship. The court refused to address the question of whether a collective bargaining agreement or the ADA would govern if the two came in conflict.)

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

expectations of other employees that the EEOC views it as an undue hardship, and this, the EEOC states is to be determined on a case-by-case basis, taking into account the duration and severity of any adverse effects caused by granting the variance and the number of employees whose employment opportunities would be affected." Id. For a further discussion of this issue, see the following Section regarding "Undue Hardship".

VI. UNDUE HARDSHIP

Employers do not have to provide an accommodation if it causes an undue hardship. Undue hardship means significant difficulty or expense in providing the accommodation. The ADA itself and the EEOC's regulations set forth factors to be considered in determining whether an accommodation poses an undue hardship. These include:

- The nature and net cost of the accommodation;
- The overall financial resources of the facility involved, including the number of persons employed at the facility and the effect on expenses and resources;
- The overall financial resources of the covered entity, the size of the business, number of employees, and the number, type and location of its facilities;
- The entity's type of operation or operations, including the composition, structure and functions of its workforce and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
- The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

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

Undue hardship is a defense to a claim for failure to provide reasonable accommodation. Therefore, the burden is on the employer to show that the requested accommodation would result in an undue hardship. An employer must come forth with credible evidence and generally an employer will be unable to rely on the undue hardship defense unless it specifically conducted an analysis to determine whether the proposed accommodation would result in an undue

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

hardship. Bryant v. Better Business Bureau of Maryland, 923 F.Supp. 720 (D.Md. 1996). It is also important to note that the burden to show undue hardship in ADA cases is much higher than in Title VII cases regarding religious accommodation. In religious discrimination cases under Title VII, it is enough for the employer to show *di minimus* hardship which does not apply to ADA cases. Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996) cert. denied., 117 S.Ct. 1318 (1997). The ADA employs a significantly higher standard in determining if the requested accommodation actually presents an undue hardship and the employer will have to show a strong factual basis free from speculation or generalization about the nature of the disability or demands of the particular job. Bryant at 740-41.

A. Cost

Generally, courts are determining undue hardship on the reasonableness standard discussed In the "What is Reasonable?" section of this article. Instead of looking toward the cost in relation to the employer's resources, most courts are employing the cost-benefit analysis set forth in Vande Zande v. Wisconsin Dept. of Administration, 44 F.3d 538 (7th Cir. 1995). The EEOC disagrees with this approach and states the amount spent on accommodation should depend on the employer's resources. The current court approach is better for employers, who may otherwise be forced to submit their finances and spending practices to jury and court scrutiny and determination of how much is too much to spend on a particular accommodation.

B. Non-cost

1. Collective Bargaining Agreements

As discussed above, courts agree that accommodations, including reassignment, which would violate a collective bargaining agreement pose an undue hardship on employers. The EEOC disagrees with a "per se" rule that an accommodation imposes an undue burden "simply because it violates a collective bargaining agreement." (Guidance at 59). The EEOC advocates a determination made on a case-by-case basis.

Further, although Congress did not address the issue, the EEOC has argued the union and employer must bargain over permitting an exception to be made to collective bargaining

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

agreements. However, the circuit courts have squarely followed Rehabilitation Act authority and hold an accommodation is not required if it would violate a bona fide seniority system in a collective bargaining agreement.[2] See, for example, Kralik v. Durbin, 130 F.3d 76, 82 (3rd Cir. 1997) (employee's request for relief from forced overtime was not a reasonable accommodation because it required employer to infringe on seniority rights under the collective bargaining agreement, which it could not do without a waiver from the union); Foreman v. Babcock & Wilson Co., 117 F.3d 800, 810 (5th Cir. 1997) cert. denied 118 S.Ct. 1050 (1998)('the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement'); Boback v. General Motors Corp., 107 F.3d 870 (6th Cir. 1997)(unpublished)(employer is not required to violate seniority provisions of a collective bargaining agreement by reassigning employee with a disability); Pond v. Michelin North America, Inc., --- F.3d ---, 1999 WL 444633 (7th Cir. 1999) (The ADA does not require an employer to bump a less senior employee from an occupied position to open it up as an accommodation for a disabled employee because the ADA does not require it); Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996) (an employer is not required to violate a collective bargaining agreement and reassign a disabled employee to a position to which s/he has no seniority rights); Benson v. Northwest Airlines, 62 F.3d 1108, 1114 (8th Cir. 1995) ("The ADA does not require that Northwest take action inconsistent with the contractual rights of other workers under a collective bargaining agreement"); Willis v. Pacific Maritime Ass'n., 162 F.3d 561, 566 (9th Cir. 1998) ("An employee's proposed accommodation under the ADA is unreasonable if it conflicts with a bona fide seniority system established under a CBA."); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995) (employer need not provide requested accommodation of reassignment when such transfer would violated a CBA because of lack of seniority); Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1225 (11th Cir. Sept. 3,

[2]With the exception of the D.C. Circuit. See, Aka v. Washington Hospital Center, 156 F.3d 1284 (D.C. Cir. 1998)(en banc).

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

1997)(employer not required to violate bargaining agreement and reassign disabled employee as an accommodation).

Other circuits deciding the same issue under § 504 of the Rehabilitation Act have ruled similarly. See Shea v. Tisch, 870 F.2d 786, 789-90 (1st Cir. 1989)(per curiam) (employer was not required to reassign postal worker to permanent assignment to a day time weekday position within 15 miles from his home as a reasonable accommodation when doing so would violate the rights of other employees under the CBA); Carter v. Tisch, 822 F.2d 465, 467-69 (4th Cir. 1987)(post office custodian with asthma was not entitled to requested accommodation of reduced duties and permanent light duty assignment where it would affect other employees' rights under a CBA).

2. Other Non-Cost Accommodations

Courts have found other requested accommodations to cause undue hardship where other employees or the employer's needs are affected. For example, in Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983) the court determined assigning additional employees to cover plaintiff's physically demanding duties was an undue hardship. In Turco v. Hoechest Celanese Chemical Groups, Inc., 101 F.3d 1090 (5th Cir. 1996)(per curiam), the Fifth Circuit determined that requiring an employer with rotating shifts to provide a fixed daytime shift for an employee with diabetes would not be reasonable in part because would require other employees to work harder or longer. In Walton v. Mental Health Ass'n. Of Southeastern Pennsylvania, 168 F.3d 661 (3rd Cir. 1999) the court also found continued leave imposed undue burden because the employer needed someone in the employee's position for leadership necessary to maintain funding from outside sources.

However, where the employer takes no steps to determine whether the requested accommodation would truly create a burden, courts will deny summary judgment on the issue of undue hardship. For example, in Bryant v. Better Business Bureau of Greater Maryland, Inc., 923 F.Supp. 720 (D.Md. 1996) the court denied summary judgment to the employer on the issue of undue hardship when the employer did not reasonably investigate the effect of providing a

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

TTY for hard of hearing employee and merely made the decision on its belief that providing the accommodation would slow down the employee's job as membership coordinator. Similarly, in Rascon v. US West Communications, Inc., 143 F.3d 1324 (10th Cir. 1998) the employer claimed allowing the employee a four month leave would create an undue hardship. The court denied summary judgment to the employer because it found this claim inconsistent with the employer's generous leave policies and the fact they did not replace the employee while he was out on leave.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

The Abilities Accommodation Program

A Comprehensive Program for Employers, Designed to Reduce the Human & Economic Costs of Disability in the Workplace

Robert Hall, Ph.D., CRC, CDMS
7777 Alvarado Road, Ste.308
La Mesa, CA. 91941
(619) 463-9334

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

CONFIDENTIAL INFORMATION, ACCESS LIMITED TO:____

REQUEST FOR REASONABLE ACCOMMODATION

Applicant ( ) Employee ( )

Name: ______________________________Date: _________________

Position:____________________________Department:____________

This information is voluntary and will in no way influence an employment decision. If you are an individual with a disability who needs an accommodation, _________________ is committed to providing reasonable accommodation to qualified individuals to help them participate in pre-employment testing and/or perform the job satisfactorily and safely. Please assist us by completing this form and specifying any accommodation you may need. Your information will be kept confidential and used in compliance with applicable law and _______________________ policy on Reasonable Accommodation.

Describe the limitation(s) or condition that this request is based on:

____

____

Do you require assistance for pre-employment testing? Yes or No
If yes, please specify what accommodation you require:

____

____

Which essential job task or tasks are you unable to perform without reasonable accommodation?____

____

Which marginal job task or tasks are you unable to perform?

