ADA UPDATE:

REASONABLE ACCOMMODATION IN THE WORKPLACE

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***** The views expressed herein are those of the authors and do not reflect the views of the EEOC or the City of Philadelphia *****

EEOC Fiscal Year 2017 Charge Statistics

- 84,254 charges of workplace discrimination that the agency received in fiscal year 2017 (runs from Oct. 1, 2017, through Sept. 30, 2017).
- Disability charges accounted for 31.9% (26,838) of the charges, the third largest category of charges filed.
- The EEOC secured more than $398 million for victims of discrimination, $135 million of which went to charges filed and resolved under the Americans with Disabilities Act ("ADA").
- As many as 11,754 of the 2017 charges filed under the ADA alleged failure by the employer to provide a reasonable accommodation.
- For disability charges filed with the EEOC, cases from Pennsylvania accounted for 6.1% of the overall US charges.
- On a state-wide basis, disability charges were 36.5% of all charges alleging discrimination in the state, which trends higher than the nation-wide average of 31.9%.

Significant EEOC Settlements – American Airlines and Envoy Air

- In 2017, the largest ADA settlement came against American Airlines and Envoy Air who agreed to pay $9.8 million in stock (worth over $14 million if cashed in), and provide other significant relief to settle a nationwide class disability discrimination lawsuit filed by the EEOC.
- According to the EEOC's suit, American and Envoy violated the ADA by requiring their employees to have no restrictions before they could return to work following a medical leave.
- Under this policy, if an employee had restrictions, American and Envoy refused to allow them to return to work and failed to determine if there were reasonable accommodations that would allow the employee to return to work with restrictions.

Significant EEOC Settlements – American Airlines and Envoy Air

- **TAKEAWAY**- If employees with disabilities are not able to do their current job, even with a reasonable accommodation, employers are obligated to look for a reassignment to another position for those employees.

Significant EEOC Settlements – Nevada Restaurant Services

- In 2018, one of the largest settlements was against Nevada Restaurant Services, a large Las Vegas-based gaming company that operates slot machines, taverns and casinos in Nevada and Montana. The company paid $3.5 million and provided other relief to settle a disability discrimination lawsuit filed by the EEOC.
- According to the EEOC's suit, since at least 2012, Nevada Restaurant Services violated federal law by maintaining a well-established companywide practice of requiring that employees with disabilities or medical conditions be 100 percent healed before returning to work.
- The EEOC also charged that Nevada Restaurant Services fired and/or forced employees to quit because they were regarded as disabled, had a record of disability, and/or were associated with someone with a disability.

Significant EEOC Settlements – Nevada Restaurant Services

- **TAKEAWAY**- A policy that does not allow for engagement in an interactive process or providing reasonable accommodations for disabled employees will almost always run afoul of the ADA

The Basics of the Americans with Disabilities Act (ADA)

- Only applies if there are 15 or more employees
- Covered employer required to provide a covered job applicant or employee with a reasonable accommodation unless doing so would pose an undue hardship or constitute a direct threat
- "Reasonable accommodation" means an employer must take steps to enable a qualified individual with a disability to perform the essential functions of the position

Definition of Reasonable Accommodation

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." See 29 C.F.R. app. § 1630.2(o).

Definition of Reasonable Accommodation

The regulations provide that reasonable accommodation means modifications or adjustments that are classified in three categories, as follows:

- *Job Application Process* (to enable a qualified applicant with a disability to be considered for the job)
- *The Work Environment* (or the way the job is customarily performed to enable a qualified individual with a disability to perform the job's essential functions)
- *Benefits and Privileges of Employment* (to enable a covered employer's employee with a disability to enjoy benefits and privileges of employment equal to those of similarly situated employees without disabilities)
- See 29 C.F.R. § 1630.2(o)(1).

Examples of Common Reasonable Accommodations

- Job re-structuring
- Modifying work schedules or reducing hours to part-time
- Reassigning an employee to a vacant position
- Making existing facilities readily accessible
- Acquiring or modifying equipment or devices
- Adjusting or modifying examinations, training materials or policies
- Providing leave
- Providing accessible transportation
- Allowing the use of reserved parking spaces
- Telecommuting
- Use of service animals

Reasonable Accommodations Do Not Include:

- Eliminating or reallocating an essential function of a job
- Lowering production standards of quality or quantity
- Providing items for general daily living not specific to the requirements of the job
- Promoting the individual with a disability

Common Reasonable Accommodation Situations

Although the determination of whether an accommodation is reasonable is a fact-specific inquiry, employers may learn more about their own accommodation obligations by reviewing judicial assessments of common accommodation requests.

The Interactive Process

The ADA itself does not mention the term "interactive process" . . .

BUT . . .

The regulations and case law do …

- 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 accommodation.

- This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations.

See 29 C.F.R. § 1630.2(o)(3).

The Interactive Process

- An employer's obligation to provide an accommodation is generally prompted by a request from the employee or applicant which triggers the interactive process.
- The ADA does not require employers to speculate about the accommodation needs of employees and applicants; rather, the individual requesting the accommodation has an obligation to provide the employer with enough information about the disability to determine a reasonable accommodation.
- An employer then has an obligation to explore a potential accommodation and provide the employee with an appropriate reasonable accommodation.
- Both the employer and the individual seeking accommodation must participate in the interactive process in good faith.

Employee's Duty to Request an Accommodation

- Generally, courts have recognized that an employee must request an accommodation to trigger the interactive process.
- An employee's request for an accommodation may be either verbal or written.
- The EEOC takes the position that requests for accommodation do not need to be in writing.
- The employee must link the accommodation request to a medical condition.

Example of an Employee Not Linking Accommodation Request to Disability

- Plaintiff, a 10 year employee of the Philadelphia Int'l Airport, claimed the City failed to accommodate his disability by not allowing use of discretionary unpaid leave available.
- Court found no evidence that Plaintiff ever requested such an accommodation.
  - His deposition affirmed that he felt he did not need to make such a request because the 15 days of unpaid leave were given to every employee.
  - He was placed on the No Unpaid Leave List in 2006 and 2009.
  - The City issued a notice in 2009 that it would not be as generous in approving unpaid leave.
- Plaintiff's unauthorized absences did not provide notice of a desire for an accommodation as there was no documents which informed the City that his absences were attributable to his knee disorder.
- No evidence that the City knew of Plaintiff's depression until he asked for FMLA leave, which was granted along with an extension of that leave.

McCall v. City of Philadelphia, No. 14-4374 (3d Cir. Nov. 18, 2015).

Example of an Employee Not Linking Accommodation Request to Disability

- Follow-up leave request based on a physician's note stating that Plaintiff's "*job related problem continues unimproved. He is unable to work through April 4, 2011*" could not be processed because the condition for which he was being treated was not listed.
- Despite follow-up requests, Plaintiff never completed and submitted a leave request or provided the necessary medical documentation.
- City lacked not only a request for leave but also the information necessary to determine what kind of accommodation was desired.
- **TAKEAWAY** - Constructive notice of an accommodation request cannot be inferred merely from an employee's absence from work without evidence linking the absences to the specific disability for which the accommodation is sought.
- **TAKEAWAY** - Although no "magic" language, or even the term "accommodation" in the request, is required, an employee must be clear in indicating the need for an accommodation **because of** a medical condition.

McCall v. City of Philadelphia, No. 14-4374 (3d Cir. Nov. 18, 2015).

No Express Accommodation Request from the Employee?

•Many employers may assume that, without an express request, there is no duty to accommodate under the ADA . . .

GUESS AGAIN . . .

•If the employer knows both about the disability and the need for accommodation, it may have an obligation to provide the accommodation—even without an express request that a modification is needed because of a disability.

No Express Accommodation Request from the Employee

- Employee advised her supervisors that she was diagnosed with, and was being treated for depression.
- She also told them that she didn't feel like she was the teacher she had once been.
- Plaintiff requested temporary placement in a floating or prep sub position because either of those positions would be less stressful.
- Although Plaintiff did not use the words "reasonable accommodation," Plaintiff's request to be temporarily reassigned coupled with her disclosure about being diagnosed with depression put Defendant on notice that Plaintiff suffered from a disability and requested a reasonable accommodation

Aptaker v. Bucks County Intermediate Unit, No. 14-225 (E.D. Pa. Sept. 3, 2015)

Example of Employer's Bad Faith When the Employee Requests an Accommodation

- Where there is very little evidence in the record demonstrating that Defendant engaged in an interactive process after being notified about Plaintiff's depression and request to be temporarily placed in a different position, and
- Defendant never followed up with Plaintiff, or with her doctors, to inquire further about Plaintiff's symptoms or limitations, Defendant did not act in good faith.
- Unilaterally offering Plaintiff one month of FMLA leave, without looking into any other possibilities, did not evidence good faith under the circumstances considering Plaintiff stated it would be counterproductive in her healing process, and employer instead pursued an aggressive course of action to evaluate Plaintiff's teaching abilities, with serious consequences.

