

Is it That Hard to Accommodate Me?

Dealing Wisely with Employee Accommodation Issues and Preparing for Future EEO Accommodation Trends

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Accommodations topics to be covered:

PART 1 (ADA Accommodations):

- Leave
- Work at Home/Telework
- Drug Testing
- Mental Health
- Service and Comfort Animals

PART 2 (Non-ADA Accommodations):

- Religious/Prayer
- Transitioning/Transgender Employees
- Pregnancy/Mother Wellness

Part 1: ADA Accommodations

Leave

Work at Home/

Telework

Drug Testing

Mental Health

Service and Comfort

Animals

The Americans with Disabilities Act of 1990

- Protects individuals with disabilities
 - Physical or mental impairment that substantially limits one or more major life activities
- An employee must be able to perform the essential functions of the position with or without a reasonable accommodation
- Employer must engage in interactive accommodation process upon request of accommodation
 - Employer not required to provide requested accommodation
 - Interactive process is ongoing

ADA Amendments Act of 2008 (ADAAA)

- Relaxed the definition of “disability” so easier to satisfy
 - Need not prevent, or significantly or severely restrict, a major life activity
 - Major life activities include “major bodily functions”
 - Ameliorative effects of mitigating measures not considered
 - “Episodic” or “in remission” impairments are substantially limiting if they would be when active

Reasonable Accommodation & Undue Hardship

- Reasonable accommodation
 - Must be provided to qualified individuals (employees or applicants) with disabilities, unless to do so would cause undue hardship
- “Undue hardship” means significant difficulty or expense of providing a specific accommodation
 - Fact specific inquiry

Reasonable Accommodation - Examples

- Examples include:
 - making existing facilities accessible;
 - job restructuring;
 - part-time or modified work schedules;
 - acquiring or modifying equipment;
 - changing tests, training materials, or policies;
 - providing qualified readers or interpreters; and
 - reassignment to a vacant position

Leave as a Reasonable Accommodation

Leave of Absence as an Accommodation

- An **indefinite** leave of absence is not reasonable (EEOC views it as an undue hardship)
- A **finite** leave of absence may be a reasonable accommodation depending on the circumstances
 - Extensions beyond one year mostly rejected by courts
- If an employee exhausts statutory leave (i.e. FMLA) or the leave granted by company policy, additional leave may still be available as a reasonable accommodation

Leave of Absence - No Fixed Date of Return

- Examples:
 - Approximate date of return (e.g., the employee can return to work “within eight to twelve weeks”)
 - Delay in originally agreed-upon return to work date
- EEOC position:
 - Leave without a fixed date of return may be a reasonable accommodation
 - But the lack of a fixed date may itself make the leave an undue hardship based on disruption caused if employer cannot plan for the employee’s return or permanently fill the position

Leave of Absence - “No-Fault” Leave Policies

- “No fault” leave policy - employee is automatically terminated after using a certain amount of leave (e.g., after 6 months of absence regardless of reason)
- These maximum leave policies are, themselves, not reasonable
- Employer must make an exception to the policy as a reasonable accommodation, absent undue hardship, if a disabled employee needs additional leave as a reasonable accommodation
- Again, indefinite leave is not reasonable

Undue Hardship for Leave Requests

- Factors to consider:
 - the amount and/or length of leave required;
 - the frequency of the leave;
 - whether there is any flexibility with respect to the days on which leave is taken;
 - whether the need for intermittent leave on specific dates is predictable or unpredictable;
 - the impact of the employee's absence on co-workers and on whether specific job duties are being performed in an appropriate and timely manner;
 - the impact on the employer's operations and its ability to serve customers/clients appropriately and in a timely manner, which takes into account, for example, the size of the employer; and
 - the amount of time already taken, whether pursuant to workers compensation, FMLA, an employer's leave program, or as a reasonable accommodation

What the Courts Are Saying



- Circuit split over whether an employee who is completely unable to work for a finite period of time due to a disability is “qualified” for the position
 - Seventh Circuit – multi-month leave of absence is not a “reasonable” accommodation; rejected EEOC’s view that leave should be considered reasonable accommodation if it is of a definite, time-limited duration requested in advance, and likely to enable an employee to perform essential job functions when he or she returns (*Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (2017))
 - Ninth Circuit – leave enables employee to work, albeit at end of leave, and thus employee is qualified (case against large multi-national retailer)
- Supreme Court recently denied *certiorari* in *Severson* that would have potentially resolved the split

What the Courts Are Saying



EEOC v. United Parcel Service, Case No. 09-cv-5291 (N.D. Ill.) **(consent decree entered Aug. 2017)**

- EEOC alleged employer applied 12-month maximum leave policy to terminate qualified employees who could have been accommodated absent undue hardship
- Settlement included payment of \$2 million, update to and improved implementation of policies, training, and reporting to EEOC

www.eeoc.gov/eeoc/newsroom/release/8-8-17.cfm

What the Courts Are Saying



Billups v. Emerald Coast Utils. Auth., 714 F. App'x 929 (11th Cir. 2017)

- Plaintiff was a utility services technician in Florida who was out of work for six months
- Employer asserted leave was an undue hardship and plaintiff sued for failure to accommodate
- The Court held that employee could not show he was denied a reasonable accommodation that would have enabled him to perform his essential job functions given the uncertainty of when the employee could return to work
 - The court emphasized that an accommodation is unreasonable unless it would allow the employee to “perform the essential functions of [his job] presently or in the immediate future.”