____

____

Identify any accommodation that would assist you in performing the essential job tasks in question. (This can include special equipment or methods, changes in the physical layout, etc.____

____

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

CONFIDENTIAL INFORMATION, ACCESS LIMITED TO:
____

ACCOMMODATION CONSIDERATION / SELECTION

When an individual with a disability is qualified to perform the essential functions, except for functions that cannot be performed because of related limitations and existing job barriers, the employer must try to find a reasonable accommodation to reduce or eliminate these barriers. EEOC TAM 3.2

Applicant / Employee Name:
____

Reason for
Accommodation:____

Job Related
Limitation:____
____

Direct
Threat:____
Existing
Barrier(s):____

An employer should always consult the person with the disability as the first step in considering accommodation. EEOC TAM 3.7

Accommodation(s) Suggested by and/or Discussed with Applicant / Employee:
1.____
2.____
3.____
4.____

If consultation does not identify an appropriate accommodation, technical assistance is suggested. EEOC TAM 3.11(4b)

Internal/External Resource(s) Consulted	Date	Outcome
1.____	__________	______________________
2.____	__________	______________________
3.____	__________	______________________

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

4.____ __________ ______________________

Accommodation Consideration / Selection Form - page two

Applicant / Employee Name:____

Accommodation(s) Considered: Cost Source

1.____ __________ ______________________

2.____ __________ ______________________

3.____ __________ ______________________

4.____ __________ ______________________

Effective Accommodation(s) Considered Reasonable:

1.____

2.____

3.____

The employer is free to choose among effective accommodations; however the individual's preference should be considered - all things being equal. The accommodation selected should best serve the needs of the individual and the employer. EEOC TAM 3.8(4). The accommodation need not be the best available as long as it is effective. EEOC TAM 3.4

Selected
Accommodation:____
Total Cost:_________________________
Rationale for Selection:
____
____
____
____

____

Financial Assistance Obtained: (Specify amount next to source) ***(EEOC TAM 3.11)***

Tax Credit for Small Business: ________________
Tax Deduction/Barrier Removal:________________
Targeted Tax Credit: ________________
Applicant/Employee: ________________
Insurance: (Identify type): _______________ ________________________
Other: (Identify source) ________________ ________________________
Net Cost:(Total cost, less amount received from other sources):____________

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Is this accommodation part of a Vocational Rehabilitation Plan? Yes or No

Accommodation device(s) or equipment is owned by:

Employee ______ Employer ______ Insurance Company ______

Other - If other, please specify:____

An individual is not required to accept an accommodation; however, if the individual refuses an accommodation necessary to perform essential job functions and as a result cannot perform those functions, the individual may not be considered qualified.
EEOC TAM 3.8 (III-II)

Applicant / Employee Rejected Accommodation : _______
Reason(s)
Given:____
____
____

Form Completed By:

____
____
(Signature / Title) (Date)

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

CONFIDENTIAL INFORMATION, ACCESS LIMITED TO: ______________________________________

JOB FUNCTIONS / LIMITATIONS REVIEW

"If an otherwise qualified individual with a disability cannot perform one or more essential job functions, because of a disability, the employer must include in the assessment of qualification, whether reasonable accommodation would enable the person to perform those functions. EEOC TAM 2.3(C)

Applicant / Employee Name: ____

Functional Limitations: (Physical and / or Mental)
____
____
____

Essential Functions Requiring Accommodations: (Please refer to the attached job description)
____
____
____

If the need for accommodation is not obvious, or the employer questions the need, documentation of functional limitations may be requested. EEOC TAM 3.6

Documentation Not Requested: _____ Documentation of Need on File: ______

Documentation Requested: _______________________/____________________
Date Required Date Received

Marginal Tasks to be Reassigned: ____
____

Marginal Replacement Tasks:____
____

OTHER LIMITATIONS TO BE ACCOMMODATED:

Reasonable accommodations must be provided to enable an employee with a disability to enjoy benefits and privileges of employment equal to those enjoyed by similarly situated non-disabled employees. EEOC TAM 3.3

Other accommodations to be considered for equal accessibility ?
(restrooms, lunch rooms, conference rooms, exercise facilities, etc.) Yes ___No ___ If yes, please list.
1. ____________________________________ 2. _____________________________
3. ____________________________________ 4. _____________________________

Completed By: ____
Signature / Title / Date

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

CONFIDENTIAL INFORMATION: ACCESS LIMITED TO:
____

APPLICANT / EMPLOYEE MEDICAL REVIEW

Physician, please complete this form and return to:

Employer:________________________________Attention:________________________________

Address/Telephone:____

including any pertinent medical reports by:_____________________. Thank you.

Medical information may be required to determine if the individual meets the ADA definition of an individual with a disability and is entitled to an accommodation. EEOC TAM 6.6 Additionally, the employer may request medical documentation of functional limitations to support an accommodation request. EEOC TAM 3.6

Applicant / Employee
Name:____

Job Title:
____

Medical Review

I have reviewed the job description for this job title and examined the applicant/employee and it is my opinion that:

Applicant / Employee is currently able to perform all job functions described without posing a direct threat to the safety of self or others. Yes ____ No _____

IF NO, Applicant / Employee has the following limitations in relation to described job functions.

Functional Limitation(s) (Please be specific in your description)	**Duration** (State period of time)
____	________________________
____	________________________
____	________________________
____	________________________

Medical Diagnosis:____

Additional Comments:____
____
____
____

Please complete the risk assessment portion on Page Two of this form

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Medical Review - Page Two

Employee Name:________________________

The assessment of risk must be based on reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence. EEOC TAM 4.5(4).

It is my opinion that the applicant/employee meets the health and safety requirements of this position.
Yes ___ No ____
(If no, complete the following section)

DIRECT THREAT RISK ASSESSMENT

The following factors must be considered in respect to the specific aspect of the disability that would pose a direct threat . The risk may not be speculative or temporary. It must be a significant risk of substantial harm. EEOC TAM 4.5(2)

(Please complete the following statements.)

Aspect of disability causing risk is:____
The type of harm this risk will cause is:____
____

(Check all statements that apply.)

____The aspect of disability described will pose a risk for an extended period of time.

____The resulting harm from this risk will be substantial.

____It is highly probable that this harm will occur.

____This significant risk of substantial harm is current or immediate.

Comments: ____
____
____

Optional: Did the applicant and/or can you suggest any accommodations that could reduce or eliminate the health or safety risk and assist the individual to perform the essential functions of the job safely?
____
____

____
Physician Signature Date Medical Specialty

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

CONFIDENTIAL INFORMATION: ACCESS LIMITED TO:____

DIRECT THREAT - EMPLOYER REVIEW

An employer is not required to hire or retain an individual with a disability who would pose a "direct threat" to the health and safety of self or others and may state this as a qualification standard for all applicants. However, an employer must meet very specific and stringent requirements under the ADA to establish that such a "direct threat" exists. A finding of direct threat must substantiate a significant risk of substantial harm to health and safety. It cannot be based on unfounded assumptions, fears, or stereotypes about the nature or effect of a disability or of disability generally. EEOC TAM 4.5(4)

Applicant / Employee Name: ____
Job Title: ____

FACTUAL EVIDENCE GATHERED

The determination of direct threat must be based on objective factual evidence related to that individual's present ability to perform essential functions safely. EEOC TAM 4.5(4)

Direct Threat Identification: Physical __ Mental __ Food Handling __

Aspect of Disability / Behavior that poses direct threat: ____
____
____

Essential Function(s) Affected: ____
____
____

Objective factual evidence may include documentation from psychologists, physical or occupational therapists, rehabilitation counselors or others with expertise and direct knowledge of the individual and the disability. EEOC TAM 4.5(4)

Input from Individual with Disability: ____
____

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

____
____
____
____
____

Employer Direct Threat Review - page two

Experience of applicant / employee in previous jobs:
____
____
____
____
____
____

Results of physical agility tests (if given):
____
____
____
____
____
____

Employer Representative Completing Above Review:

____ ___________________________

(Name / Title) (Date)

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

CONFIDENTIAL INFORMATION, ACCESS LIMITED TO:
____

DEFENSE TO NOT MAKING AN ACCOMMODATION

An employer is not required to make a reasonable accommodation if it would impose an undue hardship on the operation of the business. EEOC TAM 3.9

Applicant / Employee Name:
____

Considered Accommodation(s) Rejected:
____
____
____
____
____

Defense Cited (**circle all that apply**):
Undue Hardship Direct Threat Unqualified

UNDUE HARDSHIP

An undue hardship is an action that requires "significant difficulty or expense" in relation to the size of the employer, the resources available, and the nature of the operation. EEOC TAM 3.9

Circle appropriate reason(s) for undue hardship decision :

a. - Significant Net Expense Total Cost: _________Net Cost: _________

Financial assistance requested from:
____

Employee Contribution? - Yes____ No____
Amount:____________________________

b. - Unduly disruptive to business
c. - Causes overload or difficulty in other employees' work
d. - Fundamentally alters nature and/or operation of business
e. - Conflicts with terms of Collective Bargaining Agreement. ***(EEOC TAM 3.9(5)):***

Discussed with Union representative: - Yes - No If yes,

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

____________________________on ___________________
Name of Union Rep Date

Defense to Not Making an Accommodation
Page Two

Supporting Data for Decision:
____
____
____
____
____
____
____
____
____
____
____
____
____
____
____

DIRECT THREAT

If an effective accommodation cannot be found, the employer may refuse to hire an applicant or discharge an employee who poses a direct threat. EEOC TAM page I-6

- Accommodation fails to eliminate/reduce direct threat.
- Accommodation of threat would create an undue hardship.

