

Reasonable Accommodations Under the ADA¹

I. Introduction

The Americans with Disabilities Act (ADA) differs from other federal anti-discrimination laws because it defines discrimination to include the failure to provide “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee.”² The requirement to provide reasonable accommodations is one of the most important aspects of the ADA, and one of the most complex. The process of identifying and implementing an effective reasonable accommodation requires stakeholders to be creative thinkers and problem solvers and, like other parts of the ADA, requires a true individualized assessment, as the appropriate accommodation depends on the functional limitations of the individual, the responsibilities of the job, and the needs of the employer.

This Legal Brief examines how courts have analyzed legal issues related to reasonable accommodations. After discussing the fundamentals, including who is entitled to accommodations and the interactive process, it outlines recent trends regarding common accommodations, such as leave, job restructuring, light duty, remote work, and reassignment.

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² Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A). Additionally, Section 504 of the Rehabilitation Act of 1973, which applies federal-government employers and employers receiving federal financial assistance, requires employers to reasonably accommodate the disabilities of a qualified employee. 29 U.S.C. § 794, *McCray v. Wilkie*, 966 F.3d 616, 620–21 (7th Cir. 2020). Because federal courts treat the accommodation duty as the same under both statutes, although we primarily discuss the ADA caselaw, this brief applies equally to Section 504. Also note that many state and local laws also require reasonable accommodation, which may also incorporate ADA caselaw.

II. The Fundamentals

Reasonable accommodations are changes to the workplace that enable a qualified applicant or employee with a disability to have full and equal access to employment. Broadly speaking, accommodations fall into one of three categories: (1) changes to the job application process to enable applicants to be considered for a position; (2) changes to the workplace to enable employees to enjoy equal benefits and privileges of employment; and (3) changes to the work environment or the way a job is typically performed to enable an individual to perform the essential functions of the position.³

But who is entitled to a reasonable accommodation? How does an employee request one and how must an employer respond? What is the interactive process? Given the great number of cases involving reasonable accommodations, courts have had many opportunities to develop legal trends to answer these common questions.

A. Who is Entitled to Accommodations?

To be covered by the ADA, an individual must have a disability as defined by the Act. Disability is defined as including three categories: (A) a physical or mental impairment that substantially limits one or more of the major life activities (“actual disability”), (B) a record of such an impairment (“record-of”), or (C) being regarded as having an impairment (“regarded-as”).⁴ It is beyond the scope of this brief to fully explore who is included in each of these categories, but we pause to here to note that the accommodation duty extends only to the first two categories.

³ 29 C.F.R. § 1630.2(o)(1).

⁴ 42 U.S.C. § 12102(2). The “regarded as” category is further defined as covering situations where an individual “has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity; it does not “apply to impairments that are transitory and minor,” with transitory meaning “an impairment with an actual or expected duration of 6 months or less.” *Id.* § 12102(2). See also 29 C.F.R. § 1630.2(j)(2) (“[w]hether an individual’s impairment ‘substantially limits’ a major life activity is not relevant to coverage under paragraph (g)(1)(iii) (the ‘regarded as’ prong) of this section”).

Individuals who fall into the actual or record-of disability prongs are entitled to reasonable accommodations in employment under the ADA. 42 U.S.C. § 12111(9) (defining reasonable accommodations for “individuals with disabilities”); 42 U.S.C. § 12112(b)(5) (employer’s duty to accommodate impairments); 29 C.F.R. § 1630.2(k)(3) (entitling individuals “with a record of a substantially limiting impairment ... to a reasonable accommodation if needed and related to the past disability”); *Edwards v. BNSF Railway Company, Co.*, No. 15-CV-1217, 2015 WL 6690020, at *6 (C.D. Ill. Nov. 2, 2015) (“[i]ndividuals who allege that they have a record of disability may be entitled to a reasonable accommodation in some instances”).

Owing to the 2008 ADA Amendments Act (ADAAA), though, employers have no duty to reasonably accommodate persons who are only “regarded as” disabled.⁵ *Majors v. General Elec. Co.*, 714 F.3d 527, 535 n.4 (7th Cir. 2013) (“[t]he amendments to the ADA clarified that employers needn’t provide reasonable accommodation to a ‘regarded as’ disabled individual”); *Freeman v. Metro. Water Reclamation Dist. of Greater Chicago*, No. 17 C 4409, 2021 WL 4283973, at *13 (N.D. Ill. Sept. 21, 2021) (same).

Also, while the ADA’s prohibition of discrimination also covers individuals because of their “relationship or association” with individuals with disabilities—such as spouses and parents with family members with disabilities⁶—the ADA’s reasonable accommodation duty does not apply to this class of employees, either.⁷ *Magnus v. St. Mark United Methodist Church*, 688 F.3d 331, 336 (7th Cir. 2012) (“[a]ssociational discrimination claims are unlike those otherwise falling under the ADA because employers are not required to provide reasonable accommodations to non-disabled workers”). Thus, in *Larimer v.*

⁵ 42 U.S.C. § 12201(h); 29 C.F.R. § 1630.2(o)(4) (“covered entity . . . is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the ‘regarded as’ prong”).

⁶ 42 U.S.C. § 12112(b)(4); *Larimer v. Int’l Bus. Mach. Corp.*, 370 F.3d 698, 700 (7th Cir. 2004) (further elaborating on factual circumstances where “associational discrimination” provision might apply).

⁷ 29 C.F.R. § 1630.8 (employer need not provide the applicant or employee without a disability with a reasonable accommodation because that duty only applies to qualified applicants or employees with disabilities).

Int'l Bus. Mach. Corp.,⁸ the Seventh Circuit held there is no accommodation claim where a parent requests shorter hours to care for two newborns with serious medical conditions, noting that “the right to an accommodation, being limited to disabled employees, does not extend to a nondisabled associate of a disabled person.”⁹

However, note the potentially overlapping coverage of ADA “associational discrimination” and the federal Family and Medical Leave Act (“FMLA”). Unlike the ADA, the FMLA requires employers with 50 or more employees to provide eligible employees with unpaid leave to care for a spouse, child, or parent with a serious health condition.¹⁰ Employees eligible for FMLA protection are protected by the FMLA’s interference obligations (i.e., individuals must be provided with FMLA leave) and the FMLA’s retaliation obligations (i.e., individuals cannot be penalized or retaliated against for exercising their FMLA rights).¹¹ As a result, if an employee associated with an individual with a disability needs the reasonable accommodation of leave, the employee should consider whether they can request leave under the FMLA in lieu of an ADA accommodation.

B. Initial Request for Accommodations

As a rule, it is expected that an employee who needs an accommodation will make the initial request to the employer.¹² The same principle applies to requests for modifications to accommodations already been granted by an employer. In *Cowgill v. First Data Techs., Inc.*, the Fourth Circuit held that there was no ADA violation where an employee who had already been granted

⁸ 370 F.3d 698, 700 (7th Cir. 2004).

⁹ *Accord Perry v. Porter Hospital LLC*, No. 2:20 CV 118, 2022 WL 10048860, at *14 (N.D. Ind. Oct. 14, 2022); *Campbell v. Ohio Department of Rehabilitation and Correction*, 2022 WL 3682293, at *6 (S.D. Ohio Aug. 25, 2022).

¹⁰ 29 U.S.C. § 2613(a)(1)(A)–(D).

¹¹ 29 U.S.C. § 2615; 29 C.F.R. § 825.220.

¹² “In general ... it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed.” 29 C.F.R. pt. 1630, App., at 351.

reduced hours for back pain failed to make a new request for a different accommodation, *i.e.*, to be taken off the shift schedule during flare-ups on specific days or numbers of days.¹³

Yet there are exceptions to this rule. The EEOC states that employers may have an obligation to launch the interactive process if they know that the employee has a disability and they are experiencing workplace problems, but their disability interferes with their making the request.¹⁴

In an early ADA case focusing on this issue, *Bultemeyer v. Fort Wayne Community Schools*, plaintiff was a custodian with mental illness, including bipolar disorder, anxiety attacks and paranoid schizophrenia.¹⁵ On recommendation of his doctor, he wanted a transfer to a less-stressful school, but the district terminated him instead. “[A]n understanding of mental illness is central to understanding Bultemeyer’s request for accommodation and his complaint. He was unable to articulate to [the school district’s employee relations director] that he wanted FWCS to accommodate his disability, but through Dr. Fawver he did communicate that he wanted a position that was ‘less stressful.’”¹⁶ The court held that the school had a duty to engage in the interactive process, even without a formal request. “[P]roperly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say ‘I want a reasonable accommodation,’ particularly when the employee has a mental illness. The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn’t know how to ask for it, the employer should do what it can to help.”¹⁷

¹³ 41 F.4th 370, 379 (4th Cir. 2022).

¹⁴ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002 (Question 40), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

¹⁵ 100 F.3d 1281 (7th Cir. 1996).

¹⁶ *Id.* at 1284.

¹⁷ *Id.* at 1285. See also *Castaneda v. Bd. of Educ. of the City of Chicago*, No. 16 C 10167, 2019 WL 1332181, at *12 and n.5 (N.D. Ill. Mar. 25, 2019) (in case where plaintiff was

The case law and regulatory guidance make clear that employees do not need to use any “magic words” to request accommodations *See, e.g., King v. Steward Trumbull Memorial Hosp., Inc.*, 30 F.4th 551, 564 (6th Cir. 2022) (“an employee does not need to use ‘magic words’ to inform her employer that she is disabled” or “explicitly use the word ‘accommodation’”); *Garrison v. Dolgencorp, LLC*, 939 F.3d 937, 941 (8th Cir. 2019) (employer knew worker “suffered from various medical conditions, that those conditions had been worsening and had required regular doctor visits, and that she had repeatedly inquired about a leave of absence to deal with them” and so “a reasonable jury could conclude that [plaintiff] requested an accommodation, even if she never used those ‘magic words’”); EEOC Enforcement Guidance (“an individual may use ‘plain English’ and need not mention the ADA or use the phrase ‘reasonable accommodation’”).¹⁸ Employees must, however informally, indicate that they have a medical need or disability and that they are requesting something from the employer related to that need. In *Fisher v. Nissan No. Am., Inc.*, the Sixth Circuit held that it was enough to trigger the interactive process for an employee seeking reassignment (due to kidney failure) to tell human resources that he believed he “had some kind of right to either, you know, try to hold onto my job, you know, maybe get a little bit of assistance, help somehow, somewhere, something.”¹⁹ *See also Rowlands v. United Parcel Service - Fort Wayne*, 901 F.3d 792, 800–01 (7th Cir. 2018)

diagnosed with mental illness that affected communication, plaintiff who requested “medical leave” triggered further duty of inquiry by employer). *Hensel v. City of Utica*, No. 6:15-CV-0374, 2020 WL 1451579 at *10 (N.D.N.Y. March 20, 2020) (employer’s awareness of employee’s disability and his obvious need for an accommodation triggered employer’s responsibility to initiate the interactive process)

¹⁸ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002 (Question 1), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

¹⁹ 951 F.3d 409, 419 (6th Cir. 2020). *Compare Hrdlicka v. General Motors, LLC*, 59 F.4th 791, 803 (6th Cir. 2023) (talking about “head ... really hurting” and being “sick” and even being “depressed” did not put employer on notice about requesting accommodation). *See also Owens v. Governor’s Office of Student Achievement*, 52 F.4th 1327, 1334–36 (11th Cir. 2022) (announcing a somewhat stricter standard for the Eleventh Circuit: employee must “identify her disability and suggest how the accommodation will overcome her physical or mental limitations”).

(employee alleged request to accommodate knee injuries that limited her ability to walk, stand, squat and kneel despite that her doctor cleared her to return to work without restrictions).

Requests that were not clearly connected to disabilities have been found not to trigger the employer's duty. In *Ness-Holyoak v. Wells Fargo Bank Nat'l Ass'n*,²⁰ a customer service representative complained to her supervisor that she was receiving the most difficult calls. Although the employee had acute stress reaction and depression, she did not link her complaint to her disability. She ultimately sued for failure to accommodate, and the court held that the employee never requested an accommodation because she failed to explain that her complaint or request related to a disability. *See also Owens v. State of Georgia*, 52 F.4th 1327, 1334 (11th Cir. 2022) (employee must both identify disability and explain how proposed accommodation will address disability); *Deister v. AAA Auto Club of Michigan*, 91 F. Supp. 3d 905, 923–25 (E.D. Mich. 2015) (concluding that employee who asked human resources to review his medical file and also stated that he would not be returning to work under the same supervisor failed to request a reasonable accommodation because he did not make clear that his request was due to a disability); and *Jenks v. Naples Cmty. Hosp., Inc.*, 829 F. Supp. 2d 1235, 1253 (M.D. Fla. 2011) (finding that plaintiff's FMLA paperwork indicating that fatigue was a side effect of cancer did not constitute a request for reasonable accommodation of additional break periods).²¹

If an employer has a process or form for accommodation requests, employees should ordinarily make use of such channels. Yet it is critical for employers to train their staffs to recognize a verbal reasonable accommodation request as

²⁰ No. 2:15-CV-544-DB, 2017 WL 2257339 (D. Utah May 22, 2017).

²¹ The filing of an FMLA leave request is not necessarily deemed a request for an ADA accommodation. *See Gray v. WinCo Foods, LLC*, No. 4:20-CV-791-SDJ-KPJ, 2022 WL 2899277, at *13 (E.D. Tex. June 6, 2022), *citing Acker v. Gen. Motors, L.L.C.*, 853 F.3d 784, 791 (5th Cir. 2017); *Payne v. Woods Srvs., Inc.*, 520 F. Supp. 3d 670, 680 (E.D. Pa. 2021); *Alvarado v. ValCap Grp., LLC*, No. 3:21-CV-1830-D, 2022 WL 19686, at *9 (N.D. Tex. Jan. 3, 2022) (finding no ADA request). *But see Weed v. Spraying Sys., Co.*, No. 20-CV-731-PB, 2022 WL 2440352, at *10 n.10 (D.N.H. July 5, 2022); *Murphy v. D.C.*, No. CV 18-1478 (JDB), 2022 WL 2643554, at *4 (D.D.C. July 8, 2022) (finding that FMLA request presented an issue of fact about whether employer was on notice).

courts have found that verbal requests are sufficient, even where a company has a different procedure for requesting an accommodation. For example, in *Jones v. Clark Cnty. School Dist.*, a bus driver with depression concluded that he was no longer able to safely drive a bus.²² He discussed his concerns with his supervisor and expressed his desire to transfer to a new position. A supervisor instructed him to contact the ADA coordinator. The employee did so but told the ADA coordinator that his doctor advised him to retire from driving. The school district argued that the driver never requested a reasonable accommodation. The court disagreed and said it was sufficient to have made the request to the employee's supervisor and it was not the driver's fault that one administrator failed to communicate with another. See also *Kravits v. Shinseki*, No. 10-861, 2012 WL 604169, at *7 (W.D. Pa. Feb. 24, 2012) (approving employee's oral request for accommodations despite employer policy requiring written request); *Boice v. Southeastern Pennsylvania Transp. Auth.*, No. 05-4772, 2007 WL 2916188, at *13-15 (E.D. Pa. 2007) (finding employee's request for accommodation sufficient despite failure to use employer's ADA accommodation form); *King v. Steward Trumbull Memorial Hosp., Inc.*, 30 F.4th 551, 564 (6th Cir. 2022) (We have generally given plaintiffs some flexibility in how they request an accommodation...A plaintiff's own requests, whether written or oral, can satisfy this element.); EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002 (Question 3), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> ("[r]equests for reasonable accommodation do not need to be in writing," and may be made "in conversation or . . . any other mode of communication," and while "an employer may ask the individual to fill out a form or submit the request in written form, . . . the employer cannot ignore the initial request").

Another person can request an accommodation on the employee's behalf. See, e.g., *Snapp v. United Transp. Union*, 547 F. App'x 824, 826 (9th Cir. 2013) (letter from doctor referring to disability and need for accommodations); *Adams v. Crestwood Med. Ctr.*, 504 F. Supp. 3d 1263, 1275 n.9 (N.D. Ala.

