The ADA's Reasonable Accommodation Requirement Ten Years Later

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In 1990, in landmark legislation, Congress sought to eradicate unwarranted discrimination against people with disabilities by enacting the Americans with Disabilities Act (ADA).[1] The law provides a range of federal civil rights protections. Among other things, it protects people with physical or mental impairments that substantially limit a major life activity, from adverse employment actions.[2] The statute covers all state[3] and local government employees, regardless of the number of people the governmental unit employs.[4]

Although the ADA is one of the most important civil rights laws ever enacted, it also is among the most misunderstood. Ten years after its passage, many issues remain unresolved.[5] Much of the confusion can be traced to the law's vague and somewhat ambiguous language. Understanding the act often requires dissecting several terms of art, such as "major life activity," "essential job functions," and "reasonable accommodation." Even the word "disability" takes on a different meaning from people's normal understanding of it. Although some opinions from the U.S. Supreme Court and federal appellate courts have clarified the statute, inconsistent decisions from federal judges and disagreements among the appellate courts have only created more confusion. As courts continue to grapple with interpretation of the ADA, North Carolina employers are seeking practical guidance on compliance with its requirements.

Perhaps more than any other ADA issue, the employer's duty to accommodate people with disabilities frequently raises questions. This article briefly explores what the term "rea-

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sonable accommodation" means, who is entitled to reasonable accommodation, what the various types of reasonable accommodations are, and what constitutes an undue hardship excusing an employer from the duty to accommodate. This article also addresses important aspects of *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act*,[6] recently released by the Equal Employment Opportunity Commission (EEOC). This document contains the agency's clarification of ambiguities arising under existing case law.

An Overview of the Reasonable Accommodation Requirement

The ADA requires that employers make

> reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business. . . .[7]

This duty is considered one of the ADA's most important statutory requirements. It also is one of the most confusing of the statute's mandates and therefore has resulted in much litigation.

Regulations interpreting the ADA, issued by the EEOC, define "accommodation" as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[8]

The reasonable accommodation requirement is intended to remove barriers that prevent people with disabilities from entering or remaining in the workforce. Generally, reasonable accommodations fall into one of three broad categories:[9]

- Changes to the application process for a job so that a qualified applicant with a disability may be considered for the job
- Modifications to the work environment, including how a job is performed, so that a qualified person with a disability can perform the job
- Changes so that an employee with a disability can enjoy equal privileges and benefits of employment

The ADA, the EEOC's regulations, and case law identify many types of reasonable accommodations that an employer may be required to provide. They include, but are not limited to, providing assistants; providing special equipment; restructuring a job; providing light-duty work; offering part-time or modified work schedules; reassigning an employee to a vacant position; and offering leave without pay.

Employers are not required to address nonworkplace barriers or provide personal-use items that aid someone in daily activities both on and off the job. Such items might include prosthetic limbs, wheelchairs, eyeglasses, service animals, or hearing aids if those items are used off the job. However, when such items are specifically designed or required to meet job-related needs, the ADA may require employers to provide them as reasonable accommodation.

> Inconsistent decisions from federal judges and disagreements among the appellate courts have only created more confusion.

Both qualified applicants and current employees with disabilities are entitled to reasonable accommodation.[10] An employee's status as temporary, probationary, or part-time is irrelevant. Generally, people with disabilities must inform their employers or prospective employers that they may need an accommodation.[11]

The Meaning of "Reasonable"

Congress did not define the term "reasonable accommodation" in the ADA. Instead, it gave examples of what the term encompasses. The only statutory limitation on an employer's duty to provide reasonable accommodation is that such accommodation is not required if it would impose an "undue hardship" on the employer. According to the EEOC, the word "reasonable" has no independent definition. It simply means that the accommodation must be effective in removing workplace barriers.[12] In other words, if a modification or an adjustment enables the employee to perform the essential functions of a job, or in the case of an applicant, to have an equal opportunity to apply and be considered for employment, it is reasonable.

Courts have developed various interpretations of the term. For example, in *Vande Zande v. Wisconsin Department of Administration*, the court held that a proposed accommodation is not reasonable if an employer can show that the cost is not worth the resulting gain.[13] The case involved an employee who wanted, among numerous other accommodations, the sink in the break room to be lowered so that she could use it instead of the sink in the restroom. The court commented as follows:

> [R]easonable may be intended to . . . weaken "accommodation," in just the same way that if one requires a "reasonable effort" of someone this means less than the maximum possible effort. . . . Even if the employer is so large or wealthy . . . that it may not be able to plead "undue hardship," it would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee.[14]

According to the Seventh Circuit Court of Appeals, the employee must show not only that the accommodation is effective but also that its benefit is proportional to its cost. After the employee meets this threshold, the employer may introduce evidence that the costs are excessive in relation to either the benefits of the accommodation or the employer's financial well-being.