What the Courts Are Saying



Delgado Echevarria v. AstraZeneca Pharm., LP, 856 F.3d 119 (1st Cir. 2017)

- Plaintiff, a Hospital Specialist, suffered from depression and anxiety
 - Exhausted STD benefits after almost five months
 - When employer requested she return to work or be presumed to have resigned, employee submitted paperwork requesting an additional 12 months of leave
 - Filed suit alleging failure to accommodate her leave request
- Court found that plaintiff could not perform essential functions of position with reasonable accommodation
 - Plaintiff failed to show that 12-month leave request was reasonable

What the Courts Are Saying



Adigun v. Express Scripts, Inc., 2018 U.S. App. LEXIS 21864 (11th Cir. 2018)

- Plaintiff, a patient care advocate, had a heart attack and suffered from cardiac disease, a condition that would last indefinitely
 - Never returned to work following heart attack and never contacted employer
 - Terminated for excessive absences
- Plaintiff sued for failure to accommodate
 - Claimed FMLA Certification of Health Care Provider Form should have been construed as a request for a reasonable accommodation
- Court held form did not trigger request but even if it had, her request was not reasonable because it did not provide a specific date on which she could return to work

Leave of Absence - Best Practices

- Analyze and revise leave policies, as necessary, to ensure the policy is not inflexible
- If you have a no-fault attendance policy, consider revising it to remove the mandatory termination provisions
- Amend policies, if necessary, to include language stating that exceptions will be made in order to provide reasonable accommodation
- Train employees responsible for granting leave requests to understand where the courts and EEOC fall on leaves of absence
- Analyze each leave request on a case-by-case basis (definite vs. indefinite; specific expected return to work date; undue hardship) and engage in interactive process

Leave of Absence - Best Practices (cont'd)

- Follow-up in reasonable intervals with employees on their projected return to work date and document communications
- Document any facts or information related to an undue hardship analysis (i.e. steps taken to fill-in for employee, operational impact of the absence, etc.)
- Request medical documentation supporting extended leave and expected return date, if warranted

Leave of Absence - EEOC Resources

- Employer-Provided Leave and the Americans with Disabilities Act
www.eeoc.gov/eeoc/publications/ada-leave.cfm
- Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA
www.eeoc.gov/policy/docs/accommodation.html

Work at Home / Telework as a Reasonable Accommodation

Work at Home/Telework

- The ADA does **not** require an employer to offer telework
- If an employer does offer telework, it must allow employees with documented disabilities an equal opportunity to take part in the program
- If an employer has certain eligibility requirements for employees to participate in the program (such as a rule that the employee work for at least one year before becoming eligible), it may be required to waive those requirements for an employee with a disability who needs to work from home
- In some situations, working at home may be the only effective option for an employee with a disability

Telework - Factors to Consider in Reasonable Accommodation Determination

- Employer's ability to supervise the employee adequately
- Whether any duties require use of certain equipment or tools that cannot be replicated at home
- Whether there is a need for face-to-face interaction and coordination of work with other employees, or in-person interaction with outside colleagues, clients, or customers
- Whether the position requires the employee to have immediate access to documents or other information located only in the workplace

What the Courts Are Saying



EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015)

- Plaintiff was a resale buyer whose position was highly interactive, involving regular face-to-face meetings and other in-person communications
- Plaintiff had irritable bowel syndrome and sought to work from home on an as-needed basis, up to four days per week
 - Ford denied her request, deeming regular and predictable attendance to be an essential function of plaintiff's job
- The court found that regular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs
 - When an employee requests an accommodation that exempts her from an essential function, the accommodation is unreasonable
- The court noted, “[m]ost jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation.”

What the Courts Are Saying



Mosby-Meachum v. Memphis Light, Gas & Water Div., 883 F. 3d 595 (6th Cir. 2018)

- In-house attorney requested to work from home for 10 weeks after being placed on modified bed rest during pregnancy
 - Employer denied request, asserting physical presence was an essential function of the job
 - Employer relied on internal memo stating it expected its lawyers to be at work during office hours but had no formal written telecommuting policy
- Court upheld jury verdict for failure to accommodate because plaintiff had previously worked remotely and the requested accommodation was for a reasonable, finite period of time
 - Jury awarded \$92,000 in compensatory damages

What the Courts Are Saying



Credeur v. Louisiana, 860 F.3d 785 (5th Cir. 2017)