Aptaker v. Bucks County Intermediate Unit, No. 14-225 (E.D. Pa. Sept. 3, 2015)

No Express Accommodation Request from the Employee?

•Keenan v. Toys "R" Us, Inc., 2010 U.S. App. LEXIS 19101 (9th Cir. Sept. 13, 2010) (unpublished) (holding where the employer knew that the employee had "a diminished intellectual and emotional capacity" there may have been an obligation to provide reasonable accommodation).

•Brady v. Wal-Mart Stores, Inc., 531 F.3d 127 (2d Cir. 2008) (holding that even without an express request "an employer has a duty reasonably to accommodate an employee's disability if the disability is obvious—which is to say, if the employer knew or reasonably should have known that the employee was disabled").

Self Identification

Invitation to Self Identify

[redacted] is a government contractor subject to the Vietnam Era Veterans' Readjustment Assistance Act of 1974 and section 503 of the Rehabilitation Act of 1973, as amended, which require government contractors to take affirmative action to employ and advance in employment qualified persons with disabilities and qualified disabled veterans and veterans of the Vietnam era covered by the Acts. If you are a covered disabled veteran, a veteran of the Vietnam era, or a person with a disability and would like to be considered under our affirmative action program, please tell us. You may inform us of your desire to benefit under our program at this time and/or at any time in the future. This information will assist us in placing you in an appropriate position and making, where appropriate, reasonable accommodation for your disability. Submission of this information is voluntary, and refusal to provide it will not subject you to any adverse treatment. Information you submit will be kept confidential, except that:

1. Supervisors and managers may be informed regarding restrictions on the work/duties of persons with disabilities and disabled veterans, and regarding necessary accommodations;
2. First aid and safety personnel may be informed, when and to the extent appropriate, if the condition might require emergency treatment; and
3. Government officials engaged in enforcing laws administered by the OFCCP or the Americans With Disabilities Act may be informed.

Self Identification

I certify that I have read the "INVITATION TO SELF IDENTIFY" on the top of this form and that I understand its terms. I further attest, by checking the appropriate block and signing below, that I am (please check all that apply):

X A person with a disability – as defined by Section 503 of the Rehabilitation Act of 1973, as amended.

_____ An Armed Forces Service Medal Veteran – a person who "while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (62 FR 1209)."

_____ A Recently Separated Veteran – "any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty." Date Separated: _____

_____ A Disabled Veteran – "a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary, or was discharged or released from active duty because of a service-connected disability."

_____ Other Protected Veteran – a person who "served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized by the Department of Defense."

_____ None of the above

If you are a person with a disability, a disabled veteran, or veteran of the Vietnam era covered, we would like to include you under our affirmative action program. If you are a person with a disability or a disabled veteran, it would assist us if you tell us about:

1. Any special methods, skills, and procedures which you believe may be able to qualify you for positions that you might not otherwise be able to do because of your disability so that you may be considered for appropriate positions; and
2. The accommodations which we may be able to make which would enable you to perform the job properly and safely.

– Help given freely, when asked. –

– may take a little longer to complete certain tasks –

Employer's Duty to Engage in the Interactive Process

Courts have generally held that the interactive process requires employers to:

- analyze job functions to establish the essential and nonessential job tasks;
- identify the barriers to job performance by consulting with the employee to learn the employee's precise limitations; and
- explore the types of accommodations which would be most effective.

Good Faith Participation in the Interactive Process

Employers can demonstrate a good faith attempt to accommodate by taking the following steps:

✓meeting with the employee

✓requesting information about the limitations and type of accommodation the employee is seeking

✓considering the employee's requests

✓discussing alternatives if a request is burdensome

See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999).

Employer Not Liable Where Employee Causes Breakdown in Interactive Process

Because the interactive process imposes mutual obligations on employers and employees, an employer cannot be liable for failure to accommodate if a breakdown in that process is attributable to the employee.

Employer Not Liable Where Employee Causes Breakdown in Interactive Process

Carter v. Northwest Airlines, Inc., 2004 U.S. App. LEXIS 5663 (7th Cir. Mar. 23, 2004) (holding that the employer did not fail in its duty to provide reasonable accommodation where it attempted to meet with the employee about whether he could return to his job, but the employee did not respond to the employer's calls or invitation to meet).

Employer Is Not Liable Where Employee Causes Breakdown in Interactive Process

- Outright refusal to engage in the interactive process at all by employee made summary judgment against her on failure to accommodate claim appropriate.
- Employer engaged in the interactive process by "identif[ying] specific positions outside of Rowland's chain of command for [Tourtellotte] to consider. . .
- [Tourtellotte] failed to apply for a single position during this period."
- **TAKEAWAY** - The interactive process imposes mutual obligations on employers and employees. An employer cannot be liable for failure to accommodate if a breakdown in that process is attributable to the employee.

Tourtellotte v. Eli Lilly and Company, No. 15-1090 (3d Cir. Jan. 13, 2016)

Employer Is Not Liable Where No Reasonable Accommodation Is Possible

- Plaintiff's disability occasionally caused her to become dizzy and faint. She was provided with various accommodations, including a leave of absence and the ability to miss work without formally incurring absences.
- During one incident, Plaintiff became nauseous, informed her supervisor that she needed a break, and other nurses took her vital signs and treated her with saline solution through an I.V.
- In doing so, the nurses did not call a "rapid response," the Hospital's procedure for treating an employee or visitor before bringing them to the emergency room for further care, or obtain a doctor's order to provide treatment.

Mullen v. Chester County Hosp., CIV.A. 14-2836, 2015 WL 1954399 (E.D. Pa. Apr. 30, 2015)

Employer Is Not Liable Where No Reasonable Accommodation Is Possible

- Plaintiff was terminated "for her involvement in the provision of medical care outside the scope of her license," which consisted of "permit[ting] a co-worker to administer intravenous medication to her."
- Plaintiff claims that by telling her supervisor she felt sick she requested an accommodation for emergent medical care, and she requested another accommodation of lenient discipline during an internal investigation of the incident.
- **TAKEAWAY**- A request to allow illegal medical practice is not reasonable and a request to allow an illegal act cannot qualify as a reasonable accommodation.
- **TAKEAWAY**- No obligation to withhold discipline or termination of an employee who, because of a disability, violated a conduct rule that is job-related for the position in question and consistent with business necessity.

Mullen v. Chester County Hosp., CIV.A. 14-2836, 2015 WL 1954399 (E.D. Pa. Apr. 30, 2015)

Employer Not Liable Where Employee Causes Breakdown in Interactive Process

Anderson v. JP Morgan Chase & Co., 2011 U.S. App. LEXIS 5885 (11th Cir. Mar. 22, 2011) (suggesting that the employee was responsible for the breakdown in the interactive process where she would not allow the employer to discuss with her doctor her alleged allergy to carpet cleaner after attempts to accommodate her were unsuccessful).

Employer Not Liable Where Employee Causes Breakdown in Interactive Process

Whelan v. Teledyne Metal Working Products, 2007 U.S. App. LEXIS 6268 (3d Cir. Mar. 15, 2007) (holding that the employee was responsible for the breakdown in the interactive process by uncompromisingly insisting on a single accommodation that was "unreasonable as a matter of law").

Employer Causes Breakdown in Interactive Process

If the breakdown in the interactive process is attributable to the employer, courts have generally held this to be an adverse employment action.

Examples of employer-based breakdowns:

- Ignoring an accommodation request or inaction
- Not responding in a timely fashion
- Making the process unnecessarily difficult through use of policies, forms or red tape
- Refusing to engage, simply because "it's not how it gets done here"

Significant EEOC Settlements – AT&T – March 2016

- Multi-national telecommunications company paid $250,000 and reinstated a visually impaired switch technician to his job after ignoring his accommodation request for over a year and a half.
- Employee became visually impaired due to diabetes. Doctor cleared him to return to work, at which time he requested the use of adaptive technology software to allow him to use computers and programs to perform the essential functions of his job.
- AT&T did not provide an immediate response to the request, the employee was removed from his position and not permitted to return to work while the company continued to ignore his accommodation request for over a year and a half before terminating him.
- **TAKEAWAY –** Respond timely to accommodation requests from qualified employees with disabilities.

