Mississippi College Law Review

Volume 28
Issue 1 *Vol. 28 Iss. 1*

Article 5

2009

What Is Reasonable Accommodation under the ADA - Not an Easy Answer; Rather a Plethora of Questions

John E. Matejkovic

Margaret E. Matejkovic

Custom Citation
28 Miss. C. L. Rev. 67 (2008-2009)

WHAT IS REASONABLE ACCOMMODATION UNDER THE ADA? NOT AN EASY ANSWER; RATHER A PLETHORA OF QUESTIONS.

John E. Matejkovic & Margaret E. Matejkovic***

I. INTRODUCTION

In enacting the Americans with Disabilities Act of 1990 ("ADA"), Congress made it unlawful for an employer to discriminate in most aspects of employment against any "otherwise qualified" individual with a disability. Since being signed into law by President George H. W. Bush, the ADA has raised a number of issues, some discussed in more detail *infra*. One of the more problematic issues under the ADA is the requirement that employers provide a reasonable accommodation to the disabled applicant/employee, where that accommodation allows the otherwise-qualified applicant/employee to perform the job. In other words, the requirement of reasonable accommodation relates to the removal of barriers in the workplace of the disabled. Workplace barriers may include those of a tangible, physical nature (*e.g.*, an area or task that is physically unattainable to an employee or applicant) or they may be more intangible in nature (*e.g.*, a personnel policy or practice).

While the reasonable accommodation requirement may appear on its face to be relatively straight-forward, in practice the requirement is often difficult. For instance, what is a reasonable accommodation? When does the requirement arise? Who makes the request that triggers the requirement, and how is that request made? Most importantly, what is or is not reasonable?

Despite the facial simplicity of the reasonable accommodation requirement, as a practical matter, more questions may be raised than can be easily answered. This article is not intended to be an all-encompassing exploration of the issue of reasonable accommodation under the ADA. Rather, this Article is offered as a review of law which supports the proposition that for every answer provided in response to a question of reasonable accommodations, a plethora of other questions is presented. Further, in light of the recent signing of the ADA Amendments Act ("ADAAA"), the authors submit that the questions and issues presented herein are of even greater significance, especially considering that the ADAAA has substantially broadened the ADA.

* Associate Professor of Business Law, College of Business Administration, The University of Akron.

** Assistant Dean, The University of Akron School of Law

II. OVERVIEW

In its enactment of the ADA, Congress recognized that 43 million Americans have one or more physical or mental disabilities and further suggested that this number is increasing as the population as a whole is growing older.[1] Estimates suggest that "more than 70% of those with severe disabilities are not working, even though many of them are willing and able to do so."[2]

Congress has declared that "historically, society has tended to isolate and segregate individuals with disabilities" and that such discrimination continues to be a social and economic problem.[3] Furthermore, Congress has recognized that "individuals who have experienced discrimination on the basis of disability often have often had no legal recourse to redress such discrimination," and the "continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis."[4]

In Fiscal Year ("FY") 2007 alone, the Equal Employment Opportunity Commission ("the EEOC" or "the Commission") received a total of 17,734 charges of discrimination on the basis of disability,[5] which represents 21.4% of all charges filed with the Commission during that year.[6] This total also represents a 14% increase from the total number of charges presented in 2006 and is at its highest level in ten years (i.e., since 1998). EEOC resolved 15,708 disability discrimination charges in FY 2007 and recovered $54.4 million in monetary benefits for charging parties and other

1. *See* 42 U.S.C. § 12101(a)(1) (2006). The ADA covers employers engaged in an industry affecting commerce that has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 12111(5)(A) (2006); 29 C.F.R. § 1630.2(e) (2008).

2. The Equal Employment Opportunity Commission, *The Americans with Disabilities Act: A Primer for Small Business*, 2004, *available at* http://www.eeoc.gov/ada/adahandbook.html [hereinafter *A Primer for Small Business*].

3. Thad LeVar, *Why an Employer Does Not Have to Answer for Preventing an Employee with a Disability from Utilizing Corrective Measures: The Relationship between Mitigation and Reasonable Accommodation*, 16 BYU J. PUB. L. 69, 70 (2001) (citing 42 U.S.C. § 12101(a) (2006)).

4. *Id.*

5. Individuals alleging disability or handicap discrimination also may file charges or complaints of discrimination with state Fair Employment Practices ("FEP") agencies. Coverage requirements for state FEP's vary and charge statistics from state FEP's are not included in the EEOC's statistics.

6. *See* The U.S. Equal Employment Opportunity Commission, *Americans With Disabilities Act of 1990 Charges, at* http://www.eeoc.gov/stats/ada-receipts.html (last modified Apr. 24, 2008) [hereinafter *Americans With Disabilities Act of 1990 Charges*]. As receipts include all charges filed under the ADA and those filed concurrently under other statutes (*e.g.*, Title VII, ADEA), the sum of receipts for all statutes will exceed total charges received. Further, leave provisions of the Family and Medical Leave Act ("FMLA") are often other options available to an employee who believes that he or she has been unlawfully discriminated against on the basis of disability or handicap (i.e., in connection with a request for leave of absence). The FMLA leave provisions are completely distinct from the reasonable accommodations provisions of the ADA. The FMLA does not modify or preempt the ADA. *See* 42 U.S.C. § 2651(a) (2006); 29 C.F.R. § 825.702(a) (1995). Provided the employee meets the appropriate statutory definitions, an employer must provide an employee with leave pursuant to the ADA or FMLA, whichever provides the employee with greater statutory rights. 29 C.F.R. § 825.702(a) (1995). However, an employee may only use relief provided by one of the statutes. *Id.*; *see also* Laffey v. Nw. Airlines, 567 F.2d 429, 445 (D.C. Cir. 1976) (In consideration of the EPA and Title VII, an employee cannot "reap overlapping relief for the same wrong").

aggrieved individuals (not including monetary benefits obtained through litigation).[7]

One commentator observed that some recent employment-related ADA decisions of the United States Supreme Court have been interpreted and applied between employees and employers with the preliminary decisions in favor of plaintiff-employees while other Supreme Court decisions involving claims by employees alleging ADA violations were not as "favorable to those seeking the protection of the statute."[8] According to surveys conducted by the American Bar Association, employers won 98% of the ADA employment cases resolved in 2003 and nearly 95% in 2002.[9] Notwithstanding this likelihood of success at trial, an employer's response to a federal or state agency investigation may cost the employer between $2,500 and $10,000.[10] Actually litigating a case through trial can cost the employer between $50,000 and $500,000.[11] Additionally, in most cases, the available damages are "a fraction of the costs of defense" . . . and "there is always the possibility of losing at trial."[12]

The EEOC suggests that most accommodations are not expensive when reporting that a median approximate cost of $240.00 and with one-fifth of the accommodations costing nothing.[13] The Commission reminds employers, however, that regardless of cost, an employer does not need to provide an accommodation that would pose undue hardship or other significant difficulty in terms of the operation of the employer's business, based on the resources and operation of the business.[14]

A. What is a covered disability?

Only individuals who have a qualifying disability "have standing to assert a claim under the ADA."[15] Title I of the ADA provides the general rule prohibiting disability discrimination:

---

7. *See Americans With Disabilities Act of 1990 Charges*, *supra* note 6.

8. Ronald Turner, *The Americans with Disabilities Act and the Workplace: A Study of the Supreme Court's Disabling Choices and Decisions*, 60 N.Y.U. ANN. SURV. AM. L. 379, 385 (2004).

9. *See* American Bar Association at www.abanet.org. *See also* "Washington, D.C. Employment Law Letter" (Vol. 4, Issue 4, September 2003).

10. David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1 at *18 (2003) (noting that such costs "depend[ ] . . . on the complexity and location of the case").

11. *Id.*

12. *Id.*

13. *See A Primer for Small Businesses*, *supra* note 2.

