Chapter I

ADA Basics: "Big Picture" Considerations for the Workplace

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What is the Americans with Disabilities Act?

The ADA is a federal civil rights law aimed at protecting protect people with disabilities from discrimination in employment, in activities offered by state and local governments, and when accessing public places such as stores, restaurants, offices, etc.

Title I of the ADA prohibits discrimination in employment, and requires employers to provide reasonable accommodations for employees with disabilities. Its provisions apply to private employers with 15 or more employees, as well as state and local government employers, agencies, labor organizations, and joint labor-management committees. "Congress enacted the ADA in 1990 in an effort to prevent otherwise qualified individuals from being discriminated against in employment based on a disability." *Gaul v. Lucent Technologies Inc.*, 134 F.3d 576, 579 (3d Cir. 1998). The law provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

Who Does the ADA Protect?

Title I of the ADA protects "qualified employees with disabilities."

- The term "qualified" means that the individual has the requisite skill, experience, education, and other job-related requirements of the position sought or held. A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8)

- In *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998), the Court noted that the pertinent regulations interpreting the term "impairment," provide as follows:

  [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

  45 CFR § 84.3(j)(2)(i) (1997).

- The term "employee" means, "an individual employed by an employer." The question of whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls the means and manner of the worker's work performance.

- The term "disability" means: (1) a person who has a physical or mental impairment that substantially limits one or more major life activities, (2) a person with a record of a physical or mental impairment that substantially limits one or more major life activities, and (3) a person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities.

- The "essential job functions" means the fundamental job duties of the employment position that the individual with a disability holds or desires. The term essential functions does not include marginal functions of the position. A job's "essential functions" are defined in 29 C.F.R. § 1630.2(n)(1) as those that are "fundamental," not "marginal." The regulations list a multitude of factors to consider in distinguishing the fundamental job functions from the marginal job functions, including: (1) whether the performance of the function is "the reason the position exists;" (2) whether there are a "limited number of employees available among whom the performance of that job function can be distributed;" and (3) whether the function is "highly specialized so that the incumbent in the position is hired for his or her expertise." 29 C.F.R. § 1630.2(n)(2). The regulations

further set forth a non-exhaustive list of seven examples designed to help identify what constitutes the "essential functions" of a job. They include:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the jobs; and/or

(vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(3).

Who Does the ADA Protect?

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

When Does the ADA Apply?

Title I of the ADA applies to all aspects of employment: advertising for the position, the application process including written submissions and interviews, and post-offer examinations and requirements. It then applies throughout the course of the employment relationship.

What Is a Reasonable Accommodation?

To comply with the ADA, employers must consider "reasonable accommodations" that could enable qualified persons with disabilities to perform the essential functions of a position. A "reasonable accommodation" is a modification or adjustment to a job, the work environment, or the manner of doing the job that enables a qualified individual to enjoy the opportunity to perform in the position. Pursuant to the ADA, reasonable accommodations are provided (1) to ensure equal opportunity in the application process, (2) to enable a qualified individual with a disability to perform the essential functions of a job, and (3) to enable an employee with a disability to enjoy equal benefits of employment.

Per the regulation, an employer discriminates against an individual on the basis of disability when it does "not mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the] entity." 42 U.S.C. § 12112(b)(5)(A).

The Third Circuit's decision in *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001) addresses the basics of an action for failing to offer a reasonable accommodation under the ADA, providing:

> [A] disabled employee may establish a prima facie case under the ADA if s/he shows that s/he can perform the essential functions of the job with reasonable accommodation and that the employer refused to make such an accommodation. According to the ADA, a "reasonable accommodation" includes:
>
> > job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. § 12111(9)(B).
>
> The relevant regulations define reasonable accommodations as "modifications or adjustments to the work environment, or to the manner or circumstances under which the

position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(1)(ii).

Skerski, 257 F.3d at 284.

Similarly, in *Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 670 (3d Cir. 1999), the Third Circuit held that, "on the issue of reasonable accommodation, the plaintiff bears only the burden of identifying an accommodation, the costs of which, facially, do not clearly exceed its benefits."

Where a plaintiff meets that burden, the defendant employer carries the burden to show that the proposed accommodation creates an "undue hardship." 42 U.S.C. § 12112(b)(5)(A). *See Turner v. Hershey Chocolate USA*, 440 F.3d 604, 614 (3d Cir. 2006) ("undue hardship" is an affirmative defense). The ADA defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of" a series of factors, 42 U.S.C. § 12111(10)(A).

How Should Employers Recognize Accommodation Requests?