EEOC v. AT&T, Case 3:11-cv-01964-CCC

Employer Not Liable Where No Accommodation Is Possible

An employer's failure to initiate the interactive process, however, is not itself a "*per se*" violation of the ADA, where no accommodation is possible.

Deily v. Waste Management of Allentown, 2003 U.S. App. LEXIS 1295 (3d Cir. Jan. 24, 2003) (explaining that since no accommodation would have allowed the plaintiff to perform his job, the employer was not obligated to participate in the interactive process of accommodation required by the ADA).

Employer Does Not Have to Provide Employee's Preferred Accommodation

Employers are not obligated to provide the *specific* accommodation requested by the employee; rather, employers are required to provide a *reasonable* accommodation. See 29 C.F.R. app. § 1630.9.

Trout v. Electronic Data Systems Corp., 2005 U.S. App. LEXIS 21934 (6th Cir. Oct. 7, 2005) (holding that the employer did not fail to provide reasonable accommodation where it chose to let the employee call off work, without penalty, when she felt unable to come in rather than provide her requested accommodation of work from home).

The [Il]legality of "Full-Duty Recovery," "100% Healed," and "No Restrictions Policies"

The ADA prohibits any covered employer from utilizing standards, criteria, or methods of administration:

(a) that have the effect of discrimination on the basis of disability; or

(b) that perpetuate the discrimination of others who are subject to common administrative control.

See 42 U.S.C. § 12112 (b)(3).

So What Does All of that Mean in the Context of Policies?

- A "100% healed" policy is one which requires that an injured employee cannot return to work until he or she is "100% healed" meaning the employee has no residual restrictions or limitations
- Sometimes known as "full duty" or "no restrictions policies"
- Courts have been nearly unanimous in rejecting full-duty release requirements as they "simply defy" the ADA and would be a *per se* violation of the ADA
- Such a policy would on its face discriminate against a qualified individual with a disability because it does not make an individual assessment of an individual's ability to perform the essential functions of the job with or without accommodation

Example of Fully Duty Policy

Response to Additional Questions

A. 1. When an employee is injured on the job (worker's compensation) or has a non-work related injury or illness (disability) we require them to furnish us with a Return to Work slip from their treating physician. The Return to Work slip must be received by the operation management team or Health and Safety before the employee's return to work date. The Return to Work slip should include wording such as "No restrictions, full duty." In the case of a work-related injury, we may choose to work someone in "Temporary Alternate Work." In that instance the Return to Work slip should include restrictions for the employee as well as a potential full-duty release date or next appointment date. Temporary Alternate Work is used at the discretion of management who would review available work as well as restrictions.

Example of Fully Duty Policy

The purpose of this letter is to advise you of the following regarding your employment status with the [redacted]

A review of your attendance record reveals that your entitled sick leave will expire on May 7, 2014, which is thirty (30) days from the date of this letter. If you wish to return to your regular position prior to May 7, 2014, you must make an appointment and be approved by the [redacted] Medical Department [redacted] to return to your regular assignment.

Please contact the Medical Department on [redacted] for an appointment. This approval is contingent upon you providing all the necessary documentation concerning the nature of your illness from your attending physician. If you are not approved for full duty by the [redacted] Medical Department on or before May 7, 2014, you will be dropped from the rolls of the [redacted] for expiration of your entitled sick leave.

The [Il]legality of "Full-Duty Recovery," "100% Healed," and "No Restrictions Policies"

- Hohider v. United Parcel Service, Inc., 574 F.3d 169, 195 (3d Cir. 2009) (*superseded on other grounds*).
  - It was alleged that UPS had an unofficial, companywide "100% healed" policy, under which UPS systematically required employees attempting to return from medical leave to present a full medical release - one without any permanent restriction - certifying that the employee was able to perform the "essential functions" of the employee's last job before allowing the employee to return to work in any capacity at UPS
  - Although the Third Circuit did not rule directly on the issue, it strongly indicated that where a full-duty policy is applied against a person with a qualifying disability, it violates the ADA "because it would, by its very terms, discriminate against those protected individuals on the basis of their disabilities, systematically denying them the reasonable accommodations to which they are entitled and excluding them from employment for which they are otherwise qualified"

Best Practices From the Employee Perspective

✓Familiarize yourself with the EEOC regulations and various guidance concerning the ADA (www.eeoc.gov)

✓Document the employee's request(s) in writing

✓Engage human resources professionals directly on the employee's behalf

✓Cooperate with the process; don't prolong the process

✓Consult with vocational rehabilitation counselors to address limitations and work restrictions

✓Get by with a little help from your friends (call an ADA lawyer!)

Best Practices
From the Employer Perspective

As part of employer best practices regarding the interactive process, and for each accommodation request, the employer should:

✓Document in writing its receipt of the request for accommodation, providing a copy to the individual and retaining a copy for the employer's records.

✓Determine whether the individual seeking the accommodation is a qualified individual with a disability.

✓Ask the individual for information about the extent of the impairment, including notes from doctors or other health care providers, and request medical testing relevant to the accommodation at issue.

✓Confer with the individual to discuss accommodation alternatives, which includes listening to the individual's preference and the option to suggest alternatives.

✓Document in writing the discussion about the accommodation and the final determination about how the accommodation request is resolved.

Regular Attendance as an Essential Function?

Recent decision from the Eastern District of Pennsylvania provides a very good, fact specific discussion on whether regular attendance by an attorney working for a law firm can be deemed an essential function.

- Fischer worked for Pepper Hamilton as a project attorney
- Fischer was diagnosed with Delayed Sleep Phase Syndrome ("DSPS")
- DR's NOTE: "Somewhat unusual condition in which the normal sleepiness time is delayed so that these patients typically do not fall asleep until later in the night than the average person and, as a consequence, are later in getting up in the morning."

Fischer v. Pepper Hamilton LLP, 15-02413 (E.D. Pa. Jan. 29, 2016)

Regular Attendance as an Essential Function?

- Fischer asked for permission to work non-traditional hours, including an arrival time between 11:30 am and 1pm.
- Pepper contended that one essential function of Fischer's position as a project attorney was attending work in "a regular and predictable manner."
- The Court explained that "in most jobs, especially those involving teamwork and a high level of interaction, the employer will require regular and predictable on-site attendance from all employees."

Regular Attendance as an Essential Function?

- The projects to which Fischer was assigned included reviewing documents, contracts and settlement agreements many of which could be accessed online.
- The record also established that Pepper allowed a number of project attorneys to telecommute.
- Therefore, the Court could not conclude, as a matter of law, that regular and predictable on-site attendance was an essential function of Fischer's job.

Regular Attendance as an Essential Function?

- Pepper also contended that working a full-time schedule was an essential function of Fischer's job.
- "The EEOC's Interpretive Guidance indicates that 'the employer's judgment as to which functions are essential' . . . [can constitute] evidence for determining the essential functions of a position, but that such evidence is not to be given greater weight simply because it is included in the non-exclusive list set out in 29 C.F.R. § 630.2(n)(3)."
- The Court also considered Fischer's actual experience working in his position, including the number of hours Fischer actually worked.
- Fischer's time sheets established that for two years he worked an average of 29.1 hours per week, thus raising a factual dispute about whether working full-time was an essential function of Fischer's job.

Leaves of Absence

- Unpaid leave is a form of reasonable accommodation per case law, the EEOC and the Department of Labor
- Is the 12 weeks under the Family Medical Leave Act ("FMLA") enough?
- **NO!**
- Employees who are unable to return to work after the expiration of their FMLA leave due to their own serious health condition may be entitled to additional leave under the ADA.
- In addition, employees who are not eligible for FMLA leave may nevertheless be entitled to leave as a reasonable accommodation.

Leaves of Absence

How much leave an individual must be given as a reasonable accommodation is a fact-specific inquiry depending on whether a particular amount of time imposes an undue hardship on the employer and on whether the individual is still considered "qualified."

Leaves of Absence

A few general principles may be gleaned from the recent decisions in which courts have addressed whether an employee's request for leave is a reasonable accommodation under the ADA:

•An employee's request for indefinite leave is not a reasonable accommodation.

•An employee's request for a determinate leave, which provides the expected duration of the impairment, may be a reasonable accommodation absent an undue hardship.

Leaves of Absence

- Leave that has no reasonable prospect of enabling the employee to work in the foreseeable future is not a reasonable accommodation.
- An employee's own statements that she expects to be able to return to work within a certain period of time are insufficient to substantiate leave, especially if the statements conflict with medical documentation (*i.e.*, physician states date of return is unknown but employee states that she expects to return to work within 3 months).
- Repeated extensions of leave requests, including successive requests for short periods of leave, can be tantamount to a request for indefinite leave, and therefore, an unreasonable accommodation.