²² *Jones v. Clark Cnty. Sch. Dist.*, No. 2:15-cv-00010-APG-GWF, 2017 WL 1042463, at *1 (D. Nev. Mar. 17, 2017).

2020) (spouse); *Feldman v. Law Enforcement Associates Corp.*, 779 F. Supp. 2d 472 (E.D.N.C. 2011) (request came from the employee’s spouse and lawyer); EEOC Enforcement Guidance (“[A] family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability.”); *Adams v. Crestwood Med. Ctr.*, 504 F. Supp. 3d 1263, 1297 n. 9 (N.D. Ala. 2020) (spouse could initiate accommodation request)²³

Finally, the request for an accommodation must be a “reasonable” one. Accommodations that have been deemed unreasonable, and thus triggering no duty to accommodate the employee, include those that violate federal workplace safety regulations,²⁴ excuse the employee from performing essential functions of the job,²⁵ seek adjustment to conditions beyond the workplace,²⁶ grant a promotion,²⁷ override a collectively-bargained seniority

²³ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002 (Question 22), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

²⁴ *Bey v. City of New York*, 999 F.3d 157, 168 (2d Cir. 2021) (“[a]n accommodation is not reasonable within the meaning of the ADA if it is specifically prohibited by a binding safety regulation promulgated by a federal agency”; in this case, fire department was not required to exempt firefighters from no-beard requirement necessary to conform with federal safety standards for wearing facial protective gear). *But see Mlsna v. Union Pac. R.R. Co.*, 975 F.3d 629, 634–37 (7th Cir. 2020) (disputed issue of fact whether federal rail-safety regulatory requirement to use hearing protection either applied to the specific employee or mandated specific protective gear).

²⁵ *Tate v. Dart*, 51 F.4th 789, 797–98 (7th Cir. 2022) (ability of correctional officer to respond to an emergency in jail is an essential function of job, and thus is not subject to modification as a reasonable accommodation).

²⁶ *Unrein v. Morgan*, 993 F.3d 873, 878 (10th Cir. 2021) (“Unrein’s flexible schedule request seeks an accommodation for her transportation barrier [commuting between work and home], a problem she faces outside the workplace unrelated to an essential job function or a privilege of employment”).

²⁷ *Thompson v. Microsoft Corp.*, 12 F.4th 460, 469 (5th Cir. 2021) (“no right to a promotion” as an accommodation).

system,²⁸ would require the creation of a new position,²⁹ involve a transfer away from specific individuals,³⁰ or are otherwise unrelated to the claimed disability.³¹

C. Interactive Process

Once the employee requests a reasonable accommodation (or the employer identifies the need for an accommodation), the parties must engage in the interactive process. The interactive process is a dialogue between an employer and employee, whereby they work together to identify an effective and reasonable way to accommodate the employee's disability.³²

While failure to engage in the interactive process is not an independent claim under the ADA, courts hold that an employer's failure to engage in good faith is evidence of discrimination.³³ Courts will not grant a motion for summary judgment when an employer failed to engage in the interactive process, unless

²⁸ *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394 (2002). *But see Tate v. Dart*, 51 F.4th 789, 797–98 (7th Cir. 2022) (“Sheriff’s discretion to consider factors like ‘ability, in addition to seniority’ [in assignments] creates . . . special circumstances” that override “presumption of unreasonable accommodation that attaches in a seniority system”)

²⁹ *Perdue v. Sanofi-Aventis U.S., LLC*, 999 F.3d 954, 960 (4th Cir. 2021) (reassignment must be to existing position, rejecting argument that employer was obliged to split plaintiff’s job with another employee).

³⁰ *Hrdlicka v. General Motors, LLC*, 59 F.4th 791, 806 (6th Cir. 2023) (dislike of co-workers did not make transfer a reasonable accommodation).

³¹ *Youngman v. Peoria Cnty.*, 947 F.3d 1037, 1042–43 (7th Cir. 2020) (hypothyroidism and hypocalcemia not shown to be related to requested accommodation of reassignment due to alleged motion sickness); *Hustvet v. Allina Health Sys.*, 910 F.3d 399, 411 (8th Cir. 2018) (claimed disability of allergies and chemical sensitivities unrelated to her accommodation request to be excused from MME vaccination).

³² *See, e.g., Thompson v. Microsoft Corp.*, 2 F.4th 460, 468–69 (5th Cir. 2021) (employer engaged in interactive process where “record reflects that Microsoft appropriately engaged in good faith . . . worked with Thompson over several months, explaining accommodations it deemed unreasonable, asking Thompson to respond with alternate accommodations, and offering to consult directly with Thompson’s doctors”).

³³ *Sheng v. M&TBank Corp.*, 848 F.3d 78 (2d. Cir. 2017).



no reasonable accommodation existed.³⁴ Courts regularly examine the interactions between the employee and employer to pinpoint which party is responsible for any breakdown. When the employee is responsible for the breakdown, the employer typically prevails.³⁵ When the employer is deemed responsible, the court examines whether the breakdown prevented the parties from finding a reasonable accommodation.³⁶ See *Stern v. St. Anthony's Health Center*, 788 F.3d 276 (7th Cir. 2015) (finding that although the employer failed to engage in the interactive process, this is not an independent basis for liability because the plaintiff, a chief psychologist with short-term memory loss, requested elimination of his essential job functions which is not a reasonable accommodation).

The cases below demonstrate these situations and highlight the factors that judges consider in determining the responsible party.

1. Employee Responsible for the Breakdown

In some cases, employees cause the breakdown by failing to provide required medical documentation, being unresponsive to employer requests, or simply being unwilling to consider alternative effective solutions suggested by an employer.³⁷ For instance, in *Romero v. County of Santa Clara*, the Ninth Circuit ruled against an employee who was unwilling to discuss possible alternative accommodations with his employer.³⁸ Instead, the employee demanded only

³⁴ *Snapp v. United Trans. Union*, 547 F. App'x 824 (9th Cir. Nov. 5, 2013) (concluding that employer's failure to engage in the interactive process precluded granting summary judgment).

³⁵ *Dillard v. City of Austin*, 837, F.3d 557, 563 (5th Cir. 2016) (citing *Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 736 (5th Cir. 1999)).

³⁶ See *Leibas v. Dart*, No. 19 CV 7592, 2022 WL 17752389 at *9-10 (N.D. Ill. Dec. 19, 2022) ("[t]he court concludes that the point in time that the interactive process concluded or broke down is uncertain – a question of fact that, on this record, is best left to a jury.")

³⁷ *Stanislaw v. City of Warren, Ohio*, 2022 WL 2833812 (N.D. Ohio July 20, 2022) (Employer offered accommodation which employee rejected but then offered no alternative options.); *McGuire v. Little Caesars*, 2022 WL 1186731 (E.D. Ark. Apr. 21, 2022).

³⁸ *Romero v. Cty. of Santa Clara*, 666 F. App'x 609, 611 (9th Cir. 2016).



medical leave of an unspecified duration as an accommodation and even “characterized the County’s attempts to initiate the reasonable accommodations process as harassment.”³⁹ The court concluded that the employee’s demanded accommodation was not reasonable and, because the employee was responsible for the breakdown in the interactive process, the employer was not required to attempt to continue a fruitless discussion.⁴⁰

Employees must be open with the employer during the accommodation process, which includes communicating problems with an accommodation. In *Dillard v. City of Austin*, the employee injured his shoulder while working as a street and drainage crewmember.⁴¹ After his doctor limited him to “light duty” or “administrative work,” the City gave him a position as an administrative assistant. The employee had no previous experience in administrative work and did not meet the minimum qualifications for the job; still, the City gave him training and allowed him to shadow another administrative assistant. Instead of training, the employee spent his work hours playing computer games, sleeping, and making personal calls, and he was fired. The employee sued for disability discrimination. The court concluded that because the employee accepted the administrative position, “the ball was in his court,” and he needed to make a good faith effort to perform the job.⁴² He did not; therefore, his claim failed. The Fifth Circuit was careful to note that its ruling did not open the door for employers to give disabled employees jobs they could not reasonably perform in order to create a reason to fire them.⁴³ Such accommodations are unreasonable to begin with. In contrast, the administrative role given to the employee was reasonable because the City provided all of the training and support for him to succeed at his job, and the employee accepted the position.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Dillard*, 837 F.3d 557, 561 (5th Cir. 2016).

⁴² *Id.* at 563.

⁴³ *Id.*

Courts have also held employees responsible for notifying their employer if a proposed accommodation is inadequate and giving them a chance to respond. In *EEOC v. Kohl's Department Stores*, a full-time sales associate with diabetes was struggling to keep up with her erratic work schedule.⁴⁴ The manager regularly scheduled her for "swing shifts," where she would work a late shift one day and an early morning shift the day after. She requested an accommodation based on the advice of her doctor, who wrote that the swing shifts were detrimental to her health and proposed that she be put on a regular nine-to-five schedule. Kohl's agreed to take her off of swing shifts but was unable to guarantee a steady schedule every week. As soon as the employee heard the news from her manager, she "put her keys on the table, walked out of [the] office, and slammed the door."⁴⁵ She refused to stay and discuss other potential options despite her manager's attempts to calm her down. In light of this reaction and the employee's refusal to even discuss possible accommodations, the First Circuit found the employee responsible for the breakdown of the interactive process and affirmed summary judgment for the employer. *Accord Cowgill v. First Data Techs., Inc.*, 41 F.4th 370, 379 (4th Cir. 2022) (where limited schedule did not alleviate difficulty, employee must suggest alternative); *McGuire v. Little Caesars*, No. 4:20-CV-00819-BSM, 2022 WL 1186731, at *3 (E.D. Ark. Apr. 21, 2022) (new employee with low vision requested accommodations and supervisor scheduled "walk through" of the restaurant to identify tasks employee could perform and any reasonable accommodations; employee failed to participate and ADA accommodation claim was dismissed for failing to engage in interactive process.)

2. Employers Responsible for the Breakdown

One basic principle behind the interactive process is that employers cannot engage in knee-jerk reactions and deny accommodation requests without true deliberation. One example of this comes from *Jacobs v. N.C. Administrative*

⁴⁴ *EEOC v. Kohl's Dep't Stores, Inc.*, 774 F.3d 127, 129 (1st Cir. 2014).

⁴⁵ *Id.* at 130.

Office of the Courts, where a deputy clerk requested a restructured job where she spent less time working the front desk due to her social anxiety disorder.⁴⁶ The employee submitted her request to her three immediate supervisors. Her supervisors responded that only the clerk could make this decision and the clerk was on a three-week vacation. The employee then asked if she could use her leave time for the interim period, but this request was denied. Notably, as soon as the clerk returned, she terminated the employee's job without any further discussion of the accommodation request. *See also Morrissey v. Laurel Health Care Co.*, 946 F.3d 292, 302 (6th Cir. 2019) (employer supposedly "had a blanket policy of denying accommodations for all non-work-related disabilities"); *EEOC v. LHC Group, Inc.*, 773 F.3d 688 (5th Cir. 2014) (employer failed to engage in the interactive process because branch manager walked away when employee requested accommodations); *Johnson v. Norton County Hospital*, 550 F.Supp.3d 937 (D. Kan. 2021) (failure to engage interactive process, even if employer thought request was unreasonable, precluded the court ruling for employer.)

The interactive process requires employers to permit employees the opportunity to respond to concerns. Such was the case in *Keith v. County of Oakland*, where after being hired, a deaf lifeguard was evaluated by the County doctor who approved him to work, but noted that he required "constant accommodation."⁴⁷ The County created a detailed outline of possible accommodations for the lifeguard, but then after consulting with a lifeguard training expert, who never directly observed or communicated with the lifeguard, rescinded the lifeguard's offer of employment.⁴⁸ Keith sued and asserted that he was otherwise qualified to perform the essential job functions. He was able to show that the County caused a breakdown in the interactive process by cutting communications short and not giving the lifeguard the fair opportunity to respond to concerns prior to being fired. *See also Aubrey v. Koppes*, 975 F.3d 995, 1008–09 (10th Cir. 2020) (employer

⁴⁶ *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562 (4th Cir. 2015).

⁴⁷ *Keith v. Cnty. of Oakland*, 703 F.3d 918 (6th Cir. 2013).

⁴⁸ *Id.* at 921.

failed to engage in interactive process by giving the employee less than 24 hours to provide medical documentation to support reasonable accommodation request.)

An employer must communicate with employees on a timely basis and not leave them hanging. In *Dansie v. Union Pac. RR Co.*,⁴⁹ the employer was unwilling to accept the employee's proposal of up to five days per month of incapacity for recovery from the effects of cancer treatment and AIDS while awaiting eligibility for FMLA, but supposedly did not tell him what it would accept. "Plaintiff produced email correspondence in which he asked for guidance to help formulate an appropriate request. The email shows that Plaintiff struggled to locate a written policy for transportation employees explaining full-time employment. Plaintiff also says Defendant obstructed the process by telling him that it approved his accommodation. Plaintiff testified that when he told his direct supervisor that Defendant approved his accommodation, his supervisor shrugged and walked away. When Plaintiff tried to discuss his medical issues with his supervisor by email, his supervisor responded he only wanted to know what days Plaintiff was unavailable for work, and not the details about his medical treatments."⁵⁰ See also *King v. Steward Trumbull Memorial Hosp., Inc.*, 30 F.4th 551, 567 (6th Cir. 2022) (employer terminated employee for "failure to apply timely for a leave of absence," then retroactively granted her request for non-FMLA leave only after she was fired); *Hostettler v. College of Wooster*, 895 F.3d 844, 858 (6th Cir. 2018) ("Hostettler contends that she suggested extending her working hours past noon as a way of moving back to full-time work but that [her supervisor] ignored the suggestion.")

3. Effective v. Preferred Accommodation

The ADA requires an employer to provide an employee with an effective accommodation, not necessarily the employee's preferred accommodation.

⁴⁹ 42 F.4th 1184 (10th Cir. 2022).

⁵⁰ *Id.* at 1149.

Although the employee's preference should be given primary consideration, the employer is ultimately free to "choose between effective accommodations."⁵¹

The case *Noll v. IBM* presents a situation in which a reasonable accommodation was not preferred by the employee but was found to be effective nonetheless.⁵² The employee, a deaf software engineer, had worked at IBM for over thirty years with the assistance of on-site and remote ASL interpreters, internet based real-time transcription, and video relay services. The employee requested that IBM provide on-screen captioning for videos in IBM's internal video database of 46,000 video files. IBM responded by providing video transcripts and live interpreters. The employee asserted that these accommodations were ineffective because it was confusing and tiring for him to move his eyes back and forth between the video and the interpreter or transcript. The Second Circuit held that (1) the accommodations IBM provided were reasonable; and (2) once a reasonable accommodation is provided, the employer is not obligated to engage in the interactive process.

The *Noll* court held that although the employee had some difficulty using the existing accommodations, the "reasonable accommodation requirement does not require the perfect elimination of all disadvantage that may flow from the disability."⁵³ It noted that because almost any accommodation for deafness will "involve some degree of visual taxation," the employee's complaints would not render the accommodations ineffective "without something more."⁵⁴ The Court also reasoned that since "failure to engage in an interactive process does not form the basis of an ADA claim in the absence of evidence that accommodation was possible," the reciprocal must also be true.⁵⁵ If the

⁵¹ *Noll v. Int'l Bus. Machines Corp.*, 787 F.3d 89, 96 (2d Cir. 2015) (citing *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002)).

⁵² *Id.*

⁵³ *Id.* at 96 (quoting *Fink v. N.Y. City Dep't of Personnel*, 53 F.3d 565, 567 (2d Cir. 1995)).

⁵⁴ *Id.* at 96–98.

⁵⁵ *Id.* at 98 (quoting *McBride v. BIC Consumer Products Mfg. Co., Inc.*, 583 F.3d 92 (2d Cir. 2009)).

accommodation provided is “plainly reasonable,” the employer has no duty to explore alternatives.⁵⁶ IBM was not required to grant Noll’s preferred accommodations. *Accord D’Onofrio v. Costco Wholesale Corp.*, 964 F.3d 1014, 1030 (11th Cir. 2020) (employer could provide Video Relay Interpreting, or VRI, in lieu of a live interpreter for office activities; “Regardless of whether an on-site interpreter *might have been preferable* in the opinion of Williams, there is simply no basis in the evidentiary record to conclude that Costco’s use of a supposedly less preferable medium—VRI—represented a failure to make reasonable accommodations”) (emphasis in original).

