

The Best Ways to Get Sued Over Employee Leaves and Accommodations



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ADA Reminders



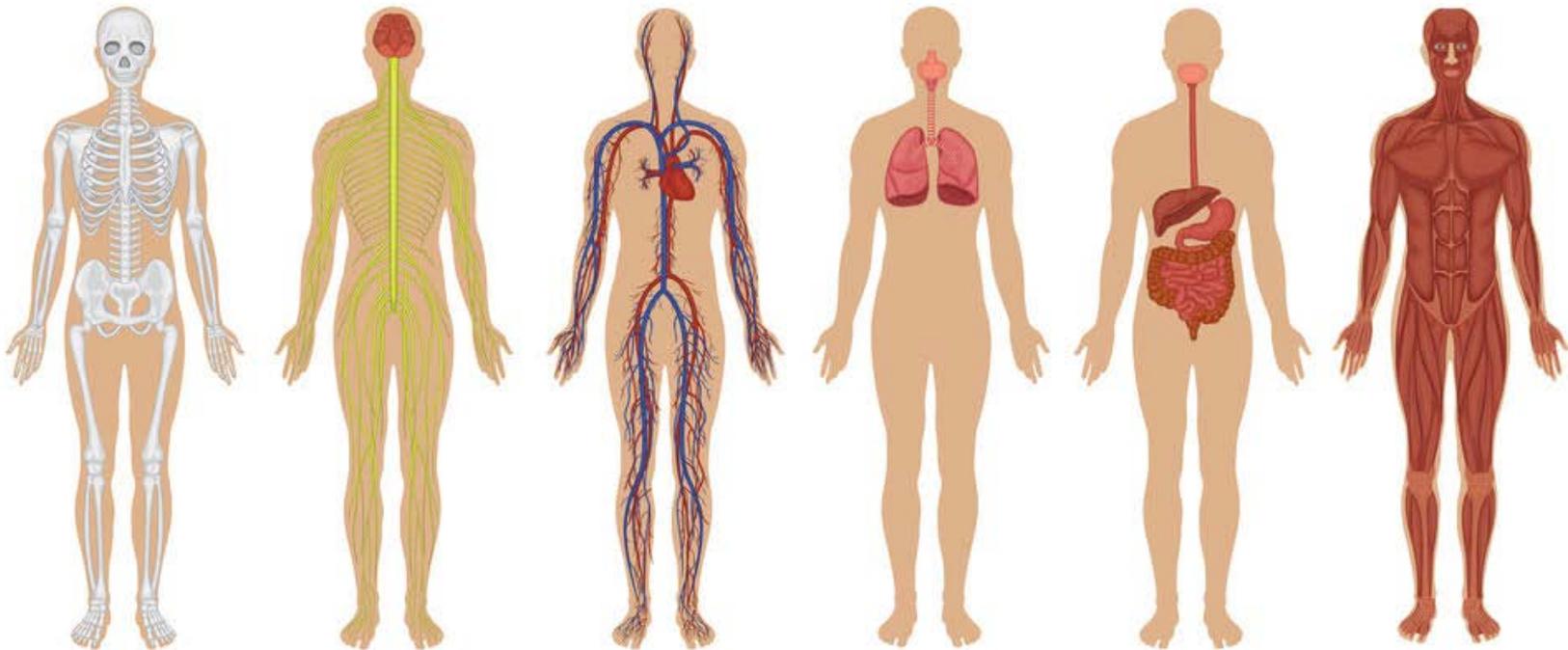
- The ADA prohibits discrimination because of a disability (or a history of a disability, or because someone is perceived as having a disability)
- Employers must also reasonably accommodate qualified individuals with disabilities unless it poses an undue hardship
- Requires an interactive process with the employee and possibly his/her healthcare provider
- Highly individualized, fact-specific analysis (the interactive process)

“Major Life Activities”

