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Witherspoon &
Galchus, P.C.

The Americans with Disabilities Act:

How to Manage ADA's Interactive Process When an Employee Requests an Accommodation

Missy McJunkins Duke | mduke@cgwg.com

Americans with Disabilities Act



ADA

- Passed in 1990.
- First comprehensive federal civil rights law concerning disabilities.
- Prohibits discrimination
 - **In employment**
 - In public services
 - With respect to public accommodations
 - With respect to telecommunications



Two Parts

- Anti-discrimination
- Provision of reasonable accommodations
-



General Rule

An employer shall not, because of a disability or other impairment, discriminate with regard to any term or condition of employment against a qualified individual with a disability or impairment who can, with or without reasonable accommodation, perform the essential functions of the job, unless such accommodation would create an undue hardship or constitute a direct threat to safety.



Who is Protected?

- Qualified Individual
 - Meets experience and educational qualifications for the job; and
 - Can perform essential functions of job
 - with or without a reasonable accommodation; and
 - Is not a direct threat.



Definition of Disability

- Physical or mental impairment
- Substantially limits
- Major life activity
- Has or may have a need for an accommodation in order to perform essential functions of job.



“Substantially Limits”

- A common sense assessment based on comparing an individual’s ability to perform a specific major life activity with that of most people in the general population.



Major Life Activities (non-exhaustive)

- Walking
- Seeing
- Hearing
- Communicating
- Breathing
- Learning
- Eating
- Sleeping
- Bending
- Speaking
- Lifting
- Reaching
- Standing
- Sitting
- Caring for oneself
- Working
- Interacting with others
- Concentrating
- Reading



Major Life Activities

Operation of Major Bodily Functions

- In addition to the previous list of major life activities, under the ADA Amendments Act, § 4(a), the ADA now includes the operation of major bodily functions.
- The purpose of adding major bodily functions is to make it easier to find that individuals with certain types of impairments have a disability.



Major Life Activities

Operation of Major Bodily Functions

- Functions of immune system
- Normal cell growth
- Digestive functions
- Bowel and bladder functions
- Neurological and brain functions
- Respiratory functions
- Circulatory functions
- Endocrine functions
- Reproductive functions



“Mitigating Measures”

- The determination of whether an impairment substantially limits a major life activity must be made without regard to effects of mitigating measures such as:
 - Artificial aids
 - Medication
 - Assistive technology
 - Reasonable accommodations
 - Learned behavioral
 - Adaptive neurological modifications
- Eye Glasses are an exception.



“Mitigating Measures” Standard

- **What does this mean?**
 - If an employee has a disability that is made better or corrected by a mitigating measure (such as medication), it does not disqualify the employee from being considered to have an impairment or disability



Definition of Impairment

- “Not transient and not minor.”
- Any long term or permanent condition that impedes a physical or mental ability.
- But does not substantially limit a major life activity.



ADA: Essential Functions

- Major duties of the job.
- Not incidental duties.
- Consider such factors as:
 - Frequency.
 - Duration.
 - Number of employees available.



ADA: Essential Functions

- Evidence
 - Job Description
 - Employee's testimony/statement
 - Supervisor's testimony/statement



Employer's Obligation Reasonable Accommodation

- It is an affirmative obligation.
- Enables the individual to perform the essential functions of job.
- Without creating an undue hardship to employer or to co-workers.



Reasonable Accommodation

- A physical, mechanical, electronic, or procedural device.
- That allows an employee with a disability to perform to the employer's expectations and standards.



Identifying Accommodations

- Verify essential functions of job.
- Identify physical/mental abilities & limitations in relation to essential functions.
- Consult with employee to identify potential accommodations & assess effectiveness.
- Consider preference of employee & choose accommodation that best serves needs of both employer & employee.



ADA'S Interactive Process

- A conversation (series of conversations) with a purpose.
- Follow up the conversation with summary in writing.
- If unsure, do not make commitments immediately.
 - “Let me look into this and get back with you.”
 - “I need to consider these options. I will get back with you.”
 - “I will need information from your treating provider. Please provide that to me by _____.”



ADA's Interactive Process

- Witness Present
- You are not being nice or doing a favor for the employee. This is a legal obligation on your part.
- Document everything.



Examples of Accommodations

- Making facilities accessible/usable.
- Modified work schedules.
- Flexible leave policies.
 - Must do accommodation analysis at end of any leave.
 - Will additional time foreseeably result in employee being able to return to work.
- Job restructuring.