- In 2010, DOJ litigation attorney was granted an accommodation to work from home after a kidney transplant
- In 2013, she was granted another accommodation to work from home after she had complications from the transplant but she was required to provide monthly updates
 - After several months, employee provided three doctors' notes with conflicting information on when she could return to the office
 - Kept requesting extensions of time to work from home but eventually returned after DOJ refused to extend telework
- Court held employee was not a “qualified individual” because she could not perform an essential function of her job – regular attendance in the office
 - Even if qualified, no reasonable juror could find that DOJ failed to reasonably accommodate her

What the Courts Are Saying



Morris-Huse v. GEICO, 2018 U.S. Dist. LEXIS 14284 (M.D. Tenn. 2018)

- Employee suffers from Meniere's Disease, which causes vertigo
 - Doctor stated she was able to work full day but unable to drive long distances
 - Employee requested to telecommute
 - GEICO denied request but provided public transportation and rideshare options
- Employee filed suit alleging failure to accommodate
 - Court focused on restriction not to travel long distances, which GEICO accommodated
 - Telework was not a reasonable accommodation because she was required to work a regular schedule in the office to adequately supervise other employees

Telework - Best Practices

- Review telework policy to ensure it is open to all employees and ensure those responsible for granting telework requests understand that eligibility factors may need to be waived for disabled employees
- Analyze each request on a case-by-case basis, including looking at nature of employee's position and essential job functions of the position
- Can hold teleworking employees to the same performance and production standards as those working on-site, and can require employees to be as available as when working on-site
- Can require daily accomplishment reports (or similar management tools required of all employees) (*Banim v. Florida Department of Business and Professional Regulation*, 689 F. App'x 633 (11th Cir. 2017))

Telework – EEOC Resources

- Work at Home/Telework as a Reasonable Accommodation
www.eeoc.gov/facts/telework.html
- The ADA: Applying Performance and Conduct Standards to Employees with Disabilities
www.eeoc.gov/facts/performance-conduct.html

Drug Testing and Reasonable Accommodations

Drug Use and Accommodations

- An individual who is currently engaging in the illegal use of drugs is not an “individual with a disability” under the ADA
 - ADA defines “illegal use” by reference to federal Controlled Substances Act (CSA)
- The ADA provides protection from discrimination for recovering drug abusers
 - An employer may not discriminate against a person who has a *history* of drug addiction but who is not currently using drugs and who has been rehabilitated
 - Entitled to reasonable accommodation absent undue hardship
- Marijuana use, even if legal under a state law for recreational or medical purposes, is unlawful under federal law
 - No ADA protection for employees where employer acts based on employee’s current marijuana use
 - May be state law protection depending upon the jurisdiction (see later slide)

Alcoholism Accommodations

- Alcoholism is a protected disability under the ADA
- Accommodation examples:
 - Exception to rule prohibiting personal phone calls at work to enable contacting AA sponsor
 - Schedule change to attend AA meeting
 - Leave for treatment
- BUT ... ADA allows employers to hold to same performance and conduct standards as all other employees, including uniformly applied rules prohibiting drinking or being under the influence at work

What the Courts Are Saying



Cotto v. Ardagh Glass Packing, Inc., 2018 U.S. Dist. LEXIS 135194 (D.N.J. Aug. 10, 2018)

- Plaintiff was injured on the job and sent for medical treatment
- Before returning to work, plaintiff was asked to pass drug and alcohol screenings
- Plaintiff explained that he could not pass the screenings due to his use of prescription marijuana and pain killers to treat a back injury of which the employer was aware
- Plaintiff claimed employer discriminated by failing to accommodate his marijuana use by not waiving the drug test
- The court held that waiving a drug test as a condition of employment is not a reasonable accommodation

What the Courts Are Saying



Massachusetts Case Against Large Marketing Staffing Company

- Plaintiff was terminated after testing positive for marijuana
- Plaintiff claimed disability discrimination under Massachusetts state law
 - Suffered from Crohn's Disease and had prescription for medical marijuana
 - Requested waiver of policy barring employment of anyone who tests positive for marijuana
- In denying employer's motion to dismiss, court held that the employee had a right to a reasonable accommodation, and the use of medical marijuana *may* be reasonable

What the Courts Are Saying



Noffsinger v. SSC Niantic Operating Co., LLC, 2018 U.S. Dist. LEXIS 150453 (D. Conn. 2018)

- Plaintiff's job offer was rescinded after testing positive for prescribed marijuana used to treat PTSD
- Connecticut Palliative Use of Marijuana Act (PUMA) bars an employer from refusing to hire a person solely because of the person's status as a qualifying medical marijuana patient
- Court granted summary judgment to employee, holding that employer's rescission of job offer was contrary to plaintiff's right not to be subject to discrimination because of her status as a qualifying patient under PUMA.

