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"REASONABLE ACCOMMODATION" ISSUES[1]

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[1] Nothing in this paper is to be construed as legal advice from Mr. Fram, or NELI.

"Reasonable Accommodation" Issues

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Introduction and Background

The duty to provide reasonable accommodations to qualified individuals with disabilities is considered one of the most important statutory requirements of the ADA. This requirement has resulted in a great deal of ADA litigation.

In considering reasonable accommodation issues, it is most helpful to remember that reasonable accommodation involves the removal of *workplace barriers*. Therefore, as discussed later, *non-workplace barriers* are generally outside of the employer's reasonable accommodation obligations. It is also important to understand that the Supreme Court has expressly ruled that reasonable accommodations can involve "preferences" for an employee with a disability, so that s/he can "obtain the *same* workplace opportunities that those without disabilities automatically enjoy." U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 122 S. Ct. 1516 (2002). The Court noted that "by definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.,* preferentially." Likewise, in Sanchez v. US Department of Energy, 870 F.3d 1185 (10th Cir. 2017), the court stated that the Rehabilitation Act (which applies ADA standards to the federal government), "requires federal employers to do more than treat disabled and nondisabled employees alike." Along these lines, in Kindschi v. Federal Express Corp., 2019 U.S. App. LEXIS 30938 (9th Cir. 2019)(unpublished), the court noted that making an exception to a tardiness policy (that is, "accord[ing] those with disabilities different (accommodated) treatment" could be a possible reasonable accommodation. In Holly v. Clairson Industries, LLC, 492 F.3d 1247 (11th Cir. 2007), the court stated that "reasonable accommodation" does not mean treating "non-disabled employees exactly the same as its disabled employees." Noting that the Supreme Court has acknowledged the ADA's mandate of "preferences," the court stated that "the very purpose of reasonable accommodation laws is to require employers to treat disabled individuals differently in some circumstances -- namely, when different treatment would allow a disabled individual to perform the essential functions of his position by accommodating his disability without posing an undue hardship on the employer." Similarly, in Tobin v. Liberty Mutual Insurance Co., 553 F.3d 121 (1st Cir. 2009), the court rejected the employer's argument that it did not need to provide an accommodation (assignment of premium accounts) to an employee with a disability, where those accounts were typically given as a reward for good performance. The court pointed out that exceptions were sometimes made to this rule, in addition to the fact that reasonable accommodations can sometimes involve preferential treatment.

Employers should remember that workplace barriers might be physical obstacles, such as inaccessible facilities or equipment. However, more commonly, workplace barriers are procedures or rules (such as rules concerning when or where work is performed, when breaks are taken, when leave is given, or how tasks are accomplished). For example, in EEOC v. Dolgencorp, 899 F.3d 428 (6th Cir. 2018), the court held that reasonable accommodation could include modifying a workplace policy prohibiting an employee from having orange juice near her when she was working at the cash register. In this

case, the employee with diabetes needed to have ready access to glucose in case of a hypoglycemic episode in order to prevent loss of consciousness. The court noted that the store manager "categorically denied" her orange juice request, and "failed to explore any alternatives." In Solomon v. Vilsack (Dept. of Agriculture), 763 F.3d 1 (D.C. Cir. 2014), the court stated that "technological advances and the evolving nature of the workplace" have "contributed to the facilitative options available to employers." In Miller v. Illinois Department of Transportation, 643 F.3d 190 (7th Cir. 2011), the court noted that, "the law requires an employer to rethink its preferred practices or established methods of operation. Employers must, at a minimum, consider possible modifications of jobs, processes, or tasks so as to allow an employee with a disability to work, even where established practices or methods seem to be the most efficient or serve otherwise legitimate purposes."

By way of a brief background, there are three general categories of reasonable accommodation:

- changes to the *job application process* so that a qualified applicant with a disability can be considered for the job;

- modifications to the *work environment* -- including how a job is performed -- so that a qualified individual with a disability can perform the job; and

- changes so that an employee with a disability can enjoy *equal benefits and privileges* of employment.

In Stokes v. Nielsen, 2018 U.S. App. LEXIS 28204 (5th Cir. 2018), the court held that a Department of Homeland Security operations support specialist would be entitled to an accommodation to enjoy benefits and privileges of employment, not just to perform essential job functions. In this case, the employee asked for an advance copy of meeting materials so that she could review them with her workstation magnification equipment and then "effectively participate" in the meetings. Along these lines, reasonable accommodation also includes modifications so that the employee can work without severe pain. For example, in Hill v. Associates for Renewal in Education, 2018 U.S. App. LEXIS 20882 (D.C. Cir. 2018), the court held that the employee, a teacher with a prosthetic leg, may have been entitled to a classroom aide so that he could supervise his students without prolonged standing. In this case, the court held that although the employer argued that the employee could stand with pain, forcing the employee "to work with pain when that pain could be alleviated by his requested accommodation violates the ADA."

