Labor & Employment 101: Accommodation

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101 Basics of Accommodation Law

What we will discuss today:

I. Background – the 101 Basics of Accommodation Law
   A. Prior to the ADAAA
   B. How the ADAAA changed this area of law
   C. The basics on religious accommodation

II. EEOC Guidance on Reasonable Accommodations

III. Leaves of Absence as Accommodation

IV. Telecommuting as Accommodation – Recent Decision

V. Reduced Work Schedule, Light Duty, or Elimination of Specific Tasks as Accommodation

VI. State and Local Law Trends – Accommodations for Pregnancy

VII. What Employers Can Do – Practical Tips

Prior to the ADAAA

- Is the person a “qualified individual”?
  • Is he able to perform the essential functions of the job (with or without an accommodation)

- Is the person requesting an accommodation?
  • Alternatively, are you on notice that perhaps the employer should ask if one is needed?

- Is the accommodation request reasonable?

- Are there alternative accommodations that are also reasonable?

- Would providing reasonable accommodation pose an undue hardship?
  • This is the interactive process
FOUR STEP INQUIRY

1. Impairment Substantially Limits Major Life Activity?

4. Are There Other Reasonable Accommodations?

2. Performs Essential Functions With or Without Accommodation?

3. Is the Requested Accommodation Reasonable?

HOW THE ADAAA CHANGED ACCOMMODATION LAW

- Mostly revised “major life activities” and “substantially limits” portions of the qualified individual definition.
- Duty to accommodate even if impairment is mitigated by therapies, medications, etc.
- Duty to accommodate even if impairment is episodic or in remission if, when active, it would substantially limit a major life activity.
- Employees that are only “regarded as” disabled are not entitled to a reasonable accommodation.
**RELIGIOUS ACCOMMODATIONS**

- Voluntary schedule changes and swaps
- Flexible scheduling or leaves of absence for religious observances
- Lateral transfer and change of job assignments
- Dress
- Grooming
- May be undue hardship if:
  - costly,
  - compromises workplace safety,
  - decreases workplace efficiency,
  - infringes on the rights of other employees, or
  - requires other employees to do more than their share of potentially hazardous or burdensome work

**EEOC GUIDANCE ON REASONABLE ACCOMMODATIONS**

- Job restructuring
  - Marginal job functions reallocated
  - Essential or marginal functions: alter when they must be performed
  - Never have to reallocate essential functions but may
- Part-time or modified work schedules
- Leaves of absence
- Working from home
- Acquiring or modifying equipment
- Changing tests, training materials, or policies
- Reassignment to vacant position for which the employee is otherwise qualified
LEAVES OF ABSENCE AS ACCOMMODATION

- Permitting use of accrued paid or unpaid leave
- Need not provide paid leave beyond policy
- No-fault leave policy may need to be suspended for a person with a protected disability
- Holding the position open during leave
- Prorating production requirements
- Disregarding absence period when making selective decisions like bonuses, RIFs, promotions
- Request for leave of an indefinite duration

Hwang v. Kansas State Univ. (10th Cir. May 29, 2014)

- University policy 6 month maximum LOA
- Professor requested and was granted 6 month LOA for cancer treatment
- Professor requested several additional months of leave, which University denied
- Held: not a reasonable accommodation to provide leave more than 6 months. Not able to perform essential functions of the job.
- Rejected EEOC Guidance re “inflexible leave policies”
**TELECOMMUTING**

EEOC v. Ford Motor Co. (6th Cir. Apr. 22, 2014)

- Jan Harris – resale steel buyer at Ford Motor
- This is a group problem solving, interactive task
- Harris suffered from IBS, missed work a lot
- Ford offered flextime telecommuting as a trial
- She missed deadlines, lacked access to info, people, and suppliers
- Ford offered to move her office or change jobs to one suitable for telecommuting
- Harris rejected both options

More poor performance, terminated
- EEOC sued
- Trial court: MSJ for Ford. She was not qualified for the position because of her excessive absenteeism
- Sixth Circuit: Reversed and remanded
  - Is physical presence essential to job?
  - Could Ms. Harris perform all of her duties remotely?
CHANGE IN JOB DESCRIPTIONS