Leaves of Absence

Rascon v. U.S. West Communications, Inc., 143 F.3d 1324 (10th Cir. 1998).

- Leave of a specific duration is a form of reasonable accommodation
- Noting that the employer should have provided four months leave so that the employee could be treated for his post-traumatic stress disorder
- Leave was not an undue hardship because:
  - Employer is a global operation with 50,000 to 60,000 employees
  - Employer did not replace employee while he was out
- Employee's duties were covered by co-workers while he was on leave

Leaves of Absence

To the contrary, courts have consistently held that an indefinite leave is not a reasonable accommodation, particularly where the employee presents no evidence of the expected duration of the impairment and no indication of a favorable prognosis

Leaves of Absence

- Krensavage v. Bayer Corp., 2008 U.S. App. LEXIS 1290 (3d Cir. Jan. 22, 2008) (noting that "open-ended disability leave" is not a reasonable accommodation where there is no "expected duration" for the leave).

Leaves of Absence

- Brangman v. Astrazeneca, LP, 952 F. Supp. 2d 728 (E.D. Pa. 2013) (a former drug company worker with post-traumatic stress disorder was not entitled to have her short-term disability leave extended as a reasonable accommodation because she did not show that she would eventually be able to return to work).

Leaves of Absence

- Valdez v. McGill, 2012 U.S. App. LEXIS 2783, at *5-15 (10th Cir. Feb. 13, 2012) (holding that the employee was not a "qualified individual" with a disability under the ADA because there was no reasonable accommodation that would have allowed him to perform the essential functions of his job at the time he was terminated and that an additional leave of absence was not a reasonable accommodation when the employee seeks leave, but is uncertain if or when he will be able to return to work).

Leaves of Absence

- Epps v. City of Pine Lawn, 353 F.3d 588 (8th Cir. 2003) (holding that a six-month leave of absence was not a required reasonable accommodation for a policeman with a small municipality which could not reallocate his job duties among its small staff of fifteen to twenty-two police officers and stating that "an employer is not required to hire additional people or assign tasks to other employees to reallocate essential functions that an employee must perform").

Leaves of Absence

- Wilson v. Dollar General Corp., 2012 U.S. Dist. LEXIS 47818 (W.D. Va. Apr. 5, 2012) (holding repeated extensions of leave requests, including successive requests for short periods of leave, can be tantamount to a request for indefinite leave, and therefore, an unreasonable accommodation).

Leaves of Absence

Employer Best Practices:

✓Conduct an individualized assessment.

✓Engage the employee in the ADA's interactive process.

✓Utilize an application for extended leave which includes a request for supporting medical documentation.

✓Document the undue hardship analysis.

✓Make the process transparent.

Attendance and No Fault Leave Policies

An employer's attendance and leave policies are often the subject of dispute in ADA cases, especially when the policy is one deemed "inflexible."

There are two contrasting approaches taken by courts in the last year in addressing leave policies.

Attendance and No Fault Leave Policies

- First case - -
- The court examined whether the EEOC could challenge United Parcel Service Inc.'s policy of terminating employees who were unable to return to work after twelve months of leave on the grounds that such a policy constitutes an unlawful qualification standard under the ADA
- EEOC v. UPS, Inc., 2014 BL 35887, N.D. Ill., No. 1:09-cv-05291, Feb. 11, 2014)

Attendance and No Fault Leave Policies

- Second case - -
- "Must an employer allow employees more than six months' sick leave or face liability under the Rehabilitation Act? Unsurprisingly, the answer is almost always no."
- Hwang v. Kansas State Univ., No. 12-3070, 2014 WL 2212071, *1 (10th Cir. May 29, 2014)

Attendance and No Fault Leave Policies

- In the UPS case, the EEOC contended that UPS's leave policy, which acts as a 100% healed requirement, operates as a qualification standard in violation of Section 12112(b)(6).
- UPS countered by arguing that this is irrelevant because "the ability to regularly attend work and not miss multiple months is an essential job function and not a qualification standard, employment test or other selection criteria."

Attendance and No Fault Leave Policies

- Holding: that if the 12-month leave policy was indeed a "100% healed policy," then according to the Seventh Circuit, when applied to a qualified individual with a disability, such a policy is *per se* impermissible because it "prevents individualized assessment" and thus "necessarily operates to exclude disabled people that are qualified to work."

Attendance and No Fault Leave Policies

- By contrast, in Hwang the employee contended that the failure to extend her sick leave, and the employer's application of its inflexible six-month leave limitation, amounted to a failure to accommodate under the ADA.

Attendance and No Fault Leave Policies

- Holding: "By her own admission, she couldn't work at any point or in any manner for a period spanning more than six months. It perhaps goes without saying that an employee who isn't capable of working for so long isn't an employee capable of performing a job's essential functions — and that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation. After all, reasonable accommodations — typically things like adding ramps or allowing more flexible working hours — are all about enabling employees to work, not to not work."

Modification Of Work Schedule

•Work schedule modification may be a reasonable accommodation depending on the nature of the job and the modification

•The critical inquiry is whether there is a nexus between the disability and the requested schedule. The modified work schedule must be needed *because of* the disability.

Modification Of Work Schedule

- One critical question with respect to work schedule modification is whether attendance during particular hours or shifts is an essential function of the job

Modification Of Work Schedule

•A modified work schedule may include:

- Flexible start or stop times
- Permanent shift reassignment
- Temporary shift change

Modification Of Work Schedule

Conneen v. MBNA America Bank, N.A., 334 F.3d 318 (3d Cir. 2003) (holding that "setting a good example" was not enough to make the 8:00 a.m. schedule essential and thus a modified schedule would be a reasonable accommodation for an employee who could not report to work until 9:00 a.m. because of her depression).

Modification Of Work Schedule

McMillan v. City of New York, 2013 U.S. App. LEXIS 4454 (2d Cir. Mar. 4, 2013) (holding that an employee whose schizophrenia interfered with his ability to arrive at work on time may have been entitled to a reasonable adjustment in his work hours because of the city's flex-time policy and the city's failure to discipline the employee for tardiness in the past which "implie[d] that punctuality and presence at precise times may not be essential" functions of the position).

Modification Of Work Schedule

Gaines v. Runyon, 107 F.3d 1171 (6th Cir. 1997) (holding that the plaintiffs requested schedule change was not needed *because of* his epilepsy; rather, the employee's medical documentation showed that he simply needed a straight shift which he already had because of his need for a consistent sleep pattern).

Modification Of Work Schedule

Palotai v. University of Maryland, 2002 U.S. App. LEXIS 12757 (4th Cir. June 27, 2002) (holding that even if the plaintiff had a disability, it was not a reasonable accommodation to eliminate the time constraints and deadlines from his job as a technician in a University greenhouse because the rigid scheduling of tasks (such as spraying plants and ventilating the greenhouse) was essential since the plants would not properly grow unless the tasks were done in a timely manner).

Job Restructuring

Job restructuring is a form of reasonable accommodation which may include:

•Reallocating marginal (non-essential) job functions

•Changing when and how an essential function is performed

Job Restructuring

Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001) (holding that climbing might not be an essential function of a cable repairman's job, where the company had excused him from climbing because of his panic disorder and finding that although the employee might have climbed 50% of the time before his diagnosis, he did not have to climb for three and a half years after his diagnosis with "no adverse consequences for his employer")

Job Restructuring

Richardson v. Friendly Ice Cream Corp., 594 F.3d 69 (1st Cir. 2010) (holding that where performing a number of manual tasks was essential for a restaurant assistant manager, the restaurant was not required to reallocate those functions to other employees as a reasonable accommodation)

Job Restructuring

Majors v. GE Elec. Co., 714 F.3d 527 (7th Cir. 2013) (affirming summary judgment for employer because lifting objects weighing more than 20 pounds was an essential function of the position and requested accommodation by an employee with a permanent lifting restriction of having another employee lift the heavy objects for her was not a reasonable accommodation)

Job Restructuring

Courts have consistently held that a change in an employee's reporting procedure (*i.e.*, changing an employee's supervisor) is not a reasonable accommodation.

- Kennedy v. Dresser Rand Co., 193 F.3d 120 (2d Cir. 1999) (holding that it was not a required reasonable accommodation for the employer to reassign the employee to a different supervisor and to protect the employee from any "interaction" with the supervisor where the employee claimed that her depression was triggered by interaction with her supervisor).