In *Persechino v. United Services, Inc.*, 2022 WL 4599152 (D. Conn. Sept. 30, 2022), an employee with bi-polar disorder, worked as a domestic violence counselor at a shelter that was open 24 hours a day and was staffed by 3 8-hour shifts. It was a job requirement to be able to work all 3 shifts. Based on her doctor’s recommendation, employee submitted an accommodation request to not work the 3rd shift (overnight). The employer granted the request and assigned the employee to only work the 1st shift, but the employee’s preferred accommodation was a hybrid of the 1st and 2nd shifts and sued for the failure to accommodate. In ruling for the employer, the court found that the ADA only requires employers to provide an effective accommodation, not the employee’s preferred accommodation.⁵⁷

In *Bunn v. Khoury Enterprises*,⁵⁸ an employee who is blind was hired to work at a Dairy Queen where employees typically rotated between various duties, including preparing ice cream treats, preparing grilled food, working the cash register, maintaining the dining room, and more. The employee’s first assignment was with the ice-cream treats which proved difficult for him to perform because the ingredient labels were small and the monitors displaying the orders were too high. The store manager decided to train the employee to work in the “Expo” department, which was responsible for delivering food to dine-in customers and keeping the store and dining room clean. He worked in

⁵⁶ *Id.*

⁵⁷ *Id.* at *13-14.

⁵⁸ *Bunn v. Khoury Enterprises*, 753 F.3d 676 (7th Cir. 2014).



this position successfully until he was suspended for insubordinate conduct. The employee brought an ADA lawsuit asserting a failure to accommodate. The district court granted summary judgment to the employer and the Seventh Circuit affirmed the decision. The court found it undisputed that the employee could not perform the rotating duties and that the manager had determined he could accommodate the employee by assigning him to perform the duties in the Expo department. Calling this accommodation “job restructuring” or possibly a “modified work schedule,” the court concluded that it was “exactly the kind of accommodation envisioned by the regulations applicable to the ADA.”⁵⁹ The court held that the employee’s “apparent displeasure with the way [the employer] decided on that accommodation, or with its failure to provide the exact accommodation he would have preferred, is irrelevant.”⁶⁰

However, when an employer rejects the express request of an employee, they should be sure that the provided accommodation is effective, as explained by the Ninth Circuit in *EEOC v. UPS Supply Chain Solutions*.⁶¹ The plaintiff, a deaf clerk in the accounts payable division, requested ASL interpreters for his weekly department meetings. Instead of providing an interpreter, UPS attempted to accommodate the clerk by providing agendas, contemporaneous notes, and written summaries. The clerk argued that these alternatives were not effective. The agendas provided only cursory information; the notes had limited information, contained only short little words, and prohibited him from being able to ask questions; and the summary notes were incomplete and did

⁵⁹ *Id.* at 682–83.

⁶⁰ *Id.* at 683. See also *Elledge v. Lowe’s Home Centers, LLC*, 979 F.3d 1004, 1011–13 (4th Cir. 2020) (employer met accommodation duty by providing motorized scooter for employee’s in-store visits and light-duty restrictions, rather than reassigning employee to other, more desirable work); *Khoury v. Secretary of the U.S. Army*, 677 F. App’x 735, 737–38 (3d Cir. 2017) (finding the Army accommodated an employee who needed to “stretch his extremities” and “get up and walk around” while travelling for work by approving travel by train with a sleeper car upgrade even though the employee desired to travel by plane in a first-class cabin).

⁶¹ *U.S. E.E.O.C. v. UPS Supply Chain Sols.*, 620 F.3d 1103 (9th Cir. 2010).

not always contain the questions and answers from the meeting. Although the district court found for the employer, the Ninth Circuit reversed the decision, finding a genuine issue of material fact as to whether the provided accommodations were effective. Said the court: “an employer has discretion to choose among effective modifications and need not provide the employee with the accommodation he or she requests or prefers, but an employer cannot satisfy its obligations under the ADA by providing an ineffective modification.”⁶²

4. Medical Documentation for Accommodation

It is well-settled that employers are permitted to request medical documentation following an accommodation request if an employee’s disability or need for accommodation is not obvious.⁶³ Employers, however, are limited in the type of information they can request as they cannot request documentation if the disability and need for accommodation is obvious, or when the individual has already provided sufficient information.⁶⁴ This means that an employer usually “cannot ask for an employee’s complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation.”⁶⁵

When a request for documentation is reasonable, however, and an employee fails to provide sufficient medical support for a request, courts find the

⁶² *Id.* at 1113.

⁶³ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002 (Question 6), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

⁶⁴ *Id.* at Question 8.

⁶⁵ EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), July 27, 2000 (Question 10).

employee responsible for the breakdown in the interactive process.⁶⁶ Such was the case in *Ortiz-Martinez v. Fresenius Health Partners, PR, LLC*, when a healthcare worker requested accommodations for her sprained arm.⁶⁷ The employee submitted a note from her doctor that outlined her injuries but omitted detail about an accommodation. The employer requested additional information, including: “the weight or amount in pounds that the employee may lift, the frequency and duration of rest periods, the repetitive movements she must avoid, the specific limitations for grabbing pulling or squeezing.”⁶⁸ Despite the employer’s attempts to contact the employee to obtain this supplemental information, the employee failed to respond, the communications broke down, and the employee was never accommodated. In evaluating the employee’s ADA claim, the First Circuit concluded that the employee was responsible for the breakdown in the interactive process.⁶⁹ It explained that the employer’s requests for detailed medical information “were not unreasonable, especially in light of [the employee’s] burden to explain how her specific accommodation requests were related to her disability and duties at work.”⁷⁰

In *Brinner v. Illinois Dep’t of Children and Family Services*, No. 20 C 6984, 2023 WL 22137 (N.D. Ill. Jan. 3, 2023), plaintiff worked as a child welfare specialist. After she started the job, she began experiencing headaches. She sought leave as a reasonable accommodation and the employer requested medical documentation to confirm her disability and that leave would

⁶⁶ *Igasaki v. Illinois Dep’t of Fin. and Prof’l Regul.*, 988 F.3d 948, 961–62 (7th Cir. 2021) (request for flexible deadlines was not supported by the medical documentation); *Tchankpa v. Ascena Retail Group, Inc.*, 951 F.3d 805, 812 (6th Cir. 2020) (“employers may require documentation supporting an employee’s requested accommodation” and “an employee’s failure to provide requested medical documentation supporting an accommodation precludes a failure to accommodate claim”).

⁶⁷ *Ortiz-Martinez v. Fresenius Health Partners, PR, LLC*, 853 F.3d 599 (1st Cir. 2017).

⁶⁸ *Id.* at 603.

⁶⁹ *Id.* at 605.

⁷⁰ *Id.* at 606.

effectively address her headaches. The employee failed to provide the requested paperwork, so the employer denied the accommodation, and plaintiff was subsequently fired. She filed suit alleging, among other things, failure to accommodate. The court found for the employer. The employee caused breakdown in the interactive process by not providing the requested documentation and the employer's request was not unreasonable.⁷¹

An employer may require supporting documentation to come from an "appropriate health care or rehabilitation professional," which will depend on the disability and type of functional limitation.⁷² For example, in *Heit v. Aerotek, Inc.*, an employee was unable to produce urine necessary for an employer-required drug test.⁷³ He requested an alternative test as a reasonable accommodation for shy bladder syndrome. The company requested medical documentation and the employee provided a note from a doctor at a drug testing clinic that stated that the employee had a form of anxiety that caused him to be unable to urinate in public. However, the doctor was not an expert in this condition, did not examine the employee or diagnose him and instead just documented what the plaintiff reported. The employer required the employee to provide supplemental documentation from a primary care physician. The employee did not and explained that he did not have a relationship with a primary care physician. The court found for the employer in this case. It explained that it was sympathetic toward the employee but that an employee cannot self-diagnose his own disability and that it was reasonable to request additional medical documentation from a professional with expertise in the condition or at the very least who had examined the employee.

⁷¹ *Id.* at *4-5.

⁷² EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002 (Question 6), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

⁷³ *Heit v. Aerotek, Inc.*, No. C15-1805-JCC, 2016 WL 6298771, at *4 (W.D. Wash. Oct. 27, 2016)

In a case about the interplay between reasonable accommodations and medical documentation itself, the court in *Schneider v. Works*, considered whether it was a reasonable accommodation to seek a short leave extension for the purpose of waiting for the next medical appointment.⁷⁴ In this case, the plaintiff worked as a personnel supervisor and had previously provided medical support that he was not healthy enough to work. During a telephone call, he requested a ten-day extension of his previously approved leave so that his doctor could examine him and he could provide medical clearance, at least to return in a light duty capacity. The court permitted the employee's claim to move forward, finding that it may have been a reasonable accommodation.

5. Delay in Delivering Accommodation

Unreasonable delay in delivering an accommodation to an employee may itself be deemed failure to accommodate. In *McCray v. Wilkie*,⁷⁵ the employee had medical restrictions affecting his knee and requested a new van to transport patients because the current one caused him pain. It took the agency eleven months to comply. The Seventh Circuit held that the employee stated a claim for denial of reasonable accommodations. "An unreasonable delay in providing an accommodation for an employee's known disability can amount to a failure to accommodate his disability that violates the Rehabilitation Act Whether a particular delay qualifies as unreasonable necessarily turns on the totality of the circumstances, including, but not limited to, such factors as the employer's good faith in attempting to accommodate the disability, the length of the delay, the reasons for the delay, the nature, complexity, and burden of the accommodation requested, and whether the employer offered alternative accommodations."⁷⁶ Here, "McCray raised the issue at weekly staff meetings with his supervisor, and yet the only interim accommodation he was offered was a van that was *worse* in material respects. Apart from that, there was no dialogue with McCray about what else could be done and on what timeline, an

⁷⁴ *Schneider v. Works*, 223 F. Supp. 3d 308, 317 (E.D. Pa. 2016).

⁷⁵ 966 F.3d 616 (7th Cir. 2020).

⁷⁶ *Id.* at 621.



omission that could be understood to violate the VA's duty to engage in an interactive process with its employee in an effort to arrive at an appropriate accommodation, and also as evidence of his employer's lack of good faith." Only after he threatened to file a charge did the agency act.⁷⁷ See also, *DiFranco v. City of Chicago*, 589 F. Supp. 3d 909, 915–16 (N.D. Ill. Mar. 7, 2022) (Police officer with cystic fibrosis died from COVID when police department failed to respond to his accommodation request for remote work or social distancing. Although only ten days had passed since the request, the response was deemed untimely, and a violation of the ADA given the totality of the circumstances.)

D. Confidentiality

The ADA requires employers to keep confidential disability-related information gathered during the interactive process.⁷⁸ Protected disability-related information must be maintained in a file separate from the employee's personnel file and disclosed only to a limited group of people, such as the employee's supervisor or managers in certain circumstances, safety personnel, or the government when it is investigating the employer's compliance with the ADA.⁷⁹

Violating confidentiality is an independent cause of action that does not require another type of disability discrimination. See *Gascard v. Franklin Pierce Univ.*, No. 14-cv-220-JL, 2015 WL 1097485, at *4 (D.N.H. Mar. 11, 2015) ("The statute itself does not limit its prohibition on such disclosures to those that are done in furtherance of some act of disability discrimination, and the defendants provide no authority for reading the statute that way. The court declines to do so.").

To bring a case, plaintiffs generally need to show that the disclosure was not

⁷⁷ *Id.* at 622.

⁷⁸ 42 U.S.C. § 12112(d)(3)(B).

⁷⁹ 42 U.S.C. § 12112(d)(3)(B)(i)–(iii).

voluntary and that it caused a tangible injury. When an employee discloses a disability due to a need for an accommodation, it is not a voluntary disclosure and thus, is protected by the ADA's confidentiality requirements. For example, in *EEOC v. Ford Motor Credit Co.*, an employee with HIV requested a schedule modification so that he could participate in an HIV-study that paid for his HIV medication.⁸⁰ The employee was wary of disclosing to his direct supervisor, for fear that she was a "gossip" and so instead disclosed to a manager.⁸¹ Although the employee initially declined to name his underlying diagnosis because it was "confidential" and because there was "stigma attached," the manager demanded to know and the employee acquiesced.⁸² The manager kept the diagnosis confidential for a short time, but the employee's direct supervisor continued to ask him and pressure him to disclose and finally, in the presence of the employee, the manager disclosed the employee's condition to the direct supervisor. The supervisor then disclosed to a number of other employees, and the plaintiff brought a suit under the ADA. In defense, the employer argued that the disclosure was not protected because the employee had voluntarily disclosed. The court rejected this argument, as it was clear that the employee disclosed only because he was requesting medical leave. The court also referenced the facts surrounding the disclosure, such as the supervisor continuing to press the employee and the fact that the employee had already been written up for missing work so he had a credible fear of disciplinary action should he not seek leave. *See also Brown v. Wilkie*, No. 1:20-cv-01154-JPH-MJD, 2022 WL 1658802, at *10 (S.D. Ind. May 24, 2022) (letter issued "in response to Ms. Brown's request for reassignment" is not "voluntary" for purposes of the Rehabilitation Act); *Rivera v. City of North Chicago*, No. 19 C 5701, 2021 WL 323794, at *3-4 (N.D. Ill. Feb. 1, 2021) ("inquiries into the ability of [Mr. Rivera] to perform job-related functions" and other "medical information from Mr. Rivera's providers to facilitate the interactive process" protected under this section).

⁸⁰ *EEOC v. Ford Motor Credit Co.*, 531 F. Supp. 2d 930 (M.D. Tenn. 2008).

⁸¹ *Id.* at 932-33.

⁸² *Id.* at 933.

With respect to experiencing a tangible injury, the court in *Ford Motor Credit* concluded that because the plaintiff experienced shame, embarrassment and depression as a result of the disclosure, the disclosure caused a tangible injury. *Accord Rivera v. City of North Chicago*, 2021 WL 323794, at *5 (emotional distress at disclosure of private information can be a tangible harm). Note, however, that it may be more difficult for a plaintiff to assert an injury of embarrassment and shame if the disability disclosed is one already known. *See, e.g., Porfiri v. Eraso*, 121 F. Supp. 3d 188, 199 (D.D.C. 2015) (“[n]or is it clear whether such harms would be plausible, given that Plaintiff has already stated that his colleagues and supervisors already knew of his condition, and that at least some outward signs of his disability were clearly ‘visible’”).

E. Undue Hardship

Employers need not provide an accommodation that would amount to an undue hardship, defined as an action requiring significant difficulty or expense.⁸³ If a plaintiff successfully establishes that a proposed accommodation is reasonable on its face, then the burden shifts to the employer to establish that the accommodation would pose an undue hardship on the employer.⁸⁴

While the ADA does not provide a specific formula for determining if an accommodation constitutes an undue hardship, it does provide a list of factors to consider in this inquiry including: (1) nature and cost of the accommodation needed; (2) overall financial resources of the facility, number of employees, effect on expenses/resources, impact on operations; (3) overall financial resources, size, number of employees, and type and location of facilities of employer, if the facility involved in the reasonable accommodation is part of a larger entity; and (4) type of operation of the employer, including the

⁸³ 29 C.F.R. § 1630.2(p).