- Light Duty
- Transferring marginal job functions to others

MODIFIED OR PART-TIME SCHEDULE

- Adjusting arrival or departure or break times, absent an undue hardship
  - Some operations are such that this would significantly disrupt operations
  - May need to consider re-assignment to a vacant position that would enable altered hours
- Elimination of Specific Tasks as Accommodation
ACCOMMODATIONS FOR PREGNANCY

- Supreme Court hearing UPS case re: pregnancy bias
- Young v. United Parcel Serv., Inc., U.S., No. 12-1226, 7/1/14) (707 F.3d 437 (4th Cir. 2013)
  - Requested light duty – 20 pounds lifting
  - UPS countered by putting her on maternity leave
    - Light duty was for ADA, Workers’ Comp, or those who lost DOT certification, but not for pregnancy
  - Courts have ruled that pregnancy neutral policies are not violative
- Pregnant Workers Fairness Act

ACCOMMODATIONS FOR PREGNANCY

- LOCAL AND STATE TRENDS
  - California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Minnesota, New Jersey, West Virginia, City of New York, City of Philadelphia
  - Pending: D.C., Georgia, Missouri, Pennsylvania
**Accommodations for Pregnancy**

- **Maryland:**
  - Change job duties, work hours, light duty, leave
  - If light duty offered, then must transfer
  - Exceptions: creating additional employment, discharging another, transferring a senior coworker, or promoting an unqualified employee
- **California:** No undue hardship defense
- **Minnesota:** No undue hardship defense for (1) more frequent breaks; (2) seating; (3) limits on lifting more than 20 pounds
- **San Francisco:** accommodation due for any family status caregiver, and allows telecommuting, schedule changes, reduction in hours, and altered work assignments

**Practical Tips**

- Develop well-drafted job descriptions
- Create or revise a reasonable accommodation policy
- Train managers to recognize accommodation requests and how to handle
- Go through the four steps outlined above
- If your organization is not comfortable with the risk, develop a consistent policy about the instances in which it will inquire into step 1
- Before beginning the interactive process, make sure that you have asked every question possible to understand the request:
  - What duties can and cannot be performed
  - Helps to have well developed job descriptions
  - How long will it last
- Document the entire interactive process
- If appropriate for your company, consider multiple levels of review and/or accommodation committee
RESOURCES

- Accommodations for employees with disabilities:
  http://www.eeoc.gov/laws/types/disability.cfm
- EEOC guidance accommodations:
  http://www.eeoc.gov/policy/docs/accommodation.html
- Religious Discrimination and Accommodation
  http://www.eeoc.gov/laws/types/religion.cfm
- Religious accommodations related to grooming:
  http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm
January 22, 2010

Second Circuit Holds Leave Is Not Protected by ADA If It Does Not Lead To A Return To Essential Job Functions

Manesh K. Rath
Wesley K. Wright

The Second Circuit recently held that an employer did not need to provide leave as an accommodation under the ADA if, after the leave, the employee was unable to return to duty. The case is Graves v. Finch Pruyn & Company, Inc.

The Facts Of The Case

George Graves worked for paper manufacturer Finch Pruyn & Company, Inc. (“Finch”) for 17 years. He began as a laborer in the wood room and eventually was promoted to paper inspector in its quality-assurance department. Paper inspectors at Finch Pruyn are on their feet for much of their shifts.

In late 1999, Mr. Graves was diagnosed with a bone spur in his foot, a condition which required surgery and treatment. After receiving this diagnosis, Finch assigned Mr. Graves to “light duty” for the months before surgery to accommodate him.

Mr. Graves underwent surgery in May 2000 and missed the next three months of work while on paid disability leave.

He returned to work in September 2000 and was assigned to light duty through October. Finch had no more light duty work at the end of October, so Mr. Graves was placed on paid disability leave.