Supporting data: (Attach *Accommodation Consideration / Selection* and *Employer Review of Direct Threat* forms)
Other Comments:
____
____
_____
____
_____

UNQUALIFIED

A qualified individual with a disability is one who meets the skill, experience, education and other job related requirements of a position held or desired, and who, with or without reasonable accommodation, can perform the essential function of a job. EEOC TAM I -3

___ No Effective Accommodation ____ Refused Accommodation

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

___ Other (Please specify):
____

Supporting Data for Decision: (Attach *Accommodation Consideration/Selection* form)
Other Comments:

Defense to Not Making an Accommodation
Page Three

Decision Discussed with Applicant/Employee? _______No _____Yes - Date:
____
Applicant / Employee
Comments:____
____
____
____

Applicant/Employee Signature: __________________________________
Date:_____________

Accommodation Review Completed By:
____
Signature /Title
Date

Accommodation Review Approved By:
____
Signature/Title
Date

Decision and Defense Reviewed by Legal Counsel: ____Yes or ____ No
Name____Date:_________________________

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Reasonable Accommodation Under the ADA

- Robert Hall, Ph.D., CRC, CDMS
- 619-594-7466
- bhall@mail.sdsu.edu

SDSU / Work & Health Technologies Center

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

What is reasonable accommodation?

"Any change in the work environment or in the way things are customarily done that enables an individual to enjoy equal employment opportunities"

SDSU / Work & Health Technologies Center

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

What is reasonable accommodation ?

- ✗ an affirmative employer response;
- ✗ covers all programs, activities, and job tasks;
- ✗ all employment decisions & employees are potentially impacted.

SDSU / Work & Health Technologies Center

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

EEOC Guidance on Reasonable Accommodation & Undue Hardship

- pre-determine qualifications
- job performance standards
- any requested change or modification
- open, interactive process
- allowed documentation
- FMLA, WC, ADA integration
- clear, detailed policy & procedure & forms

SDSU / Work & Health Technologies Center

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Reasonable Accommodation: "an informal, interactive process"

EEOC's 4-Step Process

1) **Essential function analysis**

2) **Identify barriers to performance**

3) **Identify potential accommodations**

4) **Assess "reasonableness" & choose**

SDSU / Work & Health Technologies Center

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Types of job accommodation

- ✗ Transfer of job tasks
- ✗ Acquisition or modification of equipment or devices
- ✗ Adjustment or modification of exams, training, or policies
- ✗ Providing qualified readers, interpreters, personal assistants for work related activities
- ✗ Altering existing facilities or transportation
- ✗ Use of accrued paid or unpaid leave for medical treatment
- ✗ **Part-time or modified work schedules**
- ✗ **Job restructuring**
- ✗ **Reassignment to a vacant position**

SDSU / Work & Health Technologies Center

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Reasonable accommodation issues

- what constitutes a request?
- what is required vs. voluntary?
  - ✗ reassignment
  - ✗ job restructuring
- what is possible vs. reasonable?
  - ✗ undue hardship
  - ✗ direct threat

SDSU / Work & Health Technologies Center

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Policy, Procedure, & Forms

- Standardize the process
- Objectivity & clarity
- Consistent decision-making
- Tools for training

SDSU / Work & Health Technologies Center

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Determining the "reasonableness" of job accommodation

- Issues addressed in model:
  - What is undue hardship?
  - trade-offs
  - initial & on-going economic costs
  - organizational response:
    - objectivity
    - consistency
  - Formula: initial & on-going cost of accommodation, capital invested per employee, payroll, the value of the employee contribution

SDSU / Work & Health Technologies Center

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Key Points

- pre-determine job qualifications & performance standards;
- maintain an open, interactive process;
- focus on "any requested changes";
- develop clear, detailed policy & procedure;
- coordinate absence management;
- provide supervisor training;
- use outside resources

SDSU / Work & Health Technologies Center

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

INSTRUCTIONS FOR FIELD OFFICES: ANALYZING ADA CHARGES AFTER SUPREME COURT DECISIONS ADDRESSING "DISABILITY" AND "QUALIFIED"

Background

The Supreme Court over the past two terms has issued several ADA decisions involving the determination of:

(1) whether a person has a "disability" as defined by the ADA. (See Bragdon v. Abbott, 524 U.S. 624 (1998); Sutton v. United Airlines, Inc., 527 U.S. ___, 67 U.S.L.W. 4537 (June 22, 1999); Murphy v. United Parcel Service, Inc., 527 U.S. ___ (1999); and Albertsons, Inc. v. Kirkingburg, 527 U.S. ___ (1999)); and

(2) whether a person with a disability is "qualified." (See Cleveland v. Policy Management Systems Corp., 119 S. Ct. 1597 (1999); and Albertsons, Inc. v. Kirkingburg, 527 U.S. ___ (1999)).

Since these cases involve fundamental issues that are addressed in many ADA charges, the Office of Legal Counsel has prepared these instructions for the field to aid in gathering and analyzing evidence.

Last year, the Supreme Court broadly interpreted the terms "impairment," "major life activity," and "substantial limitation" in Bragdon, holding that a woman with asymptomatic HIV infection had an ADA "disability." Consistent with the Court's approach, the EEOC will continue to give a broad interpretation to these terms.

This year, the Supreme Court held in Sutton and Murphy that the determination of whether a person has an ADA "disability" **must take into consideration whether the person is substantially limited in a major life activity when using a mitigating measure**, such as medication, a prosthesis, or a hearing aid. A person who experiences no substantial limitation in any major life activity when using a mitigating measure does not meet the ADA's first definition of "disability" (a physical or mental impairment that substantially limits a major life activity). In Albertsons, the Court extended this analysis to individuals who specifically develop compensating behaviors to mitigate the effects of an impairment. In so ruling, the Supreme Court rejected the Commission's position that the beneficial effects of mitigating measures should not be considered when determining whether a person meets the first definition of "disability."

In all of these cases, the Supreme Court emphasized that, consistent with EEOC's position, the determination of whether a person has a "disability" **must be made on a case-by-case basis**. The Court stated that it could not be assumed that everyone with a particular type of impairment who uses a particular mitigating measure automatically was included -- or excluded -- from the ADA's definition of "disability." Nor does the definition of "disability" depend on general information about the limitations of an impairment. Rather, one must assess the specific

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

limitations, or lack of limitations, experienced by a Charging Party (CP) who uses a mitigating measure or compensating behavior to lessen or eliminate the limitations caused by an impairment.

The Court also emphasized that the disability determination must be based on a person's **actual condition at the time of the alleged discrimination**. Therefore, if a CP **did not use a mitigating measure at that time**, an Investigator must determine whether s/he was substantially limited in a major life activity based solely on his/her actual condition. For the purpose of determining whether a CP meets the definition of "disability," speculation regarding whether the person would have been substantially limited if s/he used a mitigating measure is irrelevant.

The instructions below, consistent with these Supreme Court decisions, modify previous field instructions and emphasize the individualized analysis that must be used in determining whether a particular CP has an ADA "disability."

- Part One addresses each of the three definitions of "disability" as they apply to CPs who use mitigating measures. (Pages 2-16) It also highlights certain issues relating to **any** "regarded as" case. (Pages 12-16)
- Part Two addresses special issues that may arise when a Respondent claims to rely on federal safety standards in determining that a CP is not "qualified" because of a disability. (Pages 16-17)
- Part Three discusses the relationship between application for, or receipt of, disability benefits and a determination of whether a CP is "qualified." (Pages 17-19) (A summary of the decisions in Albertsons and Cleveland is found on pages 16 and 17, respectively.)

