

Legal Briefings

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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, this Legal Brief outlines recent judicial trends regarding common accommodations, including leave, job restructuring, light duty, rotating shifts, telework, scent-free policies, and reassignment.

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. Generally speaking, accommodations fall within 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

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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 applicant or employee must have a disability as defined by the law. An individual has an ADA-covered disability if he or she has: (1) a physical or mental impairment that substantially limits one or more of the major life activities (“actual disability prong”); (2) a record of such an impairment; or (3) been regarded as having an impairment.⁴

It is well-settled that individuals who fall within the actual disability or record of disability prong are entitled to reasonable accommodations. See, e.g., *Miller v. United Parcel Service, Inc.* 149 F.Supp.3d 1262 (D. Or. 2016) (confirming that plaintiff with an actual disability was entitled to reasonable accommodations under the ADA); *Monroe v. County of Orange*, 2016 WL 5394745 (S.D.N.Y. 2016) (correctional officer with panic disorder, agoraphobia and ADHD was entitled to reasonable accommodations because he had an actual disability and a record of a disability).

Although the courts previously split on this issue, the ADA Amendments Act clarified that individuals who only qualify under the “regarded as” are not entitled to accommodations,⁵ and courts agree. For instance, in *Ryan v. Columbus Regional Healthcare System*, the plaintiff worked as an operating room nurse and had a degenerative joint disease and arthritis in her knee.⁶ After exhausting her FMLA leave, the plaintiff requested a number of accommodations including limited standing, stooping, kneeling and crouching. The employer denied these requests, and the employee filed suit, alleging that she was regarded as having a disability. Because the ADAAA does not require employers to accommodate employees who are regarded as disabled, the court dismissed the claim. See also *Chamberlain v. Securian Financial Group, Inc.*, 180 F.Supp.3d 381 (W.D.N.C. 2016) (noting that individuals who qualify for ADA protection under the regarded as prong are not entitled to reasonable accommodations).

Further, while the ADA prohibits discrimination against individuals *without* disabilities because of their “relationship or association” with individuals *with* disabilities, the ADA’s reasonable accommodation requirements do not apply to this class of employees.⁷ For example, in *Milchak v. Carter*, an employee requested a second-shift work schedule so that he could be available to care for his wife, who had a disability.⁸ The employee had previously been assigned to the second-shift, but the shift was eliminated for financial reasons and the employee had opted not to request a transfer. After the employee’s request was denied, he worked partial days for a short period of time, using his accrued sick leave to cover the remainder of his shift. He then retired

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and brought an ADA lawsuit. The defendant asserted that it had no obligation to accommodate his request and the court agreed. The court explained that generally, the law does not require employers to accommodate nondisabled employees based on their association with an individual with a disability and here, there was no requirement to modify a work schedule. See also *Fenn v. Mansfield*, 2015 WL 628560 (D. Mass. Feb. 12, 2015) (confirming that the employer had no obligation under the ADA to permit the plaintiff to miss a week-long training so that he could care for his wife, who had a disability).

As a result of this limitation, individuals without disabilities will not be able to bring claims for retaliation if the only protected activity is requesting a reasonable accommodation. For instance, in *Lukic v. Eisai Corp. of North America, Inc.*, a medical sales specialist requested a transfer to a different work territory to accommodate her need to care for her daughter with disabilities.⁹ The employee was ultimately fired for falsifying call logs and brought a lawsuit under the ADA alleging, among other things, that her employer retaliated against her. A claim of retaliation requires the plaintiff to show that she engaged in a covered activity; here, the plaintiff asserted that her request for a transfer was a reasonable accommodation request, a protected activity. The court dismissed the plaintiff's case finding that the plaintiff was not entitled to a reasonable accommodation because "employers are not required to provide reasonable accommodations to non-disabled workers' due to their association with a disabled person."¹⁰

Whether an employee without a disability is entitled to an accommodation based on association is an issue that confuses employees and employers alike. This uncertainty stems, most likely, from the complementary benefits provided by the 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, son, daughter or parent with a serious health condition.¹¹ 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).¹² As a result, if an employee associated with an individual with a disability needs the reasonable accommodation of leave, the employee should consider whether she can request FMLA in lieu of an ADA accommodation.

B. Initial Request for Accommodations

Under most circumstances, an employee who needs a reasonable accommodation is responsible for making the initial request. There are exceptions to every rule, however. According to the EEOC, employers may have an obligation to engage in the interactive process if they have knowledge that the employee has a disability, is experiencing workplace problems, and whose disability prevents him from making the request.¹³

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Similarly, courts have gone even further and faulted employers for penalizing an employee with performance issues that it knows to be stemming from a disability without considering reasonable accommodations. For instance, in *Doresy v. CHS*, the plaintiff was a salesman with Parkinson's disease.¹⁴ He underwent surgery to mitigate the symptoms of his disability and started experiencing speech-related issues. Although the salesman was maintaining performance standards, clients complained that it was difficult to understand the salesman. The employee was then fired due to his "voice issues" and he brought a claim for discriminatory termination and failure to accommodate. The employer argued that the employee never requested an accommodation and therefore it had no obligation to engage in the interactive process. The court disagreed. It explained that the salesman's "obvious manifestation" of his disability put the company on notice and triggered the interactive process, even though the employee never expressly asked for a reasonable accommodation. See also *Johnson v. Delaware County Community College*, 2015 WL 8316624, at *6 (E.D. Pa. 2015) (concluding that the employer had an obligation to engage in the interactive process because it had enough information to know about his disability and desire for an accommodation although the employee did not make a specific request until after he was terminated).