Under company policy, Mr. Graves was entitled to six months of paid disability leave. This paid leave expired in December 2000. On January 4, 2001, Finch gave Mr. Graves three options: (1) return to full-duty work immediately; (2) take a 64% pay cut and work at a desk job; or (3) have a doctor find Mr. Graves totally disabled, allowing him to take disability retirement and pension benefits of $269,000.

Mr. Graves elected total disability with a disability payment of $269,000. He left Finch at the end of January 2001.

Mr. Finch then sued the company under the ADA, alleging that Finch should have provided the accommodation of additional unpaid leave after the last day of his paid disability leave. Mr. Graves argued that this was a reasonable accommodation request since Finch had already provided paid disability leave.

What The Court Said

Finch Pruyn argued that a leave request for an indefinite period is unreasonable under the ADA. On appeal, the Second Circuit held that Mr. Graves failed to demonstrate that a reasonable accommodation existed at the time of the adverse action that would have allowed him to perform the essential functions of his job.

Specifically, the court held that Mr. Graves’ leave request would not enable him to perform his essential job functions presently or in the immediate future. Mr. Graves’ doctors reported that it was unlikely that Mr. Graves would ever be able to return to his previous occupation after the surgery.

Mr. Graves argued that, nevertheless, Finch was required to at least engage in the interactive process about a reasonable accommodation. The Second Circuit rejected that argument, too, stating that, since Mr. Graves could not make a prima facie showing that an accommodation existed, Finch was under no duty to engage in the interactive proves.

What Employers Should Do

In light of the Finch Pruyn decision, an employer may deny an employee’s request for leave if the employee cannot demonstrate that the leave will enable him to return to his essential job functions immediately or in the near future.

Please do not hesitate to contact us with questions.

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Keller and Heckman LLP

EEOC Issues Final Rule for Americans with Disabilities Act Amendment
Act of 2008

Manesh K. Rath

On March 25, 2011, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued a Final Rule to amend the existing Americans with Disabilities Act (“ADA”) regulations. The purpose of the Final Rule is to revise the existing regulations to conform to the Americans with Disabilities Act Amendment Act of 2008 (“ADAAA”), which changed the definitions of “major life activities,” “substantially limits,” and “regarded as.”

“Major Life Activities” Defined

The Final Rule broadens the definition of “major life activities” by including two non-exclusive lists of major life activities: (1) a list of major life activities; and (2) the operation of major bodily functions.

The first list includes active tasks, such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Notably, sitting, reaching, and interacting with others, were not mentioned in the ADAAA.

The second list, “operation of major bodily functions” includes bodily functions specified in the ADAAA, such as normal cell growth, immune system, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, reproductive, special sense organs, skin, and genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal.

“Substantially Limits” Defined

In the Final Rule, the EEOC included a “common-sense assessment” based on comparing an individual’s ability to perform a specific major activity to that of most of the general population.

The agency introduced nine rules of construction for determining whether an impairment “substantially limits” an individual. They include a mandate to interpret the Act broadly; to compare an individual to most people and not to look at whether “substantial” means “significantly” or “severely;” to focus on the employer’s compliance rather than the employee’s limitations; to consider but not require scientific, medical or statistical analysis; to disregard mitigating measures such as treatments or assistive devices; and to consider conditions that are episodic or in remission when the condition is active.

Clarification of “Regarded As”

The EEOC states in the Final Rule that employees who are not seeking an accommodation should be evaluated under the “regarded as” standard, and not under the “actual disability” or “record of” standards for who qualifies for protection under the ADA.

Plaintiffs claiming protection under the “regarded as” standard are not entitled to an accommodation as a means of relief.

Nor may they point to a failure to accommodate as violative conduct. Plaintiffs seeking to show a failure to accommodate or seeking an accommodation as relief must meet the “actual disability” or “record of” standards.

What Employers Should Do

The Final Rule takes effect on May 24, 2011. In light of the substantial changes to the ADA effected by the Final Rule, employers should take several steps to bring their practices into compliance.

First, employers should update their policies and begin training management, human resources professionals, and supervisors of the Final Rule’s changes.

Second, employers should carefully document the interactive process between employees and employers in discussing accommodations. This is now critical since an employee has an easier threshold to meet the the ADA’s definitions for what used to be called a “qualified disability.”