If an Investigator is uncertain whether a CP who uses a mitigating measure is substantially limited in a major life activity, s/he should contact the OLC ADA Division attorney assigned to the field office.

PART ONE: THE THREE DEFINITIONS OF "DISABILITY"

First Definition of "Disability": CP Has a Substantially Limiting Impairment

All of the questions below seek information about a CP's condition at the time of the alleged discrimination.

In determining whether a CP, or a potential CP, has a physical or mental impairment that substantially limits a major life activity, an Investigator must do the following:

I. Identify the CP's physical or mental impairment(s).

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

II. Ask whether the CP uses a *mitigating measure* to control or eliminate symptoms or limitations of the impairment.

A. Ask the CP to identify the precise mitigating measure used (e.g., medication, insulin, prosthetic limb, hearing aid).

- If a CP uses more than one mitigating measure (e.g., a CP uses two medications), be sure to get information on how well each mitigating measure controls a CP's symptoms, the respective side effects of each, and whether the two medications together cause limitations because of the interaction between them.

B. Ask the CP to identify any behaviors s/he may have specifically developed to cope with the limitations of an impairment.

- For example, an individual with monocular vision might have developed specific compensating behaviors in head or eye movements to see effectively at long distances.

C. If the CP is **not** using a mitigating measure, then discuss what limitations, if any, the CP experiences in performing a major life activity due to the impairment.

III. Ask whether the mitigating measure or compensating behavior *fully or only partially* controls the symptoms or limitations of the impairment.

A. A number of questions should be asked to determine whether a mitigating measure fully controls, partially controls, or has little effect in controlling the symptoms and limitations of an impairment. Examples include:

1. Describe what symptoms and limitations you experienced before using the mitigating measure (e.g., 3 seizures a week; frequent and severe headaches, blurred vision, urination, thirst, and other symptoms of high levels of blood sugar (hyperglycemia) for a person with diabetes; chronic, severe shaking due to Parkinson's disease; ability to hear only certain high-pitched sounds).

- This question seeks information to establish what **major life activity(ies)** may be affected by the CP's impairment, despite the use of a mitigating measure or compensating behavior. Remember that **major life activities are broadly defined and that the list of major life activities in the EEOC regulations and enforcement guidances is not exhaustive**.

- Bragdon took an expansive view of the terms "major life activity" and "substantial limitation." Investigators should continue to consult the Compliance Manual and EEOC guidances for additional

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

information on identifying major life activities and assessing whether a CP is substantially limited. (Also, see Sutton, 67 U.S.L.W. 4537, 4542 (June 22, 1999) for a discussion of "substantial limitation.")

- See pages 7-9 for a listing of some of the major life activities that you should review with a CP to determine if s/he still experiences limitations in performing them, despite the use of a mitigating measure.

2. How well does the mitigating measure control the symptoms and limitations identified above?

- Does the mitigating measure control the symptoms or limitations *all of the time or only some of the time*? (e.g., medication has reduced the number of seizures from 3 per week to 1 per week; the treatment of diabetes through diet, medication, and insulin has limited the frequency and severity of the incidents of hyperglycemia; the shaking only occurs when the CP is tired and is not as severe as it used to be; the hearing aid enables the CP to hear low and high-pitched sounds, but not words).

- A CP who uses a prosthetic hand or arm may continue to experience substantial limitation in the major life activity of performing manual tasks because the device does not permit fine motor manipulation.

- If a CP uses a behavior specifically developed to compensate for a limitation resulting from an impairment, how well does that behavior compensate for the limitation? Do any limitations remain for which the compensating behavior is ineffective?

- For example, a CP with monocular vision might be able to turn his/her head to compensate sufficiently for a decrease in his/her field of vision. This will not compensate for the loss of depth perception. To deal with that limitation, a CP may have learned to judge long distances by relying on monocular cues such as linear perspective, overlay of contours, and distribution of highlights and shadows. However, *this* behavior may not compensate for limitations in seeing at shorter distances. Therefore, a CP who uses certain compensating behaviors might still experience limitations in performing numerous tasks involving close range vision. The limitation in close range vision is relevant to determining whether the CP is substantially limited in seeing or any other major life activities.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

3. How long has the CP been using the mitigating measure or compensating behavior?

- If a CP has been using a mitigating measure or compensating behavior for only a short period, initially it may not be very effective in controlling the limitations.

- Whether a mitigating measure, over time, might become more effective involves speculation. The Supreme Court's decisions make it clear that the determination of whether a CP is substantially limited, even with the use of a mitigating measure or compensating behavior, must rest on evidence of how well the measure or behavior **actually worked at the time of the alleged discrimination**.

4. Does the mitigating measure tend to become less effective under certain conditions? If certain conditions interfere with the effectiveness of a mitigating measure, how often and for how long a period do these conditions arise? For example:

- If the CP is under great stress, or is tired, does the mitigating measure work as well?

- Do adverse weather conditions or other environmental changes impact the effectiveness of a mitigating measure?

- Do illnesses, such as a cold or the flu, change the effectiveness of a mitigating measure?

- For women, do monthly hormonal changes impact the effectiveness of a mitigating measure?

5. Does the mitigating measure tend to be effective only for awhile?

- For example, while a CP with bipolar disorder who uses medication does not experience severe symptoms of the disorder for a period of time, he then experiences symptoms for several weeks and undergoes a severe manic episode. Following the manic episode, the CP again experiences few or no symptoms while using the mitigating measure.

- Mitigating measures used to treat degenerative illnesses, such as Parkinson's disease, may only work for a period of time before the condition worsens, making the mitigating measure ineffective.

6. Has the CP had to change mitigating measures because previous ones became less effective? If yes, how many previous mitigating measures has the CP used, and what happened when each one became less effective? How long did each mitigating measure remain effective? Is the current mitigating measure different from previous ones so that it is less

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

likely to fail? Or, conversely, is there any indication that the current mitigating measure is becoming less effective?

7. Are there any symptoms or limitations that are unaffected by the mitigating measure? If yes, what are they and how severely do they limit the CP from engaging in a major life activity?

8. Has the impairment caused any complications that are not controlled by a mitigating measure and may substantially limit a major life activity?

- For example, complications from diabetes may result in substantial limitations in major life activities. This can include complications such as eye disease (seeing); nerve damage (sitting, standing, walking, eating); blood vessel disease (walking); and difficulties with reproduction. These are all complications that are not controlled by insulin.

IV. Ask whether the *mitigating measure itself causes any limitations* in performing a major life activity.

A. Investigators need to ask CPs whether they experience any symptoms, side effects, or limitations in performing certain activities **as a result of using a mitigating measure**. If a CP does experience limitations, the Investigator needs to probe their severity and duration.

- If a CP uses medication, it is critical to identify the specific medication and the specific side effects caused by it. Not all medications produce the same side effects. Moreover, the same medication does not produce the same side effects in all individuals.

B. If a CP uses two or more mitigating measures, and they are not substantially limiting by themselves, determine if the combined negative effects of all the mitigating measures together substantially limit one or more major life activities.

- For example, a CP with Attention Deficit Disorder (ADD) and depression may take medications to treat each condition. Each medication, by itself, affects the ability to sleep (a major life activity), but does not substantially limit it. However, the combined effect of the two medications substantially limits the CP's ability to sleep.

C. A number of major life activities may be severely affected by a mitigating measure. (These major life activities may also be directly affected by the impairment *despite* the use of a mitigating measure.)

1. *Thinking, concentrating, and other cognitive functions* may be substantially limited when a CP uses certain drugs to treat many different impairments, including psychiatric illnesses and epilepsy. It may take much greater effort to engage in cognitive functions because the

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

medication causes a person to feel groggy, disoriented, or slow. Or, a CP may have difficulty with memory because of certain medications.

2. *Walking, standing, and lifting* may be substantially limited even with the use of a prosthetic foot, leg, arm, or hand.

- For neurological reasons, some people experience "pain" or "discomfort" from a missing limb. A CP may experience problems in the remaining limb resulting from over-use to compensate for the missing limb. Significant pain may accompany wearing a prosthetic device. A CP may need to minimize the amount of walking in order to wear the prosthetic leg for longer periods. Or, a person using a prosthetic leg may be able to walk without significant problems, but can only wear the leg for 8 hours per day, and then must rely on a wheelchair or crutches for mobility.