The ADA, the EEOC's regulations, and court decisions identify many types of reasonable accommodations that an employer may have to provide, such as:

- job restructuring;

- part-time or modified work schedules;

- reassignment to a vacant position;

- acquiring or modifying equipment;
- changing exams, training materials, or policies; and
- providing qualified readers or interpreters.

42 U.S.C. 12111(9); 29 C.F.R. § 1630.2(o)(2).

In Dillard v. City of Austin, 837 F.3d 557 (5th Cir. 2016), the city apparently argued that it did not have to provide a reasonable accommodation to an drainage maintenance employee whom it could have terminated (because he needed indefinite leave), but instead chose to continue to employ once he was able to return to work. The court disagreed, noting that nothing in the ADA "extinguishes that obligation merely because an employer had a basis for getting rid of the employee in the past."

Of course, employers should never limit reasonable accommodations to work-related disabilities. In Morrissey v. Laurel Health Care Co., 943 F.3d 1032 (6th Cir. 2019), the court held that where the employer allegedly had a "blanket policy of denying accommodations for all non-work related disabilities" and had forced the employee, a nurse, to work beyond her 12-hour physical restriction, the employer may well have violated the ADA.

Although most courts seem to require reasonable accommodations for any functional limitations flowing from the disability, at least one court has stated that "there must be 'some causal connection between the major life activity that is limited and the accommodation sought'" (citation omitted). Youngman v. Peoria County, 947 F.3d 1037 (7th Cir. 2020).

Employers should always keep in mind that they do not have to provide an accommodation that causes an *undue hardship*. "Undue hardship" means significant difficulty or expense in providing the accommodation. This analysis focuses on the particular employer's resources, and on whether the accommodation is unduly extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business. 42 U.S.C. 12111(10); 29 C.F.R. § 1630.2(p).

Since employers do not have to alter non-workplace barriers, they are not required to provide personal use items, such as equipment that helps someone in daily activities, on *and* off the job. This includes things like prosthetic limbs, wheelchairs, or eyeglasses if those items are used off the job. The EEOC has also said that an employer is not required to provide other personal use items, such as a hot pot or refrigerator if those items are not provided to employees without disabilities. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02). Along these lines, an employer is not required to cure or treat the individual's medical condition as an accommodation. For example, in Stevens v. Rite Aid Corp., 851 F.3d 224 (2d Cir. 2017), the court found that the employer was not required to offer the employee, a pharmacist

with needle phobia, desentization therapy so that he could perform the essential function of administering immunizations.

The EEOC and courts agree that an employer is only required to provide an accommodation that is for the individual's disability. For example, in Complainant v. Castro (HUD), 2015 EEOPUB LEXIS 417 (EEOC 2015), the EEOC denied the employee's claim that the employer should have reasonably accommodated him by restricting his travel so that he could care for his wife and child with disabilities. The EEOC noted that an employer "is not required to provide a reasonable accommodation to a person without a disability due to that person's association with someone with a disability." In Stansberry v. Air Wisconsin Airlines, Corp., 651 F.3d 482 (6th Cir. 2011), the court held that "employers are not required to provide reasonable accommodations to non-disabled workers under" the section of the ADA prohibiting discrimination because the employee has a relationship with someone who has a disability. Similarly, in Erdman v. Nationwide Insurance Co., 582 F.3d 500 (3d Cir. 2009), the court held that "the association provision does not obligate employers to accommodate the schedule of an employee with a disabled relative" because "the plain language of the ADA indicates that the accommodation requirement does not extend to relatives of the disabled." The court stated that "there is a material distinction between firing an employee because of a relative's disability and firing an employee because of the need to take time off to care for the relative." Supporting this, the court noted that the "statute clearly refers to adverse employment actions motivated by "the known disability of an individual" with whom an employee associates, as opposed to actions occasioned by the association."

General Reasonable Accommodation Issues

The Term "Reasonable"

There has been a great deal of controversy about what the term "reasonable" means in the context of "reasonable accommodation." In U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 122 S. Ct. 1516 (2002), the U.S. Supreme Court held that a reasonable accommodation is one that "seems reasonable on its face, *i.e.,* ordinarily or in the run of cases." After a plaintiff makes this showing, the employer bears the burden of showing "special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." The Supreme Court approvingly cited this "practical" approach adopted in lower court cases such as Reed v. Lepage Bakeries, Inc., 244 F.3d 254 (1st Cir. 2001). In Reed, the court stated that a "reasonable request for an accommodation must in some way consider the difficulty or expense imposed on the one doing the accommodating." For example, the court noted, it would not be "reasonable" for someone to request that an employer relocate its operations to a warmer climate. Therefore, a plaintiff must show both that a "proposed accommodation would enable her to perform the essential functions of her job," and "at least on the face of things, it is feasible for the employer under the circumstances." The employer can then defend by showing that "the proposed accommodation is not as feasible as it appears but rather that there are further costs to be considered, certain devils in the details." The court noted that "the difficulty of providing

plaintiff's proposed accommodation will often be relevant both to the reasonableness of the accommodation and to whether it imposes an undue hardship."