Please do not hesitate to contact us with questions.
Seventh Circuit Holds that Employers Must Re-assign Disabled Workers to Vacant Positions

Manesh K. Rath
Crystal N. Skelton

The Seventh Circuit recently overturned longstanding precedent involving whether an employer is required to transfer a disabled employee as a “reasonable accommodation” under the Americans with Disabilities Act (ADA). The case is Equal Employment Opportunity Commission v. United Airlines, Inc.

Facts of the Case

In 2003, United Airlines introduced its Reasonable Accommodations Guidelines for employees who could no longer perform their current job duties due to a disability.

The Guidelines provide that, although employees requiring accommodation will not automatically be placed into a vacant position, these employees will be given preferential treatment, such as being allowed to submit unlimited transfer applications, receiving a guaranteed interview, and receiving priority consideration over an equally qualified applicant.

The Equal Employment Opportunity Commission (EEOC) sued United, challenging this policy as violative of the ADA. The agency argued that ADA requires a “reassignment to a vacant position” as a possible “reasonable accommodation” for disabled employees.

The EEOC alleged that the term “reassignment” under the ADA requires employers to appoint employees who are losing their current positions due to disability to a vacant position for which they are qualified.

What the Court Said

The district court dismissed the complaint on the merits, holding that the Seventh Circuit decision in EEOC v. Humiston-Keeling was binding.

In 2000, the Humiston-Keeling court held that a competitive transfer policy does not violate the ADA, because the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided that the employer has a “consistent and honest policy” to hire the best applicant.

The Seventh Circuit overturned the district court, and its previous decision in Humiston-Keeling, holding that the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, so long as such accommodation is reasonable and does not present an undue hardship on the employer.

The Seventh Circuit found that Humiston-Keeling was no longer authoritative in light of the 2002 Supreme Court decision of U.S. Airways, Inc. v. Barnett. In Barnett, the Supreme Court considered reassignment under the ADA in the context of a “seniority system;” that is, where employees are given preferential treatment based on seniority, regardless of the employee’s disability status.

In Barnett, U.S. Airways had argued that it was not required to grant an accommodation when it would violate a disability-neutral rule.

What Employers Should Do

In light of this case, an employer may no longer rely on the fact that it has a policy that is consistently and neutrally applied.

Instead, an employer should provide a person with a qualified disability with the presumption that a transfer is an appropriate accommodation unless it can show that such a transfer is an undue hardship to the organization. Also, the fact that the company has a well-established competitive or seniority system does not, per se, qualify as an undue hardship.

Please do not hesitate to contact us with questions.
Manesh K. Rath  
Jacquelyn L. Thompson

The Eighth Circuit affirmed its rule that an employer is entitled to rely on its good faith investigation findings in making an adverse employment action. The case is *Pulczinski v. Trinity Structural Towers, Inc.*

**Facts of the Case**

Joe Pulczinski worked as a lead painter for Trinity Structural Towers in Newton, Iowa from 2008 until his termination in 2010.

Mr. Pulczinski’s son has cerebral palsy and severe asthma. Mr. Pulczinski occasionally took time off under the Family and Medical Leave Act (“FMLA”) to care for his son.

As part of his duties as lead painter, Mr. Pulczinski was required to work overtime whenever someone on his team volunteered to work weekends.

On November 19, 2010, David Thornton, Mr. Pulczinski’s supervisor, asked for volunteers to work that Saturday, November 20. Several members of Mr. Pulczinski’s team volunteered.

Later that day, another team member informed Mr. Thornton that Mr. Pulczinski had stated that he was planning not to show up at work, and was to visit a casino on Saturday.

On November 20, Mr. Pulczinski’s son had an adverse reaction to his asthma medicine. Mr. Pulczinski called in to inform Trinity that he would not be able to work because he had to take his son to the hospital.

Mr. Thornton, fully expecting Mr. Pulczinski to call in as absent, suspended Mr. Pulczinski and commenced an investigation.