The ADA does not require an employee to complete a form or a make a formal request for an accommodation, providing that they make the inquiry and potentially need known in relatively clear terms. The individual does not need not mention the ADA explicitly, or use the term "reasonable accommodation" to request an accommodation. The employee or potential employee need only indicate that he/she is having a problem; the problem is related to a medical condition; and the employer should consider whether the employee is making a request for accommodation under the ADA.

What Happens After Receiving an Accommodation Request?

The employer and disabled individual should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation, commonly referred to as an "interactive process." The employer may ask the individual relevant questions that will allow it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.

The exact nature of the dialogue will vary. Sometimes, both the disability and the type of accommodation will be obvious. In other instances, the employer may need to ask questions about the disability and limitations in order evaluate potential accommodations. While the disabled individual does not have to specify the precise accommodation, that employee must be able to describe the underlying hindrance. The employee can suggest, but does not have the right to specify and select precisely what accommodation the employer ultimately provides.

Can Employers Request Specific Medical Information?

Yes, but employers may only request medical information tailored to the scope of the accommodation request. An employer may require that the employee provide medical documentation to confirm the ADA qualifying disability, to confirm that the employee needs an requested accommodation, and to allow them to evaluate accommodation options as part of the interactive process. Although the ADA limits the scope of medical requests, it does not include specific forms for requesting medical information.

How Do Employers Meet Their Obligation to Engage In the Interactive Process?

The Third Circuit has held that good faith participation in an "interactive process" with the employee is an important factor in determining whether a reasonable accommodation exists. The court in *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 772 (3d Cir. 2004) explained the interactive process, explaining:

> [W]e have repeatedly held that an employer has a duty under the ADA to engage in an "interactive process" of communication with an employee requesting an accommodation so that the employer will be able to ascertain whether there is in fact a disability and, if so, the extent thereof, and thereafter be able to assist in identifying reasonable accommodations where appropriate.

"The ADA itself does not refer to the interactive process," but does require employers to "make reasonable accommodations" under some circumstances for qualified individuals. *Shapiro v. Township of Lakewood*, 292 F.3d 356, 359 (3d Cir. 2002). To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal,

interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3). *See also Jones v. UPS*, 214 F.3d 402, 407 (3d Cir. 2000) ("Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.") (*quoting* 29 C.F.R. Pt. 1630, App. § 1630.9).

An employee proves that the employer breached that duty if able to show "(1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for his or her 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." *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 319-20 (3d Cir. 1999).

Who Specifies the Accommodation?

While employees may provide input, the employer ultimately gets to choose effective accommodation options. If more than one accommodation would be effective, the disabled individual's preference should be given priority consideration.

When Are Accommodations Unreasonable?

Reasonable accommodations have limits, and under the ADA they do *not* include removing essential job functions, creating a new job, and providing personal need items (*id.* eye glasses, mobility aids.)

Job restructuring, short of eliminating an essential function or creating a new position, can include modifications such as reallocating or redistributing non-essential job functions, or altering the manner in which any function must be performed. Again, an employer never has the duty to reassign or eliminate essential functions as a reasonable accommodation.

Must an Employer Offer "Light Duty" Work as an Accommodation?

"Light duty" is not universally defined, but generally refers to less physically demanding work that may be offered on a temporary or long-term basis. "Light duty" also may also refer to positions that were specifically created as alternatives for employees unable to perform some or all job duties.

An employer does not have an obligation to create a light duty position for a non-occupationally injured employee with a disability as a reasonable accommodation. This is because the ADA does not compel an employer to create a new position for a disabled person. Instead, the same principles addressed in the context of the reasonable accommodation process apply, such as potential for restructuring marginal job functions, providing scheduling flexibility, or job reassignment.

Of note, however, if an employee reserves a select number of "light duty" positions for employees with occupational injuries, the employer needs to consider reassigning an employee with a disability to such a position under the ADA. Such a transition falls under the ADA's call to consider job transfer as a reasonable accommodation, although it should again be noted that the job may be deemed temporary in nature.

When Is a Leave of Absence a Reasonable Accommodation Under the ADA?

Medical leave, beyond that may be available to the employee pursuant to the FMLA, must be evaluated like any other accommodation request in that the employer must provide leave only to the extent it does not result in an undue, unreasonable hardship. An employer may request updates; an indefinite leave is not considered a reasonable accommodation.

Courts have held that "a request for FMLA leave may qualify, under certain circumstances, as a request for a reasonable accommodation under the ADA." *Capps v. Mondelez Glob., LLC*, 847 F.3d 144, 156-57 (3d Cir. 2017) (upholding grant of summary judgment to defendant because, "even assuming, *arguendo*, that Capps' requests for intermittent FMLA leave constituted requests for a reasonable accommodation under the ADA as well, Mondelez continued to approve Capps' requested leave, and indeed, Capps took the requested leave," with the result that "Capps received the accommodation he asked for").