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Reasonable Accommodations: Can Employees Have Their Cake and Eat it Too?
Disability, Religion & Pregnancy

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Duty to Provide Reasonable Accommodation (RA)

- **Disability** – Under ADA, employers must provide RA to qualified applicants & employees, unless doing so would result in undue hardship
- **Pregnancy** – RA may be required under ADA, for pregnancy-related medical conditions under Title VII, under PDA if accommodations provided to others with similar limitations, and under growing number of state laws
- **Religion** – Under Title VII, employers must provide RA to sincerely held religious beliefs unless doing so would result in undue hardship

Reasonable Accommodation: Practical Tips

- Designate "guru" as **point person** – make sure HR involved
- Engage in **interactive process** – focus on interactive dialogue
- Perform **individualized analysis** in each case – be creative; think outside the box
- Focus on reasonableness of accommodation & undue hardship, not disability
- Review & **update job descriptions** – make sure accurate, up-to-date, & include regular and timely attendance as essential job function
- Always **consider leave/**time off as RA unless undue hardship
- **Revise return to work policies**/practices requiring full release with no restrictions
- Include **"saving" language** in long-term absence policy, *e.g.,* exceptions will be made as necessary to comply with applicable law, including ADA.
- **Update "form" letters** to EEs at or near end of approved leave
- Create protocols & **formalize process** for dealing with accommodation requests
- **Inject flexibility** into policies & practices
- **Document** – especially what you did/didn't do & why

Duty of Reasonable Accommodation – Supervisors Often Weak Link

- Undue Hardship – critical that supervisors weigh in
- Undue Hardship – supervisors often reach this conclusion with little or no analysis
- Documentation is critical
- Train supervisors to recognize accommodation requests & respond appropriately

Requests for Accommodations – Written Policy Recommended

- Have written policy – require requests be made to HR, not supervisor
- Why? Supervisors likely not fully aware of duty to engage in interactive process and/or fail to engage in appropriate RA analysis
- Engage in interactive process even for unreasonable requests
- Risk of eliminating essential job functions if too willing to accommodate
- Even with policy, EEs may go to supervisors; train supervisors to recognize requests & forward to HR

DISABILITIES – ACCOMMODATION UNDER ADA

Disability: Duty of RA under ADA

- Absent undue hardship, employer must provide RA to otherwise qualified individual with a disability (includes applicants, PT and probationary employees)
- Generally, individual with disability must inform employer that accommodation is needed

- When employee requests accommodation & need not obvious, employer (i.e., HR) may request documentation

Disability: What is a RA under the ADA?

- A change to work environment or in way things customarily done that enables individual with disability to enjoy equal employment opportunities
- RA removes workplace barriers for individuals with disabilities
- Barriers may be physical obstacles (such as inaccessible facilities or equipment) or policies, procedures, or rules (such as when/where work is performed, when breaks are taken, or how essential or marginal functions are performed)

Disability: Examples of Accommodations

- Schedule changes – PT or modified work schedule, allowing to make-up missed time
- Flexible leave & time off
- Working from home / telecommuting
- Policy exceptions
- Reassignment to vacant / soon-to-be open position (if employee qualified)
- "Princess" parking

ADA: Is Attendance an Essential Job Function?

- EEOC says "No", but many courts disagree
- 5th Circuit has held that **regular attendance is essential function of many jobs**
- Individualized assessment required
- This is hotly litigated topic

5th Circuit: Employer Not Required to Accommodate Early Departures for Anxiety / Panic Attacks Due to Rush Hour Traffic – Attendance is Essential Job Function

- EE's job required she be in office to interact with team at certain times
- She had panic attacks while driving to/from work; Dr. suggested earlier departure to avoid heavy traffic
- ER offered to adjust schedule to 7 am to 4 pm. EE never tried 4 pm departure time; instead, brought another Dr. note and asked to leave at 11 am.
- ER again offered early 4 pm departure, public transportation, or ride sharing; EE refused.
- EE missed work in excess of FMLA certification. Fired for excessive absences.
- 5th Circuit: Actual presence in office was essential job function. EE failed to engage in interactive process. *Trautman v. Time Warner Cable* (5th Cir. Dec. 12, 2018).

5th Circuit: Telecommuting Not RA. Regular attendance is essential function of most jobs. So, in most cases, ERs not required to allow telecommuting as RA. In determining what job functions are truly "essential," ER's judgment takes precedence over all other factors. *Credeur v. State of Louisiana* (5th Cir. June 23, 2017).