The case law and regulatory guidance make clear that employees do not need to make requests in writing and do not need to use any "magic words." See, e.g., *Floyd v. Lee*, 85 F.Supp.3d 482, 506 (D.D.C. 2015) (holding employee does not need to "invoke the magic words 'reasonable accommodations' . . . [they] must simply enable the employer to 'know of both the disability and the employee's desire for accommodations for that disability'"); *Waterbury v. United Parcel Service*, 2014 WL 325326 at *7 (E.D. Cal. Jan. 28, 2014) (noting that neither employee nor employee's physician were required to use "magic words" to request a reasonable accommodation); *Snapp v. United Trans. Union*, 547 Fed. Appx. 824 (9th Cir. Nov. 5, 2013) (finding that plaintiff's job application letter coupled with a medical note referring to his disability and need for accommodations could have been a request for an accommodation triggering the interactive process); EEOC Enforcement Guidance ("[A]n individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.'").¹⁵ Employees do, however, need to indicate that they have a medical need or disability, and that they are requesting something related to that need.

Despite these legal principles, it is a best practice for employees to be as clear as possible when requesting a reasonable accommodation. The recent case, *Ness-Holyoak v. Wells Fargo Bank National Association*, is a good example of why.¹⁶ In *Ness-Holyoak*, 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 workplace complaint to her disability. She ultimately brought a lawsuit for failure to accommodate and the court held that the

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employee never requested a reasonable accommodation because she failed to explain that her complaint and/or request was tied to a disability. See also *Deister v. AAA Auto Club of Michigan*, 91 F.Supp.3d 905 (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); *Jenks v. Naples Cmty. Hosp., Inc.*, 829 F. Supp. 2d 1235 (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).

Similarly, if an employer has a process and/or form to use for accommodation requests, employees should, as a best practice, use such forms. However, it is critical for employers to train their staff to recognize a reasonable accommodation request as courts have found that verbal requests are sufficient, even when a company has a different procedure for requesting an ADA accommodation. For example, in *Jones v. Clark County School District*, a school bus driver with depression concluded that he was no longer able to safely drive a bus.¹⁷ He discussed his concerns with his supervisor and expressed his desire to transfer to a new position. The employee's supervisor instructed him to contact the ADA coordinator. The employee did, but told the ADA coordinator that his doctor advised him to retire from driving. In defending this ADA case, 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*, 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. Authority*, 2007 WL 2916188, at *13-15 (E.D. Pa. 2007) (finding employee's request for accommodation to be sufficient despite failure to use employer's own accommodation request form).

Another important principle is that someone other than the employee can make a request for a reasonable accommodation on the employee's behalf. See, e.g., *Snapp v. United Transp. Union*, 547 Fed. Appx. 824, 826 (9th Cir. 2013) (finding that employee had requested an accommodation by submitting a job application letter and letter from his physician referring to his ongoing disability and need for accommodations); *Rednour v. Wayne Tp.*, 51 F. Supp. 3d 799, 827 (S.D. Ind. 2014); *Feldman v. Law Enforcement Associates Corp.*, 779 F. Supp. 2d 472 (E.D.N.C. 2011) (permitting employee's reasonable accommodation case proceed even though the 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."¹⁸).

C. Interactive Process

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

While failure to engage in the interactive process is not an independent claim under the ADA, courts have found that an employer's failure to do so in good faith can be evidence of discrimination.¹⁹ Courts also find it inappropriate to grant a motion for summary judgment when an employer failed to engage in the interactive process, unless no reasonable accommodation existed.²⁰ For that reason, courts regularly examine the interactions between the employee and employer to pinpoint which party is responsible for the breakdown in communication. When the employee is responsible for the breakdown, the employer typically prevails.²¹ When the employer is responsible for the breakdown, the court examines whether the breakdown prevented the parties from finding a reasonable accommodation.²² 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 as the plaintiff, a chief psychologist with short-term memory loss's only requested accommodations was an elimination of his essential job functions).

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 many situations, 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. 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.²³ Instead, the employee demanded only medical leave of an unspecified duration as an accommodation and even "characterized the County's attempts to initiate the reasonable accommodations process as harassment."²⁴ 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.²⁵ The court affirmed summary judgment for the employer.

Employees also have obligations to be open and honest with the employer during the

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entire accommodation process, including an obligation to communicate problems with a granted accommodation. For instance, in *Dillard v. City of Austin*, the employee injured his shoulder while working as a street and drainage crewmember.²⁶ 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; however, 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 filed suit 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.²⁷ 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.²⁸ 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 because the employee accepted the position.

Courts have also held employees responsible for notifying their employer if a proposed accommodation is inadequate and giving them a chance to respond. In *E.E.O.C. v. Kohl's Department Stores*, a full-time sales associate with diabetes was struggling to keep up with her erratic work schedule.²⁹ 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.”³⁰ 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.

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 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.³¹ The employee submitted her request to her three immediate supervisors. Her supervisors responded that only the clerk could

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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 EEOC v. LHC Group, Inc.*, 773 F.3d 688 (5th Cir. 2014) (finding that employer failed to engage in the interactive process when the branch manager simply walked away after the employee requested accommodations).