14. *Id.*

15. Stephen F. Befort, *Reasonable Accommodation and Reassignment under the Americans with Disabilities Act: Answers, Questions, and Suggested Solutions after* U. S. Airways, Inc. v. Barnett, 45 ARIZ. L. REV. 931, 932 (2003). A detailed discussion of what constitutes a "disability" including "who is a qualified individual" is beyond the scope of this article and is reserved for discussion in a future article.

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[16]

To successfully maintain a claim of violation of the ADA, the claimant must prove that (1) he or she has a disability; (2) that he or she is otherwise qualified for the job; and (3) that the employer either refused to make a reasonable accommodation for his or her disability or made an adverse employment decision regarding him or her solely because of his or her disability.[17]

With respect to an individual, the term "disability" means "a *physical or mental impairment* that *substantially limits* one or more of the *major life*

16. 42 U.S.C. § 12112(a) (2006); *see also* 42 U.S.C. §12112(b) (2006) (stating that unlawful discrimination includes: "(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee; (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this . . . [title] (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs); (3) utilizing standards, criteria, or methods of administration (A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control; (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association; (5) (A) not making 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 of such covered entity; or (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant; (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure)").

17. Roush v. Weastec, Inc., 96 F.3d 840, 843 (6th Cir. 1996) (citing Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758, 763 (5th Cir. 1996); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1265 (4th Cir. 1995). In *Roush,* the plaintiff suffered from kidney and bladder conditions that resulted in frequent absenteeism. The court considered the kidney and bladder issues separately finding (1) the kidney condition did not amount to an ADA-covered disability as this impairment did not presently substantially limit the major life activity of working and the fact that it may recur is not sufficient to establish that the condition is substantially limiting; and (2) the bladder condition, including bladder infections, may amount to a substantial limitation on the major life activity of working. The court remanded the second issue back to the district court (the district court only considered whether her bladder infections constituted a disability). *Id.* at 843.

activities of such individual; a record of such an impairment; or being regarded as having such an impairment."[18] "Physical or mental impairment" is defined to mean,

> any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[19]

"Major life activities" include functions "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[20]

The term "substantially limits" means that the "disabled individual is unable to perform a major life activity that the average person in the general population can perform with little or no difficulty."[21] Also, an individual may be "significantly restricted as to the condition, manner or duration under which he or she can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[22] In "determining whether an individual is substantially limited in a major life activity," the following factors should be considered: "the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or the expected permanent or long term impact of or resulting

18. 42 U.S.C. § 12102(2) (2006) (emphasis added).
19. 29 C.F.R. § 1630.2(h) (2007).
20. 29 C.F.R. § 1630.2(i) (2007).
21. 29 C.F.R. § 1630.2(j)(1)(i) (2007).
22. 29 C.F.R. § 1630.2(j)(1)(ii) (2007).

from the impairment."[23] "Temporary, non-chronic impairments" with no long-term impact are not generally considered to be substantially limiting.[24]

Notwithstanding the EEOC's prior pronouncement that mitigating measures should not be considered in the determination of whether an individual is substantially limited, the United States Supreme Court held otherwise in *Sutton v. United Air Lines, Inc.*, in which two sisters who were denied employment due to myopia, but who had 20/20 vision once corrected were not disabled under the ADA.[25] In *Sutton*, the Court reiterated the tenet outlined in the above-referenced regulation that "'inability' to perform a single, particular job is not a substantial limitation upon working.'"[26]

Accordingly, the EEOC currently recognizes that a person who experiences no substantial limitation in any major life activity when using a mitigating measure may not meet the ADA's first definition of "disability" (i.e., a physical or mental impairment that substantially limits a major life activity).[27]

B. Who is a "qualified individual with a disability?"

"The term "'qualified individual with a disability' means 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."[28] "Consideration [is] given to the employer's judgment as to what functions of a job are essential [ ]."[29] "If an employer

23. 29 C.F.R. § 1630.2(j)(2) (2007). With respect to the major life activity of working, this section of the regulations goes onto note that "the term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.* This section also outlines factors that may be "considered in determining whether an individual is substantially limited in the major life activity of 'working' including the geographical area to which the individual has reasonable access; the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes)." *Id.*

24. *See, e.g.*, Sanders v. Arneson Products, Inc., 91 F.3d 1351, 1354 (9th Cir. 1994) *cert. denied* 520 U.S. 1116 (1997) ("Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza."); *see also* 29 C.F.R. §1630.2(j) (2007) (temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities).

25. 527 U.S. 471 (1999).

26. *Id.* at 493 (quoting 29 C.F.R. §1630.2(j)(3)(i) (2007)).

27. *See, e.g.*, http://www.eeoc.gov/facts/blindness.html.

28. 42 U.S.C. § 12111(8) (2006).

29. *Id.*

has prepared a written description before advertising or interviewing applicants for the job, this description is considered evidence of the essential functions of the job."[30]

C. *What is the requirement of reasonable accommodation?*

"As the U. S. Supreme Court has clarified, and narrowed, who is disabled for purposes of the ADA, the focus of attention now is shifting to the reasonable accommodation provision."[31]

"Adverse employment decisions[32] include refusing to make reasonable accommodations for (an employee)'s disabilities."[33] "The ADA specifically provides that an employer 'discriminates' against a qualified individual with a disability when the employer does not mak[e] reasonable accommodations to the known physical or mental limitations of the individual unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [employer]."[34] The term 'reasonable accommodation' further "includes the employer's reasonable efforts to assist the employee and to communicate with the employee in good faith . . . under what has been termed a duty to engage in the interactive process."[35]

A "reasonable accommodation" may:

> include making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification

30. *Id.*

31. Befort, *supra* note 15, at 933. It should be noted that "in disparate treatment cases, a similarly-situated individual is treated differently because of his disability than less- or non-disabled individuals. The key element is discriminatory intent. . . . As such, the *McDonnell Douglas*, three-step approach is applied where no direct evidence of discrimination is available. . . . The failure to make reasonable accommodations in the employment of a disabled employee is a separate form of prohibited discrimination. . . . Reasonable accommodation claims are not evaluated under the McDonnell Douglas burden-shifting analysis." Peebles v. Potter, 354 F.3d 761, 766 (8th Cir. 2003).

32. Approximately 2,995 of the 22,555 charges of retaliation filed in 2006 with the EEOC were filed under non-Title VII causes of action. *See* The United States Equal Opportunity Employment Commission, *Charge Statistics FY 1997 Through FY 2007*, *available at* http://www.eeoc.gov/stats/charges.html (last modified Feb. 26, 2008). Retaliation as a cause of action is not discussed herein, but must be recognized as another cause of action available to employees who also alleged disability discrimination in employment. To establish a *prima facie* case of retaliation, the employee must show that he or she engaged in a protected activity, that his or her employer took adverse action against him or her, and that there existed a causal connection between the protected activity and the adverse action. Rhoads v. FDIC, 257 F.3d 373, 392 (4th Cir. 2001), *cert. denied* 535 U.S. 933 (2002). "The employer then has the burden to rebut the presumption of retaliation by articulating a legitimate nonretaliatory reason for its actions. . . . If the employer does so, the plaintiff [employee] must demonstrate that the proffered reason is a pretext for forbidden retaliation. . . . The plaintiff [employee] always bears the ultimate burden of persuading the trier of fact that he or she was the victim of retaliation." *Id.* (citing Haulbrook v. Michelin N. Am., 252 F.3d 696, 705–07 (4th Cir. 2001); Beall v. Abbott Labs., 130 F.3d 614, 619 (4th Cir. 1997)).

33. Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 761–62 (3d Cir. 2004).

34. *Id.* (quoting Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999)).

35. *Id.* (quoting Mengine v. Runyon, 114 F.3d 415, 416 (3d Cir. 1997)).