People Entitled to Reasonable Accommodation

Qualified current employees, regardless of their position or status, are entitled to reasonable accommodation. Further,

North Carolina Office on the ADA

In 1994 the North Carolina General Assembly created a special office to consult with state and local governments, businesses, and industries on complying with the Americans with Disabilities Act (ADA) of 1990. Operating under the state's Department of Administration, the office promotes compliance through training, technical assistance, and the provision of an alternative process for resolving disputes. It also serves as a resource center on the ADA, disseminating accurate and relevant information to government, business, professionals, and consumers.

Larry Jones, a longtime employee of the Department of Administration, was recently named coordinator of the ADA Office. Jones has worked in state government for more than nineteen years. Before assuming his present position, he worked for the Governor's Advocacy Council for Persons with Disabilities, most recently as manager of the council's North Central Regional Office in Butner, North Carolina.

Services that are available through the ADA Office include the following:

State and Local Governments

Seminars for staff
- Requirements for building accessibility
- Effective communication
- Employment obligations

Technical assistance
- Self-evaluation and transition plans (ADA Office staff help agencies determine whether they are in compliance with the ADA and, if necessary, help them develop a plan to ensure compliance)
- Program and communication compliance
- Identification of resources and training materials

Information (through telephone inquiries and publications)—for example, on significant case decisions

Businesses and Industries Covered by the ADA

Seminars for groups and associations
- Obligations under Title III (which prohibits discrimination in public accommodations)
- "Readily achievable" barrier removal
- Achievement of "good faith effort" status
- Available tax benefits

Technical assistance
- Effective communication
- Alternative ways to provide service
- Identification of resources and training materials

Information (through telephone inquiries and publications)

For more information, contact the ADA Office, 217 West Jones Street, Raleigh, NC 27603, phone (919) 715-2302.

employers must accommodate applicants for employment. An employer may be aware of a current employee's disability, whereas it will usually know little about the physical or mental condition of an applicant. Therefore the law allows an employer to tell an applicant what the screening process involves—for example, an interview, a written test, a physical agility test, or a job demonstration (a demonstration of ability to perform certain aspects of the job)—and to ask the applicant whether he or she will need a reasonable accommodation to complete the screening process. Before making a conditional offer of employment, however, the employer should not ask the applicant whether he or she needs a reasonable accommodation to perform the essential functions of the job unless the applicant voluntarily discloses his or her disability or the disability is obvious.

Although an employer may suspect that it will be unable to accommodate an applicant's disability if the person is ultimately hired, the employer must nonetheless enable the person to have an equal opportunity to participate in the application process and be considered for the position, unless the employer can establish that even this step poses an undue hardship. People with disabilities who meet the prerequisites to be considered for a job should not be excluded because the employer speculates, on the basis of a request for reasonable accommodation during the application process, that it will be unable to provide the person with reasonable accommodation to perform the job. The employer must assess the need for accommodations for the application process separately from the need for accommodations to perform the job.

The ADA also covers people whom employers perceive as having a disability.[15] The EEOC maintains, however, that employers do not have a duty to provide a reasonable accommodation to these people. This position is consistent with the rationale for the reasonable accommodation requirement—to eliminate workplace barriers. In "perceived as" cases, there is no legitimate workplace barrier because no real disability exists.

Most federal courts that have addressed this issue have concurred with the EEOC. In *Newberry v. East Texas State University*, for example, the court stated that "an employer need not provide reasonable accommodation to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment."[16]

On the other hand, in *Corrigan v. Perry*, North Carolina's own Fourth Circuit Court of Appeals determined that the plaintiff employee did not have a disability. However, it assumed that the plaintiff might have been regarded as disabled, and it analyzed whether he was denied a reasonable accommodation.[17]

Because this issue remains unsettled, employers still should determine whether a reasonable accommodation

is needed when interviewing people who have a record of a disability or are regarded as having a disability.