Interestingly, the Supreme Court did not mention (either to accept or reject) the approach taken by several Courts of Appeals, which have stated that the term "reasonable" itself requires a cost/benefit analysis. In other words, in determining whether the accommodation is "reasonable," an employer should look at the *costs* of providing the accommodation weighed against the *benefits* of the accommodation See, e.g., Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001); Keys v. Joseph Beth Booksellers, Inc., 1999 U.S. App. LEXIS 1581 (6th Cir. 1999)(unpublished); Woodman v. Runyon, 132 F.3d 1330 (10th Cir. 1997); Vande Zande v. Wisconsin Department of Administration, 44 F.3d 538 (7th Cir. 1995); Borkowski v. Valley Central School District, 63 F.3d 131 (2d Cir. 1995); Kennedy v. Dresser Rand Co., 193 F.3d 120 (2d Cir. 1999). The Vande Zande court noted that the cost of the accommodation should "not be disproportionate to the benefit." Id. at 542. The court stated that an employer can show that the accommodation is not *reasonable* because its "costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health." Id. The Borkowski court explained that although the plaintiff bears the burden of production on whether an accommodation is "reasonable" (using a cost/benefit analysis), this burden "is not a heavy one." The court said that a plaintiff must simply "suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." The Borkowski court stated that for the employer to successfully maintain that an accommodation is not reasonable because of cost, it *must* present some evidence as to the cost of providing the accommodation in relation to the benefits of the accommodation. 4 AD at 1273. In Monette, the court stated that "determining whether a proposed accommodation is "reasonable" requires a factual determination of reasonableness (perhaps through a cost-benefit analysis or examination of the accommodations undertaken by other employers) untethered to the defendant employer's particularized situation." In one of the most illustrative cases to date, Walsh v. United Parcel Service, 201 F.3d 718 (6th Cir. 2000), the court applied a cost-benefit analysis to an employee's request for long-term (arguably indefinite) leave. The court stated that "[w]hen both the time and likelihood of return to work cannot be roughly quantified after a significant period of leave has already been granted, the costs of the requested additional leave outweigh the benefits. The employer incurs additional administrative costs and more importantly is forced to shoulder long-term uncertainty regarding the composition of its work force. Further, during the extended leave, the employee loses valuable work skills, and if the employee ever returns, he or she will likely require significant retraining. When this is balanced against the potential benefit derived from the employee returning to work, which must be significantly discounted by the obvious indeterminacy involved, the cost exceeds the likely benefit."

It is possible that after U.S. Airways, an employer can still maintain that whether an accommodation is "reasonable" on its face depends on whether the costs greatly exceed the benefits. For example, in Obnamia v. Shinseki (Veterans Affairs), 2014 U.S. App. LEXIS 11697 (6th Cir. 2014)(unpublished), Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013), Henschel v. Clare County Road Commission, 737 F.3d 1017 (6th Cir. 2013) and Steward v. New Chrysler, 2011 U.S. App. LEXIS 2267 (6th Cir.

2011)(unpublished), the courts reiterated that the employee's "initial burden on this issue" is to show that "the accommodation is reasonable" in that it is both "efficacious" and "proportional to costs." In McMillan v. City of New York, 711 F.3d 120 (2d Cir. 2013), McElwee v. County of Orange, 700 F.3d 635 (2d Cir. 2012)(a Title II case applying Title I caselaw) and Theilig v. United Tech Corp., 2011 U.S. App. LEXIS 6074 (2d Cir. 2011)(unpublished), the courts noted that a plaintiff must show "the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." In Filar v. Board of Education of the City of Chicago, 526 F.3d 1054 (7th Cir. 2008), the court held that an accommodation must be "reasonable in the sense both of efficacious and of proportional to costs." In this case, the court found that the "administrative burden" would be "prohibitively weighty" for the employer to try to assign the plaintiff, a substitute teacher, to particular schools instead of assigning her wherever she was needed. Likewise, in Tobin v. Liberty Mutual Insurance Co., 553 F.3d 121 (1st Cir. 2009), the court noted that whether something is a "reasonable accommodation" must "in some way consider the difficulty or expense imposed on the one doing the accommodating."