Reassignment as RA

- **EEOC**: Employers must consider reassignment and cannot require disabled employees to compete for position. "Reassignment means employee gets the vacant position if qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended."
- **5th Circuit:** ADA does **not** require "affirmative action in favor of individuals with disabilities, in the sense of requiring disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less." *Daugherty v. City of El Paso* (5th Cir. 1995).
- **Circuit Split:** 7th, 10th, & D.C. Circuits have held disabled employee must be qualified, but not most qualified for "reassignment" to vacant position, while 5th, 8th, & 11th Circuits have held ADA is not affirmative action statute.

11th Circuit Rejects EEOC's Position That ADA Requires Transfer of Less Qualified Disabled Employee into Vacant Position. Disabled nurse qualified for three vacant positions, but more qualified applicants selected

in keeping with hospital's policy to select best-qualified candidate. 11th Circuit held that a reassignment in violation of hospital's policy not reasonable. ADA only requires that employer allow disabled employee to compete equally for vacant positions. EEOC *v. St. Joseph's Hospital* (11th Cir. Dec. 7, 2016).

Disability: Leave as RA under ADA

Time off may be a RA under ADA if it:

- Enables employee to return to work & perform essential job functions, & does not cause undue hardship. Watch out for:
  - Blanket / inflexible leave policies
  - Return to work policies that require "full medical release" or "no restrictions"
  - Policies limiting light duty assignments to on-the-job injuries
- EEOC taking very aggressive position

EEOC Guidance on Leave as RA under ADA

- Issued May 9, 2016: *Employer-Provided Leave and the Americans with Disabilities Act*
- Emphasizes EEOC's long-standing position on leave as an accommodation
- Good resource for employers

ADA: RA Not Limited to Essential Job Functions

Under ADA, RA includes modifications / adjustments that enable employees to:

- Perform essential job functions, or
- Enjoy equal benefits & privileges of employment enjoyed by similarly situated employees w/o disabilities

"Princess Parking" May be RA Under ADA

- Employer denied request for free, reserved, on-site parking because not necessary to perform essential job functions
- EEOC Guidance: Providing reserved parking spaces may be RA
- **RA not limited to those that facilitate essential functions of employee's job**
- Providing employee suffering from osteoarthritis with free, reserved, on-site parking space is potentially RA. *Feist v. Louisiana* (5th Cir. 2013).

Requested Accommodations May Be Reasonable Even if Not Essential for Performance of Job, So Providing Meeting Materials in Large Font or In Advance May Be RA for Visually Impaired Employee

- Visually impaired employee requested meeting materials in advance or in large font.
- Employer denied request because not necessary to perform essential job functions.
- Also, employer previously provided numerous other accommodations including workstation with natural lighting, special lightbulbs, multiple monitors, magnifying software, and magnifying equipment.
- Right to accommodation includes right to measures that will provide "equal benefits and privileges." *Stokes v. Nielsen* (5th Cir. 2018)

Must Employers Accommodate Body Odors? Allergies to Strong Fragrances?

- *Bridges v. City of Indianapolis* (S.D. Ind.)(complaint filed 12/21/17) – team lead who brought air fresheners to work was fired when "smelly" coworker alleged hostile work environment; team lead filed lawsuit alleging termination due to employer's failure to provide RA to "smelly" coworker
- *Kaptur v. Capital One* **(**N.D. Ill.)(complaint filed 8/16/17) – obesity and kidney problems apparently caused severe body odor

ADA Does Not Require On-the Spot Accommodations of Employee's Choosing While "Interactive Process" Ongoing.

- Informal, interactive process is mandatory
- Both parties must participate in good faith
- Purpose to identify limitations & potential accommodations that could overcome limitations

- Refusal to immediately provide accommodation requested by employee is not, in and of itself, failure to accommodate under ADA. UPS had discretion to provide accommodation as identified through interactive process. *Brumley v. UPS* (6th Cir. Nov. 30, 2018).

How Important is Job Description? 2nd Circuit Reaches Different RA Conclusions for Pharmacists with Needle Phobias

- ***Stevens v. Rite Aid* (2nd Cir. March 21, 2017).** Jury found Rite Aid should have accommodated pharmacist by not requiring him to give injections & awarded him $2.6m. 2nd Circuit overturned. Giving injections listed as essential function in Job Description, & Rite Aid not required to eliminate essential job function.
- ***Noel v.* Wal-Mart (2nd Cir. March 11, 2019).** Before Job Description was updated, pharmacist told to get certified to give vaccines or be fired. Since requirement to give injections not added as essential job function to Job Description until *after* Noel fired, lower court's decision in favor of Wal-Mart overturned and case remanded.

Job Descriptions Must be Updated & Include Essential Job Functions

- Just because supervisor says function is essential doesn't make it so
- Employers have right to determine essential job functions
- If it's essential, make sure it's in Job Description
- Written Job Descriptions are strong evidence of what constitutes essential job functions

You be the Judge: "My Boss is Stressing Me Out!!!"