Trinity found that Mr. Pulczinski had told several co-workers earlier in the week that he was planning a trip to a casino and that he would not appear for work on Saturday.

Trinity further found several co-workers who stated that Mr. Pulczinski frequently became upset with them when they volunteered for weekend overtime.

Trinity ultimately decided to terminate Mr. Pulczinski for attempting to cause a slowdown in work by discouraging others from working overtime.

Mr. Pulczinski filed suit alleging that his termination constituted a violation of the FMLA and the Americans with Disabilities Act (“ADA”).

**What the Court Said**

Mr. Pulczinski argued that he had shown pretext by showing that the purported basis for termination was in fact false. The Eighth Circuit held that an employer is entitled to its honest belief even if that turns out to be inaccurate. Thus, taken alone, the fact that the employer’s belief turns out to be wrong is not enough to prove discrimination.

Mr. Pulczinski argued that the court should apply the Sixth Circuit’s modified “honest belief” rule. In the Sixth Circuit, an employer must establish that it placed a reasonable reliance on the facts that were before it at the time the adverse decision was made.

The Eighth Circuit specifically rejected the Sixth Circuit’s approach as being inconsistent with the statute.

The court noted that it is not in the court’s province to determine whether the employer’s investigation of alleged employee misconduct reached the correct result, so long as that result was in fact the employer’s reason for the plaintiff’s termination.

**What Employers Should Do**

The Seventh Circuit has joined with the Eighth Circuit in upholding the honest belief rule. However, there is a circuit split, so the Supreme Court may soon take up this issue.

In the meantime, all employers should conduct a good faith investigation before taking any adverse actions. A thorough investigation will help offset the risks of a court finding pretext.

Please do not hesitate to contact us with questions.
State and Local Laws Expand Employer Duty to Accommodate Family Status

Manesh Rath
Barbara Levos

San Francisco Ordinance Grants Right to Request Flexible Work Schedules

The San Francisco Family Friendly Workplace Ordinance was approved on October 9th, 2013. This ordinance requires employers of 20 or more employees to consider flexible or predictable working arrangements to assist employees who are in caregiver roles. The law prohibits employers from taking an adverse employment action against an employee with caregiver status.

Under a flexible and predictable working arrangement, a qualified employee may request scheduling changes that include the number of hours they work, telecommuting, an altered start and/or departure time and work assignments.

A “qualified” employee under this ordinance is a person who has been employed with the employer for six months or more, has worked at least eight hours per week, and is responsible for the care of a child, a family member with serious health issues or a parent over 65 years old.

The ordinance states that an employer has the right to deny a request, but it must be for a good faith business reason. The reasons may be that the identifiable costs are too great, client demands won’t be met, job sharing issues will be created among other employees, or perceived time constraints on projects.

The San Francisco Office of Labor Standards Enforcement (OLSE) will enforce the ordinance, establish rules and investigate potential violations.

Employers will be required to post a notice informing employees of their rights under the ordinance. Employers must also retain records of all requests under this ordinance for a period of three years from the date of the request.

Maryland Law Requires Light Duty Accommodation During Pregnancy

Maryland’s new law, the Reasonable Accommodations for Disabilities Due to Pregnancy Act, became effective on October 1, 2013. The act requires employers with fifteen or more employees to make reasonable accommodations for employees who request an accommodation and have a disability caused by pregnancy.

An accommodation may include changing the employee’s job duties, changing the employee’s work hours, relocating the employee’s work area, providing mechanical or electrical aids, transferring the employee to a less strenuous or less hazardous position or providing leave.

If an employee makes a request for a transfer to a less strenuous or hazardous position, the employer shall transfer the employee for a period of time up to the duration of the pregnancy if the employer has a policy or practice requiring or authorizing the transfer of a temporarily disabled employee to a less strenuous or hazardous position.

Alternatively, if the employer has no such policy or practice, it may still have to make such a transfer if a health care provider advises it and the employer can make the transfer without creating additional employment, discharging an employee, transferring a more senior employee, or promoting an unqualified employee.

Employers will be responsible for posting a notice and revising their handbooks accordingly.