State Marijuana Laws

- Many state statutes merely decriminalize; others cloak employees with protection, such as:
 - Employer cannot discriminate against employee merely because employee lawfully uses marijuana for medicinal purposes
 - Employer cannot discriminate against employee who lawfully uses marijuana for medicinal purposes based on positive drug test for marijuana **UNLESS** employee used, possessed or was impaired on employer's premises or during work hours
 - Employer must provide reasonable accommodations

Examples of Legal Impact of State Marijuana Laws



- *Callaghan v. Darlington Fabrics Corp.*, 2017 R.I. Super. LEXIS 88 (R.I. Superior Court 2017)
 - granted summary judgment to plaintiff on claim under medical marijuana statute, finding the natural interpretation of statute was that legislature contemplated employers would accommodate the medical use of marijuana **outside** the workplace
- New York medical marijuana statute: being a “certified patient” shall be deemed as having as “disability” under the human rights law and civil rights law
 - Thus, a duty to reasonably accommodate

Drug Testing – Opioids and Opioid Treatment

- ADA allows employer to exclude individual with disability from position if individualized assessment shows, even with accommodation, he cannot perform the essential functions or poses a direct threat to health or safety.
- *EEOC v. M.G. Oil d/b/a Happy Jack's Casino*, 4:16-cv-04131-KES (D.S.D.) (consent decree entered May 2018)
 - Settling claim that job offer to cashier was withdrawn in violation of ADA based on drug test showing lawful presence of prescribed medication; company also had unlawful policy of requiring all employees to report prescription and non-prescription medications they are taking
- *EEOC v. Hester Foods, Inc.*, Civil Action No. 3:17-cv-000340-DHB-BKE (S.D. Ga.) (consent decree entered February 2018)
 - Settling claim that employer fired KFC restaurant employee when it learned she was taking prescribed medications for bipolar disorder

Drug Testing – Opioids and Opioid Treatment (cont'd)

- *EEOC v. Foothills Child Development Ctr., Inc.*, Civil Action No. 6:18-cv-012555-AMQ-KFM (D.S.C.) (consent decree entered May 2018)
 - Settling claim that employee was terminated in violation of ADA after employer learned he takes Suboxone as part of supervised medication-assisted treatment program, with no individualized assessment of whether he could safely perform essential functions
- *EEOC v. Steel Painters, LLC*, Civil Action No. 1:18-cv-00303 (E.D. Tex.) (pending; filed June 29, 2018)
 - EEOC alleges painting company unlawfully fired a worker who had previously been dependent on opioid medication but was taking a prescribed dose of methadone as treatment

Drug Testing – Best Practices

- Know what is and what is not protected under both ADA and state law
- Recognize and understand that drugs and alcohol are treated differently; ensure policy recognizes the distinction
- With respect to marijuana, conduct reasonable accommodation analysis under both ADA and any state marijuana statute
- Can still prohibit employees from reporting to work under the influence or from working under the influence
- Can still prohibit buying, selling, distribution and use on Company property and during Company time

Reasonable Accommodations for Mental Health

Accommodations Related to Mental Health

- An employer is prohibited from discriminating against an employee based on the employee's mental health condition
- Can include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorder
- Accommodation analysis is the same as for a physical disability - entitled to a reasonable accommodation to perform essential functions of position, absent undue hardship on the employer

What the Courts Are Saying



Sepúlveda-Vargas v. Caribbean Rests., LLC, 888 F.3d 549 (1st Cir. 2018)

- Plaintiff was an assistant manager of a fast food chain
- He took a leave of absence to recover from an assault, which resulted in post-traumatic stress and major depression disorder
- Upon returning to work, plaintiff requested as an accommodation to work a fixed schedule, as opposed to a rotating schedule
 - Although initially ceding to his requests, the employer later explained that plaintiff would need to return to working a rotating schedule
- The Court found that the requirement that an employee work a rotating shift was an essential function of the job of assistant manager
 - The court held plaintiff was not a “qualified individual” within the meaning of the ADA because he could not perform the essential functions of his position

What the Courts Are Saying



Case Against Large Multi-National Engineering Firm in the 5th Circuit

- Electrical systems designer suffers from stutter and anxiety
 - He complained that work environment was too loud and requested a quieter workspace
 - Contended that a noisy office environment heightened his anxiety
- Court held employee failed to establish that employer knew of disability
 - While stutter was obvious, employee's limitation of sensitivity to noise was not attributed to a mental impairment
 - Court held that a jury must be able to see sufficient link between impairment and limitations
 - Because employee did not tell employer that his noise sensitivity exacerbated his anxiety, the employer did not fail to accommodate him

Mental Health Accommodation – Best Practices

- Ensure policy specifically covers mental disabilities
- Supervisors need to be trained to recognize accommodation obligation for mental disabilities
 - Distinguish between general stress/venting vs. mental disability
- Remember same standard for reasonable accommodation for physical and mental health conditions
- If would provide a particular accommodation for a physical disability, should provide the accommodation for a mental disability

Mental Health Accommodation – EEOC Resources

- Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights
https://www.eeoc.gov/eeoc/publications/mental_health.cfm
- Enforcement Guidance on the ADA and Psychiatric Disabilities (3/25/97); www.eeoc.gov/policy/docs/psych.html
- The Mental Health Provider’s Role in a Client’s Request for a Reasonable Accommodation at Work (2013)
www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm
- Q&A: Intellectual Disabilities in the Workplace & the ADA (rev. 2013); www.eeoc.gov/laws/types/intellectual_disabilities.cfm