Reassignment

- Reassignment to a vacant, funded position may be an appropriate accommodation if other efforts have not succeeded
- A position is vacant if it is available at the time of the request for accommodation or the employer knows that it will soon become vacant
- If reassignment is offered, it must be to a position of equal status, pay and other terms and conditions of employment unless there is no equivalent position as a reasonable accommodation
- Employers are not required to reassign employees to positions for which they are not qualified or to offer a promotion to a more senior position
- Only current employees are entitled to reassignment as a reasonable accommodation (not applicants or former employees)

Reassignment

- Generally, employers are not required to reassign employees when doing so would violate a seniority system. See U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).
- However, if the employer has the right to modify the seniority system and exercises that right fairly frequently or the seniority system accounts for exceptions, reassignment despite a seniority system may be appropriate.
- Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) (stating that if other employees with the company have a legitimate contractual or seniority right to a vacant position, it is not considered vacant for reassignment to the disabled employee)

Reassignment

EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. Ill. 2012), *cert. denied*,133 S. Ct. 2734 (2013):

•the employer adopted Reasonable Accommodation Guidelines, which provided that while a transfer to an equivalent or lower-level vacant position might be a reasonable accommodation, employees who sought an accommodation were still required to participate in a competitive process for the position

•the employer's policy also provided that disabled employees seeking accommodation would receive some preferential treatment in the process, but that the best-qualified candidate would ultimately be selected

Reassignment

EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. Ill. 2012) *cert. denied*,133 S. Ct. 2734 (2013):

•EEOC challenged this policy as violating the ADA

•the employer argued that it was not required to grant a requested accommodation that would violate a disability-neutral rule

•Seventh Circuit held that the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer

Telecommuting

- Courts vary with respect to telecommuting as a reasonable accommodation
- Courts largely focus on the nature of the work performed and are less concerned about an employer's preference for having workers physically on site
- If employees without disabilities are permitted to telecommute (for whatever reason), it becomes much more difficult for an employer to argue that a particular employee with a disability with the same job should not receive a similar option as an accommodation.

Telecommuting

The EEOC's informal guidance on the matter cuts in the same direction. An employer may refuse a telecommuting request when, among other things, the job requires "face-to-face interaction and coordination of work with other employees," "in-person interaction with outside colleagues, clients, or customers," and "immediate access to documents or other information located only in the workplace." EEOC Fact Sheet, *Work At Home/Telework as a Reasonable Accommodation (Oct. 27, 2005), http://www.eeoc.gov/facts/telework.html*

Telecommuting

- Kiburz v. England, 2010 U.S. App. LEXIS 1006 (3d Cir. Jan. 19, 2010) (holding that the employer was not required to allow the employee, an Information Technology Specialist, to work from home where some of his essential functions, such as attending meetings and working with others, required him to be in the office).
- Whelan v. Teledyne Metal Working Products, 2007 U.S. App. LEXIS 6268 (3d Cir. Mar. 15, 2007) (holding that work-at-home was not a reasonable accommodation for a salesperson where the employer had consolidated its marketing operations in one location in order to enhance supervision in the department and realize administrative efficiencies and noting that allowing the employee to continue working from home would deprive the employer of the efficiency gains and better quality work product it wanted from consolidation)

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

- Jane Harris was employed by Ford as a steel resale buyer. Resale buyers act as intermediaries between Ford's steel suppliers and its parts manufacturers. They purchase steel from the suppliers and sell it to the parts manufactures, who then manufacture the parts and supply them to Ford's assembly line.

- Harris suffered from irritable bowel syndrome. Her uncontrollable diarrhea and fecal incontinence, sometimes so bad that "it" could "start pouring out of her" at work. She occasionally couldn't even make the one-hour drive to work without having an accident. The vicious cycle continued, as her symptoms increased her stress, and the increased stress worsened her symptoms — making her less likely to come to work.

- Ford claimed that the resale buyer position was "highly interactive," requiring face-to-face interactions at the manufacturing site.

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

- As an accommodation for her condition, she asked to work from home as needed and up to four days per week. After several meetings with Harris, Ford advised her that it could not accommodate her telecommuting request because it would prevent her from performing the essential functions of her job, i.e. regular attendance.

- It offered alternative accommodations, which Harris rejected. Harris had agreed that four of her ten primary duties could not be performed at home.

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

- Sixth Circuit held that "in most jobs, especially those involving teamwork and a high level of interaction, the employer will require regular and predictable on-site attendance from all employees.
- An employer may refuse a telecommuting request when, among other things, the job requires 'face-to-face interaction and coordination of work with other employees,' 'in-person interaction with outside colleagues, clients, or customers,' and 'immediate access to documents or other information located only in the workplace."
- The required teamwork, meetings with suppliers and stampers, and on-site "availability to participate in … face-to-face interactions," all necessitate a resale buyer's regular and predictable attendance.
- For years Ford required resale buyers to work in the same building as stampers, further evidencing its judgment that on-site attendance is essential. And the practice has been consistent with the policy: all other resale buyers regularly and predictably attend work on site. Indeed, even those who telecommute do so only one set day per week and agree in advance to come into work if needed.

Assistance Commuting To Work

- Employers in the First, Second, Third and Ninth Circuits should be aware that the ADA may obligate them to accommodate certain commute-related requests
- Determining whether accommodation may be required or will be reasonable will vary with the individual circumstances of each request

Assistance Commuting To Work

- Colwell v. Rite Aid Corp., 602 F. 3d 495 (3d Cir. 2010) (holding that "under certain circumstances the ADA can obligate an employer to accommodate an employee's disability-related difficulties in getting to work, if reasonable").
  - One such circumstance is when the requested accommodation is a change to a workplace condition that is entirely within an employer's control and that would allow the employee to get to work and perform her job.
  - The plaintiff, a drugstore cashier whose vision impairment prevented her from driving at night, requested that she only be scheduled for day shifts.
  - In reversing summary judgment for the employer, the Third Circuit broadly interpreted the ADA and held that changing the plaintiff's work schedule "in order to alleviate her disability-related difficulties in getting to work is a type of accommodation that the ADA contemplates."
- The Third Circuit took care to distinguish its holding from one that "makes employers responsible for how an employee gets to work," noting that the plaintiff did not "ask for help in the method or means of her commute." The court explained, however, that shift scheduling decisions are made in the workplace, and a jury could "decide whether a shift change was a reasonable accommodation under the circumstances."

Light-Duty Jobs

- Providing a light-duty job is another kind of reasonable accommodation for an employee whose disability has rendered the employee unable to perform the more strenuous tasks of his/her regular position
- Light-duty jobs may be a transitional step for a worker with a disability to return to a previous job or may be a permanent change in job responsibilities
- It should be noted that an employer is not required to transform a temporary light-duty job into a permanent position nor does the ADA require employers to create light-duty jobs to enable a worker with a disability to return to the job

Light-Duty Jobs

- Shiring v. Runyon, 90 F.3d 827 (3d Cir. 1996) (holding that the employer did not have to create a permanent job simply because it created a light-duty job to give the plaintiff something to do on a temporary basis)

Fragrance-Free Workplace

- Courts consistently have held that an employee's request for a completely fragrance-free or irritant-free environment is unreasonable because it involves numerous irritants and is generally difficult to enforce given the large number of scent producing agents one finds in the workplace.
- Although an employer may have to provide some form of a workplace modification, the ADA does not require an employer to create a wholly isolated workspace for an employee that is free from potential irritants because it would place an undue financial and administrative burden on the employer.

Fragrance-Free Workplace

- Interestingly, at least one court has suggested that if the employee can pinpoint the particular fragrance or substance, it may be a reasonable accommodation for the employer to ban that particular substance in the workplace.
- *Core v. Champaign County Board of County Commissioners*, 2012 U.S. Dist. LEXIS 149120 (S.D. Ohio Oct. 17, 2012)(the court granted summary judgment to the employer on the employee's failure to accommodate claim because the employee rejected the employer's reasonable accommodation of requesting the staff not to wear the particular perfume to which the employee was sensitive).

Fragrance-Free Workplace

Courts have held the following actions to be reasonable accommodations for an employee with a chemical sensitivity:

•Prohibiting the use of a particular substance in the workplace;

•Creation of a work station in another room with better ventilation;

•A system whereby if the employee was sensing an irritant s/he could notify the supervisor, and exit the area until the problem was remedied; or

•A combination of a special seating arrangement, intervention with specific employees that wore irritating fragrances, and a department-wide memorandum from management encouraging employees to be considerate of individuals with sensitivity to fragrances and perfumes.

