

BE ACCOMMODATING: NAVIGATE YOUR ADA OBLIGATIONS IN GOOD FAITH

By: Gregory P. Kult*

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Employers often are faced with employees who experience difficulty performing their jobs because of a physical or mental impairment. The Americans with Disabilities Act ("ADA") requires employers with at least fifteen (15) employees to provide reasonable accommodations to qualified applicants and employees with known disabilities, unless doing so would cause undue hardship. Accommodations include any change in the work environment that enables an individual with a disability to enjoy equal employment opportunities. Unfortunately, as demonstrated by the ever-growing body of case law, the duty to reasonably accommodate often is misunderstood.

When a qualified individual with a known disability needs assistance to do his or her job, the employer should engage in a good faith interactive process with the individual to determine whether he or she is able to safely perform the essential functions of the position, with or without reasonable accommodation. Consider the following approach:

Analyze Job Functions. Meet with the individual and prepare a list of job requirements. If the job description is not accurate, document all changes so that your final list accurately reflects how the job is performed.

Determine Precise Job Limitations. Ask the individual to describe how the disability limits his or her ability to do the job. Consider requiring a limited, job-related medical examination/inquiry by the individual's healthcare provider, narrowly tailored to the disability the individual is claiming is causing the job-related limitation. If you receive insufficient information from the individual or his or her healthcare provider, explain why the documentation is insufficient, and ask the individual to promptly provide the necessary information. If the problem persists, ask the individual to sign a release authorizing you to communicate with his or her healthcare provider, or require the individual to be examined by a healthcare provider of the employer's choice, at the employer's expense. Maintain all medical information in a confidential medical file separate from the personnel file.

Identify Potential Accommodations. Brainstorm with the individual in an effort to identify potential accommodations that might enable the individual to safely perform the essential functions of the position. Examples of approaches to consider include: making existing facilities accessible; job restructuring; part time or modified work schedules; acquiring or modifying equipment; changing tests, training materials, or policies; and providing qualified interpreters. Some tips:

- Consider low-cost accommodations before moving on to more expensive solutions. Think "effective" not "expensive".
- Although you do not have to reassign or otherwise eliminate essential job functions, you may have to consider reassigning or eliminating marginal job functions.
- Even if you are not covered by the Family and Medical Leave Act, you may have to consider unpaid, job-protected leave as a reasonable accommodation.

- Generally, you are not required to lower performance standards that are applied uniformly to all employees. However, you may have to provide a reasonable accommodation that would help an individual with a disability meet your standards. Think “helping meet the bar”, not “lowering the bar.”
- Before declining to provide an accommodation that would enable the individual to perform the job’s essential functions, determine whether it would cause “undue hardship”. “Undue hardship” means significant difficulty or expense and focuses on the employer’s resources, other resources available to the employer (for example, from advocacy groups or in the form of tax credits), and other circumstances in relation to the cost or difficulty of providing a specific accommodation.
- If you cannot come up with an effective reasonable accommodation, consider contacting the Job Accommodation Network at 1-800-526-7234 or www.jan.wvu.edu for assistance in identifying accommodations.
- If you cannot reasonably accommodate an employee in his or her current job, consider reassignment to a vacant position for which the individual is qualified.
- If you cannot come up with an accommodation and there is no position for which the individual is qualified to which he or she may be reassigned, you may be in a position to consider termination.

Regardless of whether you accommodate the individual or end up terminating him/her, remember to **document** all conversations, proposed accommodations, and reasons for accepting or rejecting any proposed accommodation. Doing so will show your good faith, which may be critical to your defense and may help you avoid punitive damages.

*Current contact information:

Wooden & McLaughlin, LLP
One Indiana Square, Suite 1800
Indianapolis, IN 26204
(317) 639-6151 ext. 341
gkult@woodmclaw.com

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