- Employee has PTSD
- Has issues with her supervisor – work-related stress impacting her work, sleep, health
- Employee's Dr. recommends transfer to different, less-stressful supervisor

Is transfer to a different supervisor a RA?

"My Boss is Stressing Me Out!!!"

Employer not required to accommodate employee with transfer to different supervisor. Inability to work for particular supervisor not a limitation on major life activity of working. So, employee not eligible for ADA relief. *Tinsley v. Caterpillar Financial Services, Corp*. (6th Cir. March 20, 2019).

You be the Judge – Bringing Fido & Fluffy to Work

- Dogs, cats, peacocks, turkeys, snakes, bunnies, ferrets, & spiders
- Do they qualify as emotional support animals?
- If so, must employer allow them as RA for depression, PTSD, anxiety, panic attacks?

It's Raining Cats & Dogs!!

- What qualifies as emotional support or "comfort" animal? ADA does not define. Generally, includes any companion animal that mental health professional deems helpful / calming to someone with disability, usually mental or psychiatric in nature.
- No automatic right to bring comfort animal to work. Treat like any other RA request & engage in interactive process:
  - Request documentation establishing disability & explaining how animal helps
  - Can request information about animal's training, but no "training" required for "comfort" animals
  - Set ground rules, *e.g.*, must be "housebroken; set "potty" breaks – when and where; current vaccines.
  - Consider impact on others, e.g. allergies, fear, disruption / distraction, smell, noise; these usually not sufficient to deny request unless undue hardship
- Know what you can & can't say to other employees
- Health / safety concerns may cause undue hardship
- Not required to provide employee's choice of accommodation, so consider others

EEOC Says Employer Must Make Exception to "NO PETS" Policy as RA

- EEOC recently sued trucking company for failure to accommodate driver's request to allow emotional support dog to accompany him on his route.
- Truck driver's psychiatrist "prescribed" dog to help employee cope with PTSD & mood disorder & "maintain appropriate social interactions."
- Employer refused to make exception to "No Pet" policy.
- *EEOC v. CRST Int'l, Inc*. (N.D. Iowa) – case pending

ACCOMMODATION OF RELIGIOUS BELIEFS, HAIRSTYLES, ETC. UNDER TITLE VII

Religious Beliefs – Duty to Provide RA under Title VII

Under Title VII, employers must provide RA to employee's sincerely held religious beliefs unless doing so would cause undue hardship.

Holy Batman!! Jury Awards $2.1m to Dishwasher Fired "Because on Sunday I Honor God"

- Long-term employee at high-end hotel in Miami.
- For 10 years she not scheduled to work Sundays
- New manager told her she must work Sundays
- Employee provided letter from pastor explaining her sincerely held religious beliefs
- She sued, claiming hotel required to provide RA if not undue burden
- Jury agreed. *Pierre v. Hilton Hotels* (S.D. Florida Jan. 2019)

Dress Codes / Personal Appearance – When Must Employer Make Exceptions to Policy?

- General Rule: Federal law permits employers to regulate employee appearance.
- But, exceptions may be required as RA for disability, religion, gender, and race.
- Increasing litigation over dress code, grooming, and personal appearance policies.

Dress Codes / Personal Appearance – When Must Employer Make Exceptions to Policy?

- Abercrombie's "Look Policy" prohibited employee head coverings. Applicant claimed she not hired because of hijab and that Abercrombie failed to engage in RA process. *EEOC v. Abercrombie & Fitch Stores, Inc*. (U.S. 2015).
- Female employee alleged disability and sex discrimination because UPS allegedly required her to wear long pants to cover leg brace. She claimed male employees with leg braces not subjected to same dress code requirement. *Kintz v. UPS* (M.D. Ala. 2011).

Hairstyles – A Big Hairy Deal

- Employers can impose neutral hairstyle rules, e.g., hair must be neat, clean, and well-groomed, as long as rules respect differences in hair textures and applied evenhandedly.
- Employers must RA employee's religious beliefs unless undue hardship.
- Lots of litigation

Hair, Hair Everywhere

- UPS settled class action case for $4.9m over policy prohibiting males in "supervisory or customer contact positions, including delivery drivers, from wearing beards or growing hair below collar length."
- EEOC sued Florida staffing company for telling Rastafarian prep cook assigned to Walt Disney World hotel to cut hair to comply with Disney's appearance standards. Cook said his religion prohibited cutting his hair. No accommodation discussed or offered.
- EEOC lost case alleging race discrimination against employer that refused to hire applicant with dreadlocks. Court held dreadlocks not immutable characteristic, so no intentional race discrimination for enforcement of "race-neutral" grooming policy. *EEOC v. Catastrophe Mgm't Solutions* (11th Cir. 2016).
- On Feb. 18, 2019, NYC Comm'n on Human Rights issued legal guidance prohibiting workplace grooming policies that discriminate against Black people on basis of hair. Protects "right to maintain natural hair, treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state."