In U.S. Airways, the Supreme Court explicitly rejected the position previously taken by the EEOC that "reasonable" has no independent definition, simply meaning that the accommodation is "effective" (i.e., the accommodation *works*). Appendix to 29 C.F.R. § 1630.9; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (3/1/99) at p. 5.[1] Indeed, after the U.S. Airways v. Barnett decision, the EEOC modified its position to be that a modification must be "reasonable" and "effective." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at "General Principles." The EEOC also has stated that the cost/benefit analysis applied by most Courts of Appeals "has no foundation in the statute, regulations, or legislative history of the ADA." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at ft. 9.

Interestingly, in Alonso v. Dhillon (EEOC), 2020 EEOPUB LEXIS 161 (EEOC 2020), the EEOC noted that an accommodation is effective when it provides "an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment, as are available to the average similarly situated employee without a disability." Likewise, in Matilde M v. Colvin (SSA), 2017 EEOPUB LEXIS 113 (EEOC 2017), the EEOC held that where the employee received a "satisfactory" rating with the accommodation of a reduced schedule, then the accommodation was effective. Specifically, the EEOC noted that an accommodation is effective when it enables an employee "to perform her job duties in a satisfactory manner." In Complainant v. Brennan (USPS), 2016 EEOPUB LEXIS 40 (EEOC 2016), the Commission stated that a "modification or adjustment is 'reasonable' if it appears to be 'feasible' or 'plausible.'" In an extremely helpful statement for employers, in Complainant v. Bay (FERC), 2016 EEOPUB LEXIS 711 (EEOC 2016), discussed later, the EEOC found that it was "simply unreasonable" when the employee "was essentially asking the Agency to provide her with the perfect work atmosphere at every moment."

Other courts have provided a bit more guidance on what "reasonable" means. For example, in Cooley v. East Tennessee Human Resource Agency, Inc., 2017 U.S. App.

LEXIS 26345 (6th Cir. 2017)(unpublished), the court held that an accommodation is not "reasonable" if the employee has admitted that s/he would not have accepted it. In this case, although the employee claimed that additional unpaid leave would have been an accommodation, she had admitted earlier that such leave "wasn't an option" for her because of financial circumstances. In Gardea v. JBS USA, LLC, 915 F.3d 537 (8th Cir. 2019), the court held where an accommodation is "utterly impractical," it is "unreasonable." In this case, the court held that the employee's request for "lift-assisting devices" that "require overhead beams" was not reasonable where these beams are not present throughout the plant, and where such devices cannot be effectively used in some tight quarters. Similarly, in Solloway v. Clayton, 2018 U.S. App. LEXIS 16588 (11th Cir. 2018)(unpublished), the court suggested that "reasonable" means feasible, when it held that requiring the employer to "guarantee" that the employee with PTSD "would never encounter" a particular employee who triggered her condition was "unreasonable." In Jones v. Nationwide Life Insurance Co., 696 F.3d 78 (1st Cir. 2012), the court stated that one "element in the reasonableness equation is the likelihood of success." If the accommodation would be futile in allowing the employee to perform an essential function, that would be evidence that it is not reasonable. In this case, the court determined that where the employee already had failed an examination four times, it arguably would not be "reasonable" to require the employer to provide an accommodation to take the test a fifth time.

In Yochim v. Carson, 935 F.3d 586 (7th Cir. 2019), the court held that the employer's offer of a schedule modification was reasonable because it addressed the employee's doctor's note which required that the employee avoid crowded rush hour trains, despite the employee's claim that she needed to work at home to avoid all train commuting. In Adams v. Anne Arundel County Public Schools, 789 F.3d 422 (4th Cir. 2015), the court held that the "basic reasonableness" of the employer-provided accommodation (in this case transfer to a less stressful school) was supported by the fact that the transfer "was consistent with the recommendations of the mental health professionals who had examined him." Similarly, in Wenc v. New London Board of Education, 2017 U.S. App. LEXIS 15801 (2d Cir. 2017)(unpublished), the court held that employer did not violate the ADA where it complied with the employee's doctor's note to provide an additional classroom aide, despite the fact that the employee claimed he needed two additional aides.

An employer can also argue that a reasonable accommodation must be medically necessary. For example, in Jona v. Pompeo (Department of State), 2020 EEOPUB LEXIS 391 (EEOC 2020), the EEOC held that the employee was entitled only to "situational" telework, rather than full-time telework, because she did not prove that she "needed fulltime telework because of her medical conditions." In Brunckhorst v. City of Oak Park Heights, 914 F.3d 1177 (8th Cir. 2019), the court held that the employee was not entitled to work from home where his medical restrictions did not state that he "must" work from home. Although the employee testified that it would be "easier" to work from home because of his flesh-eating bateria, the court stated that an employer "is not required to accommodate an employee based on the employee's preference." Along these lines, in Atkinson v. SG Americas Securities Sec., LLC, 2017 U.S. App. LEXIS 8213

(7th Cir. 2017)(unpublished), the court held that where the employee asked for a reasonable accommodation because of his hearing loss and brain injury, the employer could obtain information to determine what accommodations were "medically necessary."