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."³² 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.³³ Keith filed a lawsuit 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 Miller v. United Parcel Service, Inc.*, 149 F.Supp.3d 1262 (D. Or. 2016) (finding that UPS failed to engage in the interactive process in good faith despite the fact that it initiated formal inquiries into the reasonableness of the accommodation and met with him because plaintiff's request—that he be permitted to use a motorized chair or scooter—was not shown to be pose an undue hardship).

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. Although the employee's preference should be given primary consideration, the employer is ultimately free to "choose between effective accommodations."³⁴

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.³⁵ 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 the 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. He brought suit and Second Circuit found for IBM, finding that (1) the accommodations IBM provided were reasonable; and (2) once a reasonable

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accommodation is provided, the employer is not obligated to engage in the interactive process.

The court found 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.”³⁶ 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.”³⁷ 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.³⁸ That is, if the accommodation provided is “plainly reasonable,” the employer has no duty to explore alternatives.³⁹ Therefore, IBM was not required to grant Noll’s preferred accommodations. *See also Howard v. United Parcel Service, Inc.*, 101 F.Supp.3d 343, 348 (S.D.N.Y. 2015) (finding that deaf truck driver’s request for an ASL interpreter during two certification courses was not necessary because the employer offered alternative, effective accommodations—placement in the front of the class so that he could see the instructor’s face during lectures, and the instructor met with the driver after every class to go over material—and that this mimicked real world situations where an interpreter was not always available).

Another recent example comes from *Bunn v. Khoury Enterprises*.⁴⁰ In this case, 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 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 envisions by the regulations applicable to the ADA.”⁴¹ 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.” *See also Khoury v. Secretary of the U.S. Army*, 677 F. Appx. 735 (3d Cir. 2017) (finding the Army accommodated an employee who needed to “stretch his extremities” and “get up and walk around” while

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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).

However, when employers reject the express request of an employee, they should be sure that the provided accommodation is effective, as explained by the Ninth Circuit in *U.S. E.E.O.C. v. UPS Supply Chain Solutions*.⁴³ In this case, the plaintiff, a deaf clerk in the accounts payable division, requested ASL interpreters for his weekly department meetings. Instead of agreeing to provide interpreters, UPS attempted to accommodate the clerk by providing agendas, contemporaneous notes, and written summaries. In his ADA case, 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 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.”⁴⁴

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.⁴⁵ 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.⁴⁶ 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.”⁴⁷

When a request is reasonable, however, and an employee fails to provide sufficient medical support for a request, courts find the employee responsible for the breakdown in the interactive process. Such was the case in *Ortiz-Martinez v. Fresenius Health Partners, PR, LLC*, when a healthcare worker requested accommodations for her sprained arm.⁴⁸ 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.”⁴⁹ 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

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concluded that the employee was responsible for the breakdown in the interactive process.⁵⁰ 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."⁵¹

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.⁵² For example, in *Heit v. Aerotek, Inc.*, an employee was unable to produce urine necessary for an employer-required drug test.⁵³ 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.

In an interesting 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.⁵⁴ 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.

D. Confidentiality

It is important to remember that the ADA requires employers to keep disability-related information confidential.⁵⁵ Protected disability-related information must be maintained in a file separate from the employee's personnel file, and can be 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.⁵⁶

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This is an independent cause of action that does not require another type of disability discrimination. See *Gascard v. Franklin Pierce Univ.*, 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 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.⁵⁷ The employee was wary of disclosing to his direct supervisor, for fear that she was a “gossip” and so instead disclosed to a manager.⁵⁸ 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.⁵⁹ 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.

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. 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) (“Nor 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 are not required to provide a reasonable accommodation that would amount to an undue hardship, defined as an action requiring significant difficulty or

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expense.⁶⁰ 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.⁶¹

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 structure and functions of the workforce, the geographic separateness, and the administrative/fiscal relationship of the facility.⁶²

Courts have provided employers with guidance about relevant and irrelevant factors when determining whether an accommodation poses an undue hardship. It is clear that 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.⁶³ 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."⁶⁴

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.⁶⁵ 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 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.

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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. 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-established seniority system or a union collective bargaining agreement. However, 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 County School District*, 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.⁶⁷ 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."⁶⁸ 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 also noted that the employee was previously assigned an air conditioned bus so it was difficult to understand how reassignment would upset the assignment process. See also *Torres v. Hilton Int'l of Puerto Rico, Inc.*, 2012 WL 2571293, at *6 (D.P.R. July 2, 2012) (noting that the CBA contained a clause "exempting enforcement of the seniority system under exceptional circumstances" and there is no evidence that the plaintiff's accommodation request fell outside the scope of that clause).

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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 his 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 the modifications or adjustments necessary to be considered for the position.⁶⁹ An applicant can request accommodations during the application, interview and pre-employment procedures, and there are several examples of such accommodations in these situations.

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.⁷⁰ 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 *E.E.O.C. v. Creative Networks, L.L.C.*, the company required all applicants to participate in a pre-employment training program.⁷¹ 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."⁷²

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.⁷³ 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.⁷⁴ 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.⁷⁵

B. Accommodations for the Benefits and Privileges of Employment

Employers are also obligated to provide an employee with a disability the benefits and privileges that other employees without disabilities would also enjoy.