- A prosthetic limb may cause serious chafing, rubbing, blisters, and ulcers, depending on a number of factors, including the materials used, the tightness of the fit, how the amputation occurred, and what body part the prosthetic device is replacing. These side effects could affect the ability to wear the prosthetic device for prolonged periods and/or affect the CP's ability to engage in walking, standing, or lifting, as well as the major life activities of *performing manual tasks and caring for oneself*.

3. *Eating* is a major life activity that may be affected by the use of a mitigating measure if a CP is required to adhere to substantial dietary restrictions because of medication or a device. Or, a CP may be less able to eat or may have to maintain a rigid eating schedule because of certain medications or devices. Certain medications can cause severe nausea, which in turn will affect a CP's ability to eat. An Investigator should ask whether a CP's ability to eat and/or eating habits had to be altered, and if so in what ways.

- Both food and lack of food can cause severe short and/or long-term medical problems for people with diabetes. They must consider the impact on the disease of everything they eat, how much they eat, and when they eat.

4. *Caring for oneself* may be substantially limited as a result of using a mitigating measure.

- Medication and prosthetic devices may cause extreme fatigue, which in turn may affect a CP's ability to care for him/herself.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

- For CPs with diabetes, the ability to care for themselves may require significant changes and/or disruptions to their daily activities to control the frequency and severity of incidents of high blood sugar (hyperglycemia) and low blood sugar (hypoglycemia). The serious short and long-term consequences of hyperglycemia include headaches, blurry vision, breathing difficulties, eye disease, kidney disease, nerve damage, blood vessel disease, and death; the consequences of hypoglycemia include disorientation, weakness, nervousness, seizure, coma, and death. To avoid these serious consequences, CPs with diabetes must be constantly vigilant in closely controlling blood sugar levels. This involves monitoring body signals for fluctuations in blood sugar levels, checking blood sugar levels mechanically, and, based on those levels, adjusting food intake, physical activity, and medications (including insulin and oral medications). People with diabetes must maintain a delicate balance between these elements in order to avoid hyperglycemia and hypoglycemia.

- There also may be a significant impact on the ability to care for oneself as a result of experiencing a medical episode. The inability of a mitigating measure to prevent such an episode may cause so much fear that it seriously affects a CP's ability to care for himself. For example, a CP with epilepsy may have had traumatic experiences having a seizure in public where strangers reacted badly. As a result, he may not be able to go out alone to run routine errands or buy groceries, and may require that someone familiar with his epilepsy always accompany him. Alternatively, a CP may fear possible injury from a seizure, and therefore may be unable to engage in basic activities of caring for oneself, such as cooking and bathing, unless another person is present.

- A person who wears a prosthetic limb may have to curtail activities that are part of caring for oneself, such as household chores and grocery shopping, because the limb can only be worn for a certain period of time.

5. *Sleeping* may be affected by certain medications. Some may cause extreme drowsiness, while others have the opposite effect.

6. *Performing manual tasks* may be affected by certain drugs which can interfere with fine motor skills.

7. *Reproduction* may be affected by use of a mitigating measure. Many medications prescribed to control seizures or psychiatric illnesses can cause birth defects, thus creating a substantial limitation in procreation. (See Bragdon.)

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

8. *Working* may be affected by use of a mitigating measure. Investigators should always review this major life activity last. For a discussion on the impact of the Supreme Court decisions on identifying a class of jobs or broad range of jobs in various classes, see pages 14-16.

V. Relevant witnesses for gathering this information

- After reviewing all of the questions above with the CP, the Investigator should interview other relevant witnesses who may be able to corroborate or supplement the CP's information. These would include:
- family members, friends, and coworkers;
- rehabilitation specialists who work with the CP to address functional limitations; and
- doctors (if they have knowledge about the CP's specific functional limitations).

VI. Based on the evidence collected from asking these and other relevant questions, does the CP who uses a mitigating measure have a substantially limiting impairment?

A. A CP meets the first definition of "disability" where, despite, or because of, the use of a mitigating measure, the CP is substantially limited in performing a major life activity.

B. Determining whether a CP meets this definition does not rest on identifying a multitude of major life activities that are **merely affected** by CP's impairment, even with the use of a mitigating measure. Rather, such a determination depends on evidence that shows that the CP is **substantially limited** in performing at least one major life activity.

C. Problems in performing numerous tasks may signal a substantial limitation in performing a specific major life activity.

- For example, **a CP with epilepsy may be substantially limited in caring for herself** because she cannot live independently due to the fact that her epilepsy necessitates assistance with running a household (e.g., preparing meals, cleaning, bathing, grocery shopping). Even if running a household is not a separate major life activity, it is part of the major life activity of caring for oneself.

D. Always look for evidence concerning the length of time a CP has experienced limitations, the frequency with which they occur, and their severity in order to determine whether the CP is substantially limited.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Second Definition of "Disability": CP Has a Record of a Substantially Limiting Impairment

I. In all charges where a CP indicates that s/he uses a mitigating measure, the Investigator should determine whether the CP has a *record* of a disability for the period before the CP began using the mitigating measure.

A. The Investigator should ask questions about what limitations the CP experienced in performing major life activities because of the impairment prior to using a mitigating measure.

B. Questions should seek detailed information and include the following:

1. What major life activities were limited or precluded prior to using a mitigating measure?

- For example, if a CP with epilepsy has been seizure-free for a substantial period of time and there are few or no side effects from medication, detailed information needs to be obtained concerning CP's seizures, and their impact on performing major life activities, before CP began using the current medication.

2. How long did the CP experience these limitations prior to using a mitigating measure?

3. Was the CP precluded from or limited in performing a major life activity all of the time or only some of the time? That is, were any limitations present only during certain periods? If limitations in performing a major life activity were episodic rather than constant, how often and for how long a period did these limitations occur? How severe were the limitations when they did occur?

- For example, a CP with major depression may have experienced episodes of severe depression that lasted several months before taking medication.

4. Before using a mitigating measure that effectively controls the symptoms or limitations of an impairment, did the CP try any unsuccessful mitigating measures?

- In certain situations, it may take months to find the right medication, or group of medications, to control the symptoms or limitations of an impairment. During this period, the CP may have been substantially limited in performing a major life activity.

C. Additional questions include:

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

1. Can the CP provide information on any "records" or files that document a former substantially limiting impairment or an erroneous record of a substantially limiting impairment (e.g., school records, Dept. of Veterans Affairs documents, workers' compensation records, vocational or other rehabilitation records, medical files)?
2. Was the Respondent aware of the CP's record or history of a disability?

- The Respondent does *not* need to be aware of the CP's record of a substantially limiting impairment for coverage purposes. However, there must be evidence that the Respondent acted on the basis of the CP's record of a disability in order to find that discrimination occurred.

II. Based on the evidence collected from asking these and other relevant questions, does the CP have a record of a substantially limiting impairment prior to using a mitigating measure?

- A CP meets the second definition of "disability" where, prior to using a mitigating measure that effectively controls the symptoms and limitations of an impairment, the CP was substantially limited in performing a major life activity.

Third Definition of "Disability": CP is Regarded as Having a Substantially Limiting Impairment

I. If an Investigator determines that there is insufficient evidence to establish that a CP who uses a mitigating measure or compensating behavior is covered under the first two definitions of "disability," or is uncertain whether a CP meets one of the first two definitions, then the Investigator should assess whether the Respondent regarded the CP as having a substantially limiting impairment.

II. An Investigator should take the following steps to determine if the CP meets this definition:

A. Identify **the impairment** that Respondent knew or believed the CP to have.

B. Identify **the reason** given by the Respondent **to disqualify, terminate, or in any way affect an employment opportunity of the CP.** Examples of possible reasons that a Respondent might offer include:

- failure to meet a physical qualification standard (e.g., hearing or lifting requirements);
- inability to work under stressful conditions;
- insufficient stamina or endurance to work effectively;

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

- concerns that the CP might pose a health or safety risk to self or others; and
- failure to obtain required licenses.

C. Determine whether the Respondent believes that the **CP's impairment is the cause of the perceived problem**. For example, is there evidence that the Respondent believes that CP's impairment is the reason that s/he: (1) failed to meet a qualification standard, (2) cannot tolerate stressful working conditions, (3) has insufficient stamina or endurance to work; (4) poses a health or safety risk, or (5) cannot obtain a required license?

D. Determine whether the Respondent's reason for disqualifying the CP involves performance of a **major life activity** (e.g., the *perceived* inability to lift 5 pounds involves the perception that the CP is unable to perform the major life activity of lifting).

1. To show that a Respondent regarded a CP as having a disability, the Respondent's reason for disqualifying the CP must involve or relate to performance of a major life activity.