In Cloe v. City of Indianapolis, 712 F.3d 1171 (7th Cir. 2013), the court stated that the reasonable accommodation obligation "is satisfied when the employer does what is necessary to enable the disabled worker to work in reasonable comfort" (citation omitted). In Noll v. IBM, 787 F.3d 89 (2d Cir. 2015), the court held that "reasonable" means effective. In McKane v. UBS Financial Services, Inc., 2010 U.S. App. LEXIS 1386 (11th Cir. 2010)(unpublished), the court noted that an accommodation is "reasonable" only "if it enables the employee to perform an essential function of the job." In Griffin v. UPS, 661 F.3d 216 (5th Cir. 2011), the court held that the employer did not fail to provide a reasonable accommodation by refusing to provide the employee with a day shift because of his diabetes. In this case, the court noted that the employee's medical documentation merely "suggested that a daytime shift would be preferable," but did not indicate that "the day shift was necessary for the management" of his diabetes. In Johnson v. Cleveland City School District, 2009 U.S. App. LEXIS 19136 (6th Cir. 2009)(unpublished), the court noted that "in order for an accommodation to be reasonable, it should be necessary in light of the plaintiff's known physical limitations." In Enica v. Principi, 544 F.3d 328 (1st Cir. 2008), the court noted that a reasonable accommodation must enable the employee to perform the job's essential functions and must be "feasible for the employer under the circumstances."

Interestingly, in Ruiz v. Paradigmworks Group, Inc., 2019 U.S. App. LEXIS 28836 (9th Cir. 2019)(unpublished), the court stated that an individual does not need to show that an accommodation (in this case, leave) "is certain or even likely to be successful to prove that it is a reasonable accommodation," but rather that it could plausibly have enabled" the employee to perform her job (citation omitted).

Some courts seem to mix up what is "unreasonable" with what has traditionally been analyzed under the "undue hardship" determination. For example, in Higgins v. Union Pacific Railroad Co., 931 F.3d 664 (8th Cir. 2019), the court held that the employee's request to only work when able was not reasonable "because it would require Union Pacific to reassign other Union Pacific Locomotive Engineers to shifts that they would not have otherwise been scheduled to work." Likewise, in Belasco v. Warrensville, 634 Fed. Appx. 507 (6th Cir. 2015)(unpublished), the court held that it was not "reasonable" for the school to have to hire a teacher's aide for a schoolteacher where this would violate the collective bargaining agreement and the union was unwilling to consent. In Henschel v. Clare County Road Commission, 737 F.3d 1017 (6th Cir. 2013), the court stated that where reassignment of an Excavator Operator to a Truck Driver job would violate the collective bargaining agreement, that would not be a required accommodation. Likewise, in Woodruff v. School Board of Seminole County, 2008 U.S. App. LEXIS 25837 (11th Cir. 2008)(unpublished), the court suggested that where an accommodation (in this case, reassignment) would violate a collective bargaining agreement, it was "not reasonable."

Importantly, in EEOC v. Sears, 417 F.3d 789 (7th Cir. 2005), the court held that where an employee "faced reprimand" for trying to use an accommodation (in this case, allowing the employee with a mobility impairment to eat her lunch in a restricted area and to walk through the restricted area), the accommodation is not reasonable.

In a case helpful to employers, Curry v. Department of Veterans Affairs, 2013 U.S. App. LEXIS 10134 (11th Cir. 2013)(unpublished), the court noted that an accommodation "is not necessarily reasonable, and thus federally mandated" simply because the employer has elected "to establish it as a matter of policy."

Whether There is a Duty to Provide Reasonable Accommodation in "Regarded As" Cases