⁸⁴ *US Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002).

structure and functions of the workforce, the geographic separateness, and the administrative/fiscal relationship of the facility.⁸⁵

Courts have provided employers with guidance about relevant and irrelevant factors when determining whether an accommodation poses an undue hardship. Employers should not look only to their accommodations budget when determining whether an accommodation would be an undue hardship. In *Reyazzuden v. Montgomery County, Maryland*, the plaintiff worked as an information and referral aide and performed her job with screen reader software and a Braille embosser.⁸⁶ To reduce costs, the county opened a consolidated call center with inaccessible software. While many of the plaintiff's coworkers were transferred to the central call center, Plaintiff was not. One issue addressed in this case was whether, as a reasonable accommodation, the software could be made accessible through either a workaround widget or changing the configuration of the software. The parties' estimates differed with the plaintiff's expert claiming it would cost \$129,000 and the employer's expert claiming it would cost \$648,000. In light of the county's total budget of \$3.73 billion, the Fourth Circuit held that either cost did not constitute an undue hardship as a matter of law. The appellate court also emphasized that the budget allocated for accommodations was an irrelevant factor, reasoning that "taken to its logical extreme, the employer could budget \$0 for reasonable accommodations and thereby always avoid liability."⁸⁷

Another irrelevant factor is the employee's salary. In *Searls v. Johns Hopkins Hospital*, a recent nursing graduate was given an offer of employment contingent on a health screening.⁸⁸ At that point, she requested a full-time ASL interpreter and her offer was rescinded. The nurse sued and one of the employer's defenses was that the interpreter would pose an undue hardship

⁸⁵ 42 U.S.C. § 12111(10).

⁸⁶ *Reyazzuddin v. Montgomery Cty., Maryland*, 789 F.3d 407, 409 (4th Cir. 2015).

⁸⁷ *Id.* at 418.

⁸⁸ *Searls v. Johns Hopkins Hospital*, 158 F. Supp. 3d 427 (D. Md. 2016).



as the nurse's salary would have been between \$40,000 and \$60,000 and the interpreter would have cost approximately \$120,000. The court explained that when determining undue hardship, the employer should have compared the cost to the overall budget, not the nurse's salary or the department's resources. Here, although the interpreter costs may have been twice the nurse's salary, it was only .007% of the hospital's overall budget.

These cases suggest that, especially with larger employers, proving undue hardship due to financial constraints is difficult for employers to do. In one recent case, an employer came close to being able to assert undue hardship, but the court ultimately discredited this conclusion based on the employer's changing explanation. In *Yinger v. Postal Presort, Inc.*, the employee requested reinstatement after his leave period had expired, and the employer argued that its financial problems prevented this reinstatement.⁸⁹ In support, the employer argued that it had recently lost two major customers, needed to reduce staff costs, and had been unable to obtain emergency financing for its business operations. However, the employer later changed its explanation for not holding the employee's position open, and stated that it had been willing to keep the employee on but that the employee himself had terminated his employment with the company. The district court held that the employer's financial difficulties were significant enough to establish an undue hardship and excuse it from holding the position open; however, on appeal, the Tenth Circuit reversed this decision, and held that the employer's shifting explanation made the issue unfit for summary judgment. Although the court did not directly address the sufficiency of the undue hardship finding, the case suggests that an employer's significant financial problems are relevant in establishing undue hardship under the ADA. It is therefore more likely that an employer will be able to establish an undue hardship defense to a proposed reasonable accommodation when the employer is experiencing significant financial strain.

In addition to cost, employers often assert that an accommodation is an undue hardship because of its impact on the workplace, such as violating a well-

⁸⁹ *Yinger v. Postal Presort, Inc.*, 693 F. App'x 768 (10th Cir. 2017).

established seniority system or a union collective bargaining agreement. Employers seeking to assert the undue hardship defense must be able to show that the seniority system is truly bona fide and that exceptions are not otherwise made. For instance, in *Hill v. Clayton Cnty. School Dist.*, the Eleventh Circuit addressed an assertion that upsetting a “seniority-sensitive” bus assignment system for bus drivers would impose an undue hardship on the school district.⁹⁰ In this case, a bus driver whose ability to breathe was impaired by heat requested to be assigned an air-conditioned bus. The school district alleged it made an offer for Hill to drive an air-conditioned bus, but that this accommodation would have to be delayed by several months because doing so immediately would “upset its seniority-sensitive bus-allocation process.”⁹¹ The Court noted that such a sparse assertion of merely upsetting an equipment allocation process is insufficient to establish undue hardship under the ADA. The court noted that the driver was previously assigned an air-conditioned bus so it was difficult to understand how reassignment would upset the assignment process.⁹² On the other hand, in *LeBlanc v.*

⁹⁰ *Hill v. Clayton Cty. Sch. Dist.*, 619 F. App’x 916 (11th Cir. 2015).

⁹¹ *Id.* at 922.

⁹² See also *Greenbaum v. NYC Trans. Auth.*, No. 21-1777, 2022 WL 3347893, at *4 (2d Cir. Aug. 15, 2022) (“concerns about the compatibility of the proposed software with defendants’ current computer systems” insufficient to establish undue hardship as a matter of law); *Fisher v. Nissan No. Am., Inc.*, 951 F.3d 409, 420 (6th Cir. 2020) (while position that employee identified for transfer was bidden by seniority, there were other positions in the same plant that seniority rules did not bar); *Suboh v. Abacus Corp.*, No. 2:20-cv-6295, 2022 WL 10569512, at *8 (S.D. Ohio Oct. 18, 2022) (assertion that plaintiff’s “branches declined in performance” and that “lack of leadership in her absence ... affected productivity” insufficient to prove undue hardship); *Dinger v. Bryn Mawr Tr. Co.*, No. 19-2324-WB, 2022 WL 6746260, at *10 (E.D. Pa. Oct. 11, 2022) (contention that employer “would face an undue hardship if Dinger did not return to work because the temporary consultant it hired to create the complex monthly cash reports in Dinger’s place was leaving the Bank at the end of January 2019” unsupported, where other temporary consultant could handle the work); *Reid v. Middle Flint Area Commun. Service Bd.*, No 1:20-CV-259 (LAG), 2022 WL 4653686, at *10 (M.D. Ga. Sept. 30, 2022) (“Defendant has not shown that exempting Plaintiff from travel until his restrictions were lifted would cause any ‘significant difficulty or expense’ that the vacancy presumably caused”); *Nowlin v. Mount Sinai Health Sys.*, No. 20 CIV. 2470 (JPC), 2022 WL 992829, at *10 (S.D.N.Y. Mar. 31, 2022) (“inefficiencies of text messages in emergency situations” not established as undue hardship); *Torres v. Hilton Int’l of Puerto Rico, Inc.*, No.

McDonough,⁹³ the Eighth Circuit held that a scheduling accommodation that limited the employee to day shifts not only disrupted a seniority-based bidding process but “would also require LeBlanc’s colleagues to work more nights, more weekends, and more irregular hours, which is also an undue hardship.”⁹⁴

III. Categories of Accommodations

Reasonable accommodations generally fall within one of three categories: (1) accommodations for the pre-employment process; (2) accommodations to enable an employee to enjoy the benefits and privileges of employment; and (3) accommodations to enable an employee to perform the essential functions of their position.

A. Accommodations for the Application Process

A reasonable accommodation during the job application process helps ensure that a qualified applicant with a disability receives modifications or adjustments necessary to be considered for the position.⁹⁵ An applicant can request accommodations during the application, interview and pre-employment process, and there are several examples of accommodations in these situations. As just one example, in *Leskovisek v. Ill. Dep’t of Transp.*,⁹⁶ a request for modification or waiver of testing and interview requirements for applicants with Autism Spectrum Disorder, who had already been performing in the roles for the positions they sought in a temporary capacity, presented a genuine dispute about reasonableness.

10-1190 (SEC), 2012 WL 2571293, at *6 (D.P.R. July 2, 2012) (although there was a collectively bargained seniority system, CBA contained a clause “exempting enforcement of the seniority system under exceptional circumstances” and so accommodation request could have been considered within that clause).

⁹³ 39 F.4th 1071 (8th Cir. 2022).

⁹⁴ *Id.* at 1075–76.

⁹⁵ 29 C.F.R. § 1630.2(o)(1)(i).

⁹⁶ 506 F. Supp. 3d 553 (C.D. Ill. 2020).

Employers should keep in mind that this requirement applies to all pre-employment procedures, not just standard applications and interviews, as demonstrated by the following case examples. In *EEOC v. Kmart Corporation*, the applicant informed the hiring manager that he was unable to provide a urine sample because of his kidney disease.⁹⁷ The employee requested a reasonable accommodation in the form of a blood, hair, or other drug test, but Kmart refused to allow an alternative test and declined to employ the applicant. The EEOC filed a lawsuit and in January 2015, announced that a settlement of \$102,048 in monetary relief for the applicant, as well as equitable relief in the form of policy changes and training.

Similarly, in *EEOC v. Creative Networks, L.L.C.*, the company required all applicants to participate in a pre-employment training program.⁹⁸ A deaf applicant requested a sign language interpreter to participate in this training and the company refused to pay for the interpreter if it cost over \$200. The court concluded that the company violated the ADA when denying this request and granted summary judgment to the EEOC on this issue. The court also granted the EEOC's motion for summary judgment on its failure to hire claim, finding that the company's failure to provide the employee reasonable accommodations "foreclosed her opportunity for employment by preventing her from proceeding further in the application process."⁹⁹

Also in *EEOC v. BNSF Ry. Co.*,¹⁰⁰ the employer conditioned a job offer on the employee's undergoing a magnetic resonance imaging (MRI) of his back. Because the MRI was deemed not medically necessary by his insurer, the job applicant would have had to pay for this procedure out-of-pocket, at a cost of \$2,500. The Ninth Circuit held that the financial burden must fall on the

⁹⁷ Kmart Will Pay \$102,048 to Settle EEOC Disability Discrimination Lawsuit, U.S. Equal Employment Opportunity Commission, January 27, 2015, available at <http://www.eeoc.gov/eeoc/newsroom/release/1-27-15b.cfm>.

⁹⁸ *E.E.O.C. v. Creative Networks, L.L.C.*, 912 F. Supp. 2d 828, 841 (D. Ariz. 2012).

⁹⁹ *Id.*

¹⁰⁰ 902 F.3d 916 (9th Cir. 2018).

employer. “The ADA requires employers to pay for reasonable accommodations unless it is an undue hardship—it does not require employees to procure reasonable accommodations at their own expense. 42 U.S.C. § 12112(a), -(b)(5)(A); see also 29 C.F.R. § 1630.2(o)(4).¹⁰ Allowing employers to place the burden on people with perceived impairments to pay for follow-up tests would subvert the goal of the ADA to ensure that those with disabilities have ‘equality of opportunity,’ § 12101(a)(7), and would force people with disabilities to face costly barriers to employment.”¹⁰¹

The ADA also prohibits employers from using eligibility criteria that screens out someone with a disability, unless the criterion is job-related and consistent with business necessity.¹⁰² There are cases that find the ADA’s accommodation requirement applies to these situations as well. For example, in *Toole v. Metal Services LLC*, a company required all applicants to take a Department of Transportation (“DOT”) test, which automatically disqualified the plaintiff because of his monocular vision.¹⁰³ The plaintiff argued that passing the DOT medical examination was not an essential part of the job and he could have, as a reasonable accommodation to the application process, taken a standard non-DOT medical examination. The court agreed, determining that the applicant “presented sufficient evidence of a reasonable accommodation; specifically, that had he been allowed to take a standard non-DOT medical examination, he would not have been automatically disqualified on the basis of monocular vision,” and permitted the applicant’s case to move forward.¹⁰⁴

B. Accommodations for Benefits or Privileges of Employment

Reasonable accommodations are not necessarily limited to changes in the workplace that enable employees with disabilities to perform the essential functions of their jobs. The ADA speaks in terms of non-discrimination (and

¹⁰¹ *Id.* at 926.

¹⁰² 42 U.S.C. §12113(a).

¹⁰³ *Toole v. Metal Srvs. LLC*, 17 F. Supp. 3d 1161 (S.D. Ala. 2014).

¹⁰⁴ *Id.* at 1180–81.



accommodation) in “terms, conditions, and *privileges* of employment.”¹⁰⁵ Courts have interpreted “privileges” to include access, safety, and comfort for employees with disabilities. Courts have disagreed, though, about how far this duty radiates.

A recent case involved a teacher’s request for a job aide to help alleviate pain. In *Hill v. Assocs. for Renewal in Education, Inc.*, the employee wore a leg prosthesis and was limited in his ability to climb stairs and stand for extended periods of time.¹⁰⁶ He risked falling and endured “pain and bruises” from prolonged standing. He requested an aide “to keep with [his] daily schedule, which requires both indoor and outdoor gross motor activities.” The school denied the request. The D.C. Circuit held, though, that the school might be required to provide an aide in such circumstances. The school argued that “Hill did not need the accommodation of a classroom aide because he could perform the essential functions of his job without accommodation, ‘but not without pain.’” But the court held that “[a] reasonable jury could conclude that forcing Hill to work with pain when that pain could be alleviated by his requested accommodation violates the ADA.”¹⁰⁷ It was deemed a “privilege” of employment to work without physical pain.

The First Circuit held that automatic door openers may also be a reasonable accommodation, even if not strictly necessary for an employee to perform essential functions of a job. In *Burnett v. Ocean Properties, Ltd.*, the court affirmed a jury verdict in favor of an associate at a call center.¹⁰⁸ The employee, who was limited in walking and used a wheelchair, had unsuccessfully sought that employer install door openers on a set of large wooden doors at the entrance of the clubhouse where he worked. Held the court, “Burnett testified that, daily, he experienced difficulty entering the clubhouse and once injured his wrist when doing so. The fact that Burnett was able to enter the clubhouse (at the risk of bodily injury) despite this difficulty and to perform the duties of an associate once inside does not necessarily

¹⁰⁵ 42 U.S.C. §12112(a) (emphasis added).

¹⁰⁶ 897 F.3d 232 (D.C. Cir. 2018).

¹⁰⁷ *Id.* at 239.

¹⁰⁸ 987 F.3d 57 (1st Cir. 2021).

mean he did not require an accommodation or that his requested accommodation was unreasonable, as Appellants claim.”¹⁰⁹

Yet the Seventh Circuit, under a similar set of facts, found that there was no ADA duty to install door openers on an internal set of doors as a reasonable accommodation. In *Swain v. Wormuth*, the employee, diagnosed with a hernia and subject to a ten-pound weight restriction, requested among other accommodations that his agency install “an automatic door opener on the double hallway doors in Building 210.”¹¹⁰ His supervisor declined to approve the installation of an opener “because he believed those doors required less than ten pounds of force (Swain’s weight restriction) to open.” The Seventh Circuit held that there was no duty to install an opener because “Swain failed to connect the double hallway doors with the essential functions of his job.”¹¹¹ The panel also noted that “[i]f restroom access was the concern, the Army resolved it by installing an opener on an alternate door, which gave Swain access to a different men’s restroom.”¹¹²

Despite the legal uncertainty, it is wise to consider that the duty to accommodate may in some cases extend beyond an employee’s essential job functions. Employers should review their accommodation forms to see if their documentation states that accommodations will be provided only for employees who are otherwise unable to perform the essential functions of their position.

C. Accommodations to Essential Job Functions

The third category of reasonable accommodations is the largest; accommodations that enable an employee to perform the essential functions of their job. Typically, the standard in such cases is *not* whether reasonable accommodations are *necessary* to perform essential functions of a job. “An employee who can, with some difficulty, perform the essential functions of his

¹⁰⁹ *Id.* at 68–9.

¹¹⁰ 41 F.4th 892, 898 (7th Cir. 2022).

¹¹¹ *Id.*

¹¹² *Id.*

job without accommodation remains eligible to request and receive a reasonable accommodation.”¹¹³

However, some courts do consider whether the employee is already able to perform the essential functions of the job to determine whether the requested accommodation is reasonable. In *Edwards v. Wellstar Medical Group*, No. 20-13866, 2022 WL 3012297, at *7 (11th Cir. July 29, 2022), an office manager was diagnosed with depression. She submitted a list of 18 accommodation requests claiming they would “maximize her productivity.” The court found that an accommodation is reasonable if it enables the employee to perform the essential functions of the job. Here the employee had performed the essential functions of her job for two years even after being diagnosed with depression and did not claim she could no longer perform them without accommodations. Because she did not require an accommodation to perform her essential job functions, the employer was not obligated to engage in the interactive process.

1. Leave as a Reasonable Accommodation

Leave is an accommodation that enables an employee to perform the essential functions in the near future, and it is an important one for employees with many different types of disabilities. Leave is also an accommodation that creates confusion because, as discussed above, the ADA is only one of various state and federal laws that provides leave-related protections for employees.