Fragrance-Free Workplace

What if the employee refuses the reasonable accommodation?

In *Yovtcheva v. City of Phila. Water Department*, 2013 U.S. App. LEXIS 9247 (3d Cir. 2013), the court held that the employee with the chemical sensitivity was not a "qualified individual" under the ADA because she refused to try the employer's pro-offered accommodation of a partial-face respirator. The court explained that because the employer offered the employee a reasonable accommodation and she refused it, the court would not consider the possibility that she could have been reasonably accommodated by a transfer.

Smoke-Free Workplace

- An employee may file a disability discrimination claim that an employer failed to provide a "reasonable accommodation"—in this instance protection from exposure to secondhand smoke—if the worker has a disability (such as asthma) that is exacerbated by exposure to secondhand smoke
- Smoke-free workplaces are legal under the ADA
- An employer should conduct an individualized inquiry when determining whether to provide a smoke-free workplace as a reasonable accommodation

Smoke-Free Workplace

- Service v Union Pacific RR Co, 153 F Supp 2d 1187, 1188 (E.D. Cal. 2001) (finding that although the employer barred employees from smoking in the plaintiff's presence, it did nothing to accommodate the plaintiff's sensitivity to residual smoke).
- The employer claimed that providing the employee with a smoke-free work environment would have constituted an undue hardship but offered no evidence of this
- Studies have shown that smoke-free workplace policies and laws are inexpensive to implement and do not harm businesses that have implemented them

ETHICS HOUR
Harter v. University of Indianapolis, 5 F. Supp. 2d 657 (S.D. Ind. 1998)

THE FACTS

- Plaintiff Greg Harter employed attorney Kelli Keller to advise him and speak for him during the "interactive process" with his employer, Defendant University of Indianapolis.
- After the process broke down, Harter filed suit under the ADA. Keller continued to represent Plaintiff in the lawsuit.
- The University responded that it made a reasonable and good faith effort to find a reasonable accommodation that would have allowed Plaintiff to return to work. The University blamed Plaintiff and his attorney for the breakdown in the dialogue.

Harter v. University of Indianapolis, 5 F. Supp. 2d 657 (S.D. Ind. 1998)

MOTION TO DISQUALIFY

- The University moved to disqualify both attorney Keller and her entire law firm arguing that Keller's role in the negotiations over possible accommodations has made her a necessary witness at trial.
- The University argued that it will need to call the lawyer as part of its defense to explain why she wrote what she did in her letters to the University and its attorney and to explain some delays in communication.

Harter v. University of Indianapolis, 5 F. Supp. 2d 657 (S.D. Ind. 1998)

ISSUE NO. 1

Whether the same attorney may assist a disabled employee during the reasonable accommodation process and then represent the employee in a later lawsuit ?

What Makes the ADA Unique

Unlike other federal employment discrimination laws, the ADA does not simply forbid discrimination on a particular basis. The ADA imposes an affirmative duty on employers to provide "reasonable accommodations" for a disabled employee. 42 U.S.C. § 12112(b)(5)(A)

The ADA envisions a process in which the employer and employee engage in a good faith dialogue in an effort to identify steps that could be taken to allow the employee to work and perform the essential functions of a position without imposing an undue burden on the employer. This process ordinarily requires information from both parties.

Rules of Professional Conduct

Rule 3.7. Lawyer as Witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Harter v. University of Indianapolis, 5 F. Supp. 2d 657 (S.D. Ind. 1998)

IS THE TESTIMONY NECESSARY?

- A necessary witness is not the same thing as the "best" witness.
- If the evidence that would be offered by having an opposing attorney testify can be elicited through other means, then the attorney is not a necessary witness.
- If the testimony is not relevant or is only marginally relevant, it certainly is not necessary.

Harter v. University of Indianapolis, 5 F. Supp. 2d 657 (S.D. Ind. 1998)

- An employer is not entitled to examine the employee's subjective thought processes by subpoenaing the employee's attorney to testify at trial.
- The focus at trial is on the *employer's actions.*
- "What matters are objective manifestations of intentions — what is most relevant here is the objective situation presented to the University and whether the University's response to that was a reasonable and good faith response."
- Questions about why the lawyer wrote what she wrote are at best only marginally relevant except to the extent that she communicated her reasons to the University.

Harter v. University of Indianapolis, 5 F. Supp. 2d 657 (S.D. Ind. 1998)

ISSUE NO. 2

Has the Plaintiff waived the attorney-client privilege for any communications with his lawyer about the interactive process by relying on advice from his lawyer and using his lawyer to communicate with his employer?

Harter v. University of Indianapolis, 5 F. Supp. 2d 657 (S.D. Ind. 1998)

HAS THE PRIVILGE BEEN WAIVED?

- A client may implicitly waive the attorney-client privilege by putting "in issue" an attorney's advice.
- Was the privilege waived by filing a lawsuit in which Plaintiff's good faith (or lack of it) may be relevant in evaluating the reasons for the breakdown in the "interactive process" concerning reasonable accommodation?
- How are Plaintiff's consultations with attorney Keller different from any other person's consultations with an attorney concerning a transaction, decision, or negotiations that ultimately result in litigation?

Harter v. University of Indianapolis, 5 F. Supp. 2d 657 (S.D. Ind. 1998)

- The university's waiver theory would, if accepted, effectively and thoroughly erode the privilege and discourage parties from seeking advice from attorneys.
- Asserting a claim based on failure to provide reasonable accommodation under the ADA does not waive the attorney-client privilege as to communications that are otherwise privileged.
- Plaintiff used his lawyer as his agent in the negotiations, but that role for attorneys is quite common and does not result in waiver of the attorney-client privilege.
- While state of mind may be relevant here, the possibility that privileged communications could provide the opponent with relevant evidence is not a sufficient basis for finding a waiver of the privilege

Harter v. University of Indianapolis, 5 F. Supp. 2d 657 (S.D. Ind. 1998)

DICTA

- There remains a possibility of course that events could unfold so that her testimony might be necessary on some points.
- Plaintiff might take steps that would effectively waive the privilege protecting his communications with Keller
- Trial may develop so that the University might need Keller's testimony to fill in a few evidentiary gaps.
- If testimony becomes necessary on a few narrow topics, Rule 3.7 leaves open the possibility that she could testify without necessarily being disqualified.
- Less drastic alternatives, including cautionary instructions to the jury about an attorney's testimony on narrowly confined topics, might be sufficient to avoid or minimize possible prejudice to the university without causing the disruption of disqualification.

Ethical Considerations

HYPO NO. 1

- Employee with an undisputed disability requests a reasonable accommodation pursuant to the ADA.
- Employee and employer engage in interactive process, in good faith.
- Process breaks down. No accommodation achieved. Employee goes out of work for one year.
- EEOC charge/Investigation/Right to Sue.
- Lawsuit filed.
- After complaint is served, employer makes a conditional offer of reinstatement

Ethical Considerations

Offer says the following:

"Employer will reinstate employee to desired position, with employee's suggested accommodation, provided employee will withdraw lawsuit and provide a full release of all claims. No back pay. No compensation. No counsel fees."

Issue:

What is your responsibility as counsel for the employee with respect to advising the employee on whether to accept or reject the offer?

Ethical Considerations

- What are the legal ramifications, if any, to rejecting the offer?
- What are the ethical considerations?
- What must you advise the client about?

Rules of Professional Conduct

Rule 1.7. Conflict of Interest: Current Clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person **or by a personal interest of the lawyer.**

Rules of Professional Conduct

Rule 1.7. Conflict of Interest: Current Clients.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.

Ethical Considerations

HYPO NO. 2

- Same facts as Hypo No. 1, however this time the offer is unconditional and says:
- "Employer will reinstate employee to desired position, with employee's suggested accommodation."
- Offer is silent with respect to withdrawing lawsuit and providing a full release of all claims.
- Offer is silent with respect to back pay, compensation, and counsel fees.

Unconditional Offers of Reinstatement

What is an unconditional offer of reinstatement?

- An unconditional offer of reinstatement must include a position and terms and conditions of employment identical to or substantially equivalent to the plaintiff's former employment
- The unconditional offer of reinstatement must be "truly" unconditional
- The unconditional offer of reinstatement must be made in good faith

Unconditional Offers of Reinstatement

What are the consequences of rejecting a conditional offer of reinstatement?

- Under Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32, 102 S.Ct. 3057, 3065-66 (1982) ("An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in [42 U.S.C. § 2000e-5(g)]. This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment.")
- Although the claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied.
- Consequently, an employer charged with unlawful discrimination often can toll the accrual of back pay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages.