1. Self-care	<ul style="list-style-type: none">■ Bathing■ Grooming■ Dressing■ Eating and feeding	<ul style="list-style-type: none">■ Bowel and bladder function■ Mobility
2. Communication	<ul style="list-style-type: none">■ Speaking■ Reading	<ul style="list-style-type: none">■ Writing■ Keyboard use
3. Physical activity	<ul style="list-style-type: none">■ Standing■ Sitting■ Reclining■ Walking■ Stooping■ Squatting■ Kneeling■ Reaching■ Bending■ Twisting	<ul style="list-style-type: none">■ Carrying■ Lifting■ Pushing■ Pulling■ Climbing■ Exercising
4. Sensory function	<ul style="list-style-type: none">■ Hearing■ Seeing■ Tactile sensation	<ul style="list-style-type: none">■ Tasting■ Smelling
5. Hand functions	<ul style="list-style-type: none">■ Grasping■ Holding■ Pinching	<ul style="list-style-type: none">■ Percussive movements■ Sensory discrimination
6. Advanced functions	<ul style="list-style-type: none">■ Travel (riding, driving)■ Sexual function■ Social interaction■ Understand concepts■ Memory	<ul style="list-style-type: none">■ Problem solving■ Stress adaptation■ Sleep pattern■ Recreational/ social activities

Major Life Activities Include Major Bodily Functions

- Functions of immune system
- Special sense organs and skin
- Normal cell growth
- Digestive functions
- Bladder, bowel, and urinary functions
- Neurological and brain functions
- Respiratory functions
- Circulatory and cardiovascular functions
- Endocrine functions
- Hemic functions
- Lymphatic functions
- Musculoskeletal functions
- Reproductive functions



Is There a *List* of Disabilities? (Yes and No)

- Autism
- Cancer
- Cerebral Palsy
- Diabetes
- Epilepsy
- HIV/AIDS
- Major Depression
- Multiple Sclerosis
- Muscular Dystrophy
- Bipolar Disorder
- PTSD
- Obsessive Compulsive Disorder
- Schizophrenia



Notice of ADA Accommodation Request

- Employee generally must initiate interactive process
 - No “magic language” required by employee
- *Exception
 - Employer must initiate interactive process, if employer has knowledge of disability or disability is apparent.
 - “Knowledge” may be imputed to employer when existence of disability is the only reasonable interpretation of the facts.
- Cannot take job performance into consideration

Jane and Bipolar Disorder Hypothetical

Request for Accommodation?



- Jane, an employee, has worked for you for six months and has begun to act strangely.
- Several people tell you she is bipolar and you start to believe she is.