Frequently, an employee is on leave pursuant to the FMLA, workers’ compensation, or another kind of employer-provided leave, and then needs an extension to that leave for a disability-related reason.¹¹⁴ This type of extension can be a reasonable accommodation under the ADA. For instance,

¹¹³ *Bell v. O’Reilly Auto Enterps.*, 972 F.3d 21, 24 (1st Cir. 2020) (holding the district court erred in instructing the jury that accommodations had to be “necessary” to perform essential functions).

¹¹⁴ For more background on the interplay between the ADA and the FMLA, see a previous brief addressing this issue available at <https://www.accessibilityonline.org/ada-legal/archives/110607>

in *Rentz v. Hospital*, a clinical clerk used her FMLA and paid time off for various medical issues, including treatments for breast cancer.¹¹⁵ After this time expired, the clerk experienced two medical issues—one requiring hospitalization. Because she did not have accrued time or FMLA leave, the employee was disciplined for taking time off. The court found that this additional time, which amounted to only a handful of additional days, could have been a reasonable accommodation under the ADA. In letting the employee's claim advance, the court confirmed that "a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances."¹¹⁶

A question often asked by employees and employers alike is how much time is reasonable? Because of the fact-intensive nature of ADA accommodations and the importance of considering the specific circumstances of the case, courts generally do not prescribe the amount of leave that is allowed. Unfortunately for those with disabilities, the Seventh Circuit is an outlier in this regard, taking the restrictive approach that any leave period exceeding a few weeks is not reasonable. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017) ("a short leave of absence—say, a couple of days or even a couple of weeks—may, in appropriate circumstances, be analogous to a part-time or modified work schedule," while "medical leave spanning multiple months does not permit the employee to perform the essential functions of his job"). *Accord McAllister v. Innovation Ventures, LLC*, 983 F.3d 963, 971 (7th Cir. 2020).

Other courts are less restrictive. A good example of this comes from *Walker v. NF Chipola, LLC*, where a certified nursing assistant (CNA) at a nursing facility requested six months of leave for shoulder surgery.¹¹⁷ Although her employer provided 12 weeks of leave under FMLA, it forced her to resign or be fired after that period. The employee brought an ADA case, and received a jury verdict in her favor. The district court upheld the jury verdict, concluding

¹¹⁵ *Rentz v. Hosp.*, 195 F. Supp. 3d 933 (E.D. Mich. 2016).

¹¹⁶ *Id.* at 946.

¹¹⁷ *Walker v. NF Chipola, LLC*, 2016 WL 1714871 (N.D. Fla. March 28, 2016).

that six months of leave was a reasonable accommodation under the circumstances. It refused to draw any bright line rules as to what length of leave is ordinarily reasonable, finding the concept to be at odds with reasonable accommodations. However, when reviewing the specific facts of this case, it explained that because there is a very high rate of CNA turnover, the employer “easily” could have left the employee on the roster without giving her pay or benefits.

For many courts, the dispositive question to whether the request is reasonable is whether the request is indefinite and open-ended, or alternatively, whether the request is temporary, which would enable the employee to perform the essential functions of their job in the near future. If the request is indefinite and open-ended, then courts typically find the request to be unreasonable and/or an undue hardship. *See, e.g., Johnson v. Cirrus Education Group, Inc.*, No. 5:20-cv-2562022, WL 4003871, at *7 (M.D. Ga. Sept. 1, 2022) (leave for an indefinite period is not a reasonable ADA accommodation); *Echevarria v. AstraZeneca Pharmaceutical LP.*, 856 F.3d 119, 127 (1st Cir. 2017) (“[Plaintiff] was seeking indefinite leave—an accommodation that is not reasonable under the ADA.”); *Larson v. United Natural Foods West Inc.*, 518 F. App’x 589 (9th Cir. 2013) (finding truck driver with alcoholism’s request for “an indefinite, leave of absence to permit him to fulfill the SAP’s treatment recommendations” so that he might eventually be physically qualified under the DOT regulations unreasonable”); *Forgione v. City of New York*, No. 11-CV-5248, 2012 WL 4049832, at *9 (E.D.N.Y. Sept. 13, 2012) (construing plaintiff’s request as a request for indefinite leave where he “simply asked for ‘some time off so he could address his medical condition,’” and holding that “[b]ereft of any allegations that [plaintiff] informed the defendants of how much leave he would need, what he would do during his leave, [or] whether and how the leave would allow him to perform the essential functions of his job”).

Courts have also had the opportunity to help define the meaning of the term. For some courts, employee requests without an anticipated date of return are considered requests for indefinite leave. *See Salem v. Houston Methodist Hosp.*, No. 4:14-1802, 2015 WL 6618471, at *7 (S.D. Tex. Oct. 30, 2015)



(concluding that the employee failed to provide an anticipated date of return and that requests “without an end-date [are] requests for indefinite leave”).

One common scenario is when an employee or an employee’s doctor fails to provide a specific return-to-work date or a stated date is either aspirational or in the form of a date range. Courts have differed in how they treat these types of requests. In *Maat v. County of Ottawa, Michigan*, the Sixth Circuit concluded that a date that is aspirational amounted to a request for indefinite leave.¹¹⁸ In this case, a court reporter for a small courthouse had worked a reduced schedule for nearly seven-months and then requested full-time leave for approximately six more weeks. Although the doctor provided an estimated date, it was clear that the doctor did not know the “probable duration” and that the stated date only signified the date they “hoped” she “might” be able to return.¹¹⁹

Other courts, however, have understood the practical realities of many medical treatments and the impracticability of setting an exact return date. In *Sharbaugh v. West Haven Manor*, the plaintiff worked as the Environmental Director of a nursing home.¹²⁰ She requested leave under the FMLA to undergo knee surgery, and provided information from her surgeon that she should be ready to return within two to six weeks from the surgery. Her employer argued that this uncertainty amounted to a request for indefinite leave. The court strongly rejected that argument, and explained that no medical professional can foresee the exact date a patient will recover. The court explained that that does not mean that an estimate or a range makes a request indefinite or open ended. Despite this conclusion, employees are encouraged to be as specific as possible when providing an estimated return to work date when requesting leave as a reasonable accommodation, and provide updates to employers promptly if the timing changes. See also *Blanchet v. Charter Commc’ns, LLC*, 27 F.4th 1221, 1230–32 (6th Cir. 2022) (doctor’s note claiming to “expect

¹¹⁸ *Maat v. Cnty. of Ottawa, Michigan*, 657 F. App’x 404 (6th Cir. Aug. 10, 2016).

¹¹⁹ *Id.* at 413.

¹²⁰ *Sharbaugh v. West Haven Manor, LP*, No. 14-1723, 2016 WL 6834613 (W.D. Pa. Nov. 21, 2016).

April” for employee’s return was not too vague to constitute definitive date); and *Bennett v. City of Atlanta*, No.: 1:18-CV-02073-MHC-JCF, 2020 WL 13653777, *10-11 (N.D. Ga. Jan. 21, 2020) (Court rejected employer’s claim that employee’s leave request was indefinite; prior to Plaintiff’s surgery, although he was unable to provide a specific date of return, he did inform employer when his surgery was scheduled, and that he anticipated returning in a month or two, which is what happened.)

Underscoring the need for an individualized inquiry in all circumstances, even when an employee cannot give a definite return to work date, courts have held that the specific circumstances must be examined to determine whether the leave is reasonable. In *Hunter v. BASF*, a machine operator with psychiatric disabilities took short-term disability and was unable to provide an anticipated return-to-work date.¹²¹ The court noted that under normal circumstances, the employee’s failure to provide a return-to-work date may have rendered her request unreasonable, but that was not the case here. The employee’s job was not specialized and under the employer policy, she was entitled to return to her job within six months of the date on which her leave began. The court further noted that the employer had the personnel, organizational infrastructure, and financial resources to tolerate the employee’s absence and reintegrate her into the workplace. The employer’s own short-term disability leave policy provided additional evidence that the company could withstand an employee’s extended absence.

Employers are also cautioned from calling all requests indefinite to escape liability, as courts are rejecting such arguments. See *Bernhard v. Brown & Brown of Lehigh Valley, Inc.*, 720 F. Supp. 2d 694, 701 (E.D. Pa. 2010) (rejecting employer’s argument that the employee’s request for an additional three month leave of absence as a reasonable accommodation under the ADA was indefinite, following the expiration of his FMLA leave, as “disingenuous[]” and “absurd”); *Feldman v. Law Enforcement Associates Corp.*, 779 F. Supp. 2d 472 (E.D.N.C. 2011) (rejecting an employer’s assertion that an employee with Multiple Sclerosis sought “indefinite” leave, as the employee sought leave for “at least three weeks” on two separate occasions).

¹²¹ *Hunter v. BASF*, 2017 WL 958382, at *5 (N.D. Ala. Mar. 13, 2017).

Employees should remember that requests for leave are unreasonable if an employee is not able or not planning to return to the workplace. For instance, in *Moss v. Harris County Constable Precinct One*, the plaintiff argued that his leave request was reasonable because he had a specific date that it would end.¹²² However, the evidence showed that the plaintiff would retire on the same date that his leave ended. The court held that because the plaintiff “would take leave and never return,” his request was not a reasonable accommodation” because it “would never enable him to perform the essential functions of his job.”¹²³ See also *Basden v. Professional Transport Inc.*, 714 F.3d 1034 (7th Cir. 2013) (finding leave request unreasonable because there was no evidence that the plaintiff would be able to return after the requested 30 days).

In addition to consider whether a leave request is reasonable or whether it would render an employee to be qualified, courts sometimes also consider whether the request would pose an undue hardship on the employer. Employers are generally more successful at establishing undue hardship when they provide evidence of the employment-related disruptions caused by an extended absence. For instance, in *Ventura v. Hanitchak*, the plaintiff, an executive assistant, exhausted her FMLA leave and then requested an additional five weeks of leave to recover from severe depression.¹²⁴ She then requested another month to undergo testing for sleep apnea and narcolepsy. Although the assistant’s absence was causing severe disruption to the office, evidenced by the fact that the employer had hired four different temporary workers, none of which performed the assistant’s duties effectively as they required greater familiarity with the employer’s ongoing projects and members of the teams, this additional request was granted. After that leave expired, however, the employer informed the employee that her position could no longer be held open. Notably, however, the employer did inform the employee that once she was ready to return, she could apply for her former position and that he would be happy to give her a strong reference. The employer also permitted the employee to remain on medical leave as long as

¹²² *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 418 (5th Cir. 2017)

¹²³ *Id.*

¹²⁴ *Ventura v. Hanitchak*, 719 F. Supp. 2d 132, 140 (D. Mass. 2010).

she qualified so she could continue to receive disability benefits and accrue seniority. The plaintiff then filed this ADA lawsuit. The court dismissed the employee's case and found that the employee's request for additional leave constituted an undue hardship. The court based its decision on the fact that the employer had held the employee's job open for 17 weeks and this had caused a severe disruption to the workplace. *See also Narayanan v. Midwestern State Univ.*, No. 7:21-cv-00046-O, 2022 WL 14318691, at *9 (N.D. Tex. Oct. 24, 2022) (undue hardship found where leave caused "three courses scheduled to be taught had to be cancelled for Fall 2019, in part because Plaintiff was not there to teach the four courses he was assigned for the semester" and his "absence forced the school to pull overloads and adjuncts to cover five of the eight scheduled courses"); *Moore v. Computer Assocs. Int'l, Inc.*, 653 F. Supp. 2d 955, 965-66 (D. Ariz. 2009), *on reconsideration*, 2010 WL 11515202 (D. Ariz. Sept. 7, 2010) (agreeing with employer that a one-year extended leave beyond the four-and-one-half-month leave already provided would have posed an undue hardship because it would force the employer to cancel or postpone classes taught by the employee or force employer to hire costly independent contractors). But in *King v. Steward Trumbull Memorial Hosp., Inc.*, 30 F.4th 551, 568-69 (6th Cir. 2022), the court held there was a genuine dispute of material fact about a five-week leave beyond FMLA where request for five weeks of non-FMLA leave where it was "well within the Hospital's policies" and "the Hospital [had previously] allowed employees to seek emergency medical leave without advance notice, and even had policies in place for handling retroactive leave requests."

2. Job Restructuring

Job restructuring is, generally, when an employee asks for a specific task or duty to be eliminated from their job. Job restructuring is undoubtedly a reasonable accommodation, as it is listed in the text of the ADA itself,¹²⁵ but whether it is required in any given instance depends on whether the particular task is essential or marginal. It is never a reasonable accommodation to

¹²⁵ 42 U.S.C. § 12111(9).

remove an essential function, but it may be a reasonable accommodation to remove a marginal function. Therefore, the case law regarding job restructuring is largely intertwined with the case law about being qualified and essential functions.

The ADA and its implementing regulations provide guidance for determining whether a job function is essential. The following is a non-exhaustive list of the factors used to consider whether any particular function is essential.¹²⁶ The factors are as follows:

- Employer’s judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing applicants for the job;
- Amount of time spent on the job performing the function;
- Consequences of not requiring the incumbent to perform the function;
- Terms of a collective bargaining agreement;
- Work experience of past incumbents in the job; and/or
- Current work experience of incumbents in similar jobs.¹²⁷

This is an area of the law that is extremely fact dependent, but case law provides helpful tips for employers and employees alike when evaluating the accommodation of job restructuring.

One factor—the consequences of not performing the function—is often considered by courts when evaluating the job requirements of an employee in a safety-sensitive position or in the healthcare field. For example, in *Swann v. Washtenaw County*, the plaintiff worked as a vocational therapist and was charged with assisting consumers with activities of daily living, including showering, toileting, walking and eating.¹²⁸ In addition, therapists were also responsible for providing physical assistance following unpredictable events like accidents, injuries or outbursts. Due to pain in her shoulder and neck from

¹²⁶ 29 C.F.R. § 1630.2(n)(3).

¹²⁷ *Id.*

¹²⁸ *Swann v. Washtenaw Cty.*, 221 F. Supp. 3d 936, 943 (E.D. Mich. 2016).

a motorcycle accident, the plaintiff was restricted from lifting, and thus, the question was whether the therapist's job could be restructured to remove lifting, or was lifting essential. The therapist argued that she rarely had to lift, and so this function could not be essential, but this argument was rejected by the court. It held that "even if a function is rarely required, the consequences of failing to require the employee to perform that function may illustrate it is essential."¹²⁹ Here, the court explained that if the plaintiff could not lift and respond if a client had an accident or outburst, it would place the consumers in a "potentially dangerous situation."¹³⁰ *But see Sivio v. Village Care Max*, 436 F. Supp. 3d 778, 792–93 (S.D.N.Y. 2020) (genuine dispute about whether home health worker with severe pet allergies could be accommodated by switching assignments with co-workers to avoid homes with animals).

When determining whether any particular task is essential, job descriptions are often used as evidence. For this reason, it is extremely important to have accurate and current job descriptions, and attention should be paid to the way various tasks are described. For instance, in *Henschel v. Clare County Road Commission*, an excavator operator sought to return to work after a multi-month medical leave while he recovered from a motorcycle accident.¹³¹ As a result of the accident, the employee had an above-the-knee amputation and a prosthetic leg. The operator previously hauled equipment as part of his job, but due to his prosthesis, was no longer permitted to drive the manual transmission vehicle required by state law. Thus, the issue before the court was whether it would be a reasonable accommodation to remove the task of hauling from the employee's position. The employee argued that his job description did not include the duty of hauling equipment, which was particularly relevant because hauling equipment was included in the job description for a different position, the truck/tractor driver position. Although the employer argued that the employee's job description's inclusion of "other duties assigned" included hauling, the court held that not every other duty

¹²⁹ *Id.* at 942.