Requests for Reasonable Accommodation

Generally it is the applicant's or the employee's responsibility to inform the employer that he or she needs a reasonable accommodation.[18] Employers are not required to speculate about an employee's physical or mental impairment or need for assistance. In *Huppenbauer v. May Department Stores Co.*, the court said that a person must "make a clear request for an accommodation and communicate it to his employer." The court found that general knowledge in the workplace of the plaintiff's "heart condition" was not enough to trigger the employer's obligation to provide reasonable accommodation.[19]

A request for reasonable accommodation may be made at any time during the application process or during the period of employment. A proper request not only asks for a change in work requirements but describes the disability necessitating the change. When requesting a reasonable accommodation, however, an employee does not have to use the term or even mention the ADA. The request may be made either orally or in writing, and it need not be made by the employee himself or herself. An external source, such as a family member, a friend, or a health care provider, may make the request on the employee's behalf.

The Employer's Responsibilities

Once an employee has made a request for reasonable accommodation, the employer should engage in an informal, interactive process[20] with the employee to clarify what he or she needs and to identify an appropriate accommodation. The following steps usually enable an employer to find an effective accommodation for the person to perform the essential functions of the job:

1. Examine the particular job to determine its purpose and essential functions.
2. Consult with the person to find out his or her specific physical or mental abilities and limitations as they relate to the essential job functions.
3. In consultation with the person, identify potential accommodations and assess how effective each would be in enabling the person to perform essential job functions. If this consultation does not identify an appropriate accommodation, technical assistance is available from a number of sources, many without cost.

Employers should take the interactive process seriously, for failure to engage in it may constitute a violation of the ADA.[21] At the very least, the employer's interaction with the employee may be used as a measure of the employer's good faith in attempting to accommodate the employee.

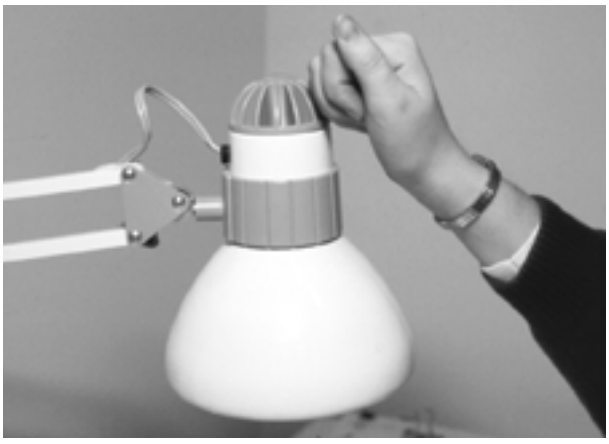
Unless the disability and the need for an accommodation are obvious, current ADA regulations permit an employer to request medical documentation relating to the employee's disability or functional limitations.[22] However, an employer may not ask for all of the employee's medical records, which are likely to contain information irrelevant to the disability or the limitation. Rather, employers should delineate the types of information they are seeking regarding the disability, the limitations on the functions the employee can perform, and the need for reasonable accommodation. If the employee fails to provide the requested documentation, he or she may not be entitled to the accommodation.[23]

In responding to a request for an accommodation, an employer should act promptly. An unnecessary delay in accommodating a qualified employee may amount to a denial of an accommodation and result in liability under the ADA.[24] The EEOC's recent *Enforcement Guidance on Reasonable Accommodation* clarifies the circumstances under which an employer will be liable for a delay in providing a reasonable accommodation. There are five relevant factors: (1) why the delay occurred; (2) how long the delay was; (3) how much the person with a disability and the employer each contributed to the delay; (4) what the employer was doing during the delay; and (5) whether the accommodation was simple or complex to provide.[25]

> An employer's obligation is to provide an *effective* accommodation—not necessarily the best accommodation or the one desired by the employee.

Options for Reasonably Accommodating Disabled Employees

Just as employees' disabilities vary, so do the appropriate accommodations. There may be countless ways to accommodate an employee's physical or



Courtesy of the Center for Universal Design, School of Design, N.C. State University

The top of the lamp is the control on this new-style drafting lamp. People with limited dexterity can use their palm or fist to turn the control.

For information about accessible and universal design, contact the Center for Universal Design, North Carolina State University, phone (919) 515-3082, e-mail cud@ncsu.edu. For information about products, contact the Job Accommodation Network, phone (800) 526-7234, e-mail jan@jan.icdi.wvu.edu, or the North Carolina Assistive Technology Project, phone (919) 850-2787, e-mail ncatp@mindspring.com.

mental impairment. An employer's obligation is to provide an *effective* accommodation—not necessarily the best accommodation or the one desired by the employee.[26] Following is a discussion of the most common types of accommodations.