Examples of Accommodations

- Reassignment to vacant position.
- Acquire/modify equipment.
- Modify tests, training, policies.
- Provide qualified readers/interpreters.



Additional Leave Time

- You must consider additional time off of work (may be unpaid) as a reasonable accommodation when employee is not released to return to work.
- Engage in an interactive process with employee.



Additional Leave Time

- How much leave team is sufficient for a reasonable accommodation?
 - There is no clear answer.
 - Look at each situation on a case-by-case basis.
- Consider:
 - The position of the employee
 - How much time has the employee already been off of work?
 - Undue hardship considerations
 - What does the doctor say?
 - How much leave does the employee need?
 - When will the employee be released to work.
 - Look to past situations. Be consistent or be able to make distinctions that justify different treatment.



Health Provider Contact Under ADA

- As part of interactive process, it may be necessary for employer to request documentation about the nature, severity, and duration of the employee's medical condition.
- You may ask the employee to provide you with certain information from health care provider. (BUT, often you do not receive the information you are seeking.)
- You may contact the health care provider directly to seek the information. (BUT, there are guidelines.)
- **Don't go it alone - consult legal counsel to assist you in making contact with employees' doctors.**



Undue Hardship

- Factors to be considered:
 - Size of facility.
 - Expense of accommodation in relationship to resources of employer.
 - Number of employees.
 - Employer's budget for other items.



ADA: Direct Threat

- Must be specifically identifiable threat.
- Must be a substantial probability of harm.
- Cannot be a mere possibility of harm.



Important Goals

- Eliminate “Disability” from vocabulary!
 - This is for lawyers, judges, and juries.
- Don’t try to be a doctor
- Focus on restrictions, not diagnosis.
- Accommodate restrictions to allow employee to perform essential functions of job.
- Be patient



Scenario 1

Cathy works for the District as a cafeteria worker. She was in a car accident 4 months ago and suffered facial lacerations, a broken right arm with permanent shoulder damage, a shattered left ankle, and broken right leg. She had multiple surgeries.

She is out of FMLA leave and recently called the school secretary and said her doctor was releasing her to come to work. Cathy's husband hand-delivered the note from the doctor. The doctor released Cathy but listed the following restrictions: sedentary work only (may not stand at all); no lifting; no use of right arm or hand.

How do you handle?



Scenario 2

Ruth is employed by the District as a kindergarten teacher and has cancer. She is much-loved, long-term District employee. She is not eligible for FMLA leave and has exhausted all available paid leave. Thus far, the District has given Ruth a total of 8 weeks unpaid leave. Ruth has not been very diligent in keeping the District apprised of her return-to-work status. After multiple letters and calls to Ruth, she finally provides the District with the following note from her physician:



Scenario 2

To Whom It May Concern:

Ruth has been under my care since September 2017. I have evaluated Ruth's return-to-work status; she should be able to return to work in 4 weeks.

Sincerely,
Dr. Fix

How do you handle?



Scenario 2

Would your plan of action be different if this is the doctor's note you had received?

To Whom it May Concern:

Ruth has been under my care since September 2017. I have evaluated Ruth's return-to-work status. I am not able to determine when, if ever, Ruth will be able to return to work.

Sincerely,
Dr. Fix



Scenario 3

Roy works as a janitor for the District. He has been on workers' comp leave for most of the fall semester after he suffered a shoulder injury. You are in frequent contact with your workers' comp contact who advises you that the doctor is ready to release Roy to return to work, with restrictions that include no lifting more than 5 pounds.

Do you have to allow Roy to return to work with these light duty restrictions? What are your options? How do you handle?



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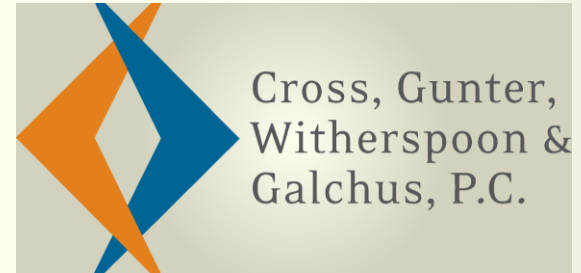
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CROSS, GUNTER, WITHERSPOON & GALCHUS, P.C.
500 President Clinton Ave. Suite 200
Little Rock, AR 72201
(501) 371-9999
info@cgwg.com | www.cgwg.com



Cross, Gunter,
Witherspoon &
Galchus, P.C.

Thank you.