¹³⁰ *Id.*

¹³¹ *Henschel v. Clare Cnty. Rd. Comm'n*, 737 F.3d 1017, 1024–25 (6th Cir. 2013), *reh'g denied* (Feb. 10, 2014).

under the “other duties assigned” category is an essential function, and to find otherwise would render the job description meaningless.¹³² The Sixth Circuit also explained that although the employer considered hauling to be an essential function, employer judgment “carries weight” but is “only one factor to be considered.”¹³³ The employee was able to move forward with his case by pointing to the other factors outlined by the EEOC, including the fact that the excavator stayed at the job site 90% of the time, there were minimal adverse consequences to the employer’s operations if the excavator did not haul equipment, and the experiences of past incumbents. *See also Brown v. Advanced Concept Innovations, LLC*, No. 21-11963, 2022 WL 15176870, at *3 (11th Cir. Oct. 27, 2022) (reasonable jury could have found that being physically in the production area was not an essential function of customer service position where “job description for the position . . . does not list being in the production area among the job’s ‘Essential Duties and Responsibilities’”); *Rorrer v. City of Stow*, 743 F.3d 1025, 1031 (6th Cir. 2014) (permitting firefighter’s case to move forward where he asserted that driving a fire truck was not essential and citing his job description which included a list of seventeen tasks and operating the vehicle was the only one to use conditional language); *Congress v. Gruenberg*, --- F. Supp. 3d ----, 2022 WL 17356878, at *8 (D.D.C. Dec. 1, 2022) (job description did not assign Adobe CQ coding duties to plaintiff).

3. Remote Work in the Wake of the COVID Experience

One area that has undergone marked rethinking during the COVID pandemic is the feasibility of remote work (also referred to as telework, work-at-home, or telecommuting). It has been the subject of a couple of EEOC documents. *See* EEOC Guidance Document, *Work at Home/Telework as a Reasonable Accommodation*¹³⁴ (“[c]hanging the location where work is performed may fall

¹³² *Id.* at 1023.

¹³³ *Id.* at 1022.

¹³⁴ EEOC Guidance Document, *Work at Home/Telework as a Reasonable Accommodation*, Feb. 3, 2003 (Question 2), available at <http://www.eeoc.gov/facts/telework.html>.



under the ADA’s reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework”); EEOC Technical Assistance Questions and Answers, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (“the temporary telework experience could be relevant to considering the renewed request” for remote work as a reasonable accommodation and “the employer should consider any new requests in light of this [experience]”).¹³⁵

Before the pandemic, employers usually prevailed in cases where employees sought remote work as an accommodation. Employers would characterize positions as “interactive” or “team-oriented” and thus demanding of physical presence in the workplace, thus making office in-person attendance an essential function of the job and precluding remote work as a reasonable accommodation. Typical of such decisions is *Credeur v. State of Louisiana*, a 2017 case out of the Fifth Circuit, where a litigation attorney who worked for the State experienced complications following a kidney transplant and requested telework.¹³⁶ The State granted the lawyer’s request initially, but as time went on, stopped permitting the accommodation. The issue was whether telework was reasonable in this case. The Fifth Circuit found that regular work site attendance is an essential function of most jobs, especially when the job is interactive and involves teamwork. Here, the State agency had a policy providing that regular office attendance was required, and exceptions were made only on a rare occasion on a temporary basis.¹³⁷

¹³⁵ EEOC Technical Assistance Questions and Answers, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, updated to July 22, 2022 (Question D.16), available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

¹³⁶ *Credeur v. State of Louisiana*, 860 F.3d 785 (5th Cir. 2017).

¹³⁷ See also *Brown v. Austin*, 13 F.4th 1079, 1085–86 (10th Cir. 2021) (“a core responsibility for an HCFS is conducting fraud investigations, which requires access to case files,” and “the evidence shows that during Brown’s employment, there was not enough remote work to occupy more than one day a week without compromising the Agency’s mission”); *Weber v. BNSF Ry. Co.*, 989 F.3d 320, 324 (5th Cir. 2021) (citing consensus of authority that regular work-site attendance is an essential function of most jobs); *Bilinsky v. American Airlines, Inc.*,



Despite the generally hostile climate for remote work as an accommodation in the U.S. Courts of Appeals prior to COVID, district courts occasionally found it feasible in light of the specific tasks assigned to an employee. In *Bisker v. GGS Information Services, Inc.*, a parts lister with multiple sclerosis requested to work from home following a medical leave.¹³⁸ She filed an ADA lawsuit after her request was denied. Her employer argued that it is *per se* unreasonable for employees who are expected to interact with others to meet tight deadlines to work from home, but the court “decline[d] to adopt such a *per se* rule.”¹³⁹ Permitting the case to proceed, the court explained that while the employee’s job description required “frequent contact with employees” and occasional interfacing, it did not specify that such interactions needed to be face-to-face.

Similarly, in *Mamola v. Group Manufacturing Services, Inc.*, a salesman was hospitalized after a severe automobile accident resulting in a brain injury, the loss of his left eye, and occurrence of periodic seizures, which resulted in a series of surgeries.¹⁴⁰ Following one surgery with a recuperation period of approximately five weeks, the employee requested permission to telework. The employer rejected this accommodation, citing the “security and integrity of the Company’s computer network and data” and instead permitted the employee to continue unpaid leave.¹⁴¹ The court permitted the employee’s

928 F.3d 565, 571 (7th Cir. 2019) ([t]he nature of [the employee’s] team’s work evolved from independent activities (curating content on a website, responding to written questions from employees, etc.) to team-centered crisis Mgt. activities, involving frequent face-to-face meetings with team members on short notice to coordinate work”); *Doak v. Johnson*, 798 F.3d 1096, 1105 (D.C. Cir. 2015) (“Doak would have been unable to perform an essential function of her job: being present in the office to participate in interactive, on-site meetings during normal business hours and on a regular basis”); *EEOC v. Ford Motor Co.*, 782 F.3d 753, 757–58 (6th Cir. 2015) (*en banc*) (“[a]n 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”).

¹³⁸ *Bisker v. GGS Info. Svcs., Inc.*, No. CIV. 1:CV-07-1465, 2010 WL 2265979 (M.D. Pa. June 2, 2010).

¹³⁹ *Id.* at *3.

¹⁴⁰ *Mamola v. Group Mfg. Svcs., Inc.*, No. CV-08-1687-PHX-GMS, 2010 WL 1433491 (D. Ariz. April 9, 2010).

¹⁴¹ *Id.* at *2 (internal citations omitted).

case to proceed past summary judgment, and stated “[a] reasonable fact finder could therefore conclude that unpaid leave actually prevented [the employee] from earning wages for work that he would have performed if [the employer] had granted the requested accommodation.”¹⁴² See also *Humphrey v. Mem’l Hosps. Assoc.*, 239 F.3d 1128, 1136 (9th Cir. 2001) (finding that all of a medical transcriptionist’s job functions can be performed at home without undue hardship).

Successful claims for remote work in the past were also often against a backdrop of an employer that tolerated. In *Mosby-Meachem v. Memphis Light, Gas and Water Division*, an attorney required bed rest due to a pregnancy-related impairment and requested to telework.¹⁴³ The employee reviewed her job description and explained exactly how she could perform each task. Nonetheless, her request was denied. In this case, the court held that the evidence showed that physical presence in the workplace was not an essential function as the employee needed only a telephone and remote access to her case files to do her job. The court also held that telework would not pose an undue hardship based on the company’s past practice of permitting another employee to telework and noting that the attorney would have access to her files if they were scanned and emailed. This case was presented to a jury, which found for the plaintiff. See also *Fischer v. Pepper Hamilton LLP*, No. 15-02413, 2016 WL 362507, at *11-12 (E.D. Pa. Jan. 29, 2016) (denying summary judgment as to whether telework was reasonable for a project attorney in light of employer’s willingness to permit other project attorneys to telecommute and because of the nature of the position, which involves reviewing documents, contracts and settlement agreements, which could be accessed online).

Even for employees whose employers have telecommuting policies or practices, it is critical for an employee to be able to perform the specific functions off-site. For example, in *McNair v. District of Columbia*, a hearing officer with systemic lupus erythematosus requested to telework about two or

¹⁴² *Id.* at *4.

¹⁴³ *Meachem v. Memphis Light, Gas and Water Div.*, 119 F. Supp. 3d 807 (W.D. Tenn. 2015).



three days a week for the foreseeable future while she recovered from a back surgery.¹⁴⁴ While the court stated that “an employer must consider telecommunicating as a potential form of reasonable accommodation,”¹⁴⁵ it held that it was not reasonable in this case because the hearing officer needed to be in the office to perform the essential functions of her position. Specifically, the hearing officer was expected to conduct on-site administrative hearings on rent-adjustment petitions filed by landlords and tenants, be on-site to access registration records for housing accommodations, meet and confer with rent administrators, and handle walk-in and scheduled appointments with landlords and tenants. Thus, telecommuting was not a reasonable accommodation in this case. See also *Merrill v. McCarthy*, 184 F. Supp. 3d 221 (E.D.N.C. 2016) (denying both parties’ motions for summary judgment as to whether it was reasonable for a specialist with the Environmental Protection Agency to telework either full-time or on occasion).

Now, the pandemic-era employment experience—when a huge percentage of the USA workforce was suddenly forced to work from home for months and often years—reveals that many office jobs can be performed remotely. Interactions that were previously face-to-face were routinely handled during the pandemic by video conferencing via Zoom, Teams and other services. Offices digitized information that used to be available only in physical form in the office. The assumptions underlying the prior law were upended in practical, professional experience.

Accordingly we have seen a wave of cases seeking remote work as an accommodation for employees at heightened risk of infection from COVID or other conditions exacerbated by the pandemic. See, e.g., *Lewis v. T-Mobile USA, Inc.*, 1:21-cv-00224-GZS, 2023 WL 315695, at *7 (D. Me. Jan. 19, 2023) (employee with PTSD); *Jordan v. School Board of City of Norfolk*, No. 2:22cv167, 2022 WL 16835868, at *7 (E.D. Va. Nov. 9, 2022) (asthma and restrictive lung disease); *Russo v. Johnson*, No. 3:20-cv-00820, 2022 WL 1787102 at *14 (M.D. Tenn. June 1, 2022) (anxiety); *Arazi v. Cohen Brothers*

¹⁴⁴ *McNair v. D.C.*, 11 F. Supp. 3d 10 (D.D.C. Jan. 23, 2014).

¹⁴⁵ *Id.* (citing 29 C.F.R. § 1630.2(o)(2)(ii); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994)).

Realty Corp., No. 1:20-CV-8837-GHW, 2022 WL 912940, at *7 (S.D.N.Y. Mar. 28, 2022) (multiple sclerosis); *DiFranco v. City of Chicago*, 589 F. Supp. 3d 909, 915–16 (N.D. Ill. 2022) (cystic fibrosis); *Gentile v. Cty. of DuPage*, 583 F. Supp. 3d 1167, 1173–75 (N.D. Ill. 2022) (pulmonary embolism lung dysfunction). Early in the pandemic, one district court even granted a preliminary injunction ordering a remote-work accommodation for and enjoining the termination of an employee with asthma. *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56 (D. Mass. 2020).

Even employees who are not necessarily at extra risk because of COVID have nevertheless cited the pandemic experience to show that they can perform the essential functions of their jobs remotely. *See, e.g., Wright v. Blackman*, No. 21-14244-CV, 2022 WL 602381, at *7–8 (S.D. Fla. Feb. 7, 2022) (court found sufficient evidence to support a telework accommodation for bowel issues, based in part on the employer’s remote-work policies during the pandemic); *See also Coleman v. New York City Dep’t of Health & Mental Hygiene*, No. 20CV10503 (DLC), 2022 WL 704304, at *4 (S.D.N.Y. Mar. 9, 2022) (denying motion to dismiss, based on allegations that plaintiff and others worked remotely during the pandemic and the plaintiff with mobility limitations successfully performed his job remotely upon return to work).

Still, some employers are successfully pushing back that the essential function of in-person service never changed, even if it was temporarily suspended at the beginning of the pandemic. *See, e.g., Baker-Redman v. Premise Health Employer Solutions, LLC*, No. 5:21-24-KKC-MAS, 2023 WL 173609, at *5 (E.D. Ky. Jan. 12, 2023) (in-person work was “essential function” even during COVID, noting that “plant continued in-person operation and never shut down”); *Turner v. Board of Supervisors of Univ. of Louisiana Sys.*, No. 21-664, 2022 WL 4482642, at *6 (E.D. La. Sept. 27, 2022) (though “recogniz[ing] that remote work is a regular part of many different fields, a reality that has grown even more prevalent since the Covid-19 Pandemic,” nevertheless “just because some employers allow remote work does not mean that all fields or workplaces are equally suited to this type of arrangement”); *Kinney v. St. Mary’s Health, Inc.*, No. 3:20-cv-00226-RLY-MPB, 2022 WL 4745259, at *6 (S.D. Ind., Aug. 31, 2022) (“providing radiology services requires the presence of the department’s leadership to ensure the department is functioning properly”); *Thomas v. Bridgeport Board*

of Educ., No. 3:20-cv-1487 (VLB), 2022 WL 3646175, at *4 (D. Conn. Aug. 24, 2022) (for high school Spanish teacher, “[i]n-person instruction did not cease to be an essential function, it was just temporarily suspended at the start of the COVID-19 pandemic—an unprecedented health emergency—the intention was always to return to in-person teaching pending the implementation of health and safety protocols”). See also *Laguerre v. Nat’l Grid USA*, No. 20-3901-CV, 2022 WL 728819, at *5 (2d Cir. Mar. 11, 2022) (“district court reasonably concluded that National Grid’s post-pandemic actions were not relevant to the reasonableness of the requested accommodation at the time of Laguerre’s pre-pandemic accommodation request”).

4. Reassignment

What happens if there are no accommodations that enable an employee to remain in their current position? The text of the ADA offers a solution—reassignment to a vacant position for which the employee is qualified.¹⁴⁶ The EEOC¹⁴⁷ and the courts¹⁴⁸ characterize reassignment as an accommodation of last resort both because it should be considered only when accommodation within the individual’s current position poses an undue hardship and because employees need only be reassigned to vacant positions for which they are otherwise qualified.¹⁴⁹ *Herrmann v. Salt Lake City Corp.*¹⁵⁰ set forth a *prima facie* case for reassignment as accommodation:

¹⁴⁶ 42 U.S.C. § 12111(9)(b).

¹⁴⁷ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002 (Question 24), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

¹⁴⁸ *LeBlanc v. McDonough*, 39 F.4th 1071, 1076 (8th Cir. 2022) (characterizing reassignment as accommodation of “last resort”).

¹⁴⁹ *Sanchez v. Moniz*, 870 F.3d 1185, 1200 (10th Cir. 2017) (“employers are only required to reassign employees to existing vacant positions,” meaning those to which “a similarly situated, non-disabled employee” could apply).

¹⁵⁰ 21 F.4th 666 (10th Cir. 2021).



- (1) The employee is a disabled person within the meaning of the ADA and has made any resulting limitations from his or her disability known to the employer;
- (2) The preferred option of accommodation within the employee's existing job cannot reasonably be accomplished;
- (3) The employee requested the employer reasonably to accommodate his or her disability by reassignment to a vacant position, which the employee may identify at the outset or which the employee may request the employer identify through an interactive process, in which the employee in good faith was willing to, or did, cooperate;
- (4) The employee was qualified, with or without reasonable accommodation, to perform one or more appropriate vacant jobs within the company that the employee must, at the time of the summary judgment proceeding, specifically identify and show were available within the company at or about the time the request for reassignment was made; and
- (5) The employee suffered injury because the employer did not offer to reassign the employee to any appropriate vacant position.^[151]

One unresolved legal question is whether reassignment means that the employer must place the employee with disabilities in a vacant position or whether it only requires an employer to allow the employee to compete for the position in an open process with others who are not disabled. The pro-reassignment position, as articulated by the Seventh Circuit *en banc* in *EEOC v. United Airlines*, is the majority position, and holds that the ADA requires an employer to give priority placement to employees with disabilities into vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not otherwise present an undue hardship to that employer.¹⁵² The Tenth and D.C. Circuits have reached similar

¹⁵¹ *Id.* at 674–75.