Providing Assistants

The ADA is clear that reasonable accommodation may include providing an assistant such as a reader or an interpreter to enable an employee to do his or her job. Nonetheless, the employee must be able to perform the essential functions of the job. In *Reigel v. Kaiser Foundation Health Plan*, the court held that the plaintiff, a physician with a shoulder injury, was not qualified for a particular job because she could not perform the job's essential functions, which included lifting patients. The court noted that the employer did not need to hire someone to assist the physician in performing evaluations because "the law does not require an employer to hire two individuals to do the tasks ordinarily assigned to one."[27]

Similarly, in *Sieberns v. Wal-Mart Stores*, the court noted that the plaintiff could not stock and price certain merchandise. Because these were essential functions of her job as a sales clerk, the court held that Wal-Mart did not have to accommodate her by hiring someone else to perform these duties.[28]

Providing Special Equipment

Acquiring or modifying equipment to enable a disabled employee to perform his or her job also is a reasonable accommodation under the ADA.[29] For example, employers may be required to provide optical scanners (reading machines) for employees with visual impairments, or a TTY-relay system (a customer talks to a relay operator, who types the customer's words and relays them to a screen) for employees with auditory impairments. The additional equipment or device is required unless acquiring it poses an undue hardship on the employer.

Restructuring a Job

Job restructuring generally refers to modifying a job to reallocate or redistribute nonessential functions, or altering when or how a function is to be performed. The statute requires job restructuring as a means of reasonably accommodating a disabled employee.[30]

The employer of this woman with diabetes accommodates her with periodic breaks to check her blood-sugar levels.

An employer does not have to reallocate *essential* functions as an accommodation. In *Reigel* the court said that the employer was not required to limit an internal medicine physician's duties to supervisory and administrative work, because this would eliminate essential functions of her position.[31]

Providing Light-Duty Work

An employer has no affirmative duty to create a light-duty position when no such position previously existed. However, if an employer has existing light-duty jobs, it may have to consider reassigning an employee with disabilities to one of these positions as a reasonable accommodation.

A question that often arises is whether an employer may create a light-duty job for a limited time. The EEOC has stated that "an employer is free to determine that a light duty position will be temporary rather than permanent."[32] In *Champ v. Baltimore County*, the court held that the em-

Courtesy of the Center for Universal Design, School of Design, N.C. State University

Providing special equipment such as a TDD (telecommunication device for deaf persons, pictured above; also called a TTY, from its origin in teletype technology) can be a reasonable accommodation under the ADA.

ployer did not have to keep an injured police officer in a temporary light-duty position permanently, even though the officer had been in the position for nearly sixteen years.[33]

A related question is whether an employer may reserve light-duty work for employees who have sustained on-the-job injuries. The EEOC's position is that an employer may not reserve existing light-duty jobs for on-the-job injuries,[34] but one can make a strong argument otherwise. Reserving light-duty jobs for people with injuries that qualify for workers' compensation does not discriminate on the basis of disability. It does differentiate on the basis of where a person is injured, but an employee with any type of a disability is eligible for such a light-duty job if he or she has sustained a workplace injury.

The Seventh Circuit Court recently addressed this issue in *Dalton v. Subaru-Isuzu Automotive*. Disagreeing with the EEOC, the court held that light-duty positions could be reserved for employees who had sustained work-related injuries. "[N]othing in the ADA," the court noted, "requires an employer to abandon its legitimate, nondiscriminatory company policies defining job qualifications, prerequisites, and entitlements to intracompany transfers."[35]

Offering Part-Time or Modified Work Schedules

An employer may be required to change an employee's work schedule as reasonable accommodation. A modified work schedule can include any number of changes, including different arrival and departure times, periodic breaks during the day, or different times at which certain functions must be performed. Employers should carefully assess whether a modification of an employee's work hours would significantly disrupt their business operations, thus causing an undue hardship, or whether the essential functions may be performed at varying times with little or no impact.

With respect to part-time employment, an employer is not required to create a position if none previously existed. For example, in *Terrell v. USAir*, the court examined whether the airline should have allowed a reservations agent with carpal tunnel syndrome to work part-time. The court held that if USAir had no part-time jobs available, it was not required to create one. Specifically, the court stated, "[W]hether a company will staff itself with part-time workers, full-time workers, or a mix of both is a core management policy with which the ADA was not intended to interfere." The court rejected the employee's claim that the part-time work was inherently reasonable merely because the employer had temporarily reduced the employee's hours on prior occasions.[36] Similarly, in *Millner v. Co-Operative Savings Bank*, the court found that full-time work was an essential function of a staff real estate appraiser's job and the employer therefore was not required to allow her to work on a part-time basis.[37]

Job restructuring generally refers to modifying a job to reallocate or redistribute nonessential functions, or altering when or how a function is to be performed. . . . An employer does not have to reallocate *essential* functions as an accommodation.