Six Flags Over Texas Denies Teens Jobs Because of Hairstyles*, Fort Worth Star Telegram*, April 1, 2019

- Two African-American teens, one with dreadlocks & one with long braid past shoulders, told to cut hair if wanted job at Six Flags in Arlington.
- Policy applies to 30,000 employees at 26 amusement parks: no extreme hairstyles or drastic variations in hair color, locks, or partially shaven heads." Dreads considered "extreme" & in violation of policy.
- Teen's parent Facebook post: "African Americans take pride in our hair and are passionate about our hair, especially being able to grow our hair out. Your hair will never look like mine and mine will never look like yours. Both [teens] hair is neat and groomed. What's the real issue?"
- Six Flags' Response: We recognize some EEs "may request accommodations to our grooming code due to religious, cultural or medical reasons. We work with those [EEs] on a case-by-case basis." Six Flags reviews policy annually. Small, visible tattoos & close shaven beards now OK.

Non-Religious, Community Service Activity May Require Accommodation. All IT staff required to work on 4th of July weekend. IT supervisor attended special, community church event on Sunday but arranged for replacement and offered to come in after event. Absence not approved and supervisor fired. 5th Circuit held focus not nature of religious activity, but whether employee sincerely believed it to be religious in her own scheme of things. Undue hardship argument failed because another employee allowed time off to attend parade and a volunteer was willing to work in place of supervisor. Summary judgment for employer on religious discrimination claim reversed. *Davis v. Fort Bend County, Texas* (5th Cir. 2014).

Religion: Accommodation of Religious Beliefs – How Far Is Too Far?

Examples of conduct, especially by a supervisor, that may infringe on rights of others:

- Religious expression that may be perceived by others as derogatory if based on, for example, gender, religion or sexual orientation / identity
- Actual or perceived favoritism toward others of same religion / belief
- Basing business decisions on religious beliefs
- Referencing religion / beliefs in performance or disciplinary communications
- Prayers, devotionals, bible studies, etc. during business meetings or in workplace
- Religious statements / references in policies, handbooks, code of ethics, email signatures

ACCOMMODATION OF PREGNANCY & RELATED ISSUES

Pregnancy Discrimination Act (PDA)

- Employers must treat women affected by **pregnancy, childbirth, or related medical conditions** in **same** manner as other applicants or employees who are **similar in their ability or inability to work**
- PDA does not require paid leave, guarantee job protection, or mandate preferential treatment

Standard for Accommodating Pregnant Employees. If female temporarily unable to perform job due to medical condition related to pregnancy or childbirth, employer must treat her in same way it treats other temporarily disabled employees. *Young v. UPS* (U.S. 2015).

Pregnancy Discrimination & Temporary Disability – ADA

- Pregnancy, by itself, not a disability under ADA. So, except in unusual circumstances, no need to accommodate pregnant employee under ADA
- Accommodation may be required if, for example, pregnancy aggravates another condition that qualifies as disability (*e.g.*, diabetes or hypertension)
- Employer can only deny RA if causes undue hardship
- ADA Amendments Act of 2008 – much easier to show that medical condition is covered disability

Breastfeeding / Lactation – Workplace Protections

- **Lactation discrimination is pregnancy discrimination** – Because lactation is physiological process caused by hormonal changes associated with pregnancy and childbirth, discrimination on basis of lactation is unlawful pregnancy discrimination under Title VII. *EEOC v. Houston Funding* (5th Cir. 2013).

- **ACA Amendment to FLSA** – Covered employers must provide unpaid, reasonable lactation breaks to nonexempt nursing mothers and private space to express milk, for one year following birth.
- **Public Sector Employers** – In Texas, under law passed in 2015, public employers must provide reasonable break time each time employee needs to express breast milk and employer must make RA. Texas Gov't Code, Chapter 619.
- **State laws** – More and more states passing laws making breastfeeding protected activity and/or requiring employers to accommodate pregnancy-related conditions.

EEOC Enforcement Guidance: *Pregnancy Discrimination and Related Issues*

- Issued on June 25, 2015 – updated after U.S. Supreme Court's *Young v. UPS* decision
- Guidance explains Title VII's prohibition against pregnancy discrimination
- Describes individuals to whom PDA applies
- Discusses expanded definition of "disability" under ADA
- Discusses how PDA applies to pregnancy-related impairments
- Sets forth examples of best practices and RAs

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