Benefits and privileges can include access to programs, such as employment-related trainings, as well as perks, such as access to a workplace cafeteria or gym. One common request is for the accommodation of parking, and this is something courts find to be a reasonable accommodation to the benefits and privileges of employment. For instance, in *Feist v. Louisiana Dept. of Justice, Office of the Attorney General*, a former employee filed suit alleging that the agency violated the ADA by failing to provide her with a free on-site parking space, which she needed due to osteoarthritis in her knee.⁷⁶ The district court found against the employee, concluding that she did not assert that the parking situation limited her ability to perform the essential functions of her job. However, the Fifth Circuit found this holding to be improper. It explained that “reasonable accommodations that the employer could be required to provide were not restricted to modifications that enabled performance of the essential job functions.”⁷⁷ Rather, “a modification that enables an individual to perform the essential functions of a position is only one of three categories of a reasonable accommodation.”⁷⁸ Therefore, the court refused to affirm the lower court’s grant of summary judgment in favor of the agency, and instead found that an employer is required to provide more than merely accommodations essential to the function of the job, and the case continued to determine the reasonableness of the accommodation in this specific situation.

Sometimes, employees are able to perform the essential functions of their position without an accommodation, but need an accommodation to ensure that they can do so in a safe and comfortable way. Such accommodations fall within this category as well. For instance, in *Merrill v. McCarthy*, the court determined that an “employee’s acknowledgement of the fact that she *could* perform the essential functions of her position without a reasonable accommodation for her disability did not defeat her reasonable accommodation claim...under the Rehabilitation Act.”⁷⁹ In this case, a former federal employee argued that the government violated the Rehabilitation Act by failing to permit her to telework due to migraines and pains.⁸⁰ The court relied on the benefits and privileges of employments provision to conclude that “[w]hile the fact that

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plaintiff could perform essential job duties without accommodation might bear on the reasonableness of telework as an accommodation, it does not defeat her failure to accommodate outright.”⁸¹

Similarly, in *Gleed v. AT&T Mobile Services, LLC*, the plaintiff requested permission to sit down due to a leg condition, which was refused by his employer.⁸² The Sixth Circuit determined that the plaintiff “needed a chair to work—as other employees do—without great pain and a heightened risk of infection.”⁸³ The court reasoned that, “the ADA’s implementing regulations require employers to provide reasonable accommodations not only to enable an employee to perform his job, but also to allow the employee to ‘enjoy equal benefits and privileges of employment as are enjoyed by ... similarly situated employees without disabilities.’”⁸⁴

These cases are good reminders to employers that the duty to accommodate extends beyond an employee’s essential job functions. Employers should review their reasonable 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 his or her job.

1. Leave as a Reasonable Accommodation

Leave is an accommodation that enables an employee to perform his 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 the ADA is only one of a number of laws that provides leave-related protections.

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.⁸⁵ This type of extension can be a reasonable accommodation under the ADA. For instance, in *Rentz v. Hospital*, a clinical clerk used her FMLA and paid time off for various medical issues, including treatments for breast cancer.⁸⁶ 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

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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."⁸⁷

A question frequently 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 particular case, courts generally do not opine on the amount of leave that is required. 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.⁸⁸ 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 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 his 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., *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 Fed. Appx. 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*, 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 Hospital* 2015 WL 6618741 (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

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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.⁸⁹ 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.⁹⁰

Other courts, however, have understood the practical realities of many medical treatments and the impossibility of providing a stated return date. In *Sharbaugh v. West Haven Manor*, the plaintiff worked as the Environmental Director of a nursing home.⁹¹ 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.

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. For instance, 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.⁹² 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. 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

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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).

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.⁹³ 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."⁹⁴ 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.⁹⁵ 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 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

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workplace. See also *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).

2. Job Restructuring

Job restructuring is, generally, when an employee asks for a specific task or duty to be eliminated from his job. Job restructuring is undoubtedly a reasonable accommodation, as it is listed in the text of the ADA itself,⁹⁶ 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 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.⁹⁷ 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.⁹⁸

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.⁹⁹ 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 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

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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.”¹⁰⁰ 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.”¹⁰¹

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.¹⁰² 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 under the “other duties assigned” category is an essential function, and to find otherwise would render the job description meaningless.¹⁰³ 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.”¹⁰⁴ 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 *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).

3. Telework

Another hot topic is when telework is a reasonable accommodation under the ADA. See EEOC Guidance Document, *Work At Home/Telework as a Reasonable Accommodation* (“Changing the location where work is performed may fall under the ADA’s reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework.”).¹⁰⁵

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Some courts have been critical of telework as a reasonable accommodation over the last few years, finding many positions to be “interactive” and/or “team-oriented” and thus, requiring physical presence in the workplace, thereby precluding telework as a reasonable accommodation. For instance, in *Credeur v. State of Louisiana*, a 2017 case out of the Fifth Circuit, a litigation attorney who worked for the State experienced complications following a kidney transplant and requested to telework.¹⁰⁶ 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. See also *EEOC v. Ford Motor Co.*, 782 F.3d 753, 757-58 (6th Cir. 2015) (holding that “[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.”).

Despite these recent appellate court cases, other courts have made clear that telework can be a reasonable accommodation and that the specific tasks of the employee must truly be examined when assessing the reasonableness of it. For instance, in *Bisker v. GGS Information Services, Inc.*, a parts lister with multiple sclerosis requested to work from home following a medical leave.¹⁰⁷ 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.”¹⁰⁸ 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. Thus, the employee established a genuine issue of fact as to whether telework was a reasonable accommodation upon her return from leave.