> of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[36]

In general, an accommodation is 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.[37]

As a general rule, "the individual with a disability (as he or she has the most knowledge about the need for reasonable accommodation) must inform the employer that an accommodation is needed."[38] An employer may not assert that it never received a request for reasonable accommodation as a defense to a claim of failure to provide such accommodation, if it actively discouraged an individual from making such a request.[39]

D. Who has the burden of proof?

"Under the ADA, the employer avoids all liability if the employee would have been fired because he or she was incapable of performing the essential functions of the job, and the burden of proof on the issue of capability is not on the employer, but on the plaintiff [employee]."[40]

To prevail on a claim of disability discrimination under the ADA,

> . . . an aggrieved employee must establish that he has a disability as defined in 42 U.S.C. §12102(2); that he is qualified to perform the essential functions of the job, with or without reasonable accommodation; and that he has suffered adverse employment action because of his disability. . . . The employee at all times retains the burden of persuading the trier of fact that he has been the victim of illegal discrimination due to his disability. . . . However, once the plaintiff makes a facial showing that reasonable accommodation is possible, the burden of *production* shifts to the employer to show that it is unable to accommodate the employee. . . . If the employer shows that the employee cannot perform the essential functions of the job even with reasonable accommodation, the employee must rebut that showing with evidence of his individual capabilities. . . . At that point, the

36. 42 U.S.C. § 12111(9) (2006); 29 C.F.R. § 1630.2(o) (2007).

37. 29 C.F.R. § 1630.2(o) (2007).

38. The U.S. Equal Opportunity Employment Commission, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act: General Principles* (Oct., 2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html#requesting [hereinafter *Enforcement Guidance*].

39. *Id.* at n.108.

40. Miller v. Ill. Dep't of Corr., 107 F.3d 483, 484 (7th Cir. 1997) (citing Weiler v. Household Fin. Corp., 101 F.3d 519, 524 (7th Cir. 1996)).

> employee's burden merges with his ultimate burden of persuading the trier of fact that he has suffered unlawful discrimination.[41]

An employer generally bears no burden of production or proof if the plaintiff-employee cannot establish that he or she is disabled.[42]

The approach of some courts suggests that the employee's burden of proof is not a heavy one—it is enough for an employee to suggest the existence of a plausible accommodation, the costs of which, facially, do not exceed the benefits.[43] Once the employee has done this, he or she has made a *prima facie* showing that a reasonable accommodation is available and the risk of non-persuasion falls on the employer.[44] With other courts, the burden remains with the employee to prove his or her case by a preponderance of the evidence.[45] Nonetheless, the employee still need only make a general or facial showing of reasonableness.[46]

E. Who must request accommodation?

In general, it is the responsibility of the individual with a disability to inform an employer that an accommodation is needed. "Once a qualified individual with a disability has requested a . . . reasonable accommodation, the employer must make a reasonable effort to determine the appropriateness of the accommodation."[47]

It is clear that "the EEOC has placed the initial burden of requesting an accommodation on the employee . .. and [t]he employer is not required to speculate as to the extent of the employee's disability or the employee's need or desire for an accommodation."[48] Such was the case for an employee who had lifting restrictions that were accommodated by employer until change in ownership of the business.[49] The new employer advised the employee that she would have to regularly lift 50+ pounds to which the employee responded that she could not do.[50] One month after informing

41. Benson v. Nw. Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995).

42. This test is not appropriate in every case, however. The test is inappropriate for cases in which the employer acknowledges that it relied on employee's handicap in making its employment decision. *See, e.g.*, Monette v. Elec. Data Sys., Corp., 90 F.3d 1173 (6th Cir. 1996).

43. Walton v. Mental Health Ass'n, 168 F.3d 661, 670 (3d Cir. 1999).

44. *Id.*

45. Barth v. Gelb, 2 F.3d 1180, 1186 (D.C. Cir. 1993) (applying parallel provisions of the Rehabilitation Act of 1973, which prohibits any federal agency from discriminating on the basis of disability ("handicap") and requires reasonable accommodation as required under the ADA). Since the ADA expands the provisions of the Rehabilitation Act to the general economy, decisions interpreting that Act are applicable to interpreting the ADA. *See e.g.*, Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1994).

46. *Vande Zande*, 44 F.3d at 542.

47. Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1046 (6th Cir. 1998) (quoting 29 C.F.R. §1630.9 (2007)).

48. *Id.* at 1046–47.

49. Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1362 (11th Cir. 1999).

50. *Id.* at 1362.

her employer, the employee resigned without providing reason for resignation due ostensibly to the fact that she could not meet the new requirements.[51] The court found that the employee did not meet her burden, in part, as proscribed in 29 C.F.R. §1630.9, by resigning without explanation instead of requesting a reasonable accommodation.[52] The employee's failure to demand accommodation was fatal to her claim that her employer "discriminated against her by failing to provide a reasonable accommodation."[53]

F. For what must an employee ask when requesting accommodation?

An "employee's request for an accommodation must be sufficiently direct and specific, giving notice that (he or she) needs special accommodation."[54] "[T]he request must explain how the accommodation requested is linked to some disability."[55] "The employer has no duty to divine the need for a special accommodation where the employee merely makes a mundane request for a change at the workplace."[56] Moreover, the ADA does not require "the plaintiff [employee] to speak any magic words;" that is, "the employee need not mention the ADA or even the term 'accommodation.'"[57]

Recently, the Sixth Circuit held that summary judgment was appropriate for an employer when one of its former employees, as a matter of law, "failed to demonstrate that he was qualified to perform the essential functions of his Pharmacy Technician position" due to excessive absenteeism as regular attendance was an essential function of his position.[58] In *Brenneman*, the employee did not even mention his disability (i.e., diabetes) or request any accommodation until after his termination of employment was effectuated, even after the employee had prior instances of approved leave due to his diabetic condition.

The Third Circuit employed similar reasoning in *Conneen v. MBNA America Bank*.[59] The employee, a marketing production manager, was granted a temporary accommodation of one-hour delayed starting time due to treatment for depression.[60] Despite numerous conversations with her

51. *Id.*

52. *Id.* at 1364.

53. *Id.*

54. Reed v. Lepage Bakeries, Inc., 244 F.3d 254, 261 (1st Cir. 2001) (quoting Wayne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 795 (1st Cir. 1992)).

55. *Id.*

56. *Id.* (citing *Enforcement Guidance*, *supra* note 38 (an employee's request for new office chair because the current one is uncomfortable does not provide sufficient notice that accommodation is needed due to a disability).

57. Schmidt v. Safeway Inc., 864 F. Supp. 991, 997 (D. Or. 1994).

58. Brenneman v. Medcentral Health Sys., 366 F.3d 412, 420 (6th Cir. 2004) (the employee did not timely notify his supervisors upon the final absence that prompted his termination of employment and that the reason for such absence was due to his disability).

59. 334 F.3d 318 (3d Cir. 2002).

60. *Id.* at 321.

employer, the employee continued to be tardy on a regular basis, both during the time of the temporary accommodation and after.[61] In addition, her employer offered other accommodations (*e.g.*, transfer to non-managerial position), but she declined and maintained that there was nothing to prevent her from working her normal schedule including her regular starting time.[62] Notwithstanding this representation, the employee's tardiness problems continued and her employment was eventually terminated for excessive tardiness. The employee brought suit, in part alleging that her former employer had violated the ADA by withdrawing an accommodation that it had previously granted to her (i.e., allowing her to report to work one hour late).[63] The court held that there was no ADA violation by the employer because the employee did not engage in the interactive process in good faith.[64] Specifically, the court noted that (1) "she had previously requested and was granted accommodation" so she was aware of what needed to be done to request accommodation; (2) both the employee and the employer acknowledged that the initial accommodation was temporary, therefore, the employee knew that if her condition persisted, she would have to provide her employer further documentation; and (3) the employee actively misrepresented reasons for some tardiness, which included her explanations for her tardiness as traffic tie-ups and cleaning up after a pet.[65]

G. When does an employer have knowledge of an employee's disability?

An employer has knowledge of an employee's disability when it is advised by the employee of the existence of the disability, or where it receives the information from a third party including family member, physician, or co-worker. The notice need not be specific nor must it contain any specific request for an accommodation. It is enough to advise the employer that the employee has some physical or mental condition that may interfere with his or her employment. For example, where the employee's son advised the employer of his mother's hospitalization in a state psychiatric hospital, the court held that sufficient notice was given to trigger the interactive process and evaluation of the need for a reasonable accommodation.[66]