Reassigning an Employee to a Vacant Position

The ADA specifically lists reassignment as a form of reasonable accommodation.[38] Despite this, some employers have argued that reassignment is not a reasonable accommodation because, by virtue of having to be reassigned, a person is not "qualified" to perform the essential functions of his or her position and therefore is not protected under the statute. Courts have generally rejected this argument, as have the EEOC and the U.S. Department of Justice.[39]

The EEOC declares that, when an employer reassigns an employee, the reassignment must be to a vacant position that is substantially equivalent in terms of pay, status, geographic location, and so forth. "Vacant" means that the position is available when the employee requests reasonable accommodation or that it soon will become available. If there is no vacant, equivalent position, the employer may reassign the employee to a vacant, lower-level position.[40]

Employers frequently ask whether, in carrying out their reassignment obligation, they may require the employee to compete with other applicants for the vacant position. The EEOC maintains that if an employee is qualified for a position, he or she is entitled to it without having to compete.[41] Likewise, some courts have held that reassignment does not mean simply allowing the employee to compete for an open position. For example, in *Aka v. Washington Hospital Center*, the court noted as follows:

> [T]he word reassign must mean more than allowing the employee to apply for a job on the same basis as anyone else. An employee who on his own initiative applies for and obtains a job elsewhere in the enterprise would not be described as having been "reassigned"; the core word "assign" implies some active effort on the part of the employer.[42]

At least one appellate court, however, has suggested that reassignment simply means having the opportunity to compete for a vacant position.[43]

Employers should be aware of the limitations on their reassignment obligations. First, reassignment is available to employees only, not to applicants. Second, an employer does not have to bump another employee from a job or create a new position in order to reassign an employee with disabilities. Third, the ADA does not require an employer to promote a disabled employee as an accommodation. Finally, a person must be reassigned only to a job for which he or she is qualified (with an accommodation if necessary).

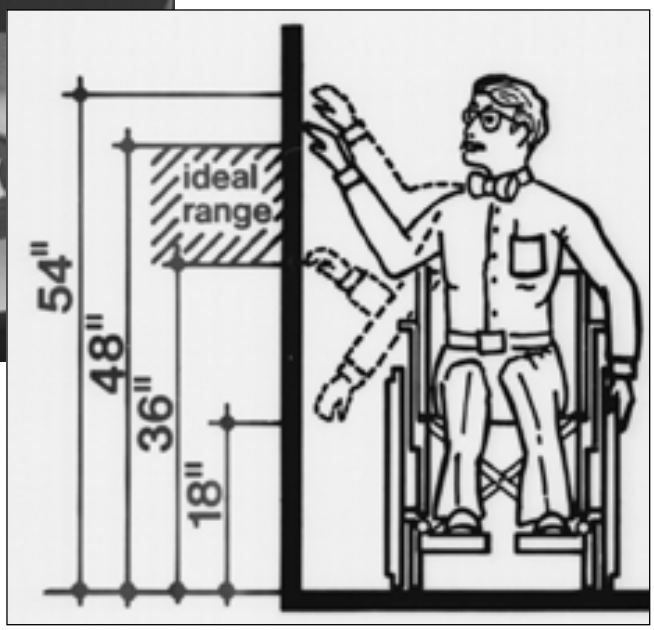
Changing an Employee's Supervisor

An employer is not required to change an employee's supervisor as a reasonable accommodation. In *Weiler v. Household Finance Corporation*, the plaintiff alleged that she was experi-

Courtesy of the Center for Universal Design, School of Design, N.C. State University

Left: A woman with limited reach demonstrates the top of the range for a reach by a person seated in a wheelchair.

