



Reasonable Accommodations under the ADA

May 23, 2019

Brett Carpenter

Poyner Spruill LLP

©Poyner Spruill LLP

Remarkably Bright Solutions



Poyner Spruill^{LLP}

ATTORNEYS AT LAW

AMERICANS WITH DISABILITIES ACT

THE LAW

- The ADA prohibits discrimination, based on an individual's disability, when that individual is "otherwise qualified"
- The ADA also mandates that employers accommodate disabled employees who need job changes, unless the accommodation is unreasonable or an undue hardship

THE LAW

- It is a violation of the ADA to refuse to hire a qualified individual because that person has a disability
- It is a violation of the ADA to fire an employee because the employee has a disability unless the individual is not able to perform the essential functions of the job

Who is a Qualified Individual?

- Satisfies skill, experience, education and other prerequisites of the job (e.g., licenses); and
- Can perform the essential functions of the job, either with or without accommodation.
- Employment decisions must be based on the person's ability to currently perform the job, not based on future assumptions or expectations.
- Requirement(s) must be job-related and consistent with business necessity.

“Disability” Under the ADA

- Physical or mental impairment which substantially limits a person’s major life activity; or
- A record of such an impairment; or
- Being regarded as having such an impairment

What is a Disability?

- In determining disability, the law provides:
 - The term “shall be construed broadly”
 - If an impairment is episodic or in remission, the person is considered to have a disability, even when the condition is not active, if it would substantially limit a major life activity when active

“Disability” Under the ADA

- Examples of covered conditions:
 - Cancer
 - Diabetes
 - Depression
 - Alcoholism
 - Past Drug Addiction (but not current drug use)

What is a Major Life Activity?

- caring for oneself,
- performing manual tasks,
- seeing, hearing, eating, sleeping,
- walking, standing, lifting, bending,
- speaking, breathing,
- learning, reading, concentrating, thinking,
- communicating, and
- working

What is a Major Life Activity?

- The law also broadly states that “major life activity” includes the operation of a major bodily function, including:
 - the immune system,
 - cell growth, and
 - digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

The Interactive Process

- What triggers the need for the employer to begin the interactive process?
 - It is generally the employee’s responsibility to notify the employer of the need for an accommodation and/or existence of a disability.
 - However, no “magic” language on the part of the employee is required, and an employee does not even have to use the term “reasonable accommodation” in the request. So, what exactly does the individual have to say when asking for a reasonable accommodation?

The Interactive Process is Triggered By

- Any notification by the employee that he/she is having difficulty performing a job because of a condition that might be a disability.
 - employee asks for leave because he/she is undergoing “treatment”;
 - employee brings in a doctor’s note with work/workplace restrictions.
- FMLA medical leave requests may provide enough notice to trigger the ADA interactive process.

The Reasonable Accommodation Process

- When an employee tells you that he/she is having trouble performing the job because of a physical or mental condition, contact HR ASAP.
- When an employee tells you that attendance is being negatively affected by a physical or mental condition, contact HR ASAP.
- The reasonable accommodation process is interactive: a conversation.

Response to Request for Accommodation

- Documentation of “Disability”
 - Employer may ask for reasonable documentation about disability and the functional limitations. An employer cannot ask for documentation when:
(1) both the disability and the need for reasonable accommodation are obvious, or (2) the individual has already provided the employer with sufficient information to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested.

Response to Request for Accommodation

The employer may choose among reasonable accommodations as long as the chosen accommodation is effective. Examples include:

- Making facilities accessible to disabled persons
- Restructuring a job by reallocating marginal functions
- Modified work schedules
- Readers/Interpreters
- Equipment or devices
- Unpaid time off for a defined period of time

Leave as a Reasonable Accommodation

- One of the most common types of accommodation is leave
- The first 12 weeks of leave are usually covered by the Family Medical Leave Act
- Even if an employee is not yet eligible for FMLA, or has used up all their FMLA, the employer needs to evaluate whether unpaid leave should be provided

Leave as a Reasonable Accommodation

- Leave provided under the ADA or FMLA is unpaid
- Leave from work may result in one or more of the following:
 - A part time schedule for some period of time
 - Ability to intermittently miss work when a condition flares up without those absences being counted under the attendance policy
 - Ability to intermittently miss work when doctor's appointments are needed, without those absences being counted under the attendance policy
 - A block of continuous leave
 - Adjusted hours or ability to work from home

Leave as a Reasonable Accommodation

- An employee is not entitled to indefinite leave
- Termination of employment (after exhaustion of FMLA and PTO) is permissible if the treating physician states that he/she is unable to determine when/if employee is able to return to work
- Always make an individualized analysis of an employee's ability to return to work when FMLA has been exhausted

Reassignment to An Alternative Open Position

- When a current employee cannot perform the essential functions of his or her present job with accommodation, employer should consider reassignment.
- Reassignment does not require “bumping” another employee, the creation of a new position, or promotion.