The ADA Amendments Act (ADAAA), effective on January 1, 2009, states that an employer need not provide a reasonable accommodation to an individual who is only covered under the ADA's "regarded as" category. ADAAA, S.3406 Sect. 6 (2008). This change in the law was especially important because of the ADAAA's dramatic expansion of the definition of "regarded as" disabilities. For example, in Amedee v. Shell Chemical, L.P., 953 F.3d 831 (5th Cir. 2020), the court noted that an employer has no obligation to provide a reasonable accommodation in a "regarded as" case. In Austgen v. Allied Barton Security Services, 2020 U.S. App. LEXIS 20085 (5th Cir. 2020)(unpublished), the court held that where the employee, a security officer with a back impairment, argued only that he was "regarded" as having a disability, he was not entitled to reasonable accommodation. In Walker v. Children's Hospital of Wisconsin, 2020 U.S. App. LEXIS 11513 (7th Cir. 2020)(unpublished), the court stated that an employer is not required to provide an accommodation (in this case, waiving a HIPPA documentation requirement) to an employee it allegedly "regarded" as having a mental disability. Likewise, in Kelleher v. Fred A. Cook, Inc., 939 F.3d 465 (2d Cir. 2019), the court noted that although it would be an ADA violation to discriminate against an employee because of her/his relationship (for example, terminating an employee for fear that he would be distracted by his daughter's disability), reasonable accommodation is not required "in this context." Likewise, in Kiniropoulos v. Northampton County Child Welfare Service, 2015 U.S. App. LEXIS 5217 (3d Cir. 2015)(unpublished), the court noted that where the employee alleged only that he was "regarded as" having a disability, he was not entitled to reasonable accommodation. As a result, the court held that he was not qualified where he claimed only that he could perform his essential functions with an accommodation. In Powers v. USF Holland, Inc., 667 F.3d 815 (7th Cir. 2011), the court reiterated that the ADAAA "clarified" that "an individual 'regarded as' disabled (as opposed to actually disabled) is not entitled to a 'reasonable accommodation.'"

Employee's Duty to Ask for an Accommodation/Employer Knowledge of the Disability

A good deal of existing authority supports the notion that generally, an individual must request an accommodation. The EEOC has stated that, in general, "it is the responsibility of the individual with a disability to inform the employer than an accommodation is needed." Appendix to 29 C.F.R. § 1630.9; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at "General Principles"

and Question 40. In Arana v. Temple University Health System, 2019 U.S. App. LEXIS 16960 (3d Cir. 2019)(unpublished), the court noted that, "an employee must say or do something to put her employer on notice that she would like to be accommodated at work." In this case, the court found that the employee never gave any such notice to the employer. Likewise, in Graham v. Arctic Zone Iceplex, 930 F.3d 926 (7th Cir. 2019), the court held that where the employee failed to disclose that he believed his job duties were inconsistent with his medical restrictions, the employer was not liable. In this case, the employer assigned the employee to tasks that it believed could be performed sitting down (consistent with the employee's restrictions), and the employee never told the employer that he felt he actually needed to stand to perform the functions. In Longway v. Myers Industries, 2020 U.S. App. LEXIS 16655 (2d Cir. 2020)(unpublished), the court dismissed the employee's reasonable accommodation claim because there was no evidence that the employer knew about his disability. The court noted that the employee "conceded that he did not inform his supervisor or anyone else" that he had "anything other than a one-time injury of the sort that would not qualify as a disability." The court pointed out the employee told his supervisor that he was being released from the hospital with no restrictions and he could come back to work the next day.

In Sessoms v. University of Pennsylvania, 2018 U.S. App. LEXIS 16611 (3d Cir. 2018)(unpublished), the employee claimed that the employer should have "proactively offered accommodations before she made a request" (apparently because of her obvious stress-related issues). The court held, however, that although an accommodation request "need not be formal, be in writing, or invoke any particular 'magic words,'" the employee must "make the initial request in order to trigger an employer's duty to engage in the interactive process." In Murray v. Warren Pumps, LLC, 2016 U.S. App. LEXIS 7471 (1st Cir. 2016), the court held that the employer did not violate the ADA where the employee did not make it clear that he needed a reasonable accommodation. The court noted that an employee "will not be protected under the law when he fails to alert his employer that a particular task requested of him conflicts with a medical restriction." In this case, although the employee claimed that the employer already "knew" his limitations, the employee had "agreed to self-monitor whether certain tasks were stressing his physical abilities, and to make appropriate adjustments himself or request accommodation." The court seemed to give weight to the fact that the supervisor was in charge of nearly 60 employees, and the employer never directly required him to violate his restrictions (e.g., it allowed him to find someone else to help with certain activities, such as lifting and painting).

In Battista v. U.S. Postal Service, 2013 EEOPUB 1255 (EEOC 2013), the EEOC held that the employee with a learning disability had not adequately requested reasonable accommodation simply because he was hired under a "handicap program." The EEOC noted the condition was not obvious or "known" to the employer. In Williams v. James (OPM), 2004 EEOPUB LEXIS 999 (EEOC 2004), the EEOC stated that "an individual with a disability should request a reasonable accommodation when she knows that there is a barrier that is preventing her from performing the job." The EEOC did not find it an acceptable excuse that the employee did not disclose her disability (HIV) and need for accommodation (a modified schedule) because she "was afraid of being judged." In

Complainant v. Department of State, 2013 WL 5876801 (EEOC 2013), the EEOC analyzed whether an employee, an Information Management Specialist at an overseas NATO post, must request accommodation anew when he is transferred to a new posting, or whether he is entitled to a "permanent" accommodation that "travels" with him. The Commission held that when an employee changes jobs with the employer, he "shall request to engage in the interactive process when he determines it is necessary."