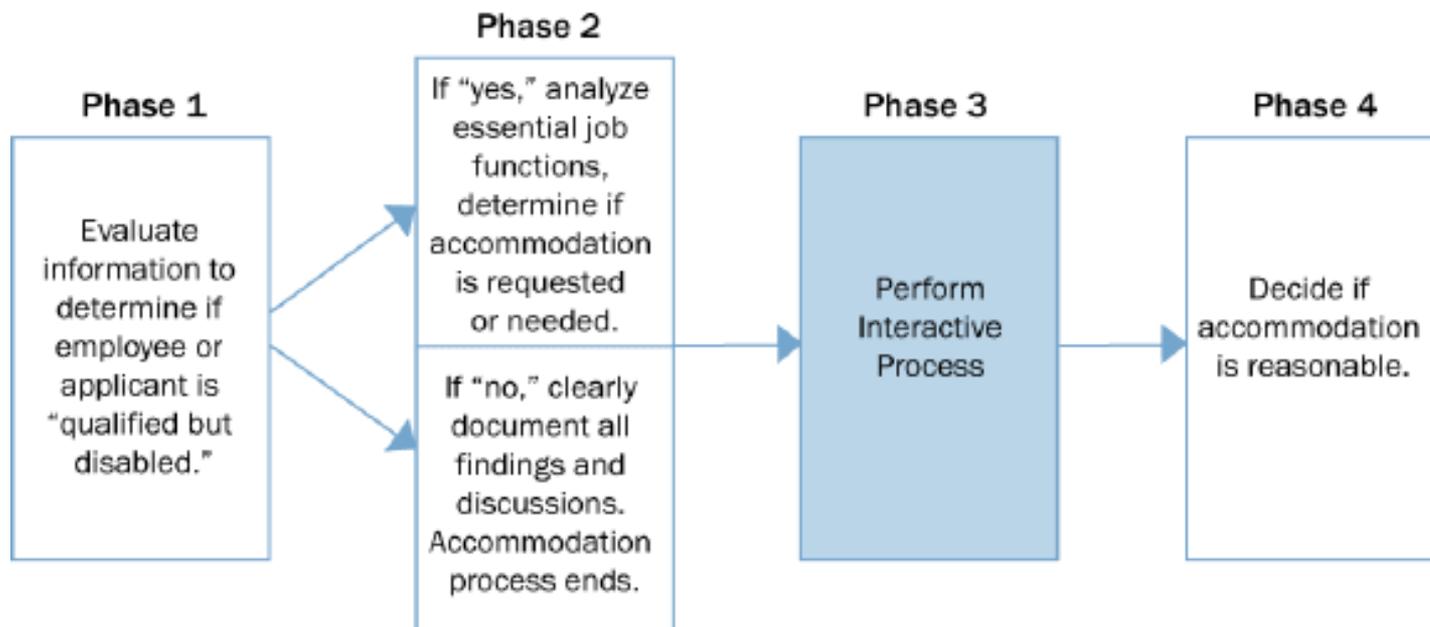
Is Jane protected under the ADAAA so that the analysis should shift from whether she is disabled to whether reasonable accommodation is merited?

What Is The Interactive Process?

Possible questions in the interactive process:

1. Nature of disability;
2. Employee's functional limitations;
3. How disability may be affecting performance; and
4. Employee's requested accommodations.

The ADA Decision-Making Cycle



Reasonable Accommodation

Title I of the Americans with Disabilities Act of 1990 (the “ADA”) requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship.

In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

Types of ADA Accommodations

There are generally three types of ADA accommodations:

- Ergonomic (equipment, work space)
- Job changes (such as schedule changes, light duty, other task modifications)
- Leaves of absence (intermittent or block)



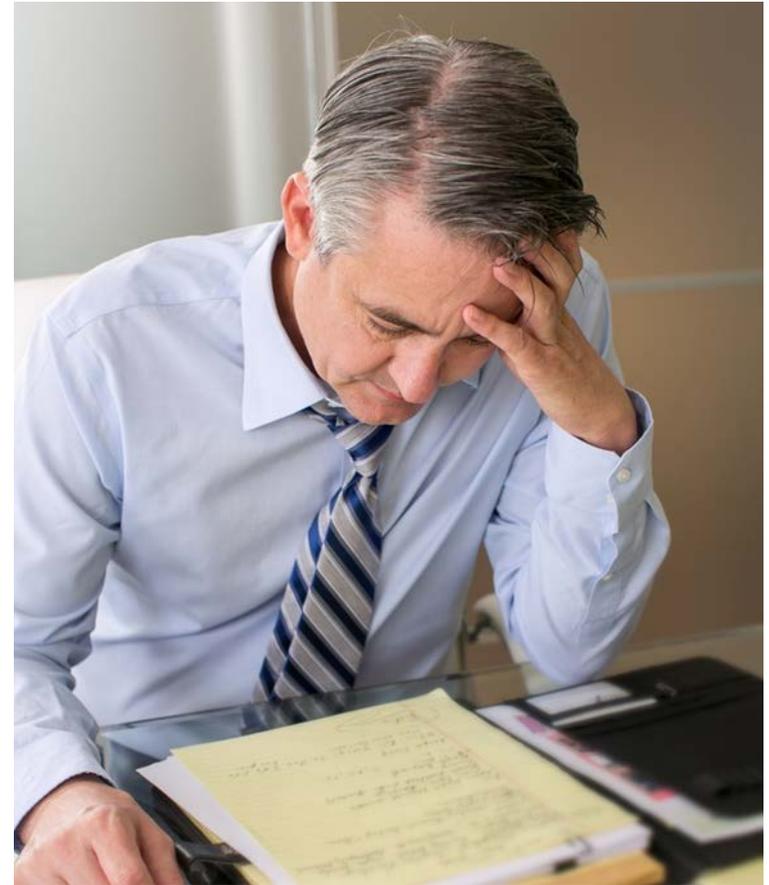
Speaking “Unwisely” to Employees Who Request Leave or Accommodation