In contrast, consider an employee who had complained for some time that her position required two full-time employees and a student helper.[67] The employee was subsequently treated for depression, but refused to sign appropriate releases or provide information regarding the depression.[68] Her refusal to release information regarding the depression was held not to

61. *Id.* at 321–22.
62. *Id.* at 322.
63. *Id.* at 325.
64. *Id.* at 333.
65. *Id.* at 332–33.
66. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 314 (3d Cir. 1999).
67. Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1132 (7th Cir. 1996).
68. *Id.* at 1132-33.

trigger the interactive process or the evaluation of the need for a reasonable accommodation (even though the employer had provided accommodations for the employee's other, disclosed, disabilities by lightening her workload and making other adjustments to ease the known disabilities).[69]

H. What constitutes essential functions of a position?

The seven non-exclusive factors to weigh in determining if a function is "essential" are:

> (1) an employer's judgment that the function is essential;
>
> (2) written job descriptions;
>
> (3) the amount of time on the job devoted to performing the function;
>
> (4) the consequences of not requiring the employee to perform the function;
>
> (5) terms in a relevant labor agreement;
>
> (6) the work experience of those who have held the position in the past; and
>
> (7) the current work experience of those who hold similar jobs.[70]

The inquiry into whether a function is essential is highly fact-specific. In *Brickers v. Cleveland Board of Education*, a bus driver sought transfer to a bus attendant position due to back and leg pain as bus attendants were only employed on special education buses transporting handicapped students.[71] The court found that lifting was an essential function of a bus attendant's job (even though the need to lift may occur only in the case of an emergency such as an accident or fire).[72] The employee also argued that her employer was "required to offer some manner of accommodation," which was a bus route in which the likelihood that an occasion would arise for her to actually have to lift a child is minimized.[73] Such an argument was not persuasive to the court, which stated that:

> The ADA does not demand that an employer exempt a disabled employee from an essential function of the job as an accommodation. What (the employee) requests is not an accommodation, but rather an exemption and, as such, does

69. *Id.* at 1136.

70. Brown v. Chase Brass & Copper, Inc., 14 F. App'x 482 (6th Cir. 2001) (unpublished) (citing 29 C.F.R. § 1630.2(n)(3) (2000)).

71. 145 F.3d 846, 848 (6th Cir. 1998).

72. *Id.* at 849.

73. *Id.* at 850.

> not survive the threshold determination of whether she is a 'qualified individual with a disability.'[74]

The *Brickers* court noted, "[a] legally-defined job qualification is by its very nature an essential function under 42 U.S.C. §12111(8),[75] [regardless] of whether the employer adheres to that requirement in all cases."[76] Additionally, the EEOC admits that an employer may be required to alter when and/or how an essential function is to be performed.[77]

I. Must an employer create a new position or restructure a job?

It is well-settled that an employer is not required to create a new position or reallocate an essential function.[78] The Tenth Circuit recognized this concept in holding that the ADA does not require an employer to "create a new position to accommodate the disabled worker."[79]

Reversing the trial court's granting of summary judgment in favor of the defendant-employer on procedural grounds, the Eighth Circuit in *Benson v. Northwest Airlines, Inc.*, specifically noted that an employer is not required to restructure the essential functions of a job as a reasonable accommodation under the ADA.[80] In *Benson*, the employee was a mechanic working in the cargo bay of an aircraft when he suffered a relapse of brachial plexopathy, a rare neurological condition that caused severe pain in his left arm and shoulder.[81] After a period of hospitalization, the employee returned to work in the employer's recycling unit, where employees with work-related injuries were temporarily assigned until they could either return to their former positions or find alternate jobs within the company.[82] The employee's doctor advised the employer, in writing, that the employee never again should engage in work requiring extensive or repetitive use of his left arm or shoulder.[83] Pursuant to a collective bargaining agreement, the employee was bumped from the recycling position by a more senior employee, and briefly became a plant maintenance mechanic until he was

---

74. *Id.*

75. As defined within 42 U.S.C. §12111(8), the term "'qualified individual with a disability' means 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. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

76. *Id.*; *see also* Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995) ("Failure to require performance of essential functions in all cases does not entitle an ADA claimant to a similar extraordinary accommodation.").

77. *See* 29 C.F.R. §1630.2(o) (2008).

78. EEOC Interpretive Guidance on ADA 29 C.F.R. pt. 1630 App'x 1630.2(o); reprinted in EEOC Compliance Manual (BNA) No. 154, N:2091, §1630.2(o).

79. White v. York Int'l Corp., 45 F.3d 357, 362 (10th Cir. 1995).

80. *Benson*, 62 F.3d at 1112.

81. *Id.* at 1110.

82. *Id.*

83. *Id.*

disqualified from that job due to his doctor's recommended limitations.[84] After unsuccessfully applying for a position as foreman in the recycling department, the employee was discharged.[85] Conceding that the employee had the skill, experience, education, and job-related requirements to hold the position of mechanic, the trial court held that the employee had failed to establish that he could perform that job with a reasonable accommodation, and that the employee's ability to work as a dispatcher or foreman did not equate to being able to perform the essential functions of a mechanic.[86] The trial court found that the employee had failed to establish, as a matter of law, that he was a "qualified individual with a disability."[87] The Eighth Circuit reversed the trial court's ruling, noting that the lower court had improperly placed the entire burden of proof on the employee instead of recognizing the requirement that once the employee had established his *prima facie* case, the burden then shifts to the employer to articulate the reasons that no reasonable accommodation can be made.[88] Specifically noting that the employer was not required to eliminate an essential job function under the ADA, the court nevertheless held that the lower court's improper application of the burden of proof precluded the issue from ever being addressed.[89]

A recent Sixth Circuit case involved an employee who was a finish helper with eight specific jobs who, for a period of fifteen years, had asked the employer to establish a rotation system whereby all finish helpers would rotate through all eight jobs within that job classification.[90] The employer never adopted his recommendation.[91] The employee presented a statement from his physician certifying his total incapacitation due to carpal tunnel syndrome in both hands.[92] The employee had surgery and took a three-month leave of absence, after which he returned to work, and then, subsequently, took another leave of absence ten months later for the same medical condition.[93] The employee again returned to work, this time with permanent restrictions, and sought transfer to a "light-duty" job held by another employee.[94] When his employer refused to remove the second employee from his job, the employee's employment ended.[95] The court held that the employee never requested the establishment of a rotation system as an accommodation.[96] While the employee's proposed job moves

84. *Id.*
85. *Benson*, 62 F.3d at 1110–11.
86. *Id.* at 1111.
87. *Id.*
88. *Id.* at 1114.
89. *Id.*
90. *Brown*, 14 F. App'x at 484.
91. *Id.*
92. *Id.*
93. *Brown*, 14 F. App'x at 484.
94. *Id.* at 485.
95. *Id.*
96. *Id.* at 487.

"[w]ould not have reassigned anyone out of the broad finish helper classification, they would have significantly redistributed tasks among [the] workers who held different jobs," which the court thought was unreasonable.[97]

J. Is an employer required to provide assistance from others?

Job restructuring is a requirement of the employer under ADA mandates in certain circumstances.[98] However, job restructuring only pertains to the restructuring of non-essential duties of a position.[99] The ADA does not require employers to accommodate individuals by shifting an essential job function onto other workers.[100]

In *Bratten*, the employee contending disability discrimination was an auto mechanic who sustained a work-related injury that left him with permanent limited use of his back, arms, and shoulders.[101] The injury necessitated a leave of absence as his work required constant use of hand tools, power tools, and hand-intensive work on a repetitive basis.[102] After his return to work from the leave, of absence, the employee admitted that he could not perform 20% of his work because his disability prevented him from doing overhead work.[103] The employee requested that a co-worker come to his work station and perform overhead work for him on an *ad hoc* basis.[104] When the employee provided his employer with a letter from his doctor imposing restrictions on his ability to work, the employer placed him on medical leave of absence pending a review by the employer's physician who found that employee's condition would not improve.[105] As a result, the employer filled the employee's position through its internal job-posting program.[106] The Sixth Circuit noted that courts have continually held that "[e]mployers are not required to assign existing employees or hire

97. *Id.* at 488; *see also* Bratten v. SSI Services, Inc., 185 F.3d 625, 632 (6th Cir. 1999). While discussed in more detail *infra* as to assistance from other employees as a form of reasonable accommodation, the *Bratten* court held that job restructuring was a reasonable accommodation only when the restructuring involves non-essential or marginal functions of the job.