Limitations on Employer's Duty to Reasonably Accommodate

- An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity.
- Prior performance issues and rule infractions do not have to be rescinded once the employer becomes aware of possible ADA issues.
- Employers are not required to eliminate an essential function of a position.

Limitations on the Employer's Duty to Reasonably Accommodate

- The accommodation provided does not need to be the perfect accommodation.
- The principle test is “effectiveness” - Does it enable the employee to perform the essential functions of the job? Does it work?
- If an employee refuses a reasonable accommodation, the employee may be considered not qualified.

Undue Hardship

- Employers do not have to provide an accommodation that causes an undue hardship.
 - Is providing the accommodation significantly difficult or expensive (in light of employer's size and gross revenues)?
 - Is the accommodation substantial or disruptive?
 - Does the accommodation change an essential aspect of the employer's operations or product?
 - Does the accommodation place an undue burden on other employees?

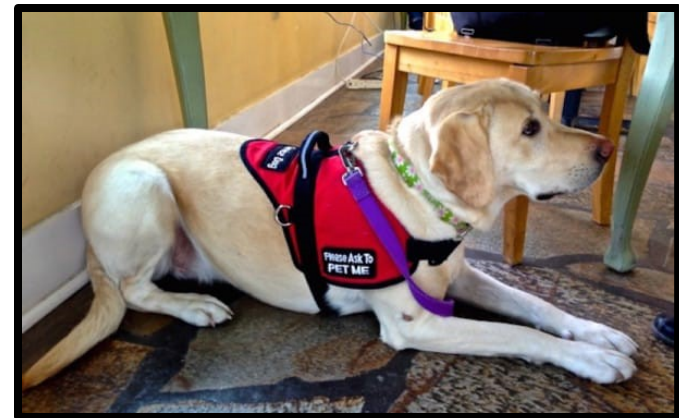
What can you tell other employees about an employee's reasonable accommodation?

- Because the ADA prohibits employers from disclosing an employee's "medical" information (including that he/she has a disability) it is risky to disclose that someone is being provided an ADA reasonable accommodation.
- It is safer to simply disclose that a "modification" has been made to comply with "federal law."

SERVICE ANIMALS AND THE ADA

Service Animal Defined - ADA

- “any dog that is individually training to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”



Miniature Horses as Service Animals

- There are separate ADA regulations about miniature horses that have been individually trained to do work or perform tasks for people with disabilities.
- Miniature horses generally range in height from 24 inches to 34 inches measured to the shoulders and generally weigh between 70 and 100 pounds.



Miniature Horses as Service Animals

Entities covered by the ADA must modify their policies to permit miniature horses where reasonable.

Assessment factors are:

1. whether the miniature horse is housebroken;
2. whether it is under the owner's control;
3. whether the facility can accommodate the miniature horse's type, size, and weight; and
4. Whether its presence will not compromise legitimate safety requirements necessary for safe operation of the facility.

Service Animal Defined – NC Law

- “Every person with a disability has the right to be accompanied by a service animal trained to assist the person with his or her specific disability...”
 - “Service animal” not explicitly defined
 - NC law extends coverage to service animals in training

Definition of Disability (ADA and NC Law)

- A physical or mental impairment that substantially limits one or more of the major life activities of an individual.
 - Epilepsy
 - Blindness
 - Inability to walk
 - PTSD

Not a Service Animal

- Any animal besides a dog or miniature horse
- Emotional support dogs
- Therapy dogs
- Companion dogs
- Dogs used to deter crime

Service Animal Tasks

- The work/task performed by the dog must be directly related to the individual's disability.
- Examples of work/tasks:
 - assisting people who are blind with navigation and other tasks
 - alerting people who are deaf to the presence of people or sounds

Service Animal Tasks (cont.)

- Examples of work/tasks:
 - pulling a wheelchair
 - assisting during a seizure
 - alerting individuals to the presence of allergens

How can you verify a dog's status - ADA

- Only two questions are permitted (if it is not readily apparent that the dog is a service animal):
 - Is the animal a Service Animal?
 - What has the animal been trained to do for the individual?
- CANNOT request documentation

How can you verify a dog's status - ADA

- The dog may have a tag issued by the Department of Health and Human Services
 - Registration is voluntary and there are no specific certification requirements
- The owner's statement that the animal is being trained or has been trained as a service animal is sufficient – you must take it at face value.

NORTH CAROLINA LAW ON SERVICE ANIMALS

North Carolina Law

- Every person with a disability has the right to be accompanied by a service animal trained to assist the person with his or her specific disability in any place of public accommodation.
- The person qualifies for these rights ***upon the showing of a tag, issued by the Department of Health and Human Services***, stamped “NORTH CAROLINA SERVICE ANIMAL PERMANENT REGISTRATION” and stamped with a registration number, ***or*** upon a showing that the animal is being trained or has been trained as a service animal.
- An animal in training to become a service animal may be taken into place of public of accommodation when the animal is accompanied by a person who is training the service animal and the animal wears a collar and leash, harness, or cape that identifies the animal as a service animal in training.