Unconditional Offers of Reinstatement

When is it reasonable to reject an unconditional offer of reinstatement?

- Offers made in bad faith may be reasonably rejected
- A reasonable fear of hostility upon returning to the workplace makes it reasonable to reject an unconditional offer of reinstatement
- Rejection of an unconditional offer of reinstatement is reasonable if a return to the workplace would cause severe mental distress

Unconditional Offers of Reinstatement Other Considerations

- What are the consequences of reasonably rejecting an unconditional offer of reinstatement?
- Who bears the burden of proof on the issue of whether the rejection of an unconditional offer of reinstatement was reasonable?
- Who determines whether the rejection of an unconditional offer of reinstatement was reasonable?
- What is the standard for determining whether the rejection of an unconditional offer of reinstatement is reasonable?
- What are the consequences of unreasonably rejecting an unconditional offer of reinstatement absent special circumstances?

No Accommodations Required For Non-Disabled Employees

- An employer is only required to provide an accommodation that is for the disability of the employee or applicant.
- The association provision of the ADA does not obligate employers to accommodate the schedule of an employee with a disabled relative because the plain language of the ADA indicates that the accommodation requirement does not extend to relatives of the disabled individual. See 29 C.F.R. § 1630.8.

No Accommodations Required For Non-Disabled Employees

- Magnus v. St. Mark United Methodist Church, 688 F.3d 331 (7th Cir. 2012) (holding employer is not required to provide an accommodation to a non-disabled employee to care for her disabled daughter).
- Erdman v. Nationwide Insurance Co., 582 F.3d 500 (3d Cir. 2009) (stating "there is a material distinction between firing an employee because of a relative's disability and firing an employee because of the need to take time off to care for the relative").

Drug Use & Alcoholism

"Current" vs. "Recovering"

•Section 12114(a) of the ADAAA excludes from its protection employees who are "currently engaging in the illegal use of drugs."

•Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

•A recovering alcoholic or drug user is protected under the ADA, and would be entitled to a reasonable accommodation (*i.e.*, time off or a modified work schedule to complete a rehabilitation program).

Post-Offer Drug Tests and the ADA

- *EEOC v. Kmart Corporation; Sears Holdings Management Corporation, (*D. Md. Civil Action No. 13-cv-02576)
- EEOC alleged Kmart refused to hire applicant because kidney disease prevented him from providing a urine sample.
- $102,048 and equitable relief

Post-Offer Tests and the ADA

- *EEOC v. Randstad, US, LP (*D. Md., Civil Action No.RDB-15-3354)
- EEOC alleged temporary agency refused to hire laborer because she was in a medically supervised drug rehabilitation program.
- $50,000 settlement plus injunctive relief.

Post-Offer Tests and the ADA

- *EEOC v. Hussy Copper (*W.D. PA*.,* Civil Action No. 08-809)
- EEOC alleged copper manufacturer refused to hire laborer because he was in a medically supervised drug rehabilitation program.
- $85,000 settlement plus injunctive relief.

EEOC Guidance on Cancer, Epilepsy, Diabetes and Intellectual Disabilities

- **Accommodating Individuals with Cancer**
- The EEOC guidance provides several examples of the types of accommodations that an employee with cancer may need, including leave for doctors' appointments and recuperation from treatment. Of particular note, the EEOC takes the position that an employer may not automatically deny a request for leave from an employee with cancer solely because the employee cannot specify an exact date of return.
- The EEOC explains that granting leave to an employee who is unable to provide a fixed date of return may be a reasonable accommodation, because the treatment and severity of side effects are often unpredictable and do not permit exact timetables.
- The EEOC cautions employees, however, that the employer has the right to require that an employee provide periodic updates on the employee's condition and possible date of return in order for the employer to evaluate whether continued leave constitutes an undue hardship.

EEOC Guidance on Cancer, Epilepsy, Diabetes and Intellectual Disabilities

- **Accommodating Individuals with Epilepsy**
- Epilepsy is a chronic neurological condition characterized by recurrent seizures. The EEOC provides several examples of the types of accommodations that an employee may need, such as a consistent start time or schedule change (for example, from the night shift to the day shift).
- Interestingly, the EEOC provides specific guidance with respect to applicants and employees who do not have a driver's license because of epilepsy. The EEOC explains that an employer need not eliminate driving as a job duty if driving is an essential function of the position.
- The EEOC cautions employers to carefully consider whether driving actually is an essential job function, rather than a marginal job function or simply one way of accomplishing an essential function. To illustrate its position, the EEOC uses the example of a college orientation guide hired to distribute packets and give tours of the campus

EEOC Guidance on Cancer, Epilepsy, Diabetes and Intellectual Disabilities

- **Accommodating Individuals with Diabetes**
- Diabetes is a group of diseases characterized by high blood glucose or sugar levels that result from defects in the body's ability to produce and/or use insulin. The EEOC states that reasonable accommodations for this condition may include a private area to test blood sugar levels or to administer insulin injections. The EEOC further explains that if a federal law prohibits an employer from hiring a person who uses insulin, the employer will not be liable under the ADA.
- The EEOC cautions that an employer should be certain, however, that compliance with the law actually is required, not voluntary. The employer also should be sure that the law does not contain any exceptions or waivers.

EEOC Guidance on Cancer, Epilepsy, Diabetes and Intellectual Disabilities

- **Accommodating Employees with Intellectual Disabilities**
- The EEOC guidance defines an intellectual disability as a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior that affect social and practical skills. The EEOC explains that employees with intellectual disabilities may need supervision modification as a reasonable accommodation.
- The EEOC cautions employers that although the general rule places the burden to request an accommodation on the employee, there are circumstances in which employers may have an obligation to initiate a discussion regarding the need for a reasonable accommodation without a request to do so.

Pregnancy Discrimination Act (PDA) and ADA

- Under the Supreme Court's 2015 decision in *Young v. United Parcel Serv., Inc.*, --- U.S. ---, 135 S.Ct. 1338 (2015) and the updated Commission Enforcement Guidance, employer policies may violate the PDA where they impose significant burdens on pregnant employees that cannot be supported by a sufficiently strong justification.
- EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues
- https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

Young v. UPS

- This case involved the denial of a pregnant employee's request for light duty due to a lifting restriction. The employer's policy was to provide light duty or alternative assignments to only certain categories of employees.

Young v. UPS

- The Supreme Court in *Young* said that a woman can establish a prima facie case of pregnancy discrimination under *McDonnell Douglas* by showing that
  - she is a member of a protected class
  - she sought "accommodation" – *such as light duty*
  - the employer did not accommodate her
  - the employer accommodated other employees who were similar in their ability or inability to work

Young v. UPS

- An employer may then articulate a legitimate, nondiscriminatory reason for the different treatment.
- The reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates.

Young v. UPS

- The Court said the claimant may show that the employer's articulated reason is pretextual, i.e., that an employer's policies "significantly burden" pregnant employees and that its "legitimate, nondiscriminatory reasons" are not "sufficiently strong" to justify the burden, "but rather, when considered along with the burden imposed—give rise to an inference of intentional discrimination."

PDA and ADA

- The *Young* case did not involve the ADA's 2008 amendments.
- While pregnancy itself is not an impairment within the meaning of the ADA, pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, even though they are not permanent.
- A pregnant employee may be entitled to reasonable accommodation under the ADA for limitations resulting from pregnancy-related impairments that constitute disabilities.

Obtaining Medical Information

The ADA limits an employer's ability to ask questions related to disabilities and to conduct medical examinations at three stages: pre-offer, post-offer, and during employment.

An employer may ask an employee about his/her disability to the extent the information is necessary to:

- support the employee's request for a reasonable accommodation needed because of the disability;
- verify the employee's use of sick leave related to the disability, if the employer requires all employees to submit a doctor's note to justify their use of sick leave; or
- enable the employee to participate in a voluntary wellness program.

Questions From Other Employees Regarding "Special Treatment"

- An employer may not tell employees who ask why their co-worker is allowed to do something that generally is not permitted (such as work at home or take periodic rest breaks) that he/she is receiving a reasonable accommodation.
- The EEOC takes the position that telling co-workers that an employee is receiving a reasonable accommodation is tantamount to a disclosure that the employee has a disability.
- In response to such an inquiry, the employer should emphasize that its policy is to refrain from discussing the work situation of any employee with co-workers.