98. 29 C.F.R. §1630.2(o)(2)(ii) (2008) ("Reasonable accommodation may include . . . : Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.").

99. *Benson*, 62 F.3d at 1112–13; *see also* Henchey v. Town of N. Greenbush, 831 F. Supp. 960, 967 (N.D.N.Y. 1993).

100. *Bratten*, 185 F.3d at 633.

101. *Id.* at 627–28.

102. *Id.* at 629.

103. *Id.* at 629. It is interesting to note that his employer contended that the employee could not perform 40-50% of his work, but the court commented that it was "not concerned with the quantity of the tasks at issue, but rather whether the duties constitute essential functions of the position." *Id.* at 633n.2.

104. *Bratten*, 185 F.3d at 629.

105. *Id.*

106. *Id.*

new employees to perform certain functions or duties of a disabled employee's job that the employee cannot perform . . . [because] of his disability."[107]

K. Must an employer utilize temporary positions?

The ADA does not compel an employer to change temporary positions it has earmarked for another purpose (*e.g.*, issues related to workers compensation) into permanent positions for its disabled employees. As the *Dalton* court explained, "to hold otherwise would be to require [the employer] to create new full-time positions to accommodate its disabled employees, a course of action not required under the ADA."[108]

The Seventh Circuit has held that assignment to a temporary position may act as a reasonable accommodation only where both the employer and the employee are aware that the position is temporary.[109] In *Bever*, the employee was a long-time assembler who had a leg amputated due to cancer and later the employee received a prosthetic limb.[110] The employee's job had two main components: (1) a physically-strenuous element, and (2) a more passive element involving running a machine.[111] When the employee returned to work with his prosthetic leg, an external rehabilitation agency determined that the employee could not perform the more physically-strenuous element of the assembler job, but he was capable of safely running the machine, which the employee did for a over a year.[112] Subsequently, the employer determined that since the employee could not perform both elements of the assembler job, he should be terminated.[113] At trial, a jury determined that the employee's termination was in violation of the ADA since he had been performing the essential functions of the assembler's job after the job was restructured to only involve the operation of the machine.[114] The jury determined, and the Seventh Circuit agreed, that since there was no clear indication that the restructure was temporary, the employer could not later claim that the reassignment was only temporary, and the employee was still required to perform all the essential functions of the assembler job.[115]

---

107. *Id.* at 632; *see, e.g.,* Cochrum v. Old Ben Coal Co., 102 F.3d 908, 913 (7th Cir. 1996) ("to be protected under the ADA, [the employee] must be qualified to do the job and, with reasonable accommodations for his disability, *be able to perform the essential functions of that job . . . [which he currently holds.*]") (emphasis added). The *Cochrum* court noted that a co-worker's performance of overhead work for the employee would essentially amount to the helper *de facto* performing the employee's job.

108. Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 680 (7th Cir. 1997).

109. Bever v. Titan Wheel Int'l, 6 F. App'x 401 (7th Cir. 2001) (unpublished). *See also* discussion of the interactive process, *infra* at page 29.

110. *Id.* at 402.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Bever*, 6 F. App'x at 402.

115. *Id.* at 406.

L. Must the employer permit working from home as a reasonable accommodation?

Allowing an employee to work at home, which may be referred to as telework or telecommuting, may be a "reasonable accommodation where an employee's disability prevents him or her from successfully performing the job on-site, and the job (or parts of the job) can be performed at home without causing significant difficulty or expense."[116] According to the EEOC,

> An employer and employee first need to identify and review all of the essential job functions (i.e., those tasks that are fundamental to performing a specific job). An employer does not have to remove any essential job duties to permit an employee to work at home. However, it may need to reassign some minor job duties or marginal functions if they cannot be performed outside the workplace and they are the only obstacle to permitting an employee to work at home. After determining what functions are essential, the employer and the individual with a disability should determine whether some or all of the functions can be performed at home. For some jobs, the essential duties can only be performed in the workplace. For example, food servers, cashiers, and truck drivers cannot perform their essential duties from home. But, in many other jobs some or all of the duties can be performed at home. Several factors should be considered in determining the feasibility of working at home, including the employer's ability to supervise the employee adequately, and whether any duties require use of certain equipment or tools that cannot be replicated at home. Other critical considerations include whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace. An employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. Frequently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.[117]

116. *See* The Equal Opportunity Employment Commission, *Work at Home/Telework as a Reasonable Accomodation*, *available at* www.eeoc.gov/facts/telework.html (last modified Oct. 27, 2005).

117. *Id.* at Question 4.

Courts have taken differing approaches toward working at home as an accommodation. The Seventh Circuit has found that an employer is not required to allow disabled workers to work at home except in extraordinary circumstances while the District of Columbia Circuit (with subsequent approval by the Ninth Circuit) has held that an employer must consider requested accommodation of working at home.[118]

In *Smith v. Ameritech*, the Sixth Circuit held that an employer is not required to permit an employee to work at home as an accommodation because the employee's productivity is inevitably reduced.[119] In *Smith*, an employee who worked as an advertising sales representative injured his back in a car accident while working.[120] Despite the injury, the employee worked for eighteen months until he took a disability leave of absence.[121] At issue was the employee's contesting of the termination of his short-term disability benefits as well as an ADA violation for his employer's alleged failure to accommodate.[122] The employee was no longer able to lift yellow page books and his employer had unsuccessfully tried to find alternate work within his request for sedentary employment and other physical restrictions.[123] The employee argued that his employer could have reassigned him to a collections agent position, and he could be allowed to work from home as the company did with another employee who had multiple sclerosis.[124] The court held that the employee, in effect, was asking for two accommodations, a transfer to a new position and the ability to work from home, and that he failed to show that either was reasonable in this case.[125] The court reiterated certain principles including:

> (1) an employer is not required to create a new position for the disabled employee who can no longer perform the essential functions of his or her job;
>
> (2) the ADA does not require employer to reassign an employee to a position that was not vacant; and
>
> (3) the ADA does not require that employer allow disabled workers to work at home when their productivity is inevitably reduced.[126]

---

118. *Compare Vande Zande* 44 F.3d at 544–45, *with* Langon v. Dep't of Health and Human Services, 959 F.2d 1053, 1060–61 (D.C. Cir. 1992) (cited with approval in Buckingham v. United States, 998 F.2d 735, 740 (9th Cir. 1993).

119. 129 F.3d 857 (6th Cir. 1997).

120. *Id.* at 860.

121. *Id.*

122. *Id.* at 862.

123. *Id.* at 866.

124. *Smith*, 129 F.3d at 866.

125. *Id.*

126. *Id.* at 867 (quoting *Vande Zande*, 44 F.3d at 545); *see also* Tyndall v. Nat'l Educ. Centers, Inc., 31 F.3d 209, 213 (4th Cir. 1994) (quoting Winbley v. Bolger, 642 F. Supp. 481 (W.D. Tenn. 1986), *aff'd*, 831 F.2d 298 (6th Cir. 1987) ("except in the unusual case where an employee can effectively perform all work-related duties at home, an employee who does not come to work cannot perform *any* of his job functions, essential or otherwise.")).

M. Is an employer that provides an accommodation not required by the ADA to one employee consequentially obligated to provide the same accommodation to other disabled employees?