¹⁵² *EEOC v. United Airlines*, 693 F.3d 760 (7th Cir. 2012).



conclusions.¹⁵³ Most recently, the Tenth Circuit reaffirmed its position *Lincoln v. BNSF Railway Co.*,¹⁵⁴ in which the employer argued that “its policy in favor of hiring the most qualified applicant for a position is an important employment policy” that rendered reassignment unreasonable. But the court held that under that “logic, every employer could adopt a policy in favor of hiring the most qualified candidate such that a disabled employee could never rely on reassignment to establish the existence of a reasonable accommodation for purposes of his prima facie case. Such a result would effectively and improperly read ‘reassignment to a vacant position’ out of the ADA’s definition of ‘reasonable accommodation.’”¹⁵⁵

The Eighth Circuit has staked out the opposite position, that reassignment does not require an employer to place the employee with disabilities in a vacant position for which there would otherwise be a competitive hiring process. It first so held in *Huber v. Wal-Mart Stores, Inc.*¹⁵⁶ In *EEOC v. St. Joseph’s Hospital, Inc.*, the Eleventh Circuit cited and adopted the Eighth Circuit’s position.¹⁵⁷ The plaintiff worked as a nurse in a psychiatric ward. After she developed spinal stenosis, arthritis and started using a cane, her employer restricted her from working in her position, asserting that the cane could be grabbed by a patient and used as a weapon. The employer gave the plaintiff 30 days to apply for a new position. The EEOC argued that the ADA required the hospital to place her in a vacant position. The hospital, in defense, argued that the ADA does not mandate reassignment without competition—and the district court and Eleventh Circuit agreed. The Eleventh Circuit based its decision on the ADA statutory language stating that reasonable accommodation “may” include reassignment to a vacant position. It also read the Supreme Court’s decision in *U.S. Airways v. Barnett* to mean that it is not

¹⁵³ See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (*en banc*); D.C. Circuit: *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*).

¹⁵⁴ 900 F.3d 1166 (10th Cir. 2018)

¹⁵⁵ *Id.* at 1205.

¹⁵⁶ 486 F.3d 480 (8th Cir. 2007).

¹⁵⁷ 842 F.3d 1333 (11th Cir. 2016).

reasonable to violate a best-qualified hiring policy or a transfer policy “in the run of cases.”¹⁵⁸

Even under the pro-reassignment position, there are circumstances in which reassignment is deemed not reasonable, such as where it would violate an established, bona fide seniority system. That was the exact situation in the Supreme Court’s decision in *U.S. Airlines v. Barnett*,¹⁵⁹ and this position has been consistent in the lower courts. For example, in *Henschel v. Clare County Road Commission*, the employer declined to reassign an excavator returning from a leave to another position.¹⁶⁰ The Sixth Circuit confirmed that the employer had no legal obligation to do so under the ADA because “there is no requirement that an employer violate a collective bargaining agreement.”¹⁶¹ Reassignment in this case would have required the employer to bump a more senior employee from their position, which the court found to be unreasonable.

Reassignment should not be forced on an unwilling employee if it is possible to accommodate them in their current job. In *Wirtes v. City of Newport News*, the Fourth Circuit held that it “is generally inappropriate for an employer to unilaterally reassign a disabled employee to a position the employee does not want when another reasonable accommodation exists that would allow the disabled employee to remain in their current, preferred position.”¹⁶² Plaintiff, a police detective, was diagnosed with “permanent nerve damage called meralgia paresthetica, which caused discomfort, pain, numbness, and tingling to his waist, left leg, and thigh area.” This made it untenable for the detective to wear a heavy “duty belt,” but the City rejected his proposal to

¹⁵⁸ *Id.* at 1346. Despite these statements of law, the court also upheld the jury verdict, which found that the employer’s failure to reassign the plaintiff was a failure to accommodate in this case. See also *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995) (ADA does not require disabled persons be given priority in hiring or reassignment over those who are not disabled).

¹⁵⁹ *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

¹⁶⁰ *Henschel v. Clare Cnty. Rd. Comm’n*, 737 F.3d 1017, 1024–25 (6th Cir. 2013).

¹⁶¹ *Id.* at 1025.

¹⁶² 996 F.3d 234, 235 (4th Cir. 2021).



wear the equipment on a shoulder or vest holster, citing “the need to be in full police uniform.” It instead assigned him to civilian work. The Fourth Circuit held that the lower court erred in holding that forced reassignment was a suitable accommodation without exploring the alternative accommodations that did not require a transfer.¹⁶³

Herrmann v. Salt Lake City Corp.,¹⁶⁴ conversely, represents a case where the employee had evidence that they could *not* be accommodated in their current position and thus reassignment was warranted. “Herrmann began working for the City in 2002 and successfully held different positions in the Salt Lake City Justice courts for nine years. Starting in 2011, Herrmann began working as an in-court clerk, which required her to spend more time in court than her previous positions.”¹⁶⁵ Because of her PTSD, “stemming from a nearly decade-long abusive marriage,” she found that “[h]er presence in the courtroom during domestic violence cases frequently triggered her anxiety, causing severe migraines that could last for several days at a time and resulting in a significant downturn in her productivity.”¹⁶⁶ She thus sought to avoid assignment to domestic relations cases. The Tenth Circuit observed that the employee learned “it was not feasible to accommodate [her] by removing all domestic violence cases from her existing position” and so “specifically requested reassignment to a different position with the City.”¹⁶⁷

Employers considering reassignment must wherever possible offer positions comparable to the employee’s former position, and it is generally not an accommodation to reassign an employee to a position with a “significant diminution in salary, benefits, seniority or other advantages.”¹⁶⁸ In *Simmons*

¹⁶³ *Id.* at 243. See also *Vollmert v. Wisconsin Dep’t of Transp.*, 197 F.3d 293, 301–02 (7th Cir. 1999) (“reassignment generally should be utilized as a method of accommodation only if a person could not fulfill the requirements of her current position with accommodation”).

¹⁶⁴ 21 F.4th 666 (10th Cir. 2021).

¹⁶⁵ *Id.* at 670.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 675.

¹⁶⁸ *Norville v. Staten Island University Hosp.*, 196 F.3d 89, 99 (2d Cir. 1999).

v. New York City Transit Authority, an employee was reassigned from the position of train operator to the position of bus cleaner.¹⁶⁹ While the employer asserted that it was accommodating her disability of irritable bowel syndrome, a jury concluded that the bus cleaner job was inferior in terms of working environment, hours, pay, and benefits, and other positions comparable to job of train operator were available at the time the employer ordered the reassignment. Affirming the jury’s decision, the Second Circuit also explained that the employee had presented evidence that she was qualified for reassignment to a more comparable position, such as a position in “the Yard” or to the position of Transit Property Protection Agent, and that such positions were available at the time of her unlawful reassignment.

Further, an equivalent position can mean more than simply the same pay. In *Harris v. Chao*, a deaf employee was experiencing difficulty participating in conference calls with several participants, so he requested to be reassigned as a reasonable accommodation.¹⁷⁰ In furtherance of this request, the employee identified eleven positions that he believed he was qualified to perform. Instead of placing the employee in any of these positions, the employer assigned him to be a manager in the acquisitions office. The employee objected, despite maintaining his same salary and benefits, because he was performing work at a significantly lower GS level, which limited his promotional opportunities. The employer argued that it had fulfilled its ADA obligation because it reassigned him and maintained his salary. The district court disagreed and noted that the employee provided evidence that his “job was inferior because it provided fewer opportunities to perform interesting and difficult work and reduced his promotion potential.”¹⁷¹

There may, nonetheless, be cases where the only possible accommodation involves a demotion.¹⁷² In *Ford v. Marion County Sheriff’s Office*, the Seventh Circuit held that it was not an adverse action to transfer a former sheriff’s deputy to a jail visitation clerk after a car accident rendered her too physically limited to perform her former functions.¹⁷³ The panel noted that had the deputy “qualified for a vacant position that more closely matched her previous

¹⁶⁹ 340 F. App’x 24 (2d Cir. 2009).

¹⁷⁰ 257 F. Supp. 3d 67 (D.D.C. 2017).

¹⁷¹ *Id.* at 82.

¹⁷² “An employer may reassign an individual to a lower graded position if ... there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation.” 29 C.F.R. Pt. 1630, App. § 1630.2(o).

¹⁷³ 942 F.3d 839 (7th Cir. 2019).

job, the ADA would have obliged the Sheriff’s Office to offer it to her.” But, as in this case, “[a] demotion can be a reasonable accommodation when the employer cannot accommodate the disabled employee in her current or prior jobs or an equivalent position.”¹⁷⁴ See also *Thompson v. Microsoft Corp.*, 2 F.4th 460, 469 (5th Cir. 2021) (only absent available positions would result in lower pay).

Courts have also considered what constitutes a request for reassignment, and many have noted that all an employee with a known disability needs to do is express that he does not want to stop working.¹⁷⁵ According to the Seventh Circuit: “Even if an employee ... just says to the employer, ‘I want to keep working for you—do you have any suggestions?’ the employer has a duty under the [ADA] to ascertain whether he has some job that the employee might be able to fill.”¹⁷⁶

There are many situations where an employee wants to be reassigned, but is unable to identify a specific, vacant position and does not make that specific request. Courts are generally understanding of this limitation and find it to be the employer’s burden to assist the employee in identifying a vacant position.¹⁷⁷ For instance, in *Suvada v. Gordon Flesch Co.*, there was evidence that the employer did “nothing” to provide the employee with information

¹⁷⁴ *Id.* at 854.

¹⁷⁵ See, e.g., *Suvada v. Gordon Flesch Co.*, No. 11 C 07892, 2013 WL 5166213, at *7 (N.D. Ill. Sept. 13, 2013).

¹⁷⁶ *Miller v. Ill. Dep’t of Corr.*, 107 F.3d 483, 486–87 (7th Cir. 1997). Accord *Fisher v. Nissan No. Am., Inc.*, 951 F.3d 409, 419 (6th Cir. 2020).

¹⁷⁷ See, e.g., *Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011, 1022 (8th Cir. 2000) (genuine dispute of material fact where “she asked for assistance in identifying alternative positions from other members of the human resources department and received minimal help in that regard”); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 316 (3d Cir.1999) (“[W]hile an employee who wants a transfer to another position ultimately has the burden of showing that he or she can perform the essential functions of an open position, the employee does not have the burden of identifying open positions without the employer’s assistance. ‘In many cases, an employee will not have the ability or resources to identify a vacant position absent participation by the employer’”); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1304 n.27 (D.C. Cir. 1998) (en banc) (employer has “a corresponding obligation to help [the employee] identify appropriate job vacancies”).

about available positions.¹⁷⁸ The court rejected the employer’s argument that the employee should have known about internal job postings based on an orientation training she received before her cancer diagnosis, explaining that employers have “an affirmative duty” to make reasonable accommodations and cannot simply rely on past provision of training or employment materials.¹⁷⁹ See also *Taysom v. Bannock Cnty.*, No. 4:12-cv-00020-BLW, 2013 WL 3322296 (D. Idaho July 1, 2013) (“Employees do not possess the extensive information regarding possible alternative positions, or other possible accommodation that the employers possess. Putting the entire burden on the employee to identify a reasonable accommodation risks shutting out many workers simply because they do not have the superior knowledge of the workplace that the employer has.”); *Adduci v. Yankee Gas Servs. Co.*, 207 F. Supp. 3d 170, 180–82 (D. Conn. 2016) (questioning whether the employer engaged in the interactive process regarding reassignment in good faith when the employer gave the employee 90 days to find another position, but also told the employee that there were no jobs that he could have).

The reasonable accommodation of reassignment continued to evolve during the COVID-19 pandemic. For instance, in *Madrigal v. Performance Transportation, LLC*, No. 21-cv-00021-VKD, 2021 WL 2826704 (N.D. Cal. July 7, 2021), a man with diabetes worked as a driver. His job involved driving and delivering food to customers. In February 2020, he experienced respiratory symptoms, was diagnosed with pneumonia and hospitalized. When he was otherwise ready to return, he was placed on extended medical leave due to the high risk to his health if he contracted COVID. In August, 2020, he tried to return and as a reasonable accommodation, asked for position with minimal contact with other people for 6-12 months due to his high risk if he contracted COVID. Specifically, he requested a warehouse position. No accommodations were offered and he was subsequently fired. He filed suit for failure to accommodate and the court denied his employer’s motion to dismiss and ruled that his case could move forward. In its opinion, the court noted that it is well-accepted that diabetes increases the risk of serious illness or death from

¹⁷⁸ *Suvada v. Gordon Flesch Co.*, No. 11 C 07892, 2013 WL 5166213, at *7–8 (N.D. Ill. Sept. 13, 2013).

¹⁷⁹ *Id.*

COVID-19, and that the employer had a duty to determine whether there were any positions that he could be reassigned to, including the employee's suggestion that he be reassigned to a warehouse position.¹⁸⁰

5. Light Duty

Courts typically analyze requests for light duty as either a request for reassignment or a request for job restructuring. Under the latter approach, many courts only find light duty to be reasonable when it does not require the elimination of essential functions of the job. This brief discusses both restructuring and reassignment in other sections.

One recurring issue about light duty is whether employers must provide individuals with non-work-related injuries positions that it ordinarily reserves for employees injured on the job. The EEOC's position is that if an employee is unable to perform the essential functions of their job, they must be reassigned to a vacant reserved light duty position, under the principles of reassignment.¹⁸¹ But it also holds that if an employer has only temporary light duty positions available, it need only provide a temporary light duty position for an employee with a disability.

- This rationale has been adopted by a number of courts, including *Gibson v. Milwaukee County*. In *Gibson*, one of the issues in this case was that one of the plaintiffs, a correctional officer, took a medication for an autoimmune disorder and requested to avoid contact with inmates.¹⁸² She, instead, asked to be assigned to a post, like reviewing jail records. The employer interpreted this request as one for light duty and denied this request because light duty positions were reserved for employees who were pregnant or injured on the job. The court held that the ADA requires employers to make temporary light-duty assignments and

¹⁸⁰ *Id.* at *5.

¹⁸¹ EEOC Enforcement Guidance: Workers' Compensation and the ADA, available at <https://www.eeoc.gov/policy/docs/workcomp.html> (Question 28).

¹⁸² *Gibson v. Milwaukee Cty.*, 95 F. Supp. 3d 1061, 1071-74 (E.D. Wis. 2015).

positions available to employees with disabilities who require only temporary accommodations. See also *Harris v. Steel Warehouse*, 3:17-CV-465-PPS, 2019 WL 3935328, at *5 (N.D. Ind. Aug. 19, 2019) (dismissing plaintiff's accommodation claim where plaintiff provided no facts that the light duty jobs they preferred were available); *Patrick v. Henry Cty., Ga.*, No. 1:13-CV-1344-HLM-WEJ, 2014 WL 8396734, at *12 (N.D. Ga. Dec. 3, 2014), *report and recommendation adopted in part, rejected in part*, 2015 WL 1509482 (N.D. Ga. Mar. 31, 2015) (regardless of how employee acquired their disability, a reasonable jury could have found that placing employee in an available light duty position would have been a reasonable accommodation as light duty positions were available); and *Brown v. Louisville Metro*, No. 3:19-cv-937-DJH-CHL, 2022 WL 989132, at *2-4 (W.D. Ky. Mar. 31, 2022) (When fired, Brown had two more days of light duty and was eligible for an additional 90 days of light duty. Termination could be seen as pretext for discrimination.)

6. Change of Supervisor

While a change of supervisor is an accommodation desired by many employees, presumptively it is not considered reasonable under the ADA to request such a change. *Weiler v. Household Finance Corp.*, 101 F.3d 519, 525 (7th Cir. 1996) (employer not liable under ADA "if a plaintiff merely cannot work under a certain supervisor"). In *Cook v. Morgan Stanley Smith Barney*, an employee with generalized anxiety disorder and a heart condition had a challenging relationship with her supervisor.¹⁸³ The employee took medical leave and upon her return, requested a number of accommodations, including a change in supervisor. The court quickly dismissed that aspect of the plaintiff's case, stating that "generally, a request for a change in supervisors is not a reasonable request for accommodation, and there is no evidence that a change in supervisors would be a reasonable request in this case."¹⁸⁴ See also *Adinolfi v. North Carolina Dep't of Justice*, No. 5:18-CV-539-FL, 2022 WL 956330, at *17 (E.D.N.C. Feb. 25, 2022) ("where plaintiff's request for

¹⁸³ *Cook v. Morgan Stanley Smith Barney*, No. H-13-1321, 2014 WL 4064000 (S.D. Tex. Aug. 15, 2015).