- Supervisor to employee:
 - “Those dates you say you need to take off are a terrible time for our business to have to deal with being short-staffed.”
 - “Are you sure you need that much time off?”
 - “You’re really going to take paternity leave?”
 - “Accommodation? You want us to hire someone else to do the parts of your job you don’t like?”
- Employees remember
- Maybe not be violations per se, but likely to appear verbatim in the lawsuit
- Remedy: Train managers – particularly front-line supervisors

Employee Medical Conditions May Trigger Both FMLA and ADA Obligations

- **An employee's own serious health condition is one basis for leave under the FMLA**
- **If that serious health condition also constitutes a disability under the ADA, that employee may also be entitled to accommodations**



FMLA Overview: It's All About Time

- Eligibility criteria
- Qualifying reasons
- Unpaid, job-protected leave
- Benefits continuation
- Reinstatement
- **12 work weeks per 12-month period**
- **Block or intermittent/reduced schedule leave**
- No interference, no retaliation
- It doesn't matter how inconvenient this is

Interplay between FMLA and the ADA



- Leave of absence, including intermittent leave, is a form of ADA accommodation and covered under FMLA.
- How many employees?
 - Count any employee on payroll
 - 50 employees/20 workweeks current or preceding year
- Employee: 1 year of service/1,250 hours in the preceding 12 months

Leave as an Accommodation Under the ADA



When FMLA is exhausted (or doesn't apply), leave from work may be a reasonable accommodation under the ADA, regardless of what your policies say or what your practices are.

Additional Leave as an Accommodation



- Don't wait until the very end to communicate with employee
 - “How's it going? Making progress? Anticipate coming back on [DATE LEAVE EXPIRES]?” – DOCUMENT!!
 - Written notice of leave-end date
- Input from employee's treating physician
 - Why/how will more leave lead to ability to perform job?

Employee says he won't be able to return

–Get his description of why

–“I know I'm not ready to return. I have no idea when I'll be able to do so. My doctor says she doesn't know either. She's told me I just need to keep staying home.” OR

–“If I could just stay out for a few more weeks, I think I'd be well enough to come back to work.”

Additional Leave as an Accommodation

- Employer need NOT grant indefinite, open-ended leave
 - Case law: Such a leave is not a “reasonable accommodation”
- Request for limited and finite period of additional leave must be evaluated
- Must be granted unless it would impose “Undue Hardship”
 - Very tough standard to meet
 - 14/30/45 more days almost never likely to sink the company
 - What is the nature of the job?
- Employee’s doc keeps saying he “needs just a little more time”
 - 30 days becomes 60; 60 becomes 90; etc.

So What About Undue Hardship?

- General Rule: **High Standard**
- Basic Undue Hardship Factors
 - The nature and cost of the accommodation;
 - The overall financial resources of the organization;
 - The overall number of individuals employed by the employer;
 - The effect the accommodation would have on the resources of the organization; and
 - The impact the accommodation would have on the organization.
- Net result? Tough burden for some organizations to meet



Terminating a Leave-Taker

- Looks bad
- Pay attention to timing
- How close in time will the discharge be?
- The closer the proximity, the greater the inference of retaliation
- Only do this when absolutely necessary

Why Might You Terminate Someone on Leave

- Misconduct
 - In connection with leave request
 - Committed prior to leave, discovered previously
 - Committed prior to leave discovered during or after leave
 - Committed during leave
- Poor performance
- RIF/Job Elimination

Questions?