In referencing a 1998 decision of the United States Supreme Court, the Sixth Circuit held that provision of an accommodation to one disabled employee does not automatically entitle a plaintiff to the same accommodation.[127] In this decision, the Sixth Circuit also noted a similar pronouncement by the Fourth Circuit in *Myers v. Hose* when it held that "the fact that certain accommodations may have been offered . . . to some employees as a matter of good faith does not mean that they must be extended to [plaintiff] as a matter of law."[128]

N. Must an employer reassign the employee to a vacant position?[129]

Reassignment accommodation has proven to be one of the most difficult and controversial of all accommodation issues.[130] If an otherwise disabled person can perform to the employer's satisfaction with a reasonable accommodation provided for his or her disability, the employer is required to provide the accommodation.[131] One form of the required accommodation under this standard is reassignment to a vacant position.[132] Reassignment has been described as the "reasonable accommodation of last resort."[133] The EEOC's Enforcement Guidance "provides that reassignment is required only after it has been determined that":

> (1) there is no effective accommodation that will enable the employee to perform the essential functions of his/her current position; and
>
> (2) all other reasonable accommodation would impose undue hardship.[134]

In its decision in *Gile*, the Seventh Circuit referenced the *Dalton* court in noting that "an employer is 'obligated to identify the full range of alternative positions for which the individual satisfies the employer's legitimate, nondiscriminatory prerequisites' and consider 'transferring the employee to any of these other jobs, including those that would represent a demotion.'"[135]

---

127. *Smith*, 129 F.3d at 867 (citing Traynor v. Turnage, 485 U.S. 535, 549 (1988) ("holding with regard to ADA's counterpart for federal employers, that 'there is nothing in the Rehabilitation Act that requires any benefit extended to one category of handicapped persons be extended to all categories of handicapped persons.'").

128. *Smith*, 129 F.3d at 867–68 (citing Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995)).

129. *See* Befort, *supra* note 15, at 942 (stating that reassignment as a reasonable accommodation is required only for current employees, not applicants).

130. *Id.*

131. *See, e.g.*, Gile v. United Airlines, Inc., 213 F.3d 365 (7th Cir. 2000).

132. 42 U.S.C. §12111(9)(B) (2006); *see also, e.g.*, *Dalton*, 141 F.3d at 680.

133. *See* Befort, *supra* note 15, at 942.

134. *Id.*

135. *Gile*, 213 F.3d at 374 (citing *Dalton*, 141 F.3d at 678).

Additionally, employers should reassign an employee to a position if it becomes vacant within a reasonable amount of time.[136] The determination of what comprises a "reasonable amount of time" is to be made on a case-by-case basis and is to "be determined in light of the totality of the circumstances."[137] The Third Circuit recently recognized this proposition in connection with a disability case brought by a bus driver who suffered from transient ischemic attacks (TIA's), also known as mini-strokes.[138]

In *Boykin*, the bus driver requested an accommodation from his employer after the employer's physician revoked his medical certification as a result of the employee suffering a TIA while driving a bus.[139] The statement from the employer's physician mandated that the driver be TIA-free for one year before being permitted to drive commercial vehicles.[140] The employer offered the driver the position of bus cleaner that was the only open position at that time, but the employee refused and he was terminated from employment.[141] Six months later, the employer interviewed, but did not hire, the employee for a new dispatcher position.[142] The terminated employee filed suit, contending that he should be entitled to the new dispatcher position without requiring him to compete with other candidates, but the court did not agree.[143] The court noted, as outlined in the regulations, that "employers should reassign an employee to a position if it becomes vacant within a reasonable period of time" and that the determination of reasonableness is to be made on a case-by-case basis.[144] The court compared cases wherein thirty-seven days was held to be a reasonable amount of time, but well over one year or even six months were unreasonable periods of time.[145] The court further noted that employers are not

136. *Myers*, 50 F.3d at 283. *Myers* is not without criticism, however, as to the issue of reassignment to a vacant position. In *Bratten*, the Sixth Circuit noted that *Myers* relied on case law interpreting the Rehabilitation Act before the statute was amended in 1992. *See Bratten*, 185 F.3d at 633. Prior to 1992, the Rehabilitation Act did not include reassignment to a vacant position as a reasonable accommodation. After the ADA was enacted, Congress amended the Rehabilitation Act to parallel the standards for employment discrimination under the ADA. *See e.g.*, Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996). The *Bratten* court therefore rejected employer's contention and held that reassignment may be required to reasonably accommodate an employee with a disability. *Bratten*, 185 F.3d at 635.

137. 29 C.F.R. § 1630.2(o)(3) (2008).

138. Boykin v. ATC/Vancom of Colo., 247 F.3d 1061, 1065 (10th Cir. 2001).

139. *Id.* at 1065.

140. *Id.*

141. *Id.*

142. *Id.* at 1063.

143. *Id.* at 1065.

144. *Boykin*, 247 F.3d at 1064–65; *see also* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1174–75 (10th Cir. 1999) (Under the ADA, a reasonable accommodation may include reassignment to a vacant position for which the employee is qualified. A vacant position includes not only positions that are vacant at a particular point in time, but also includes positions that the employer "reasonably anticipates will become vacant in the fairly immediate future.").

145. *Boykin*, 247 F.3d at 1065 (citing *Monette*, 90 F.3d at 1187 (a period of thirty-seven days has been held to be a reasonable amount of time)); Hoskins v. Oakland County Sheriff's Dep't, 227 F.3d 719, 729 (6th Cir. 2000) (unreasonable to require employer to assign employee to new position that became available "well over a year" after employer became aware of disability); Kiphart v. Saturn Corp., 74 F. Supp. 2d 769, 782 (M.D. Tenn. 1999) (as a matter of law, the 1,300 days employer sought new position was "well in excess of the reasonable amount of time required by the ADA"); Scheer v.

obligated to retain a disabled employee on unpaid leave indefinitely or for an excessive amount of time.[146] The EEOC suggests that six months is beyond a "reasonable amount of time."[147]

Within one year of *Boykin*, the United States Supreme Court considered the issue of assignment as a reasonable accommodation.[148] At issue was an employee, a cargo handler for the airline-employer, who had injured his back, resulting in his transfer to a less physically demanding mailroom position.[149] Later, consistent with long-standing policy of the employer, his new position became open to a seniority-based bidding program under the airline's well-established seniority system.[150] When other non-disabled employees planned to bid under this program, the employee requested that the airline allow him to remain in the mailroom position, notwithstanding the seniority program, as an accommodation to his disability.[151] The airline refused and, when a more senior employee was transferred to the mailroom, the employee lost his job.[152]

The question presented to the Court was whether the "ADA requires an employer to reassign a disabled employee to a position as a 'reasonable accommodation' even though another employee is entitled to hold the position under the employer's *bona fide* and established seniority system."[153] The Court held that an employer is not required to accommodate an employee by reassigning him or her to another job if it conflicts with seniority provisions unless there is "more" (i.e., "the plaintiff [employee] must present evidence of that 'more,' namely special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable").[154]

O. Does the ADA require promotion or special training to disabled employees?

The ADA "does not require employers to offer special training to disabled employees."[155] The Seventh Circuit was asked to consider this issue when an employee was no longer able to perform her job as a door-to-door insurance sales employee.[156] She wanted her employer to train her so that

City of Cedar Rapids, 956 F. Supp. 1496, 1501–02 (N.D. Iowa 1997) (request that position be kept open indefinitely until plaintiff had been seizure-free for six months was not reasonable accommodation).

146. *Boykin*, 247 F.3d at 1065 (Taylor v. Pepsi-Cola Co., 196 F.3d 1106, 1110 (10th Cir. 1999) (Keeping a plaintiff on indefinite leave is unreasonable where he had informed employer he "could *not* advise when and under what conditions he could return to any work.").

147. *See Enforcement Guidance, supra* note 38, at Question 24, Example D (Oct. 2002).

148. U.S. Airways v. Barnett, 535 U.S. 391, 393–94 (2002).

149. *Id.* at 394.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Barnett*, 535 U.S. at 395–96.

154. *Id.* at 406.