- For example, the perceived inability to stand more than a few minutes involves the major life activity of standing; the perceived inability to work under stressful conditions involves the major life activity of working).

2. While in many cases the Respondent's reason for disqualifying the CP may indicate a belief that the CP cannot engage in the major life activity of working, Investigators should first determine whether any other major life activity is implicated (e.g., walking, breathing, standing).

- See (F) below for further instructions on the major life activity of working.

E. Determine whether the Respondent believed that the CP was **substantially limited** in performing the major life activity.

1. **Actions speak louder than words**. This means that Investigators should carefully scrutinize the CP's disqualification and the events that led up to it. Because Respondents are likely to deny that they regarded a CP as having a disability, it is important to assess whether the Respondent's actions indicate otherwise.

- For example, medical leave or workers' compensation files may contain evidence relevant to the issue of whether the Respondent perceived that a CP was substantially limited in performing a major life activity.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

2. Review the chronology of events to see if there is a connection between the Respondent's awareness of the CP's impairment (or perceived impairment) and the Respondent's subsequent actions.

3. Determine whether the Respondent's underlying reason for disqualifying the CP is related to **myths, fears, stereotypes or other attitudes about a particular disability** (e.g., myths about a person's frailty due to a medical condition or fears about rising health insurance costs).

- For example, does the Respondent believe that a person with a moderate hearing loss cannot be a secretary because a hearing aid will not allow her to hear phones and clients needing assistance.

F. If **working is the major life activity at issue**, an Investigator must determine whether the Respondent's reason for disqualifying the CP indicates a belief that the CP is substantially limited in working, i.e., unable to work in a **class of jobs or broad range of jobs in various classes**.

1. If the Respondent can show that its reason for disqualifying the CP applies to something unique about the Respondent's job or workplace, then the Respondent only viewed the CP as unable to work in one specific job.

- In Sutton, the Supreme Court determined that a global airline pilot is only one job and not a class of jobs. Since United Airlines only viewed Sutton as unable to work as a "global pilot," it did not regard her as unable to work in the **class of pilot jobs**, which would include other types of positions, such as regional pilots, pilot instructors, and freight pilots.

- In Murphy, the Supreme Court determined that UPS's mechanics job, which required the ability to drive commercial vehicles, was a single job and not representative of the **class of mechanics jobs**. Thus, according to the Court, UPS only viewed Murphy as unable to perform its unique job requiring a mechanic to drive a commercial vehicle, and not as unable to work in the class of mechanics jobs, which would include diesel mechanics, automotive mechanics, gas-engine repairers, and gas-welding equipment mechanics -- none of which require an individual to drive commercial vehicles.

2. The fact that a CP is unable to satisfy a Respondent's physical or other job requirement does not alone constitute sufficient evidence that the Respondent regards the CP as substantially limited in working.

- Therefore, the Investigator should carefully question the CP to determine whether the Respondent said or did anything to suggest that the CP was viewed

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

as substantially limited in the ability to perform a class or broad range of jobs.

- The Investigator also should seek evidence from the Respondent as to whether it viewed the job from which the CP was disqualified as representative of a class or broad range of jobs.

- For example, a CP with epilepsy who does not actually have a substantially limiting impairment may be covered under the "regarded as" definition if evidence shows that the Respondent has a generalized fear of seizures, and not a specific fear about the consequences of a seizure due to something unique about the Respondent's job or workplace.

- Similarly, if a Respondent has a generalized fear that a person with a psychiatric illness may become violent, without any objective information regarding this particular CP, then the Respondent is acting on generalized fears and misconceptions that would indicate the Respondent believes the CP could not work in most jobs.

- *Respondents may claim that the CP's inability to meet a physical or other job requirement shows that the CP is not "qualified." This claim involves the merits of the charge and must be analyzed separately from the determination of whether the Respondent regarded the CP as having a disability. The Supreme Court's decision in Albertsons (see page 16) underscores the necessity of assessing each qualification standard to determine whether it is valid and whether a CP is "qualified."*

3. Investigators should assess whether the Respondent's reasons for disqualifying the CP would also result in his/her disqualification from other jobs in the Respondent's workplace.

- Investigators should document how many jobs in the Respondent's workplace, and what kind of jobs, were also closed to the CP based on the Respondent's reasoning.

- For example, if a Respondent had all of the different types of mechanic jobs discussed in (F)(1) above, and refused to hire a CP for any of them because of his/her disability, then the Respondent could be regarding the CP as substantially limited in working in the class of mechanics jobs.

III. Based on the evidence collected from asking these and other relevant questions, did the Respondent regard the CP as having a substantially limiting impairment?

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

- A CP meets the third definition of "disability" where a Respondent regards a CP as having a substantially limiting impairment.

PART TWO: IS A CP "QUALIFIED" IF S/HE FAILS TO MEET A FEDERAL REGULATORY SAFETY STANDARD?

After determining that a CP meets one of the definitions of "disability," the next issue is whether the CP is "qualified." In Albertsons, the Supreme Court determined that an employer can require a CP to meet an applicable federal safety standard, even if the standard can be waived under an experimental program. *The following instructions apply to any CP who meets the ADA definition of "disability," regardless of whether s/he uses a mitigating measure.*

In cases where Respondents allege that a CP cannot meet a federally-mandated safety standard, Investigators need to do the following:

I. Carefully review a Respondent's claim that a CP is not qualified because s/he fails to meet a federally-mandated safety requirement.

A. Does the regulatory requirement **absolutely** prohibit the Respondent from hiring the CP due to a disability? Does the regulation apply to the particular position the CP holds or desires, and/or does it apply to the CP's specific disability? Or, is the Respondent **voluntarily** choosing to adopt a federal safety standard?

B. If a Respondent is required by federal law to impose a safety standard on a CP that results in screening out the CP based on disability, does the regulatory requirement establish any exceptions, waivers, or other mechanisms by which the CP would meet the safety concerns embodied in the regulatory requirement?

1. If there is an exception, waiver, etc., is it part of the regulatory requirement? Does a person who qualifies for the exception, waiver, etc. meet the safety requirements of the federal regulation, or does the exception, waiver, etc., constitute an exemption from meeting the regulation's safety requirements?

2. For example, in Albertsons, the Supreme Court determined that an employer does not have to follow an **experimental** waiver program designed to permit persons with monocular vision to qualify for DOT certification to operate commercial motor vehicles. This type of waiver program did not modify the general safety standard that precludes persons with monocular vision from obtaining certification. Rather, the waiver program was designed to obtain data to determine if changes should be made in the general safety standard.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

- The type of program at issue in Albertsons would be different from a waiver program **based on data already collected that has shown that people qualifying for the waiver meet the generalized safety requirements.** Furthermore, an employer could not require an individual to meet the general safety standard if the waiver program **specifically modified the general safety standard**.

II. A Respondent cannot disqualify a CP for failure to meet a general safety standard if the CP receives a waiver from, or is eligible for an exception to, that standard. A Respondent must give deference to the waiver or exception if it is predicated on maintaining safety, constitutes or contains an alternative way to maintain safety, and modifies the general safety standard.

PART THREE: WHAT IMPACT DOES A CP'S APPLICATION FOR, OR RECEIPT OF, DISABILITY BENEFITS HAVE ON A DETERMINATION AS TO WHETHER A CP IS "QUALIFIED?"

In Cleveland, the Supreme Court adopted EEOC's position that application for, or receipt of, Social Security Disability Insurance (SSDI) benefits does not automatically preclude an individual from meeting the ADA's definition of "qualified."

I. There is no inherent conflict between being eligible for SSDI benefits and meeting the ADA's definition of "qualified."

A. Thus, there is no presumption that application for, or receipt of, SSDI benefits defeats a CP's claim that s/he is "qualified" as defined by the ADA.

B. The analysis used by the Supreme Court to compare an application for SSDI benefits and a CP's claim that s/he is "qualified" **also would apply to applications for other types of disability benefits**, such as Long Term Disability benefits or workers' compensation.

C. A CP must be able to explain his/her statements on the benefits application that s/he is unable to work, and thus qualifies for benefits, while also maintaining that s/he can perform the essential functions of the position at issue in the ADA charge, with or without reasonable accommodation.

- For example, because SSDI and the ADA serve different purposes, they use different approaches to assess whether a person can work. Therefore, it is possible for a CP to meet the ADA's definition of "qualified" and also be eligible for SSDI benefits.

D. Below is a general summary of the steps to follow in an ADA investigation involving the receipt of disability benefits. For more detailed information on questions to ask and evidence to seek, Investigators should refer to the EEOC

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" Under the ADA.