Employer Defenses to Accommodation Claims

- Undue hardship
- Direct threat
- "Essential Functions"

Undue Hardship

- Where an accommodation places an undue hardship on the employer, an employer is not obligated to accommodate the employee
- Burden is on the employer to prove undue hardship

Undue Hardship

Undue hardship includes any action that is:

•Unduly costly.
•Extensive.
•Substantial.
•Disruptive.
•Fundamentally alters the nature or operation of the business.

•See 29 C.F.R. app. § 1630.2(p)

Undue Hardship

The ADA and EEOC regulations identify the following factors to consider when determining whether an accommodation would impose an undue hardship:

•The nature and net cost of the accommodation.
•The overall financial resources of the covered entity.
•The number of employees employed by the covered entity.
•The number, type and location of facilities.
•With respect to accommodations provided by a specific facility:
  – financial resources of the facility;
  – number of employees at the facility; and
  – effect of the accommodation on expenses and resources of the facility.
•The type of operation of the covered entity, including:
  – composition, structure and functions of the workforce; and
  – geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.
•The effect of the accommodation on the operation of the facility making the accommodation.

See 42 U.S.C. § 12111(10)(B) ; 29 C.F.R. § 1630.2(p)

Undue Hardship

- Ward v. Massachusetts Health Research Institute, Inc., 209 F.3d 29 (1st Cir. 2000) (explaining that an employer could assert that a modified schedule for a laboratory assistant might be an undue hardship because of the significant cost of keeping the laboratory open which included additional hours for other personnel such as security personnel).

Undue Hardship

- Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997) (holding that an accommodation to one employee which violates the seniority rights of other employees in a collective bargaining agreement simply is not reasonable because it would expose the employer to potential union grievances and costly remedies).

Direct Threat

- Some disabilities pose a direct threat to the health and safety of individuals in the workplace.
- Where there is no reasonable accommodation available to negate that threat, employers may cite the direct threat defense

Direct Threat

Factors considered in assessing whether an individual poses a direct threat include:

- The duration of the risk.
- The nature and severity of the potential harm.
- The likelihood that the potential harm will occur.
- How soon the potential harm may occur.

See 29 C.F.R. § 1630.2(r).

Direct Threat

Haas v. Wyoming Valley Health Car Sys., 553 F. Supp. 2d 390 (M.D. Pa. 2008) (holding testimony of a medical personnel who witnessed erratic behavior of the plaintiff, a surgeon with bipolar disorder, was sufficient to demonstrate that he posed a danger to patients and was a direct threat).

Direct Threat

**** NOT JUST LIMITED TO DANGER TO OTHERS ****

Mobley v. Madison Square Garden LP, 2012 U.S. Dist. LEXIS 85467 (S.D.N.Y. June 14, 2012) (holding that employer was not required to engage in the accommodation process because it believed employee posed a direct threat to himself due to professional medical opinions stating that plaintiff should stop playing professional basketball because of significant risks to his disability, including sudden heart failure).

Essential Functions

The ADA provides that "[t]he term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1).

Essential Functions

A job function may be considered "essential" for any of a number of reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

29 C.F.R. § 1630.2(n)(2)

Essential Functions

The Third Circuit's Model Instruction 9.2.2 regarding the definition of the term "essential functions" reads as follows, in pertinent part:

"Essential functions are a job's fundamental duties."

In deciding whether [the function] is essential to [the job], some factors you may consider include the following:

1. Whether the performance of [the function] is the reason that [the job] exists;
2. The amount of time spent on the job performing [the function];
3. Whether there are a limited number of employees available to do the job;

Essential Functions

4. Whether the function is highly specialized;
5. Whether an employee in the job is hired for his or her expertise or ability to perform the function;
6. The employer's judgment about what functions are essential to the job;
7. Written job descriptions;
8. The consequences of not requiring an employee to perform the job in satisfactory manner, and
9. Whether others who held the position performed the function.

Essential Functions

Issues concerning the essential functions of a position are typically a fact issue, to be resolved by the fact finder.

Keith v. Cnty. of Oakland, 703 F.3d 918, 926 (6th Cir. 2013) (whether a job function is essential "is a question of fact that is typically not suitable for resolution on a motion for summary judgment.")

Turner v. Hershey Chocolate USA, 440 F.3d 604 (3d Cir. 2006) (essential functions are a question of fact to be made on a case by case basis and based on all the relevant evidence by the jury).

Essential Functions

In the context of law enforcement or jobs involving public safety, several courts have rejected the argument that the ability to "patrol" is an essential function of the job of police officer.

DeStefano v. City of Philadelphia, Civil Action No. 11-6715 (E.D. Pa. Oct. 3, 2013, Buckwalter, J.)

Price v. City of NY, 264 Fed. App'x 66, 69 (2d Cir. 2008)

Cripe v. City of San Jose, 261 F.3d 877, 894 (9th Cir. 2001)

Requests for Admissions

RULE 36. REQUESTS FOR ADMISSION

(a) SCOPE AND PROCEDURE.

(1) *SCOPE.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

* * *

(b) EFFECT OF AN ADMISSION; WITHDRAWING OR AMENDING IT. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended.

42 USC § 12111 - Definitions

(8) Qualified individual

The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

Requests for Admissions

BINDING ADMISSIONS MADE BY DEFENDANT, CITY OF PHILADELPHIA, PURSUANT TO RULE 36

66. The Police Department has always been able to provide a limited duty assignment to an officer who requests one and who is able to fulfill the functions of the limited duty position. **(See Plaintiff's Request for Admissions No. 66)**.

67. The Police Department imposes no time limit on how long a police officer is allowed to remain in a limited duty assignment. **(See Plaintiff's Request for Admissions No. 67)**.

Requests for Admissions

BINDING ADMISSIONS MADE BY DEFENDANT, CITY OF PHILADELPHIA, PURSUANT TO RULE 36

78. There are some situations when the Police Department calls in and/or schedules all available police officers for active patrol/street duty. The Police Department has emergency orders and a re-call list for these situations, which include emergencies and large special events such as the Phillies parade and the Greek Picnic. **(See Plaintiff's Request for Admissions No. 78)**.

79. During emergencies and special events when all police officers are on duty, the Police Department relies on the limited and restricted duty police officers to fill administrative positions. **(See Plaintiff's Request for Admissions No. 79)**.

80. In each Patrol District as well as some police units such as Evidence Intake, there are always one or more employees working in administrative positions to fulfill such functions as answering the phones, attending to the window, and talking to complainants. **(See Plaintiff's Request for Admissions No. 80)**.

Requests for Admissions

BINDING ADMISSIONS MADE BY DEFENDANT, CITY OF PHILADELPHIA, PURSUANT TO RULE 36

93. Several different units of the Police Department have available limited duty assignments, whereas others do not. **(See Plaintiff's Request for Admissions No. 93)**.

94. Among those that have such available positions include Police Academy, Court Liaison, Evidence Custodian Unit, Traffic Court Liaison, Reports and Control, Differential Response, and Neighborhood Services (or Gun Recovery Reward Information Program). **(See Plaintiff's Request for Admissions No. 94)**.

95. Other units that offer possible, but infrequent or non-routine limited duty placements include building security, crime scene, staff services, detention unit, narcotics, and research and planning. The latter categories usually involve short-term assignments. **(See Plaintiff's Request for Admissions No. 95)**.

* * *

124. At the time of his separation, Lieutenant DeStefano was qualified by education, training and experience to fill other administrative positions within the Police Department. **(See Plaintiff's Request for Admissions No. 124)**.

Requests for Admissions

BINDING ADMISSIONS MADE BY DEFENDANT, CITY OF PHILADELPHIA, PURSUANT TO RULE 36

99. Pursuant to applicable Civil Service Regulations, the contract between the Fraternal Order of Police and the City of Philadelphia, and by virtue of his length of service, had Lieutenant DeStefano not been separated from employment with the City under Regulation 32, he could not be separated from his employment without just cause or other legitimate reason such as a violation of the City Charter. **(See Plaintiff's Request for Admissions No. 99)**.

* * *

121. Lieutenant DeStefano's status as "permanently and partially disabled" under Regulation 32 was the only basis for his separation from his employment. **(See Plaintiff's Request for Admissions No. 121)**.

Job Descriptions

- It is imperative that a job description identify the position's essential functions.
- Whether a function is essential is evaluated on a case-by-case basis by examining a number of factors, including an employer's written job description.
- If a job description includes categories, such as "general duties" and "essential duties," employers should ensure that essential functions are listed under the appropriate category.

Job Descriptions

Job descriptions should:

- Specify educational and/or professional prerequisites for the position
- Note any scheduling requirements
- List “essential functions” of the position
- State attendance requirements
- Detail physical requirements
- Outline travel expectations
- Be consistent with hiring criteria