155. Williams v. United Ins. Co. of Am., 253 F.3d 280, 283 (7th Cir. 2001).

156. *Id.* at 281.

she could become qualified for promotion to the position of sales manager.[157] The court disagreed with the employee's request noting that:

> the duty of reasonable accommodation may require the employer to reconfigure the workplace to enable a disabled worker to cope with her disability, but it does not require the employer to reconfigure the disabled worker. A blind person cannot insist that her employer teach her Braille, though she may be able to insist that her employer provide certain signage in Braille to enable her to navigate the workplace.[158]

P. Is an employer required to provide an indefinite leave of absence?

The ADA does not require an employer to give an employee an indefinite leave of absence when the employee cannot provide the expected duration of her impairment.[159] The Tenth Circuit has agreed, holding that the determination of exactly how long an employer should retain an employee on indefinite or medical leave pending the availability of a position that would accommodate the employee's disability, or how long after termination an employee should continue to be entitled to immediate placement when a position he can fill becomes vacant, must be made on a case-by-case basis.[160]

Q. Must the employer provide the accommodation requested by the employee?

In determining whether an accommodation is reasonable, the employer must consider:

> (1) the particular job involved, its purpose, and its essential functions;
>
> (2) the employee's limitations and how those limitations can be overcome;
>
> (3) the effectiveness an accommodation would have in enabling the individual to perform the job; and
>
> (4) the preference of the employee.[161]

An employer is not required to give employee the reassignment of his or her choice. Rather, "the goal is to identify an accommodation that allows the employee to perform the job effectively, not to provide the job of the employee's choice."[162]

Additionally, a disabled employee is "not required to accept an accommodation," but if he or she chooses to reject the accommodation and

157. *Id.*
158. *Id.* at 282–83.
159. *Boykin*, 247 F.3d at 1065.
160. *Id.*; *see also Monette*, 90 F.3d at 1188.
161. 29 C.F.R. § 1630.9(a), app. (2008).
162. Connolly v. Entex Info. Services, Inc., 27 F. App'x 876, 878 (9th Cir. 2001).

he or she "cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability."[163]

Consider the case of a police officer who was injured while apprehending criminals.[164] He had a number of absences because of his injuries (i.e., between 17 and 26 days of absence per year).[165] He and his employer disagreed as to whether he could use his injury leave for his absences or whether he had to first exhaust his sick leave.[166] Following a union grievance over this issue, including alleged deterioration in his working relationships with his supervisors, the employee retired in exchange for a $4600 settlement, the approximate value of the restoration of his sick leave.[167] The employee and his health care provider stated that he was permanently and partially disabled, and the employee sought and received disability benefits.[168] The employee then filed suit claiming, *inter alia*, that his alleged forced retirement amounted to a constructive discharge.[169] He also claimed that he was harassed because of his disability and disability-related absences from work.[170] The employee further claimed that his employer refused to accommodate him by not letting him work the 11:00 p.m. to 7:00 a.m. shift and by not transferring him to a detective position, as he claimed that both alternatives were less stressful.[171] His employer had offered for the employee to work the desk job within the department (i.e., less stress and no effect on seniority, pay, or benefits).[172] The employee did not want the desk job because he said it was used as punishment, was less prestigious, and had diminished material responsibilities.[173] Instead, he wanted to be a police officer on the outside, not on the inside.[174] His supervisor felt that the employee was looking for a position where he did not have to come to work every day.[175] The district court found that the employer's offer of desk job was a reasonable accommodation noting that:

> [i]t is well settled that an employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided. [If an employee rejects the offered reasonable accommodation] that is necessary to enable the individual to perform the essential

163. 29 C.F.R. § 1630.9(d) (2008).
164. Keever v. City of Middletown, 145 F.3d 809, 809 (6th Cir. 1998).
165. *Id.*
166. *Id.*
167. *Id.* at 810.
168. *Id.*
169. *Keever*, 145 F.3d at 811.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 812.
174. *Keever*, 145 F.3d at 811.
175. *Id.*

> functions of the position . . . the individual will not be considered a qualified individual with a disability.[176]

R. What is the interactive process and what does it require?

"'The ADA itself does not refer to the interactive process,' but does require employers to 'make reasonable accommodations' under some circumstances for qualified individuals."[177]

> With respect to what constitutes reasonable accommodation the EEOC regulations indicate that it may be necessary [for the employer] to initiate an informal interactive process with [the employee]. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.[178]

The employer and the employee both have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith.[179] The Third Circuit has recognized that:

> the interactive process does not dictate that any particular concession must be made by the employer; nor does the process remove the employee's burden of showing that a particular accommodation rejected by the employer would have made the employee qualified to perform the job's essential functions . . . [a]ll the interactive process requires is that employers make a good-faith effort to seek accommodations.[180]

In other words, because "employers have a duty to help the disabled employee devise accommodations, an employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations."[181] The interactive process "may not be necessary if it is clear to

176. *Id.* at 812 (citing Hankins v. The Gap, 84 F.3d 797, 801 (6th Cir. 1996)). In *Hankins*, a warehouse employee suffered from stress-related migraine headaches and requested to be moved to a less stressful area of the warehouse. *Hankins*, 84 F.3d at 799. Instead of transferring her, the employer found that the employee was more adequately accommodated by the employer's medical and leave policies. *Id.* Eventually, the employee was terminated and she sued claiming her employer had not reasonably accommodated her disability. *Id.* at 799–800. The court held that the employer had made a reasonable accommodation and even if the employee's accommodation request was also reasonable, the employer had the discretion to choose which accommodation to provide. *Id.* at 797.

177. *Williams*, 380 F.3d at 771 (citing Shapiro v. Township of Lakewood, 292 F.3d 356, 359 (3d Cir. 2002)).

178. *Id.* at 771 (citing 29 C.F.R. §1630.2(o)(3) (2008)).

179. *Id.* (citing Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997)); *see also* Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1111 (9th Cir. 2000).

180. *See Taylor*, 184 F.3d at 317.

181. *Id.* at 317–18.

both parties involved what accommodation will work . . . because sometimes the accommodation is obvious" (*e.g.*, an employee confined to a wheelchair whose desk needs to be elevated with blocks so that her wheelchair will slide under it) and on other occasions, the accommodation is impossible.[182]

An employee can demonstrate that his or her employer breached its duty to provide reasonable accommodation because it failed to act in good faith in the interactive process by showing:

> (1) the employer knew about the employee's disability;
>
> (2) the employee requested accommodation or assistance for his or her disability;
>
> (3) the employer did not make a good faith effort to assist the employee in
> seeking accommodations; and
>
> (4) the employee could have been reasonably accommodated but for the employer's lack of good faith.[183]

But, the employee must show that a reasonable accommodation was possible.[184]

In *Williams*, the employee was a police officer who was treated for psychological conditions including depression.[185] The employee requested assignment to the training unit or radio room as accommodation for his restricted duty release, but his employer instead offered him an extended unpaid leave of absence.[186] The court found that the employee could have been accommodated with the training unit or radio room assignment but for the employer's failure to engage in good faith in the interactive process.[187] Good faith may be demonstrated by meeting with the employee, obtaining information about the disability and/or condition, obtaining input from the employee as to particular wants and/or needs, at least considering the employee's requests, and providing other choices (particularly if the employee's ideas may prove to be too burdensome to the employer).[188]

The Sixth Circuit decided a case wherein upon an employee's return from the latest of a series of medical leaves of absence, the only request she presented was for her employer to furnish her with a conveyor to assist

182. *Id.* at 319.

183. *Williams*, 380 F.3d at 772 (citing *Taylor*, 184 F.3d at 319–20); *see also* Montoya v. State of N.M., 2000 WL 216593, *3. (unpublished opinion)).

184. *Id.* (citing Donahue v. CONRAIL, 224 F.3d 226, 234 (3d Cir. 2000)); *see also Taylor*, 184 F.3d at 319–20.

185. *Williams*, 380 F.3d at 756.

186. *Id.* at 757–58.

187. *Id.* at 776.