II. Investigators should do the following:

A. Review the CP's application for disability benefits. Determine if there appears to be any discrepancies between claims made on the application and the CP's contention that s/he is "qualified." Carefully review apparent discrepancies to determine whether they can be explained by differences in definitions or formulas.

- For example, a CP's claim of "total disability" does not necessarily indicate that s/he cannot perform the essential functions of a job, with or without reasonable accommodation. To the contrary, "total disability" is a Social Security term that, in this context, only means that s/he meets the criteria for SSDI benefits.

B. In reviewing the CP's application for disability benefits, determine whether the CP was merely checking off boxes or fully describing his/her disability and ability to work. To the extent that there appears to be a discrepancy in finding a CP to be "qualified," greater weight should be given to a CP's narrative description of his/her disability and ability to work on a benefits application form than information captured when a CP checked off a box.

C. Determine whether the CP can perform the essential functions of the position at issue, **with or without reasonable accommodation.**

- In many of these cases, a CP's ADA charge will include an allegation of denial of reasonable accommodation. Whether a person can work with reasonable accommodation generally is not a consideration in determining whether a person is eligible for disability benefits.

- For example, the Social Security Administration does not consider whether a person could work if given a reasonable accommodation, but focuses only on an SSDI applicant's ability to work without accommodation. If the CP could have performed the essential functions with a reasonable accommodation, then there is no conflict between statements made on the SSDI application and a CP's claim to be "qualified."

D. Determine whether the CP's condition changed over time. If it did, then a statement about the CP's disability on a benefits application might not reflect his/her ability to perform the essential functions, with or without reasonable accommodation, at the time of the Respondent's employment decision.

- For example, a CP alleges that s/he was wrongfully terminated in January. The following June, the CP filed an SSDI application. If the CP could have performed

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

the essential functions in January, but by June his/her disability had deteriorated so that s/he could no longer work, the CP would still be "qualified" during the relevant period of time for the ADA charge.

If an Investigator has questions about anything in these Instructions, please contact the OLC ADA Division attorney assigned to your field office.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

RELIGIOUS AND "CULTURAL" REASONABLE ACCOMMODATIONS

Prepared by

Pamela Poff

&

Edward Herban

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

RELIGIOUS AND "CULTURAL" REASONABLE ACCOMMODATIONS

Title VII prohibits discrimination based on race, color, sex, national origin, or religion. Of these classifications, religion is the only one that specifically requires an employer to accommodate an individual's practice if the accommodation would not result in undue hardship. The United States Supreme Court and the Equal Employment Opportunity Commission ("EEOC") both offer some guidance as to how the law should be implemented. It is important to note that the EEOC differs from the Supreme Court in its interpretation in certain key respects.

Although the statute specifies that religion as the protected category, other alleged violations of employees' rights based on a denial to accommodate their cultural practices have been prosecuted under the Title VII framework by expanding the scope of religion to include these practices. These practices include vegetarianism and pacifism among other things.

This outline was drafted to give a cursory perspective into the contours of the religious civil right, its enforcement mechanisms, and the resulting cultural impacts.

I. Federal Statutory Source- Title VII

A. Section 703(j) states that the term ``religion'' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. Codified at 42 U.S.C. § 2000e(j) (1999).

B. Religious discrimination claims can take the following forms:

1.) Discrimination based on an affiliation with an established religion. For example, not hiring or promoting an individual because he or she is Buddhist, Catholic, Muslim, etc. The same legal standards apply to this form of discrimination as those for discrimination based on race, sex, or national origin. These include the hostile environment, disparate treatment, and disparate impact paradigms.

2.) Failure to accommodate a religious practice or belief of an employee or prospective employee where such an accommodation would not cause an undue hardship on the employer. This type of claim is aimed at limiting an individual's *personal* conflict between his or her religion and job requirements. Once an individual raises a conflict between a religious belief and a job requirement, the belief must be accommodated unless the employer can demonstrate that the accommodation would cause an undue burden.

C. Since claims of religious discrimination under federal law are confined to the Title VII framework, claimants must exhaust administrative remedies before proceeding to court.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

1.) The EEOC is the federal agency charged with enforcement of religious discrimination claims.

II. What is a Religious Belief?

A. The EEOC interprets "religion" to mean "…moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1. The EEOC relies on two United States Supreme Court Cases defining religious beliefs for purposes of the conscientious objector exception contained in the Universal Military Training and Service Act of 1948.

B. The United States Supreme Court has endorsed this interpretation of religion with respect to Title VII interpretation.

C. The term, "Religious Belief," which is at the crux of Title VII's religion protection, is not clearly defined by either the courts or the EEOC although some guidance is offered in various court decisions.

1.) The belief does not have to be widely held, however, the employee must be sincere in his/her adherence to that belief.

2.) It is fruitless for an employer to argue the validity of a belief or practice with respect to a particular religion since the Supreme Court ruled that "[c]ourts are not arbiters of scriptural interpretation." *Thomas v. Review Bd. of the Indiana Employment Security Div*., 450 U.S. 707 (1980) As such, they cannot adjudicate the validity of a religious requirement with respect to a particular religion. *See id.*

3.) A person can subscribe to a religious belief that is <u>not</u> part of the tenets of his or her chosen religion and still garner protection under Title VII.

4.) There are extremes that cannot be offered Title VII protections, e.g. human sacrifice, certain forms of drug use, etc.

5.) Politics or Religion?

a.) Some political issues are often blurred by religious overtones, however, these political beliefs are not protected by Title VII. For example, the views of white supremacists are often cloaked by Biblical references. These views are not protected.

b.) Some issues may be "religious" for some and "political" for others. For example, a devout Roman Catholic police office or federal agent cannot be required to guard an abortion clinic if the officer's motivation for refusing derived from the teachings of the church. On the other hand, a pro-choice activist cannot seek an accommodation to attend a rally promoting his/her point of view, since it is politically based.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

6.) Church sponsored secular functions, e.g. picnics, are not considered religious obligations for purposes of Title VII.

III. Religious Accommodation – Once the threshold question of whether a belief is a "religious" belief is resolved in the affirmative, the employer MUST give a reasonable accommodation if it doesn't create an undue hardship.

A. REASONABLENESS – In order to understand what types of accommodations must be given, the term "reasonable" must be defined.

1.) The legal standard of reasonableness is fairly relaxed.

2.) Reasonableness is a factual issue and is rarely decided as a matter of law.

a) So long as an accommodation allows the employee to satisfy his religious beliefs, the issue as to whether the accommodation is reasonable becomes a question for the trier of fact.

3.) Employers need only provide an accommodation that is reasonable in light of the situation. Alternatively, it need not provide the accommodation that the employee feels is most advantageous. However, the accommodation provided must allow the employee to successfully satisfy his/her religious belief.

a.) In *Ansonia Board of Education v. Philbrook*, the Supreme Court ruled that the school board's accommodation to allow an employee to take religious holidays off with no pay was not unreasonable even though the employee suggested other alternatives that were more favorable to him; i.e., exhausting personal day entitlements with pay, or, paying for the substitute teacher out-of-pocket and receiving a full day's pay. The fact that the employee's suggested accommodations were reasonable had no effect on the reasonableness of the school board's accommodation. See *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986).

4.) The EEOC is the first trier of fact on all federal religious discrimination claims.

a.) The EEOC guidelines concerning the meaning of "reasonable accommodation" require the following:

ii.) When there is more than one method of accommodation available which would not cause undue hardship, the alternatives for accommodation considered by the employer or labor organization must be evaluated, and

iii.) Since, "some alternatives for accommodating religious practices might disadvantage the individual with respect to his

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

or her employment opportunites, [sic] such as compensation, terms, conditions, or privileges of employment…, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities." 29 CFR § 1605.2(c)(2)(ii) (1999).

b.) **N.B.:** The EEOC guidelines on reasonableness are in conflict with the Supreme Court's ruling in *Ansonia*. In *Ansonia,* the Court specifically held that the guidelines, to the extent that they requires the employer to accept any alternative favored by the employee short of undue hardship, are "***simply inconsistent with the plain meaning of [Title VII].***" *Ansonia Board of Education v. Philbrook*, 479 U.S. at n. 6. The Court also noted that EEOC guidelines are properly accorded less weight than administrative regulations declared by Congress to have the force of law. *See id.*

5.) EEOC Guidance on "work schedule" accommodations. The EEOC found that the most common conflict between employees' religious beliefs and their work assignments can be resolved by modifying the work schedule. The following are a few possibilities suggested by the EEOC:

a.) Voluntary Substitutes and "Swaps"- The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. 29 CFR § 1605.2(d)(3)(i) (1999).

b.) Flexible Scheduling- The EEOC suggests flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices. 29 CFR § 1605.2(d)(3)(ii) (1999).

c.) Lateral Transfer and Change of Job Assignments- Employers and labor organizations should consider whether it is possible to change the job assignment or give the employee a lateral transfer when an employee cannot be accommodated either as to his or her entire job or an assignment within the job. 29 CFR § 1605.2(d)(3)(iii) (1999).