What Employers Should Do

Both the San Francisco and Maryland laws impose posting responsibilities. In addition, Maryland employers must revise their written policies to reflect their compliance duties under the new law.

Please contact us with questions.
BIOGRAPHY OF JEFFREY A. SPECTOR

Jeffrey A. Spector is an Assistant General Counsel, Labor and Employment Law, for Sodexo, Inc. in Gaithersburg, Maryland. Sodexo, Inc. is a leading quality of daily life solutions company in the United States, Canada and Mexico, providing food and nutrition, facilities management, environmental, retail, concierge, logistics, and space design services. With $8 billion in annual revenue and 125,000 employees, Sodexo in North America serves more than 10 million customers daily in corporations, leisure and entertainment venues, conference centers, health care centers, senior living communities, schools, colleges and universities, government agencies, and remote sites.

Prior to his employment at Sodexo, Mr. Spector was Associate Counsel, Employment Law for MCI, Inc., a global telecommunications company; practiced labor and employment law with law firms in Washington, D.C.; and served as a Law Clerk to the Honorable Daniel H. Huyett, III, U.S. District Judge, Eastern District of Pennsylvania.

Mr. Spector is a graduate of Cornell University’s School of Industrial and Labor Relations and the University of Pennsylvania Law School, where he was an Executive Editor of the Comparative Labor Law Journal.
Manesh Rath is a trial and appellate attorney with experience in general commercial litigation, wage and hour and class action litigation, occupational safety and health (OSHA) law, labor law, and employment law. He has served as lead amicus counsel on several landmark cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. On developing legal issues, he has been quoted or interviewed in *The Wall Street Journal*, *Bloomberg*, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS’s Nightly Business Report," WAVY-TV and C-SPAN. He was listed in *Smart CEO* Magazine’s Readers’ Choice List of Legal Elite.

**General Commercial Litigation**
Mr. Rath counsels and represents businesses and associations facing business litigation disputes. In numerous cases nationwide, Mr. Rath has conducted motions and trials before state and federal courts and administrative agencies throughout the nation, including serving as lead counsel defending businesses in collective and class action matters.

Mr. Rath serves as an instructor for the National Institute for Trial Advocacy.

**Wage and Hour and Class Action Litigation**
For almost 20 years, Mr. Rath has successfully defended employers nationwide in wage and hour litigation.

He has served as lead counsel in class and collective action litigation in a number of jurisdictions. Mr. Rath also performs internal wage and hour audits for companies around the country.

**OSHA**
Mr. Rath has extensive experience representing industry in OSHA rulemakings. He has successfully represented employers—including some of the largest in the country—against OSHA citations and investigations before federal and state OSHA.

**Accessibility**
Mr. Rath advises product manufacturers, employers, and construction firms on compliance with accessibility guidelines.

**Transportation**
Mr. Rath works with shippers and carriers of freight and passengers on matters involving federal motor carrier safety and hours of service compliance.

**Labor Law**
In the area of labor law, Mr. Rath represents employers throughout the country in union organizing campaigns, in negotiating collective bargaining agreements, and in defending against unfair labor practice (ULP) charges.

**The Employment Law Aftermath**
For ten years, *The Employment Law Aftermath with Manesh Rath*, has presented the most impactful employment law developments in the past quarter to the corporate counsel of some of the region's largest employers.

**OSHA 30/30 – A Thirty Minute OSHA Update Every Thirty Days**
Mr. Rath is the host of the *OSHA 30/30* webinar, bringing critical developing issues in OSHA law to corporate counsel and safety and health professionals nationwide.

**Service:** Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. Society For Human Resources (SHRM) Special Expertise Panel, and on the Northern Virginia SHRM Board of Directors for several years. Faculty, National Institute for Trial Advocacy.

**Publications:** Mr. Rath is a co-author of three books: *Occupational Safety and Health Law Handbook* (Government Institutes, 2001), *Employment-Labor Law Audit* (9th Edition), and *Understanding Fair Labor Standards Act Violations* (Aspatore 2010). His writing has been referenced by attorneys and judges.