Many cases expressly support the point that an individual must indicate that an accommodation is needed. For example, in McFarland v. City & County of Denver, 2018 U.S. App. LEXIS 22943 (10th Cir. 2018)(unpublished), the court held that a visually-impaired Customer Service Agent applicant did not have a valid reasonable accommodation claim where she was given a reader as an accommodation for her employment test and she never told the employer that the accommodation was insufficient. In Connelly v. WellStar Health System, 2019 U.S. App. LEXIS 604 (11th Cir. 2019)(unpublished), the court held that the employer did not violate the ADA by enforcing its policy concerning employees who report to work impaired by a drug. Although the employee claimed that the employer should have accommodated her by providing her with time to "compose herself after an emotional episode" because the drug was lawful medication for her depression, the court found that she "presented no evidence that she ever requested such an accommodation." In Walz v. Ameriprise Financial, Inc., 779 F.3d 842 (8th Cir. 2015), the court held that where the employee did not request accommodation for her bipolar disorder (which the court said was not "open, obvious, and apparent to the employer," the employer did not violate the law. In this case, the employee claimed that the employer should have known that her erratic behavior was caused by a mental disability and should have forced her to take leave as an accommodation. The court noted that an employer does not have "a duty to guess" that an employee has a disability. In Dooley v. Jetblue Airways Corp., 2015 U.S. App. LEXIS 22046 (2d Cir. 2015)(unpublished), the court held that the employee could not claim that the employer did not provide an accommodation by failing to train her for her "transitional duties" (following her leave) where she never requested such training. The court noted that the duty to accommodate is normally triggered by an employee request for needed accommodation. Likewise, in Preddie v. Bartholomew Consolidated School Corp., 799 F.3d 806 (7th Cir. 2015), the court held that the employee, a fifth-grade teacher with diabetes, was not entitled to reasonable accommodation where he never requested an accommodation, even though the employer may have known about his condition. In Aldini v. Kroger Co. of Michigan, 2015 U.S. App. LEXIS 17748 (6th Cir. 2015)(unpublished), the court stated that "a request for a reasonable accommodation—whether explicitly or by inference" is needed for an individual to be able to claim that the employer failed to accommodate. In Johnson v. Parkwood Behavioral Health System, 2014 U.S. App. LEXIS 213 (5th Cir. 2014)(unpublished), the court held that the employer did not fail to provide time off "for flare-ups" of the employee's condition as an accommodation where the employee never asked for this time off. Similarly, in Burdett-Foster v. Blue Cross Blue Shield of Michigan, 2014 U.S. App. LEXIS 14751 (6th Cir. 2014)(unpublished), the court held that the employee had no reasonable accommodation claim where "by her own admission, she did not ask for any accommodations aside from being able to make frequent trips to the bathroom, which [the employer] permitted."

Employers should be aware that courts have held that if the employer knows both about the disability and the need for accommodation, it may have an obligation to engage in the interactive process -- *even without* an express request that a modification is needed because of a disability. For example, in Lewis v. University of Pennsylvania, 2019 U.S. App. LEXIS 23818 (3d Cir. 2019)(unpublished), the court noted that, "if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help" (citation omitted), and that the "employee has no obligation to unilaterally identify and propose a reasonable accommodation." In Ford v. Marion County Sheriff's Office, 942 F.3d 839 (7th Cir. 2019), the court noted the employer had a duty to interact where it knew that the employee, a sheriff's deputy, could no longer perform her job because of an accident, and she had announced that she still "wanted to work." In Turner v. Association of Apartment Owners of Wailea Point Village, 2018 U.S. App. LEXIS 17644 (9th Cir. 2018)(unpublished), the court held that an employer can violate its obligation to interact when it fails to explore possible accommodations "once it becomes aware that current accommodations are ineffective."