¹⁸⁴ *Id.* at *7.

accommodation was not triggered by a particular essential function of his current job, but rather by the presence of Dismukes and Elder as supervisors in the Criminal Division, . . . reassignment on that basis was not reasonable”); *Bender v. Dep’t of Defense*, 2022 WL 3703805, at *4 (Aug. 22, 2022) (transfer to a different worksite sought to have a different supervisor, which is not a reasonable accommodation as a matter of law). Nevertheless, some courts (at least at the pleadings stage) have refused to impose a *per se* rule against a change of supervisors as an ADA accommodation. See *Torres-Medina v. Wormuth*, Civ. No. 21-1362 (SCC), 2022 WL 3557049, at *3 (D.P.R. Aug. 18, 2022) (rejecting *per se* rule that change of supervisors is always unreasonable); *Turner v. Greyhound Lines, Inc.*, No. 2:19-cv-02840-SHL-atc, 2020 WL 9264592, at *6 (W.D. Tenn. Oct. 30, 2020) (whether request for transfer to trainer was unreasonable could not be decided at the pleadings stage); *Hamilton v. GlaxoSmithKline, LLC*, 414 F. Supp. 3d 1286, 1293–94 (D. Mont. 2019) (rejecting *Weiler* decision). Despite the general presumption, it may be a reasonable accommodation to request something less than a reassignment, such as that a supervisor modify their management style, *e.g.*, putting instructions in writing or providing additional feedback.

7. Exemption from Rotating Shifts

Many employers establish requirements that all employees must rotate shifts. This becomes problematic for employees with disabilities who can successfully perform the job of certain shifts, but not others. The question then becomes is it a reasonable accommodation to exempt an employee from the shift rotation. Like other types of accommodations, especially accommodations related to the removal of certain tasks, courts assess the EEOC’s stated factors as to whether any particular job task is essential. Among other factors, courts consider the employer’s explanation for the need to rotate shifts, past practice of rotation, and whether exceptions are made for other employees, including employees without disabilities.



For instance, in *Gradek v. Horseshoe Cincinnati Management, LLC*, a table games supervisor injured her knee and was placed on standing restrictions.¹⁸⁵ Supervisors typically rotated among a number of different casino games, including craps. Craps is a particularly difficult game to supervise and there is a standing “floor person” and a sitting “box” person. The supervisor requested to be placed permanently in the sitting box position. When determining whether rotating shifts was essential, the court considered whether rotating itself was an essential function and concluded that it may not be. The job description was not conclusive, there were no serious consequences of not performing the function, and in the past, there were times when others were accommodated informally. The casino argued that failure to rotate posed an undue hardship because it prevented other employees from maintaining their skills for craps. The court rejected this argument, as there was evidence that multiple craps tables were open during the plaintiff’s shifts. *See also Morin v. Hannaford Brothers Co., LLC*, No. 1:17-CV-50-GZS, 2018 WL 2746570, at *11 (D. Me. June 7, 2018) (noting “lack of any schedule requirements in the position description; evidence that Plaintiff and the department were functioning well during the years that Plaintiff was not adhering to the standard schedule; and the inability of Defendant’s managers to articulate consistent reasons for applying the Retail Leadership Schedule to the Assistant Meat Manager position or to consistently and plausibly connect Plaintiff’s prior failure to follow the standard schedule with any perceived issues in the department”).

Compare that to *Boitnott v. Corning Inc.*, where a maintenance engineer asked that he work only eight hours a day instead of his typical rotating shift schedule after a heart attack.¹⁸⁶ The court concluded that the ability to work rotating shifts was an essential function of the position. It reasoned that the employer had made a legitimate business decision, as such shift rotation allowed for coverage of the 24-hour production process to repair any emergency situation. The court credited the employer’s explanation that

¹⁸⁵ *Gradek v. Horseshoe Cincinnati Mgt., LLC*, No. 1:16-cv-270, 2017 WL 2573256 (S.D. Ohio June 14, 2017).

¹⁸⁶ *Boitnott v. Corning Inc.*, No. 7:06-CV-00330, 2010 WL 2465490, *9 (W.D. Va. June 15, 2010).

mandatory shift rotating created consistent work teams and greater flexibility. *LeBlanc v. McDonough*, 39 F.4th 1071, 1075–76 (8th Cir. 2022) (accommodations would have violated collective bargaining agreement and “would also require LeBlanc's colleagues to work more nights, more weekends, and more irregular hours, which is also an undue hardship”); *EEOC v. AutoZone, Inc.*, No. 14-cv-3385, 2022 WL 4596755, at *26 (N.D. Ill. Sep. 30, 2022) (“if she could not work rotating shifts, this would require other employees to rearrange their schedules and place strain on other [parts sales] managers”).

An issue related to rotating shifts, is the importance for some people with disabilities to have a set schedule. In *EEOC v. Wal-Mart Stores East LP*, No. 17-C-70, 2022 WL 523767, at *4-5 (E.D. Wis. Feb. 2, 2022), an employee with Down Syndrome worked as a part time Sales Associate with set schedule for 15 years. Walmart changed its scheduling process and automatically generated shifts. As a reasonable accommodation, the employee asked for consistent schedule. Wal-Mart’s efforts to get the case dismissed on the basis that the accommodation request was unreasonable was rejected by the court. Accordingly, the case went to trial and the jury issued a \$125 million verdict.¹⁸⁷ Additionally, the plaintiff was reinstated to her job with the accommodation she sought.

8. Policies Restricting Scents or Irritants in the Workplace

Employees with severe asthma, allergies or chemical sensitivities may require a workplace free of scents or irritants, such as mold, perfume or chemicals. Courts have generally held that a strict scent-free workplace would likely pose an undue hardship given various factors outside an employer’s control. See, e.g., *Buckles v. First Data Resources, Inc.* 176 F.3d 1098, 1099–1100 (8th Cir. 1999) (finding employee’s request for an irritant-free work environment unreasonable because the ADA did not require an employer “to create a wholly isolated work space for an employee that is free from numerous possible irritants”); *Call v. Panchanathan*, No. 1:20-cv-260, 2021 WL 4206423, at *4

¹⁸⁷ [Jury Awards Over \\$125 Million in EEOC Disability Discrimination Case Against Walmart | U.S. Equal Employment Opportunity Commission](#)

(E.D. Va. Sept. 15, 2021) (“a request to ban an indeterminate list of scented chemicals imposes unduly burdensome issues of administration on an employer and is thus unreasonable as a matter of law”).

However, when the employee’s request is for something less than a strict scent-free policy, courts have found employers to violate the ADA’s accommodation requirements. For instance, in *McBride v. City of Detroit*, an employee had a life-long sensitivity to perfumes, chemicals, and other scented objects, exposure to which caused migraine headaches, nausea, chest tightness, coughing, loss of voice, scratchy throat and rhinitis.¹⁸⁸ The plaintiff worked as a city planner, and due to her reaction to a colleague’s use of strong perfumes and oils, she had to take FMLA and sick leave. The plaintiff approached HR and asked them to implement a policy change about the use of scents in the workplace. This request was denied and plaintiff’s lawsuit ensued. In defense, the city argued that a scent-free policy for the workplace is an unreasonable accommodation because it would pose an undue hardship. The court concluded that the employee did not seek a complete elimination of all scents but rather wanted to limit the most egregious scents through a written policy and employee education regarding chemical sensitivities. The plaintiff also sought the opportunity to work with management to come up with a solution and, in fact suggested a policy enacted by another state department that permitted mild scents but not “strong or offensive scents that become detrimental to the work unit.”¹⁸⁹ After the court denied the employer’s motion for summary judgment, the case settled for \$100,000. See also *Rotkowski v. Arkansas Rehab. Svcs.*, 180 F. Supp. 3d 618, 624–25 (W.D. Ark. 2016) (request for air purifier and “combination fax, scanner, and copier in order to minimize the amount of time she would have had to spend in the office’s common area, where exposure to fragrances was greatest” may be reasonable); *Kobler v. Illinois Dep’t of Human Svcs.*, No. 12 C 1277, 2012 WL 5995836, at *2 (N.D. Ill. Nov. 30, 2012) (denying employer’s motion to dismiss nurse with asthma’s claim because it was unclear whether request was for a scent-free or restrictive scent policy and whether the request

¹⁸⁸ *McBride v. City of Detroit*, No. 07–12794, 2008 WL 5062890, at *6–7 (E.D. Mich. Nov. 25, 2008).

¹⁸⁹ *Id.* at 6.

extended to the entire workplace or a smaller unit); See *Monterroso v. Sullivan & Cromwell, LLP*, 591 F. Supp. 2d 567, 570 (S.D.N.Y. 2008) (finding that a no-propellant policy, unlike a scent-free policy, was not unreasonable).

9. Job Coaches

An employer may be required to allow a job coach paid by a public or private social service agency to accompany the employee at the job site as a reasonable accommodation.¹⁹⁰ A job coach is a person—often provided by a government or not-for-profit agency—who provides specialized on-site training to an employee who is disabled. Typically, a job coach will help the employee with a disability learn the job, perform the job accurately, efficiently, and safely, and may also help acclimate the employee to the work environment. Recent cases have recognized job coaches as a reasonable accommodation for people with mental or developmental disabilities. See, e.g., *EEOC v. Wal-Mart Stores, Inc.*, 38 F.4th 651, 657–58 (7th Cir. 2022) (affirming jury verdict for EEOC in case where job coach was sought for Cart Attendant who was deaf, legally blind, and experienced anxiety); *Cogdell v. Murphy*, No. 19-2462, 2020 WL 6822683, at *11 (D.D.C. Nov. 20, 2020) (denying motion to dismiss in case where employee limited in the ability to concentrate due to Autism Spectrum Disorder, a learning disability, attention-deficit/hyperactivity disorder, obsessive compulsive disorder, and mixed personality disorder could have been accommodated by a job coach); *Morrill v. Acadia Healthcare*, No. 2:17-cv-01332-TC, 2020 WL 1249478, at *9 (D. Utah March 16, 2020) (“there is enough evidence to create a question of fact regarding whether a few weeks with a job coach could have allowed Chad to perform his job independently and competently”).

¹⁹⁰ EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities>, Mar. 27, 1997 (Question 27) (“An employer may be required to provide a temporary job coach to assist in the training of a qualified individual with a disability as a reasonable accommodation, barring undue hardship. An employer also may be required to allow a job coach paid by a public or private social service agency to accompany the employee at the job site as a reasonable accommodation.”); EEOC Press Release, EEOC Sues Party City for Disability Discrimination, Sept. 19, 2018, available at <https://www.eeoc.gov/newsroom/eeoc-sues-party-city-disability-discrimination>.

10. Service Animals

Requesting that a service animal accompany a person with a disability to work has been recognized as a reasonable accommodation.¹⁹¹ A recent case raised the issue on whether an employer has to make other accommodations to facilitate having a service animal in the workplace. In *Schroeder v. AT&T Mobility Services, LLC*, 568 F.Supp.3d 889, 893-895 (M.D. Tenn. 2021), an employee with PTSD, anxiety and depression asked for several accommodations to permit his service animal on the job, including providing a larger vehicle with LED lighting. The employer denied the request without conducting any cost analysis or exploring any alternatives. The court denied the employer's motion for summary judgment, finding that there were factual issues as to whether at least some of the employee's requests were reasonable and thus, the case should go to a jury. The fact that the employer conducted no cost assessment and denied the accommodation requests out of hand seemed to be an important part of the court's decision. The court also held that the court accommodation requests are not unreasonable because employee can physically do the job.

IV. Retaliation and Interference

The ADA also protects employees from retaliation and interference when pursuing their federally protected rights, including requesting reasonable accommodations.

The prohibition against retaliation is found in Title V of the law, which states: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act."¹⁹²

¹⁹¹ See *EEOC v. Transport Company of America*, 2019 WL 10892069, (D. Minn. Sept. 30, 2019).

¹⁹² 42 U.S.C. §12203(a).

It is beyond the scope of this brief to discuss the manifold principles governing the proof of ADA retaliation cases. In broad terms, to succeed in a retaliation case, a plaintiff must show that: (1) they engaged in a protected activity; (2) they suffered a materially adverse action; and (3) there is a causal link between the protected activity and the adverse action. The act of requesting or making use of a reasonable accommodation is deemed a protected activity under the ADA.¹⁹³

With respect to the second element—that the employee experienced a materially adverse action—courts hold that this includes any employer action that would dissuade a reasonable worker from engaging the protected activity of requesting an accommodation.¹⁹⁴ In *Crowley v. Department of Agriculture*, a technology specialist with spinal stenosis, arterial insufficiency, back and leg pain renewed his formal request to telework as a reasonable accommodation.¹⁹⁵ Two months later, he was placed on a performance improvement plan (PIP). The employee asserted that this was imposed on him because of his telework schedule and was thus retaliatory. In defense, the employer argued that it is not an adverse action to be placed on a PIP because it did not impact his salary, grade or performance. The court disagreed and said that in the retaliation context, the definition of adverse action is broad and encompasses anything that would “dissuade a reasonable worker from making or supporting a charge of discrimination.”¹⁹⁶ See also *Laguna v. Chester Housing Authority*, No. 22-1569, 2022 WL 2953687, at *3 (E.D. Pa. July 25, 2022) (Employee stated retaliation claim arising from termination after seeking leave as accommodation for complications from seven-month bout with COVID-19, which required hospitalization and subsequent treatment at a mental health facility; employee requested an additional week of leave to attend to his mental health as an accommodation, and that he was terminated the same day he made his request); *Minge v. Cook Cnty., Illinois*, No. 20-cv-

¹⁹³ *Rodrigo v. Carle Foundation Hosp.*, 879 F.3d 236, 243 (7th Cir. 2018); *Elzeftawy v. Pernix Grp., Inc.*, 477 F. Supp. 3d 734, 766 (N.D. Ill. 2020).

¹⁹⁴ *Lewis v. Wilkie*, 909 F.3d 858, 867 (7th Cir. 2018).

¹⁹⁵ *Crowley v. Vilsack*, 236 F. Supp. 3d 326, 330 (D.D.C. 2017).

¹⁹⁶ *Id.* at 330.

6935, 2022 WL 4551899, at *9 (N.D. Ill. Sept. 29, 2022) (allegations that employee “was yelled at by her supervisors and employees, ‘isolated’ at work, denied the supplies and training she needed to perform her job, excluded from department meetings and communications, and suspended without pay on several occasions” stated a claim for ADA retaliation); *Thomas ex rel. Phillips v. Ill. Dep’t of Human Servs.*, No. 20-cv-03498, 2021 WL 4439417, at *5 (N.D. Ill. Sept. 28, 2021) (indefinite paid suspension). *But see Kinsella v. Illinois Bell Tele. Co., LLC*, No. 18 C 7803, 2021 WL 3737731, at *12 (N.D. Ill. Aug. 24, 2021) (being required to share tools with coworkers not materially adverse).

An employer’s unreasonable refusal to engage with an employee’s request for disabilities may also constitute interference with ADA rights under Title V, providing that “It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.”¹⁹⁷ In *Menoken v. Dhillon*,¹⁹⁸ the D.C. Circuit held that a “10 year pattern of hostile and adverse treatment rooted in [the employer’s] antagonism towards [Menoken’s]” requests for reasonable accommodations stated a claim under this provision.

V. Conclusion

The ADA differs from other anti-discrimination laws because it requires employers to take affirmative steps to ensure that applicants and employees with disabilities are able to achieve equal opportunity in the workplace. As demonstrated by the statutory and regulatory requirements, as well as the interpretive case law, the ADA’s reasonable accommodation requirement challenges employees and employers to consider whether changes to the workplace are possible. The ADA requires a hard look at why employers operate a certain way and whether changes to accommodate an employee are

¹⁹⁷ 42 U.S.C. §12203(b).

¹⁹⁸ 975 F.3d 1 (D.C. Cir. 2020).

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reasonable. The most important practical guidance for employers and employees is to engage in the interactive process in good faith, to truly consider the employee's request and the employer's concerns, and to work collaboratively to identify possible solutions.