Service and Comfort Animals as a Reasonable Accommodation

Service and Comfort Animals

- The ADA is silent on accommodating service animals in the employment context
- Requests to bring animals into the workplace fit in one of two categories:
 - Employees who need a service animal to perform a certain task
 - E.g., a visually impaired person who has a seeing eye dog
 - Employees who request to bring an emotional support or therapy animal that provides comfort for certain disorders
 - E.g., a military veteran suffering from PTSD who requests to bring an emotional support dog to work

Service and Comfort Animals

- Interactive process permits obtaining medical information on same basis as with other types of accommodations:
 - If disability (e.g., blindness) and employee's need for the accommodation (e.g., guide dog) are obvious, employer may not need any documentation
- Where disability and need for accommodation are not obvious or already known, employer may request reasonable medical information to demonstrate employee has impairment that substantially limits major life activity and needs the accommodation

Service and Comfort Animals

- Requests for service or other support animals at work present novel considerations for employers:
 - The work environment may be dangerous for an animal, such as a factory setting
 - The workplace may require a sterile environment, such as a hospital
 - Some employees may be allergic or have a phobia to an animal
- Many service animals are dogs, but other animals may qualify as well (e.g. miniature horses, pigs)
- If an employer does allow a service animal as an accommodation for a disability, the employee is responsible for the animal's care, including hygiene, vaccinations, bathroom breaks, and controlling the animal to make sure it does not disrupt operations

Service and Comfort Animals – Effect of Animals on Other Employees

- What if other employees may experience severe allergic reactions or phobias related to the presence of a service animal? Possible accommodations might include:
 - Separate paths of travel to minimize employee's exposure to service animal
 - Telework or other flexible schedules to minimize days on which employee who uses service animal and another employee affected by service animal are both physically present in workplace
 - Alternatives to in-person communication, such as by allowing participation in meetings by phone, even when employee is in office

Service and Comfort Animals – Potential Undue Hardship

- If the animal:
 - Is disruptive
 - Poses a direct threat (i.e., significant risk to health or safety)
 - Not properly controlled by its handler

Service and Comfort Animals in Non-Employment Situations

- U.S. Dep't. of Justice regulations under Titles II and III of the ADA (state/local gov't agencies, businesses, and non-profits) for interacting with members of the public/customers in situations other than employment:
 - Obligation to admit service animals trained to perform task, but *not* animals that only provide emotional support and do not perform a service
 - May not require documentation as condition of entry, such as proof animal has been certified, trained, or licensed as service animal

What the Courts Are Saying



Maubach v. City of Fairfax, 2018 U.S. Dist. LEXIS 73815 (E.D. Va. 2018)

- Plaintiff requested to bring an emotional support dog to the workplace
- The court held that an emotional support animal's presence inside the workplace imposed an undue hardship on the employer because several employees suffered from allergies and there was no effective method for the employer to remedy the situation
 - The employer was not able to set up another work station or do anything else to prevent the affected employees from being exposed to the service animal—resulting in an undue hardship

What the Courts Are Saying



EEOC v. CRST Int'l, Inc., 2017 U.S. Dist. LEXIS 180761 (M.D. Fla. 2017)

- Plaintiff, a military veteran with PTSD, applied for a position as a long-haul truck driver and asked to bring his therapy dog on the road with him to treat his PTSD
- The employer refused to hire plaintiff
- The EEOC brought suit on behalf of plaintiff, alleging the company discriminated based on plaintiff's disability by failing to accommodate his request for a service animal
- The suit is pending

What the Courts Are Saying



Clark v. School Dist. Five of Lexington & Richland Counties, **247 F. Supp. 3d 734 (D.S.C. 2017)**

- A special needs teacher suffers from PTSD
- Participated in pet therapy program with students, then trained pet Chihuahua named Pearl as part of program
 - Brought Pearl to school as part of therapy program for 2 years
- School moved locations and banned dogs
- Plaintiff requested accommodation to use Pearl as service dog to help with panic attacks but county denied request
- Court denied summary judgment because there was a genuine issue of material fact as to whether Pearl was the only reasonable accommodation for Plaintiff's anxiety
 - Matter ultimately settled

Service and Comfort Animals – Best Practices

- Ensure that those responsible for assessing accommodation requests understand that service and comfort animals may be a reasonable accommodation
- Assess request by employee to use service animal or emotional support animal the same way as any other accommodation
- Consider whether adjustments need to be made for other employees in the workplace and whether such adjustments are reasonable/feasible

Service and Comfort Animals – EEOC Resources

Employment:

Job Accommodation Network (www.askjan.org) publication:

- Service Animals in the Workplace

<https://askjan.org/media/downloads/ServiceAnimalsintheWorkplace.pdf>

Non-Employment (State/Local Government Programs and Public Accommodations):

DOJ publications:

- Service Animals: https://www.ada.gov/service_animals_2010.htm

- Frequently Asked Questions About Service Animals and the ADA

https://www.ada.gov/regs2010/service_animal_qa.html

BREAK

Return in 15 minutes

Part 2: Non-ADA Accommodations

Religious/Prayer
Transitioning/Transgender
Employees
Pregnancy/Mother
Wellness

Religious Accommodation / Prayer

Religious Accommodation

- Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on religion
- Religion is defined broadly under Title VII to include traditional, organized religions, such as Christianity, Judaism, and Islam, and it also includes new or uncommon religious beliefs that are not part of a formal church or sect
- Examples of religious accommodations include:
 - Exceptions to an employer's dress or grooming code
 - E.g., a Muslim woman who wears a headscarf
 - An employee's request not to work on a particular day for religious reasons
 - An employee's request to be excused from a religious invocation offered at the beginning of a staff meeting
 - Prayer – an employee's request for time off from work to attend prayer services
 - Alternatively, an employer may offer a “prayer room,” or physical space dedicated to observing prayer

Religious Accommodation – Title VII Undue Burden

- An employer need not accommodate an employee's religion if doing so would create an undue hardship
- Under Title VII, “undue hardship” is defined as “more than *de minimis* cost or burden”
- Substantially lower standard for employers to satisfy than the undue hardship defense under ADA
- Examples of burdens include:
 - Violating a seniority system;
 - Causing a lack of necessary staffing;
 - Jeopardizing security or health; or
 - Costing the employer more than a minimal amount

What the Courts Are Saying



EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015)

- Plaintiff, a practicing Muslim, applied for a position with a retail clothing store
- Plaintiff interviewed for the position while wearing a headscarf, but she did not request an accommodation to wear the scarf
- The employer had a “Look Policy,” which prohibited the wearing of headware, religious or otherwise
- The Supreme Court held that the employer discriminated against plaintiff when it took her religious practice and potential need for accommodation into consideration when deciding whether to hire her
 - The Court held plaintiff’s rights were violated even though the employer did not have actual knowledge of the need for a religious accommodation.

What the Courts Are Saying



Abdi Mohamed v. 1st Class Staffing, LLC, 286 F. Supp. 3d 884 (S.D. Ohio 2017)

- The employer maintained a “prayer spot” as an accommodation for Muslim employees but eliminated it without warning due to concerns over workplace safety
- The employer offered alternative locations, but none of the alternatives were considered acceptable by the Muslim employees due to the conditions required for prayer in their faith
- Several months later, the employer cleared a space in the breakroom and hung curtains to provide seclusion for employees to pray
- The court denied summary judgment to the employer and noted that the apparent ease of creating an alternative prayer space in the breakroom did not support the employer’s defense of undue hardship
- Trial set for October 29

What the Courts Are Saying



Moore v. City of New York, 2018 U.S. Dist. LEXIS 137412 (S.D.N.Y. 2018)

- Former employee of NYC Department of Corrections, a Pentecostal Christian, filed suit for failure to accommodate his religion
- He requested to be excused from working overtime on Friday evenings due to his religious observances
 - In response, defendant offered to change his schedule to make an overtime assignment unlikely absent an emergency
 - Plaintiff rejected proposed accommodation because it interfered with his “family time”
- Court granted defendant’s motion for summary judgment because plaintiff rejected proposed accommodation for personal reasons rather than religious ones

What the Courts Are Saying



EEOC v. Consol Energy, Inc., 860 F.3d 131 (4th Cir. 2017)

- West Virginia coal miner refused to use a biometric hand scanner
 - He claimed that according to the Book of Revelations, the Mark of the Beast brands followers of the Antichrist. He feared that use of the biometric hand scanner would result in such a mark, and requested an alternative identification measure as a form of religious accommodation
 - Employer denied request and employee resigned
- Employer argued that use of scanner did not present a bona fide conflict with the plaintiff's religious beliefs
- The court said that as long as plaintiff has a sincere religious belief, courts will not question its correctness or plausibility
 - Court also noted that employer had provided alternative identification procedure for two employees whose hand injuries made use of the scanner impossible
 - Affirmed jury verdict of \$600,000

Religious Accommodation – Best Practices

- Review policy to ensure it provides for accommodation for religious belief
- Assess accommodations on a case-by-case basis
- Document any factors and determination of undue hardship
- Treat all religious beliefs the same and utilize the same analysis for accommodation requests despite the particular religious belief at issue

Religious Accommodation – EEOC Resources

- EEOC Compliance Manual: Religious Discrimination
www.eeoc.gov/policy/docs/religion.html
- Questions and Answers: Religious Discrimination in the Workplace
www.eeoc.gov/policy/docs/qanda_religion.html
- Religious Garb and Grooming in the Workplace: Rights and Responsibilities
www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm
- Best Practices for Eradicating Religious Discrimination in the Workplace
www.eeoc.gov/policy/docs/best_practices_religion.html