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.¹⁰⁹ 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.¹¹⁰ The court permitted the employee’s 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.”¹¹¹ See also *Humphrey v. Mem’l Hosps. Assoc.*, 239 F.3d 1128, 1136 (9th Cir. 2001) (finding that all of a medical

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transcriptionist's job functions can be performed at home without undue hardship).

While not always determinative, employees may have a stronger claim when there has been a past practice of accommodating telework or when the employer offers telework generally to its employees. For instance in *Meachem v. Memphis Light, Gas and Water Division*, an attorney required bed rest due to a pregnancy-related impairment and requested to telework.¹¹² 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*, 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 three days a week for the foreseeable future while she recovered from a back surgery.¹¹³ While the court stated that "an employer must consider telecommunicating as a potential form of reasonable accommodation,"¹¹⁴ 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).

4. 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

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the job. This brief discusses both restructuring and reassignment in other sections.

One legal issue about light duty is whether individuals with non-work related injuries are legally entitled to positions that an employer reserves for employees injured on the job. The EEOC's position on this issue is that if an employee is unable to perform the essential functions of his job, he must be reassigned to a vacant reserved light duty position, under the principles of reassignment.¹¹⁵ However, the EEOC has also explained that if an employer has only temporary light duty positions available, it only needs to 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.¹¹⁶ 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 positions available to employees with disabilities who require only temporary accommodations. *See also Patrick v. Henry Cty., Ga.*, 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) (finding that regardless of how the employee acquired his disability, a reasonable jury could have found that placing him in an available light duty position would have been a reasonable accommodation as light duty positions were available).

5. 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").

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.¹¹⁷ 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

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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, however, 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."¹¹⁸ After the court denied the employer's motion for summary judgment, the case settled for \$100,000. See also *Kobler v. Illinois Dep't Human Services*, 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 her request was for a scent-free or restrictive scent policy and whether the request 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).

6. Rotating Shifts

Many employers establish requirements that all employees must rotate shifts. This becomes problematic for employees 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.¹¹⁹ 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.

Compare that to *Boitnott v. Corning Inc.*, where the plaintiff, a maintenance engineer, requested that he work only eight hours a day instead of his typical rotating shift schedule after a heart attack.¹²⁰ The court concluded that the ability to work rotating shifts was an essential function of the engineer's 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 also credited the employer's explanation that mandatory shift rotating created consistent work teams and greater flexibility.

7. Change of Supervisor

While a change of supervisor is an accommodation desired by many employees, generally speaking, it is not considered reasonable to request a change in supervisors as an accommodation. In *Cook v. Morgan Stanley Smith Barney*, an employee with generalized anxiety disorder and a heart condition had a challenging relationship with her supervisor.¹²¹ 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."¹²² See also *Felix v. City & Cty. of Denver*, 729 F. Supp. 2d 1243, 1264 (D. Colo. 2010) ("requests for a change of supervision as a reasonable accommodation can be organizationally disruptive and subject to abuse"); *Ghoston v. Nissan N. Am., Inc.*, 208 WL 879737, at *5 (S.D. Miss. Mar. 30, 2008) (listing cases finding that a change in supervisor is generally an unreasonable accommodation). Despite this general prohibition, it may be a reasonable accommodation to request a supervisor to make modifications to his management style, such as putting instructions in writing or providing additional feedback.

8. Reassignment

But what happens if there are no reasonable accommodations that enable an employee to remain in his or her current position? The text of the ADA itself provides a solution—reassignment to a vacant position in which the employee is qualified.¹²³

One unresolved legal question is whether the accommodation of reassignment means that an employee must be placed in a vacant position or whether it only requires an employee to be permitted to compete for the position. Although there appears to be a majority position on this issue, there is disagreement among the circuit courts. The majority position, as articulated by the Seventh Circuit *en banc* in *EEOC v. United Airlines*, is that the ADA does indeed mandate that an employer place employees with disabilities into vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue

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hardship to that employer.¹²⁴ The Tenth and D.C. Circuits have reached similar conclusions.¹²⁵

Until 2016, the only circuit to have reached an opposite conclusion was the Eighth Circuit, which notably did so relying on pre-*United Airlines* precedent. See *Huber v. Wal-Mart*, 486 F.3d 480 (8th Cir. 2007) (adopting the reasoning from a Seventh Circuit case “wholesale” and “without analysis”). However, in 2016, the Eleventh Circuit took a different position about the reassignment obligation. In *EEOC v. St. Joseph’s Hospital, Inc.*, 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 used as a weapon. The employer gave the plaintiff 30 days to apply for a new position. The EEOC brought this case asserting that the hospital violated the ADA because it required the nurse to compete for the vacant position when it should have automatically placed her in it. 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 reasonable to violate a best-qualified hiring policy or a transfer policy “in the run of cases.”¹²⁷ However, 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.

Even under the majority position, however, there are circumstances in which reassignment is not reasonable, such as when there is a well-established, bona fide seniority system. That was the exact situation in the Supreme Court’s decision in *U.S. Airlines v. Barnett*,¹²⁸ 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.¹²⁹ 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.”¹³⁰ Reassignment in this case would have required the employer to move a more senior employee from his position, which the court found to be unreasonable.