B. UNDUE HARDSHIP – Undue hardship is a concept that has been interpreted by the Supreme Court and the EEOC, giving employers some guidance as to its meaning.

1.) In *Ansonia*, the Supreme Court stated that Title VII does not impose a burden on employers to accommodate religion at all costs. However, employers must be able to demonstrate that the accommodation would cause an undue hardship. The evidentiary burden is clearly on the employer once a request for an accommodation has been made.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

2.) An accommodation causes undue hardship where it would place a more than *de minimis* cost on the employer or other employees. See *TWA v. Hardison*, 432 U.S. 63 (1977).

3.) The EEOC guidelines weigh several factors to determine what "more than *de minimis*" means:

a.) The balance between the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation.

b.) With respect to overtime or premium wages, whether the employer must pay such wages on a regular basis to accommodate the employee.

c.) The payment of administrative costs, e.g. costs involved in rearranging schedules and recording substitutions for payroll purposes, will **not** constitute more than a *de minimis* cost.

4.) Forcing an employer to override a bona fide seniority system would be an undue hardship.

5.) Instances where an employee requests an accommodation and the employer exerts a good faith effort to create an accommodation but discovers that no accommodations is possible, the employer need not make an offer of accommodation since that accommodation, by definition, would create an undue hardship for the employer.

6.) An employer has no obligation to prove or demonstrate that other alternatives, more favorable to the employee, would cause an undue hardship to the employer. See *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986).

C. Work Rules and Regulations- Work rules and regulations often must be modified in order to accommodate employee's religious beliefs.

1.) In West Virginia, a mining employee frequently missed work because he suffered the effects of venomous snake bites as a result of a religious practice. When required by his employer to get a medical certification that he was under medical treatment of a physician he refused on the basis that he could not seek medical attention because of his beliefs. For failing to obtain the necessary certification, the employee was terminated. The EEOC sued the employer on the employee's behalf and the jury awarded the employee $20,000 because the employer failed to reasonably accommodate the employee, even though the employer could have required the certification under the Family and Medical Leave Act.

2.) In New Mexico, an applicant sued an employer for discriminating against him by not hiring him when he explained that he could not comply with

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

the company's drug use policy because of his religious beliefs. The applicant, a Native American, explained to the interviewer that he used peyote in a religious ceremony outside of work. (Peyote is a small spineless cactus that contains minute amounts of mescaline.) When sued, the employer claimed that it could not reasonably accommodate the applicant because it would raise its liability exposure and the drug use violated Department of Transportation ("DOT") regulations. The court disagreed stating that the liability issue would be no more than a *de minimis* risk and that the DOT regulations only prohibited use while on the job. Since the applicant's use was off-duty and did not interfere with his job, the employer had to accommodate the use and modify its drug use policy. *See Toledo V. Nobel-Sysco, Inc.,* F.2d 1481 (10th Cir. 1989).

3.) Some rules and regulations do trump religious accommodations. Issues where personal safety or the safety of other employees are risk, often foreclose the possibility of a reasonable accommodation. These include many OSHA regulations. *See Bhatia v. Chevron*, 734 F.2d 1382 (9th Cir. 1984). *Bhatia* is explained below in section VII.C.2.d.

4.) See also dress code issues raised below in section VII.C.2.

IV. Disparate Treatment Claims

A. Except in rare instances where religion is a *Bona Fide Occupational Qualification*, *BFOQ* members of a particular religion can not be treated more or less favorably than other employees based on their religion or religious beliefs. These claims follow the Title VII framework for other protected categories.

V. Disparate Impact Claims

A. Except in rare instances where religion is a *Bona Fide Occupational Qualification*, *BFOQ* employers cannot systematically exclude members of a particular religion or of beliefs dissimilar to their own based on that religion or belief. These claims follow the Title VII framework for other protected categories.

B. When interviewing prospective employees, it is crucial to avoid lines of questioning that will give rise to a suspicion that religion is a motivating factor. For example,

1.) Do not ask the applicant what church he or she attends or the name of his or her priest, rabbi or minister.

2.) Do not ask the applicant how he or she spends his or her spare time or what clubs he or she belongs to.

3.) How do you feel about having to work with members of a different race?

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

4.) Do you miss work to attend services on holidays?

VI. Hostile Environment Claims

A. As with any legal issue, there are two sides. Employers have a duty to accommodate individuals in their religious beliefs, but also have an obligation to maintain a work environment that is free from harassment for everyone. In some instances, religious beliefs can come into conflict with this latter obligation.

1.) In *Chalmers v. Tulon Co. of Richmond,* 101 F.3d 1012 (4th Cir. 1996), an employee was terminated for writing letters to other employees about her religious beliefs and asking the others to accept those beliefs. When she was asked to cease writing the letters, she stated that it was part of her religious beliefs and that it should be accommodated. The court ruled that there was no practical way to accommodate these beliefs. This case shows a clear conflict between accommodating an individual and maintaining the harassment free work environment.

2.) Proselytizing is generally not a belief that has to be accommodated since it in essence interferes with the rights of other employees.

3.) Similar to sexual harassment claims, hostile environments are also caused by pervasive comments, jokes, drawings, etc. that affect a term, condition or privilege of employment and/or alters the working conditions of employment so that the environment itself is intimidating, hostile, or offensive.

VII. Cultural Implications

A. Views or beliefs not normally associated with religion.

1.) VEGETARIANISM- As mentioned earlier, the term religion is defined very loosely and can be manipulated to cover many different beliefs. In 1996, the Orange County Transportation Authority agreed to pay a vegetarian bus driver $50,000 to settle his lawsuit alleging that the authority wrongfully fired him for refusing to hand out coupons for free fast-food hamburgers. Although this case settled before it was tested in a court, the EEOC found that the transit authority failed to reasonably accommodate the employee on the basis of his strongly held moral and ethical beliefs— namely that animals should not be killed or eaten.

2.) Atheism- The Supreme Court touched on the issue of atheism being a religion for purposes of Title VII's protections in the *Hardison* case. It mentioned hypothetically that in an effort to accommodate another employee's religious beliefs by allowing that employee time off and requiring other employees to fill-in, the employer is in essence penalizing

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).

the atheist employee for holding his beliefs, especially if the required make-up shift is an undesirable one. AS such, the employer must take care when it affects the lives of other employees when fashioning an accommodation for another.

B. Melting Pot issues

1.) Some practices may seem odd to mainstream individuals, especially practices that require individuals to appear differently, e.g. dress, body decorations, facial hair, etc. Attempts at accommodation must be made when facing these practices. Mere suspicion that a particular practice could hypothetically have an adverse effect on profitability is not sufficient to deny employment or otherwise discriminate against employees.

2.) Dress Codes- Mandatory dress codes must almost always yield to religious beliefs by means of accommodation, if such an accommodation is practicable.

a.) Modification of dress codes and uniforms is almost always a reasonable accommodation that doesn't create an undue hardship on the employer. However, if a component of a dress code or uniform relates to a directly bona fide and identifiable business reason, e.g. name tags, or other identity features, it may give rise to an undue hardship exception.

b.) Muslim police officers in Newark, New Jersey are allowed to keep their facial despite a general dress code prohibiting facial hair. In this case, the Muslim officers argued that allowing them to wear their beards would be a reasonable accommodation since the department already made accommodations for medical premised on the Americans with Disabilities Act. The court endorsed this argument.

c.) In another case, where a devout Muslim woman was fired for wearing her head covering, the employer was required to make a reasonable accommodation and allow her to wear her religious clothing, even though it violated the dress code and affected at least one client.

d.) On the other hand, in *Bhatia v. Chevron,* an employer did not have to accommodate an employee's belief that he couldn't shave his facial hair because his job required him to wear a respirator that would not work with his facial hair. Allowing the employee to work in the same job, but without performing the functions that required a respirator, would place others at greater risk and would simply be unfair to those other employees. Since a transfer was not available, and shaving was out of the question, the employee was let go. This termination did not violate Title VII.

This material is protected by copyright. Copyright © 1999 various authors and the American Corporate Counsel Association (ACCA).