Accommodations for Transitioning/ Transgender Employees

Status of Protection: Transitioning/Transgender Employees

- Rapidly developing area of law
- Courts are continuing to weigh in on whether sexual orientation, gender identity, transgender status and/or gender expression are protected classes under Title VII
- Currently, Title VII prohibits gender stereotyping nationwide, transgender status discrimination in the Sixth Circuit, and sexual orientation discrimination in the Second and Seventh Circuits
- The EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on sexual orientation, transgender status, gender identity, and gender expression
- Three *certiorari* cases currently pending in Supreme Court

Transitioning Employee – Potential Accommodations

- Work with employee to create “transition plan” to include:
 - Confidentiality and privacy
 - Informing coworkers (solicit input/desire of transitioning employee)
 - Changes to email addresses/name tags/ID badges/etc.
 - Legal name v. preferred name
 - Pronouns
 - Anything needed to enable use of bathroom employee chooses (such as putting up dividers between urinals, a single use bathroom for others to use (cannot require transitioning employee to use it))
 - Uniform/dress code
 - Arrangements for necessary medical appointments

Examples of Potential Claims

- Failing to hire applicant because she is a transgender woman, or firing employee because he is planning or has made a gender transition
- Workplace harassment because of gender transition (e.g., epithets or other harassing behavior, including intentional and persistent failure to use name and gender pronoun that correspond to the gender identity with which employee identifies and has communicated to management and employees, or refusal to update personnel records)
- Certain exclusions in employer-provided health insurance for medically necessary treatment otherwise covered

What the Courts Are Saying



Prescott v. Rady Children's Hospital-San Diego, 265 F. Supp. 3d 1090 (S.D. Cal. 2017)

- Brought by mother and deceased transgender minor son Kyler who committed suicide after being misgendered by hospital staff while an inpatient being treated for gender dysphoria and suicidal ideation
- Claims made under sec. 1557 of the Affordable Care Act
- Hospital filed motion to dismiss, arguing that sec. 1557 does not protect transgender status or gender identity
- On September 27, 2017, court denied the motion to dismiss
 - Relied primarily on gender stereotyping theory set out in *Price Waterhouse*
 - Held that discrimination based on gender identity is discrimination based on sex under both Title VII and Title IX, and, therefore, by extension, under sec. 1557 of the ACA

What the Courts Are Saying



Blatt v. Cabela's Retail, Inc., 2017 U.S. Dist. LEXIS 75665 (E.D. Pa. 2017)

- Blatt is a transgender female diagnosed with gender dysphoria
 - She filed suit against Cabela's, alleging that it discriminated against her and failed to accommodate her gender dysphoria by requiring her to use the bathroom corresponding to her sex assigned at birth (male) and refusing to provide her with a nametag reflecting her female name and a female uniform
- Cabela's moved to dismiss, arguing that pursuant to the ADA's gender identity disorders exclusion, Blatt's ADA claim failed on its face
 - Court stated that exclusions must be read narrowly to refer only to the condition of identity with a different gender, not to encompass gender dysphoria
- Court held that being transgender is not a disability but transgender people are not categorically barred from protection by the ADA if they suffer from gender dysphoria

Transitioning/Transgender Employees – Best Practices

- Examine policies for inclusion of sexual orientation, gender identity and/or expression
- Although no accommodation required under Title VII, may be required under ADA
- Work with the transitioning employee to establish a plan; don't assume that the Company knows best
- Cannot anticipate everything – often things come up that no one expects
 - Confront issues with dignity and respect
- Make sure employee is aware of anti-discrimination policy and that they should come forward immediately with any concerns

LGBT Issues Under Title VII – EEOC Resources

- What You Should Know About the EEOC and Enforcement Protections for LGBT Workers

www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

- https://www.eeoc.gov/decisions/0120120821_Macy_v_DOJ_ATF.txt
- <https://www.eeoc.gov/decisions/0120133395.txt>
- <https://www.eeoc.gov/decisions/0120130992.txt>
- <https://www.eeoc.gov/decisions/0120133123.r.txt>
- <https://www.eeoc.gov/eeoc/litigation/briefs/robinson.html>

Accommodations Related to Pregnancy/ Mother Wellness

Pregnancy/Mother Wellness

- The ADA and the Pregnancy Discrimination Act (PDA) apply to pregnant women and women with pregnancy-related disabilities
- The ADA only requires that employers accommodate employees who are still qualified to perform the essential functions of the job
 - Pregnancy itself is not an impairment
 - But a pregnancy-related medical condition is an impairment
 - If pregnancy-related medical condition substantially limits major life activity, entitled to reasonable accommodation if needed, unless undue hardship

Pregnancy/Mother Wellness

- PDA amended Title VII to prohibit pregnancy discrimination as a form of sex discrimination
 - Prohibits discrimination based on pregnancy (current, past, or potential), childbirth, or related medical conditions
 - e.g., non-hire or termination because pregnant
 - Requires pregnant employees be treated in same manner as others who are similar in their ability or inability to work
 - i.e., pregnant employee may be entitled to accommodation for either pregnancy or pregnancy-related limitations under the PDA if the employer gives accommodations to employees who have similar limitations not caused by pregnancy

Accommodations

- PDA accommodation may require employers to provide qualified, pregnant employees with different jobs, such as temporary or light-duty jobs
- Examples of accommodations include:
 - Altered break or work schedules
 - E.g., breaks to use the bathroom and/or rest
 - Permission to sit or stand
 - Ergonomic office furniture
 - Permission to work from home / telecommute
- Employers must provide “reasonable break time” for hourly employees to express breast milk until the child's first birthday
 - Employers with fewer than 50 employees are not subject to this requirement if it “would impose an undue hardship by causing significant difficulty or expense when considered in relation to the size, nature, or structure of the employer’s business.”