Below: A diagram, courtesy of the Center for Universal Design, shows the reach range for a person for wall-mounted objects such as light switches, electrical outlets, and bathroom dispensers.



encing job-related stress and anxiety. She claimed that, by denying her request to transfer her to a new supervisor, the employer had failed to reasonably accommodate her. The court concluded that

> the ADA does not require HFC to transfer Weiler to work for a supervisor other than Skorupka, or to transfer Skorupka. . . . Weiler asks us to allow her to establish the conditions of her employment, most notably, who will supervise her. Nothing in the ADA allows this shift in responsibility.[44]

Similarly, in *Wernick v. Federal Reserve Bank*, the court held that the employee's request for a different supervisor was unreasonable because "one of the essential functions of Wernick's job was to work under her assigned supervisor."[45]

Although an employer is not required to provide an employee with a new supervisor as a reasonable accommodation, nothing in the ADA prohibits the employer from doing so. Moreover, the ADA may require alteration of supervisory methods as a reasonable accommodation.

Offering Leave without Pay

The EEOC maintains that unpaid leave is a form of reasonable accommodation, and most courts seem to agree. Unpaid leave may be appropriate when a person expects to return to work after receiving treatment for a disability, recovering from an illness, or taking some other action related to his or her disability.

The question that often arises is how much leave a person must be given as a reasonable accommodation. The analysis requires a very fact-specific inquiry into whether a particular amount of time imposes an undue hardship on the employer. The courts, however, have provided some guidance. In *Nunes v. Wal-Mart Stores*, the court suggested that holding a job open for a lengthy period might not be an undue hardship for an employer when the employer's policy allowed employees to take up to one year of leave and it regularly hired seasonal employees to fill vacant positions.[46] Similarly, in *Haschmann v. Time Warner Entertainment Company*, the court held that holding an employee's job open for two to four weeks would not pose an undue hardship in light of the evidence that the job had been vacant for a number of months before the employee was hired, it had taken six months to fill the position after the employee was fired, and other employees were able to do the job on an interim basis.[47]

Although the EEOC's stance on this issue has fluctuated, the agency's most recent position is that if an employee cannot provide a fixed date of return, the employer may deny the leave if it can show undue hardship because of the uncertainty.[48] The courts have agreed. For example, in *Rawlings v. Runyon*, the court stated that reasonable accommodation does not require providing indefinite leave while an employee processes a disability retirement application.[49] Likewise, in *Mitchell v. AT&T Corporation*, the court held that "reasonable accommodation does not require the employer to wait indefinitely for the employee's medical conditions to be corrected."[50]

As is the case with leave taken under the Family and Medical Leave Act, a person may not be penalized for work missed during leave that was taken as a reasonable accommodation. According to the EEOC, if an employer has a "no-fault" attendance policy (a policy of

disciplining or terminating an employee based on a certain number of absences, regardless of the reasons for them), it must modify this policy to provide additional leave unless another accommodation would enable the person to perform the essential functions of the position or additional leave would cause an undue hardship on the employer.[51]

The Meaning of "Undue Hardship"

The ADA does not require an employer to provide accommodations when doing so would pose an undue hardship to the employer. Establishing an undue hardship, however, requires the employer to show more than mere inconvenience. The employer must present evidence that providing the accommodation would significantly affect its business operations. For example, an accommodation might cause an undue hardship under the ADA because it was unduly costly. But simply comparing the cost of an accommodation to the salary of the person in need of the accommodation does not suffice. The employer has to show that the cost is excessive compared with the employer's overall budget.

Unfortunately there is no magic formula for determining when a proposed accommodation will pose an undue hardship. However, when evaluating whether providing a reasonable accommodation constitutes an undue hardship, employers should take the following factors into consideration:

- The nature and the net cost of the accommodation
- The employer's financial resources, including the number of employees, the size of the business, and the number, the type, and the location of the employer's facilities
- The type of operations of the overall entity, including the composition, structure, and functions of the workforce, and the geographic separateness and the administrative or fiscal relationship of the facility or department in question to the overall entity
- The effect of the proposed accommodation on the employer's expenses and resources as well as any other effect on the operation of the business

An accommodation may be too disruptive or extensive, even though it may not be expensive. For example, an employee working as a waiter in a nightclub may not be able to see well because of the club's dim lighting. In such a case, an employer probably would not be required to brighten the lights in the nightclub, even though doing so would not be costly. Such an alteration of the club's atmosphere would cause an undue hardship because it would alter and adversely affect the nature of the business. When one accommodation will not work, however, an employer still is required to evaluate the alternatives to determine whether an effective accommodation exists.

Although a negative effect on the morale of other employees is not an undue hardship, an accommodation that inhibits the ability of employees to do their jobs is an undue hardship. The EEOC has stated that if modifying one employee's schedule as a reasonable accommodation would so overburden another employee that he or she would not be able to handle his or her own duties, the employer could establish undue hardship.[52] Disruption, however, must be established on the basis of objective facts, not on the basis of employees' unfounded fears and prejudices.