The EEOC and the courts have characterized reassignment as an accommodation of last resort both because “reassignment should be considered only when accommodation within the individual’s current position would pose an undue hardship,”¹³¹ and because employees are only required to be reassigned if a position is available.¹³² In *Fields v. Clifton T. Perkins Hospital*, for example, the employer held an employee’s position of security attendant open for seven months while the employee was on various leaves.¹³³ After this seven-month period, the employee sought to return, but was restricted from performing the duties of a security attendant. In his ADA lawsuit, he asserted that his employer violated the ADA by failing to reassign him to a

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position, but the court disagreed. The court explained that the employee had failed to proffer any evidence establishing that any position was available at the relevant time. Without this type of evidence, the employee could not pursue his failure to accommodate claim.

Employers should remember that if a position comparable to the employee's former position is available, it is impermissible for an employer to reassign an employee to a position with a "significant diminution in salary, benefits, seniority or other advantages."¹³⁴ In *Simmons v. New York City Transit Authority*, an employee was reassigned from the position of train operator to the position of bus cleaner. 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 means more than simply the same pay, as confirmed by a recent case about comparability of promotional opportunities. 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.¹³⁵ 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 D.C. 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."¹³⁶

Courts have also had the opportunity to opine on 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.¹³⁷ 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."¹³⁸

There are many situations where an employee wants to be reassigned but is unable to identify a specific, vacant position and so does not make that specific request. Courts

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are generally understanding of this limitation and find it to be the employer's burden to assist the employee in identifying a vacant position. For instance, in *Suvada v. Gordon Flesch Co.*, there was evidence that the employer did "nothing" to provide the employee with information about available positions.¹³⁹ 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.¹⁴⁰ See also *Taysom v. Bannock County*, 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).

IV. Retaliation

The ADA also protects employees from retaliation when pursuing their federally-protected rights, including requesting reasonable accommodations. These protections are 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."¹⁴¹

To succeed in a retaliation case, a plaintiff must show that: (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse employment action.

Because the act of requesting a reasonable accommodation is a protected activity, this provision protects employees who need reasonable accommodations. With respect to the second element—that the employee experienced an adverse employment action—courts have found the definition of adverse action to be broader in the retaliation context than in a traditional discrimination case. For example, 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.¹⁴² Two months later, he was placed on a performance improvement plan (PIP). The employee asserted that this was imposed on him

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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.”¹⁴³ Therefore, placement on a PIP was considered an adverse employment action.

Most retaliation cases turn on whether the plaintiff is able to establish a causal connection between the protected activity and the adverse employment action. There are many different ways to establish causation, but one of the most common approaches is through temporal proximity. In other words, asserting that because the protected activity occurred around the same time as the adverse action, one must have caused the other.

Some courts have found that temporal proximity sufficiently establishes a causal connection, depending on the amount of time between engaging in the protected activity and the adverse employment action. For example, in *Ivankovskaya v. Metropolitan Transportation Authority Bus Company*, the plaintiff alleged that she was retaliated against because she requested a bus with adjustable seats to accommodate her disability.¹⁴⁴ Approximately two months after this request, she complained that her bus had a gas leak and she was suspended for making a false report. Even with a two month gap between the protected activity and adverse action, the court permitted the plaintiff to use this evidence to establish evidence of retaliation.

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 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.

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VI. Notes

1. This legal brief was written by Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights and Rachel M. Weisberg, Staff Attorney / Employment Rights Helpline Manager with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). The authors would like to thank Colby Alexis, PILI Fellow, Jake Gordon, PILI Fellow, Karen Klass, PILI Fellow, Gianna Gizzi, Legal Intern, Aima Mori, Legal Intern, and James Naughton, Legal Intern for their valuable assistance with this Legal Brief. Equip for Equality is providing this information under a subcontract with Great Lakes ADA Center.
2. Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A).
3. 29 C.F.R. § 1630.2(o)(1).
4. U.S.C. §§ 12102(2), 12112(B)(4).
5. 29 C.F.R. § 1630.2(O)(2)(ii)(4) (“A 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. *Ryan v. Columbus Regional Healthcare System*, 2012 WL 1230234, at *4-5 (E.D.N.C. Apr. 12, 2012).
7. 29 C.F.R. § 1630.8 (an 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).
8. *Milchak v. Carter*, 2016 WL 6248074, at *6 (E.D. Mo. Oct. 26, 2016).
9. *Lukic v. Eisai Corp. of North America, Inc.*, 919 F.Supp.2d 936 (W.D. Tenn. 2013).
10. *Id.* at 946.
11. 29 U.S.C. § 2613(a)(1)(A)-(D).
12. See, e.g., *Whitfield v. Hart County, Ga.*, 2015 WL 1525187, 3 (M.D. Ga. 2015) (“the employee merely has to prove that she is entitled to a benefit and that the employer interfered with that benefit. . . . In contrast, to succeed on a retaliation claim, an employee . . . “[must show] that his employer’s actions were motivated by an impermissible retaliatory . . . animus.”).
13. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002, <https://www.eeoc.gov/policy/docs/accommodation.html> (Question 40) (hereinafter “EEOC Enforcement Guidance”).
14. *Doresy v. CHS*, 2017 WL 1356093, at *5 (D. Colo. April 13, 2017) (citing *Robertson v. Las Animas Cnty. Sheriff’s Dep’t*, 500 F.3d 1185, 1197–98 (10th Cir. 2007) (noting that an employer is “on notice that an individual needs an accommodation when it knows that an individual requires one, either because that need is obvious or because the individual requests an accommodation.”).
15. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002, <https://www.eeoc.gov/policy/docs/accommodation.html#requesting>.
16. *Ness-Holyoak v. Wells Fargo Bank National Association*, 2017 WL 2257339 (D. Utah May 22, 2017).
17. *Jones v. Clark County School District*, 2017 WL 1042463, at *1 (D. Nev. Mar. 17, 2017).