188. *Id.* at 772.

with her work.[189] Her employer complied with her request.[190] The employee then subsequently applied for and was granted disability retirement.[191] Nearly two years after the employee left employment of the employer, she filed suit alleging disability discrimination, harassment, and retaliation, claiming in part that her employer failed to accommodate her by not transferring her to a light-duty position, an accommodation that she had never requested.[192] The court found that the employee, therefore, failed the second of the four-prong test enumerated in *Taylor* (i.e., "the employee requested accommodations or assistance for his or her disability") as her only request to her employer, the conveyor, was accommodated.[193]

The Ninth Circuit also recently considered an employee's contention that she was not reasonably accommodated by her employer, but ultimately found that the employer did not have any affirmative obligation to provide an accommodation when none was ever requested.[194] The employee was arrested for drunk driving as well as being in possession of and under the influence of illegal drugs.[195] She was incarcerated and required to attend round-the-clock rehabilitation.[196] As a result, she missed work.[197] Her employer terminated her employment for "improper conduct" (pursuant to terms of a collective bargaining agreement), and absence for three consecutive shifts without an authorized reason (consistent with company policy).[198] The court noted that the employee fell out of the safe harbor provision of the ADA as she had so recently used drugs and alcohol, and found that "employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem."[199] Since the employee never requested an accommodation, either while working or when arrested and placed in rehab, the court found the employer was not under any affirmative obligation to provide an accommodation.[200]

Additionally, the *Brown* court noted that the interactive process for finding a reasonable accommodation may be triggered by the employer's recognition of the need for such an accommodation, even if the employee

189. Clark v. Whirlpool Corp., 109 F. App'x 750, 754 (6th Cir. 2004) (unpublished). While *Clark* involved issues of harassment and retaliation under an Ohio statute, that statute was a parallel of the ADA and the court applied ADA interpretations.

190. *Id.*

191. *Id.* at 751.

192. *Id.* at 752–53.

193. *Id.* at 755–56.

194. Brown v. Lucky Stores, 246 F.3d 1182, 1189 (9th Cir. 2001).

195. *Id.* at 1186.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 1188 (citing H.R. REP. No. 101-596, at 64 (1990) (Conf. Rep.), *as reprinted in* 1990 U.S.C.C.A.N. 565, 573. *See also* Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 857 (5th Cir. 1999); Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274 (4th Cir. 1997).

200. *Brown*, 246 F.3d at1189.

does not specifically make the request.[201] The usual requirement that an employee must initially request accommodation does not apply when the employer:

> (1) knows that the employee has a disability,
>
> (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and
>
> (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.[202]

"The employer is required to initiate the interactive process only when 'an employee is unable to make such a request' and the company knows of the existence of the employee's disability."[203] In *Brown*, the court found that the employee was not unable to make such a request nor did her employer know or have reason to know that she had a disability that precluded her from making such a request.[204]

A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility. For example, the cause of the breakdown might be missing information.[205]

As previously discussed, the employee alleging disability discrimination in *Beck* was a secretary in an academic unit and had been on three different medical leaves of absence.[206] When she returned from the first leave, her employer assigned her to a different unit with a different workload and requested equipment.[207] When she returned from her second leave, the employer asked her to sign a release so that her physician could provide more information to the employer's physician.[208] She failed to sign the requested release.[209] When she returned from her second leave, the employee failed to respond to her employer's request for more information so that it could know how to respond to her disability.[210] The court ruled in the employer's favor, noting that when an "employer does not obstruct the [reasonable accommodation] process, but instead makes reasonable efforts to communicate with the employee and provide accommodations based on

201. *Id.* at 1188 (citing *Barnett*, 535 U.S. at 1112–14).
202. *Id.*
203. *Id.*
204. *Id.*
205. *Beck*, 75 F.3d at 1135.
206. *Id.* at 1132–33.
207. *Id.* at 1132.
208. *Id.* at 1133.
209. *Id.*
210. *Beck*, 75 F.3d at 1133

information that it possesse[s]," the employer should not be liable for disability discrimination.[211] The court explained that when missing information about an employee's medical condition might not always indicate that the employee is responsible for failing to specify a necessary accommodation, but in a case such as this one (i.e., where the employer has made many attempts to acquire the needed information), it is the employee who appears not to have made reasonable efforts.[212] Conversely, the *Beck* court noted that if employer's unwillingness to engage in such a process leads to a failure to reasonably accommodate an employee, the employer might be liable under the ADA.[213]

An employer can be assured that it will not be punished for "engaging in frank discussions with employee[s] about the nature of what is being offered to him [or her], as required by the ADA."[214] Once an employee has informed the employer of his or her disability and requested accommodation, the ADA obligates the employer to engage with its employee in an interactive process to determine the appropriateness of the accommodation under the circumstances.[215]

S. Is an employer required to retain and accommodate a potentially violent employee?

The Seventh Circuit has recognized that the ADA:

> does not require an employer to retain a potentially violent employee. . . . [because to do so] would place the employer on a razor's edge - in jeopardy of violating the [ADA] if it fired such an employee, yet in jeopardy of being deemed negligent if . . . [the employer] retain[s] [the employee] and he [or she] then hurt someone.[216]

In *Palmer*, an employee directly threatened a co-worker by, among other things, telling the co-worker that she was "ready to kill her."[217] The court recognized that the employee was terminated for threatening to kill another employee, not due to her disability (i.e., depression and paranoia). In an interesting analogy of the case at bar to a scene from *Hamlet*, the

211. *Id.* at 1137.

212. *Id.* (citing Carrozza v. Howard County, MD, 45 F.3d 425, 1995 WL 8033 (4th Cir. 1995) (summary judgment in favor of the employer appropriate where the employee suffering from manic depression failed to articulate any reasonable accommodation). The *Carrozza* court noted that an "employer [is] not required to provide a 'stress-free environment' or immunize employee from legitimate job-related criticism." *Carrozza*, 45 F.3d 425, 1995 WL 8033 at *3 (citing Pesterfield v. Tenn. Valley Auth., 941 F.2d 437, 442 (6th Cir. 1991)).

213. *Id.* at 1137.

214. *See, e.g.*, *Bever*, 6 F. App'x at *2 (citing Bombard v. Fort Wayne Newspapers, Inc. 92 F.3d 560 (7th Cir. 1996)).

215. *Bombard*, 92 F.3d at 563.

216. Palmer v. Cir. Ct. of Cook County, 117 F.3d 351, 352 (7th Cir. 1997).

217. *Id.*

court noted that if an employer fires an employee because of the employee's unacceptable behavior, the fact that the behavior was precipitated by mental illness does not present an actionable ADA issue.[218] In other words, a reasonable accommodation inquiry is not required if an employee commits or threatens to commit violent acts. The ADA "protects only 'qualified' employees, that is, employees qualified to do the job for which they were hired; threatening other employees disqualifies one."[219]

T. What constitutes an undue hardship?[220]

In general, the term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors such as:

> (1) the nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;
>
> (2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
>
> (3) the overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
>
> (4) the type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
>
> (5) the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.[221]

The EEOC suggests that if an employer determines that providing a particular accommodation results in undue hardship, the employer should consider whether another accommodation exists that would not result in an undue hardship.[222]

---

218. *Id.*

219. *Id.*

220. A detailed discussion of what constitutes an "undue hardship" is beyond the scope of this article and is reserved for discussion in a future article.

221. 42 U.S.C. §12111(10) (2006); 29 C.F.R. §1630.2(p) (2008).

222. *A Primer for Small Business*, *supra* note 2.

III. Conclusion

As indicated at the outset, the ADA requirement that employers provide reasonable accommodations to otherwise qualified individuals with a disability would appear to be a fairly simple matter. However, issues such as when an accommodation must be considered, how the parties determine what accommodation would be appropriate, who gets to determine which accommodation is reasonable, and even what "reasonable" means, often raise many more questions than would appear to be appropriate or expected.

When considering the language of the ADA and how courts have applied it in the workplace, much remains unclear. What is clear, however, is that the ADA, at minimum, should trigger substantial and thoughtful consideration of a variety of factors in evaluating the "reasonable accommodation" requirement. Thus, employers need to provide considered analysis before reaching the conclusion that the issue has been adequately addressed. Quite often, more questions remain.