[N.C.G.S.A. § 168-4.2](#)

FACILITY OBLIGATIONS

Accommodations Required in Place of Public Accommodation

- Make reasonable accommodation to “policies, practices or procedures to permit the use of a service animal by an individual with a disability”
- Allow service animals to accompany people with disabilities in all areas of the facility where the public is normally allowed to go
- Cannot charge a surcharge or fee
- Cannot treat people with service animals any different than the general public

Accommodating Service Animals in Healthcare

- In a hospital it would be inappropriate to exclude a service animal from areas such as patient rooms, clinics, cafeterias, or examination rooms. However, it may be appropriate to exclude a service animal from operating rooms or burn units where the animal's presence may compromise a sterile environment
- This same rule usually applies to humans. For example, a family member is usually not allowed in the operating room because it increases the risk of germs and infections. Similarly, a service animal should not be permitted in those sterile environments

Exceptions: Accommodation Not Required

- The animal is out of control and the animal's handler does not take effective action and control;
- The animal is not housebroken;
- The animal is disruptive to a particular type of establishment (does not include allergies or fear of dogs); or
- The animal exhibits behavior that poses a direct threat to the health or safety of others.

Handler's Responsibilities

- Responsible for care and supervision
- The animal must be under handler's control
 - on harness, leash, or other tether unless that handler is unable to use one due to disability
 - voice control
- Must be housebroken
- Must comply with N.C. Gen. Stat 130A-185 which requires dogs be vaccinated against rabies by 4 months old and kept current

Accommodations in the Employment Context

- No EEOC regulations on service animals
- EEOC Interpretive Guidance
 - Employers must permit an individual with a disability to provide and utilize equipment, aids, or services that an employer is not itself required to provide.
 - E.g., An employer must permit an individual who is blind to use a guide dog at work.
 - Likely requires accommodation of emotional support animals in employment context (even though not required for places of public accommodation).
- Employers may be able to ask for additional documentation (similar to any other request for accommodation)

Key Takeaways

- Places of public accommodation must allow service animals to accompany patients unless the animal poses a safety risk
- Employers may need to allow service animals to accompany patients unless the animal poses a safety risk

PREGNANCY DISCRIMINATION

Pregnancy Discrimination Act (PDA) claims

- PDA covers not only current pregnancy, but discrimination based on past pregnancy and a woman's potential to become pregnant;
- Lactation is a covered pregnancy-related medical condition;
- Employers may have to provide light duty for pregnant workers;
- PDA prohibits against requiring pregnant workers who are able to do their jobs to take leave;

Pregnancy Discrimination Act (PDA) claims

- Parental leave (which is distinct from medical leave associated with childbearing or recovering from childbirth) must be provided to similarly situated men and women on the same terms;
- Employers may have to provide reasonable accommodations for workers with pregnancy-related impairments under the ADA.

Pregnancy Discrimination Act (PDA) claims

- Pregnancy itself is not a disability, BUT pregnant workers and job applicants are not excluded from the Americans with Disabilities Act (ADA), and
- Changes to the definition of "disability" in the ADA Amendments Act of 2008 (ADAAA) made it easier for pregnant workers with pregnancy-related impairments to show they are entitled to reasonable accommodation

Young v. UPS

- March 25, 2015 U.S. Supreme Court opinion
- Young was a part-time driver for UPS. She became pregnant and, as a result of her pregnancy, was assigned a 20-pound lifting restriction by her doctor
- UPS had policies that provided accommodation to certain categories of employees that included: 1) those injured on the job; 2) those who had lost their federal Department of Transportation certification to drive; and 3) those who had disabilities as defined under the ADA

Young v. UPS

- Young did not fall into any of these categories, UPS refused her request for light duty as an accommodation Young sued UPS for violation of the PDA
- Supreme Court: employer must demonstrate its denial of the accommodation was based on a legitimate, non-discriminatory reason.
 - limited employer's ability to satisfy this burden by stating that the employer's proffered reason normally cannot consist of a claim that it was more expensive or less convenient to add pregnant women to the category of those whom the employer accommodates

Pregnancy

- EEOC charges alleging pregnancy discrimination have substantially increased in recent years:
 - Discharge based on pregnancy
 - Disparate terms and conditions of employment based on pregnancy (such as closer scrutiny and harsher discipline than that administered to non-pregnant employees)
 - Suspensions pending receipt of medical releases
 - Medical examinations that are not job-related or consistent with business necessity
 - Forced leave

EEOC v. La Louisianne

- June 29, 2018
- \$83,000 settlement
- Los Angeles jazz club La Louisianne Inc. cut server's hours after finding out she was pregnant
- Eventually cut her hours entirely
- Refused to allow her to return after she had baby

Questions?



Brett Carpenter

bcarpenter@poynerspruill.com

919.783.2923



Poyner Spruill^{LLP}
ATTORNEYS AT LAW

These materials have been prepared by Poyner Spruill LLP for informational purposes only and are not legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship.