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18. EEOC Enforcement Guidance (Question 2).
19. *E.g.*, *Sheng v. M&T Bank Corp.*, 848 F.3d 78 (2d Cir. 2017).
20. *E.g.*, *Snapp v. United Trans. Union*, 547 Fed. Appx. 824 (9th Cir. Nov. 5, 2013) (concluding that employer's failure to engage in the interactive process precluded granting summary judgment).
21. *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)).
22. *See Keith v. Cty. of Oakland*, 703 F.3d 918, 929 (6th Cir. 2013).
23. *Romero v. Cty. of Santa Clara*, 666 Fed.Appx. 609, 611 (9th Cir. 2016).
24. *Id.*
25. *Id.*
26. *Dillard*, 837 F.3d at 561.
27. *Id.* at 563.
28. *Id.*
29. *E.E.O.C. v. Kohl's Dept. Stores, Inc.*, 774 F.3d 127, 129 (1st Cir. 2014).
30. *Id.* at 130.
31. *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562 (4th Cir. 2015).
32. *Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013).
33. *Id.* at 921.
34. *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)).
35. *Id.*
36. *Id.* at 96 (quoting *Fink v. N.Y. City Dept. of Personnel*, 53 F.3d 565, 567 (2d Cir. 1995)).
37. *Id.* at 96-98.
38. *Id.* at 98 (quoting *McBride v. BIC Consumer Products Mfg. Co., Inc.*, 583 F.3d 92 (2d Cir. 2009)).
39. *Id.*
40. *Bunn v. Khoury Enterprises*, 753 F.3d 676 (7th Cir. 2014).
41. *Id.* at 682-83.
42. *Id.* at 683.
43. *U.S. E.E.O.C. v. UPS Supply Chain Sols.*, 620 F.3d 1103 (9th Cir. 2010).
44. *Id.* at 1113.
45. EEOC Enforcement Guidance (Question 6).
46. *Id.* at Question 8.
47. EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), July 27, 2000 (Question 10).
48. *Ortiz-Martinez v. Fresenius Health Partners, PR, LLC*, 853 F.3d 599 (1st Cir. 2017).
49. *Id.* at 603.

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50. *Id.* at 605.
51. *Id.* at 606.
52. EEOC Enforcement Guidance (Question 6).
53. *Heit v. Aerotek, Inc.*, 2016 WL 6298771, at *4 (W.D. Wash. Oct. 27, 2016)
54. *Schneider v. Works*, 223 F. Supp. 3d 308, 317 (E.D. Pa. 2016).
55. 42 U.S.C. § 12112(d)(3)(B).
56. 42 U.S.C. § 12112(d)(3)(B)(i)-(iii).
57. *EEOC v. Ford Motor Credit Co.*, 531 F.Supp.2d 930 (M.D. Tenn. 2008).
58. *Id.* at 932-933.
59. *Id.* at 933.
60. 29 C.F.R. § 1630.2(p).
61. *Leighton v. Three Rivers Sch. Dist.*, 2017 WL 2992241 (9th Cir. July 14, 2017).
62. 42 U.S.C. § 12111(10).
63. *Reyazuddin v. Montgomery Cty., Maryland*, 789 F.3d 407, 409 (4th Cir. 2015).
64. *Id.* at 418.
65. *Searls v. Johns Hopkins Hospital*, 158 F.Supp.3d 427 (D. Md. 2016).
66. *Yinger v. Postal Presort, Inc.*, 2017 WL 2473308 (10th Cir. June 8, 2017).
67. *Hill v. Clayton Cty. Sch. Dist.*, 619 Fed. Appx. 916 (11th Cir. 2015).
68. *Id.* at 922.
69. 29 C.F.R. § 1630.2(o)(1)(i).
70. Kmart Will Pay \$102,048 to Settle EEOC Disability Discrimination Lawsuit, U.S. Equal Employment Opportunity Commission, January 27, 2015, <http://www.eeoc.gov/eeoc/newsroom/release/1-27-15b.cfm>.
71. *E.E.O.C. v. Creative Networks, L.L.C.*, 912 F. Supp. 2d 828, 841 (D. Ariz. 2012).
72. *Id.*
73. 42 U.S.C. §12113(a).
74. *Toole v. Metal Services LLC*, 17 F. Supp. 3d 1161 (S.D. Ala. 2014).
75. *Id.* at 1180-1181.
76. *Feist v. La. Dept. of Justice, Office of the Attny. Gen.*, 730 F.3d 450, 450 (5th Cir. 2013).
77. *Id.*
78. *Id.* at 454.
79. *Merrill v. McCarthy*, 184 F. Supp. 3d 221 (E.D.N.C. 2016) (emphasis supplied).
80. *Id.* at 228.
81. *Id.* at 239.
82. *Gleed v. AT&T Mobile Services, LLC*, 614 Fed.Appx. 535 (6th Cir. 2015) (unpublished).