Pregnancy/Mother Wellness

- An employer may not compel an employee to take leave due to pregnancy, as long as she is able to perform her job
- At the same time, an employer must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work
- An employer is prohibited from discriminating against an employee because of her breastfeeding schedule
- Some employers have adopted new mother “lactation rooms” or “wellness rooms”

State Pregnancy Accommodation Statutes*

- California
 - Colorado
 - Connecticut
 - Delaware
 - District of Columbia
 - Hawaii
 - Illinois
 - Louisiana
 - Maryland
 - Massachusetts
 - Minnesota
 - Nebraska
 - Nevada
 - New Jersey
 - New York
 - North Dakota
 - Rhode Island
 - South Carolina
 - Utah
 - Vermont
 - Washington
 - West Virginia
- *Covering private employers

What the Courts Are Saying



Young v. UPS, 135 S. Ct. 1338 (2015)

- Young worked as a part-time delivery driver
- After she became pregnant, she submitted a doctor's note with a recommendation that she lift no more than 20 pounds and she asked for an accommodation to work light duty
- The company denied the request, but also denied her return to work on the basis that lifting more than 20 pounds was an essential function of her job
 - However, UPS provided employees who had on-the-job injuries with light-duty assignments
- Court stated that a pregnant employee can establish a *prima facie* case by alleging the employer denied a request for an accommodation and the employer accommodated others “similar in their ability or inability to work”

What the Courts Are Saying



Paulson v. Tidal, 2018 U.S. Dist. LEXIS 118238 (S.D.N.Y. 2018)

- Plaintiff was a consultant who returned from maternity leave
- After asking her employer for a private space to express breast milk, plaintiff was terminated
- The court denied motion to dismiss because “lactation is a pregnancy related medical condition under Title VII”
- The court further noted that plaintiff sufficiently pled her claim by showing her request for accommodation to express breast milk, the employer’s negative reaction, and her ultimate termination
- Matter is still pending

What the Courts Are Saying



Ologundudu v. Manorcare Health Servs., 2017 U.S. Dist. LEXIS 207235 (D.N.J. 2017)

- Plaintiff was suspended, then terminated, for sleeping on the job and filed suit under New Jersey Law Against Discrimination
- Employee claimed she was merely resting and alleged that Manorcare refused her accommodation to take rest breaks due to her pregnancy
- Employer argued plaintiff never requested an accommodation
 - Court denied summary judgment stating that once employer learned about plaintiff's pregnancy and need for rest breaks, it was obligated to engage in the interactive process – even though defendant did not learn this until after plaintiff was suspended
- Matter ultimately settled

What the Courts Are Saying



EEOC v. Estee Lauder, Civil Action No. 2:17-cv-03897-JP (E.D. Pa.) (consent decree entered July 2018)

- EEOC alleged new fathers were provided less paid leave to bond with a newborn, or with a newly adopted or fostered child, than employer provided new mothers, in violation of Title VII and Equal Pay Act
- The parental leave at issue was separate from medical leave received by mothers for childbirth and related issues
- EEOC also alleged that the company unlawfully denied new fathers return-to-work benefits provided to new mothers, such as temporary modified work schedules, to ease the transition to work after arrival of a new child and exhaustion of paid parental leave
- \$1.1 m settlement on behalf of over 200 male employees:
<https://www.eeoc.gov/eeoc/newsroom/release/7-17-18c.cfm>

Pregnancy/Mother Wellness – Best Practices

- Ensure those tasked with addressing accommodation issues understand that pregnancy and pregnancy-related conditions are to be treated the same as other conditions which the employer accommodates
- As for all accommodations, conduct training to ensure that supervisors are trained in recognizing those conditions that are deemed disabilities, engaging in the interactive process, granting accommodations and handling medical information confidentially
- Consider having all accommodation requests handled by one person or department to ensure consistency

Pregnancy Discrimination – EEOC Resources

- Legal Rights for Pregnant Workers Under Federal Law
www.eeoc.gov/eeoc/publications/pregnant_workers.cfm
- EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues
www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm
- Fact Sheet for Small Businesses: Pregnancy Discrimination
www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm
- Helping Patients Deal with Pregnancy-Related Limitations and Restrictions at Work
www.eeoc.gov/eeoc/publications/pregnancy_health_providers.cfm



Thank you!

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