Courtesy of the Center for Universal Design, School of Design, N.C. State University

Modifying an employees' restroom is often necessary to accommodate a person in a wheelchair, whose needs include more space to maneuver and lowered sinks with knee space below.

The burden of proof is on the employer to present credible evidence that an accommodation poses an undue hardship. In *Bryant v. Better Business Bureau*, the court noted that the employer's defense of undue hardship must have "a strong factual basis and be free of speculation or generalization about the nature of the individual's desirability or the demands of a particular job."[53] Moreover, the court suggested that an employer may not rely on the undue hardship defense unless it has conducted an analysis to determine whether the accommodation presents an undue hardship.

Conclusion

The ADA remains a legal labyrinth to be explored warily by employers, employees, and their counsel. The EEOC's recent *Enforcement Guidance on Reasonable Accommodation* provides a useful roadmap, but the courts have frequently disagreed with the EEOC's interpretations of the statute and have not gone as far as the agency in protecting workers. Reasonable accommodation is an extremely fact-sensitive issue that requires dialogue among all parties on a case-by-case basis to iron out the ADA's ambiguities and to ascertain what will work effectively for both an employee with disabilities and an accommodating employer.

Notes

1. 42 U.S.C. §§ 12101–12213.
2. 42 U.S.C. §§ 12111–12117.
3. In Alden v. Maine, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999), the U.S. Supreme Court held that individual employees may no longer sue a state agency for a violation of the Fair Labor Standards Act. Similarly, in Kimel v. Florida Board of Regents, 2000 WL 14165 (U.S. Jan. 11, 2000), the Court held that, although the Age Discrimination in Employment Act (ADEA) contains a clear statement of Congress's intent to abrogate the states' immunity, that abrogation exceeded Congress's authority under Section 5 of the Fourteenth Amendment; therefore an individual employee may not bring a lawsuit under the ADEA to recover monetary damages from his or her state employer. These holdings greatly expand the states' sovereign immunity against claims by individuals alleging violations of federal em-

ployment laws. The full impact of the decisions on claims brought by employees is yet to be determined, but arguably the rulings will apply to state employees' claims for alleged violations of the ADA.

4. Title I of the ADA covers all employers, including state and local governments, with fifteen or more employees. Public entities not covered by Title I because they do not have the requisite number of employees are covered by Section 504 of the Rehabilitation Act, which serves as the means of implementing the ADA. 28 C.F.R. § 35.140(2).

5. In its last term, the U.S. Supreme Court ended some of the confusion regarding the statute by deciding an unprecedented four ADA cases. In Cleveland v. Policy Management Sys. Corp., 526 U.S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999), the Court held that people who have applied for or are receiving disability benefits are not necessarily foreclosed from pursuing a claim under the ADA. In Sutton v. United Air Lines, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999), Murphy v. United Parcel Service, 119 S. Ct. 2133, 144 L. Ed. 2d 484 (1999), and Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162, 144 L. Ed. 2d 518 (1999), the Court ruled that measures that mitigate or correct a person's impairment must be considered in determining whether the person is disabled.

6. *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act*, No. 915.002 (3/1/99) (hereinafter *Enforcement Guidance on Reasonable Accommodation*). The EEOC guidelines are not binding on a court of law but "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

7. 42 U.S.C. § 12112(b)(5)(A).

8. 29 C.F.R. pt. 1630, app. § 1630.2(o).

9. 29 C.F.R. § 1630.2(o)(1)(i–iii).

10. A "qualified individual" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

11. 29 C.F.R. pt. 1630, app. § 1630.9.

12. Enforcement Guidance on Reasonable Accommodation at p. 5.

13. Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538 (7th Cir. 1995).

14. Vande Zande, 44 F.3d at 542–43.

15. 42 U.S.C. § 12102(2)(B), (C).

16. Newberry v. East Texas State Univ., 161 F.3d 276, 280 (5th Cir. 1998).

17. Corrigan v. Perry, 1998 WL 129929 (4th Cir. 1998) (unpublished).

18. Some courts have suggested that if an employer knows both about a disability and the need for an accommodation, it may have an obligation to provide the accommodation despite the absence of an express request. For example, in Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Ore. 1994), the court said that the employer had an obligation because (1) it knew of the employee's underlying alcohol problem; (2) it "had reason to believe the employee could continue to perform the job providing an accommodation was made"; and (3) an accommodation request would have been futile, given the employer's policy of immediate termination of an employee with alcohol in his or her urine.