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83. *Id.* at 539.
84. *Id.* at 538-539 (citing 29 C.F.R. § 1630.2(o)(1)(iii)).
85. For more background on the interplay between the ADA and the FMLA, see a previous brief addressing this issue at <https://www.accessibilityonline.org/ada-legal/archives/110607>
86. *Rentz v. Hosp.*, 195 F. Supp. 3d 933 (E.D. Mich. 2016).
87. *Id.* at 946.
88. *Walker v. NF Chipola, LLC*, 2016 WL 1714871 (N.D. Fla. March 28, 2016).
89. *Maat v. County of Ottawa, Michigan*, 657 Fed.Appx. 404 (6th Cir. Aug. 10, 2016).
90. *Id.* at 413.
91. *Sharbaugh v. West Haven Manor, LP* 6834613 (W.D. Pa. Nov. 21, 2016).
92. *Hunter v. BASF*, 2017 WL 958382, at *5 (N.D. Ala. Mar. 13, 2017).
93. *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 418 (5th Cir. 2017)
94. *Id.*
95. *Ventura v. Hanitchak*, 719 F. Supp. 2d 132, 140 (D. Mass. 2010).
96. 42 U.S.C. § 12111(9).
97. 29 C.F.R. § 1630.2(n)(3).
98. *Id.*
99. *Swann v. Washtenaw Cty.*, 221 F. Supp. 3d 936, 943 (E.D. Mich. 2016).
100. *Id.* at 942.
101. *Id.*
102. *Henschel v. Clare Cnty. Rd. Comm'n*, 737 F.3d 1017, 1024-25 (6th Cir. 2013), *reh'g denied* (Feb. 10, 2014).
103. *Id.* at 1023.
104. *Id.* at 1022.
105. EEOC Guidance Document, Work At Home/Telework as a Reasonable Accommodation, available at <http://www.eeoc.gov/facts/telework.html>.
106. *Credeur v. State of Louisiana*, 860 F.3d 785 (5th Cir. 2017).
107. *Bisker v. GGS Info. Svcs., Inc.*, 2010 WL 2265979 (M.D. Pa. June 2, 2010).
108. *Id.* at *3.
109. *Mamola v. Group Mfg. Svcs., Inc.*, 2010 WL 1433491 (D. Ariz. April 9, 2010).
110. *Id.* at *2 (internal citations omitted).
111. *Id.* at *4.
112. *Meachem v. Memphis Light, Gas and Water Div.*, 119 F.Supp.3d 807 (W.D. Tenn. 2015).
113. *McNair v. D.C.*, 11 F.Supp.3d 10 (D.D.C. Jan. 23, 2014).
114. *Id.* (citing 29 C.F.R. § 1630.2(o)(2)(ii); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994)).

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115. *EEOC Enforcement Guidance: Workers' Compensation and the ADA*, available at <https://www.eeoc.gov/policy/docs/workcomp.html> (Question 28).
116. *Gibson v. Milwaukee Cty.*, 95 F. Supp. 3d 1061, 1071–74 (E.D. Wis. 2015).
117. *McBride v. City of Detroit*, 2008 WL 5062890, at *6–7 (E.D. Mich. Nov. 25, 2008).
118. *Id.* at 6.
119. *Gradek v. Horseshoe Cincinnati Management, LLC*, 2017 WL 2573256 (S.D. Ohio June 14, 2017).
120. *Boitnott v. Corning Inc.*, 2010 WL 2465490, *9 (W.D. Va. June 15, 2010).
121. *Cook v. Morgan Stanley Smith Barney*, 2014 WL 4064000 (S.D. Tex. Aug. 15, 2015).
122. *Id.* at *7.
123. 42 U.S.C. § 12111(9)(b).
124. *EEOC v. United Airlines*, 693 F.3d 760 (7th Cir. 2012), *cert. denied*, 133 S.Ct. 2734 (May 28, 2013) (No. 12–707).
125. *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).
126. *EEOC v. St. Joseph's Hospital, Inc.*, 842 F.3d 1333 (11th Cir. 2016).
127. *Id.* at 1346.
128. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).
129. *Henschel v. Clare Cnty. Rd. Comm'n*, 737 F.3d 1017, 1024–25 (6th Cir. 2013), *reh'g denied* (Feb. 10, 2014).
130. *Id.* at 1025.
131. 29 C.F.R. § 1630.2(o).
132. *See, e.g., Fields v. Clifton T. Perkins Hosp.*, 2014 WL 2802986, at *1 (D. Md. June 19, 2014).
133. *Id.*
134. *Simmons v. New York City Transit Auth.*, 340 F. App'x 24, 26 (2d Cir. 2009) (quoting *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 99 (2d Cir. 1999)).
135. *Harris v. Chao*, 2017 WL 2880827 (D.C. Cir. July 6, 2017).
136. *Id.* at 11.
137. *See, e.g., Suvada v. Gordon Flesch Co.*, 2013 WL 5166213, at *7 (N.D. Ill. Sept. 13, 2013).
138. *Miller v. Ill. Dep't of Corr.*, 107 F.3d 483, 486–87 (7th Cir. 1997).
139. *Suvada v. Gordon Flesch Co.*, 2013 WL 5166213, at *7–8 (N.D. Ill. Sept. 13, 2013).
140. *Id.*
141. 42 U.S.C. § 12203(a).
142. *Crowley v. Vilsack*, 236 F. Supp. 3d 326, 330 (D.D.C. 2017).
143. *Id.* at 330.
144. *Ivankovskaya v. Metro. Tran*

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