19. Huppenbauer v. May Dep't Stores Co., 1996 WL 607087 (4th Cir. 1996) (unpublished).

20. See 29 C.F.R. § 1630.2(o)(3). The EEOC regulation states that this process may be necessary to identify the precise limitations resulting from the disability and reasonable accommodations that might overcome those limitations.

21. The extent of the employer's obligation to participate in the interactive process as set forth in EEOC regulations has divided the appellate courts. In Jacques v. Clean-Up Group, 96 F.3d 506 (1st Cir. 1996), the court acknowledged in dicta that "[t]here may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of that act." *Jacques*, 96 F.3d at 514. On the other hand, in Barnett v. U.S. Air, 157 F.3d 744 (9th Cir. 1998), the court rejected the notion that an employer can be independently liable for failing to engage in an interactive process.

22. *See* 29 C.F.R. § 1630.9.

23. *See* Templeton v. Neodata Services, 162 F.3d 617 (10th Cir. 1998) (concluding that plaintiff's refusal to provide information from her physician on her medical condition constituted breakdown in interactive process required under ADA and therefore was sufficient to preclude her claims).

24. *See* Dalton v. Subaru-Isuzu Automotive, 141 F.3d 667 (7th Cir. 1998).

25. *Enforcement Guidance on Reasonable Accommodation* at p. 19.

26. *See* Hankins v. The Gap, Inc., 84 F.3d 797, 800 (6th Cir. 1996) (holding that employer does not have to provide accommodation that person wants, as long as it has "made available other reasonable and effective accommodations").

27. Reigel v. Kaiser Foundation Health Plan, 859 F. Supp. 963, 973 (E.D.N.C. 1994).

28. Sieberns v. Wal-Mart Stores, 125 F.3d 1019 (7th Cir. 1997).

29. 42 U.S.C. § 12111(9)(A).

30. 42 U.S.C. § 12111(9)(B).

31. *Reigel,* 859 F. Supp. at 973–74.

32. *EEOC Enforcement Guidance: Workers' Compensation and the ADA*, No. 915.002 (9/3/96), at p. 22.

33. Champ v. Baltimore County, 884 F. Supp. 991 (D. Md. 1995), *aff'd*, 91 F.3d 129 (4th Cir. 1996).

34. *Champ*, 884 F. Supp. at 22.

35. Dalton v. Subaru-Isuzu Automotive, 141 F.3d 677, 678 (7th Cir. 1998).

36. Terrell v. USAir, 132 F.3d 621, 627 (11th Cir. 1998).

37. Millner v. Co-Operative Savings Bank, 1998 WL 377931 (4th Cir. 1998) (unpublished).

38. 42 U.S.C. § 12111(9)(B).

39. *See* Gile v. United Airlines, 95 F.3d 492, 498 (7th Cir. 1996). In this case the court held that it was the employer's obligation to accommodate a disabled employee, even though the employee was not able to perform the essential functions of her job. The court relied in part on the legislative history of the ADA, which states, "'Reasonable accommodation may include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker.'"

40. 29 C.F.R. § 1630.2(o)(2).

41. *Enforcement Guidance on Reasonable Accommodation* at p. 44.

42. Aka v. Washington Hosp. Center, 156 F.3d 1284, 1304–05 (D.C. Cir. 1998).

43. *See* Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995).

44. Weiler v. Household Finance Corp., 101 F.3d 519, 526 (7th Cir. 1996).

45. Wernick v. Federal Reserve Bank, 91 F.3d 379, 384 (2d Cir. 1996).

46. Nunes v. Wal-Mart Stores, 164 F.3d 1243 (9th Cir. 1999).

47. Haschmann v. Time Warner Entertainment Co., 151 F.3d 591 (7th Cir. 1998).

48. *Enforcement Guidance on Reasonable Accommodation* at p. 57.

49. Rawlings v. Runyon, 1997 WL 128533 (4th Cir. 1997) (unpublished).

50. Mitchell v. AT&T Corp., 1997 WL 770929 (4th Cir. 1997) (unpublished).

51. *Enforcement Guidance on Reasonable Accommodation* at p. 27.

52. *Enforcement Guidance on Reasonable Accommodation* at pp. 55–56.

53. Bryant v. Better Business Bureau, 923 F. Supp. 720, 741 (D. Md. 1996).