In Fox v. Costco Wholesale Corp., 918 F.3d 65 (2d Cir. 2019), the court held that the employee, an Assistant Cashier with Tourette's Syndrome and Obsessive-Compulsive Disorder, did not have a reasonable accommodation claim where he did not ask for an accommodation in the position and he "failed to introduce other evidence that Costco knew or should have been aware that his condition would be affected by" a transfer from his greeter position to the cashier position. Importantly, the court held that the employee might have a hostile work environment case based on his claims that his co-workers mocked him for his conditions. In Cannon v. Jacobs Field Services North America, 813 F.3d 586 (5th Cir. 2016), the court held that "although a plaintiff must usually request an accommodation to commence an interactive process," he "is excused from doing so in a situation" where the employer knows of his disability (in this case, a shoulder injury) and "had received a report from its own doctor recommending accommodations." In Complainant v. Lynch (FBI), 2015 WL 6459920 (EEOC 2015), the EEOC found that the agency failed to provide reasonable accommodation by letting an employee with severe mobility issues communicate with her supervisors by email rather than requiring her to walk to their offices 10-15 times per day. In this case, the EEOC suggested that the employer was well aware of the employee's limitations because of the employee's surgery leave, doctors' notes, and observations of the employee's pain when walking in the office. In Keenan v. Cox, 2010 U.S. App. LEXIS 19101 (9th Cir. 2010)(unpublished), the court held that where the employer knew that the employee had "a diminished intellectual and emotional capacity" because he was "'childlike' and not functioning at an adult level," and where the supervisor knew that the employee "should not interact with customers," there may have been an obligation to provide reasonable accommodation.

Along these lines, in Ewing v. Doubletree, 2016 U.S. App. LEXIS 22177 (10th Cir. 2016)(unpublished), the court noted that there may be "certain instances" where an employer "will know of the individual's need for an accommodation because it is 'obvious.'" However, in this case, the court held that even if the employer knew of the employee's intellectual disability, there was nothing indicating that she needed an

accommodation, especially where she had never identified a needed accommodation and her own doctor testified that she is "not a lot different from other people."

Similarly, the EEOC has stated that although an individual generally must request accommodation, the situation could be different if, "because of the disability, the employee is unable to request the accommodation."[1] For example, the EEOC has written that "an employer should initiate the reasonable accommodation interactive process without being asked if 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." In one federal court case, the EEOC took the position that where a food store knew that its grocery bagger had autism (which affected his communication skills and ability to interact with others), it should have -- on its own -- considered providing reasonable accommodation when the employee made loud and possibly inappropriate comments to customers. Specifically, the EEOC wrote that the employer "was required to consider accommodation, even though [the employee] did not expressly request one, because the company was aware of [his] disability and the need for accommodation was clear, but the very nature of his disability prevented [him] from recognizing that need." EEOC's Amicus Curiae Brief in Taylor v. Food World, Inc., No. 97-6017 (Brief Filed with Eleventh Circuit, 4/30/97).

The EEOC has also written that if the individual "states that s/he does not need a reasonable accommodation, the employer will have fulfilled its obligation." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 40. In Complainant v. Vilsack (Agriculture), 2015 EEOPUB LEXIS 1230 (EEOC 2015), the EEOC found that the employer did not fail to provide reasonable accommodation where the employee, who had a mood disorder, "cancelled her request for accommodations." Courts seem to agree with the position that the employer need not engage in the interactive process if the employee denies needing an accommodation, or implicitly/explicitly withdraws the request. For example, in Grant v. Harris County, 2019 U.S. App. LEXIS 32647 (5th Cir. 2019)(unpublished), the court held that the employee, a Juvenile Supervision Officer, could not succeed on a reasonable accommodation claim (for walking and standing) where the evidence showed that he denied needing an accommodation. In Jackson v. Blue Mountain Production Co., 2019 U.S. App. LEXIS 5152 (5th Cir. 2019)(unpublished), the court held that where the employee, a chemical operator with respiratory problems, voluntarily retired before returning from FMLA leave, he "terminate[d] the interactive process" and could not claim that the employer failed to provide a reasonable accommodation (in this case, reassignment). In Arndt v. Ford Motor Co., 2017 U.S. App. LEXIS 25155 (6th Cir. 2017)(unpublished), the court held that the employer had not refused the manufacturing employee's request to bring in a service dog because of his PTSD when his first request was "expressly withdrawn" after he returned from medical leave and "no conclusion had been reached" on the second request at the time the employee resigned. In Garcia v. Salvation Army, 918 F.3d 997 (9th Cir. 2019), the court stated that where the employee provided "a doctor's release to work without restrictions" and she failed to provide requested medical information to support her claim for an accommodation, the employer

"was not required to continue an interactive process." Similarly, in Hudson v. Tyson Farms, 2019 U.S. App. LEXIS 12753 (11th Cir. 2019)(unpublished), the court held that the employer did not fail to provide a reasonable accommodation, where, among other things, the employee's doctor "had returned her to work with no restrictions." In Calderone v. TARC, 2016 U.S. App. LEXIS 3394 (5th Cir. 2016), where the employee repeatedly denied having a disability and her doctor returned her to work without restrictions, she could not later claim that the employer failed to accommodate with a modified schedule. Likewise, in Aldini v. Kroger Co. of Michigan, 2015 U.S. App. LEXIS 17748 (6th Cir. 2015)(unpublished), the court stated that when the employee brought in a doctor's note clearing him to work without restrictions, after earlier bringing in a note with lifting restrictions, he "retracted" his request for accommodation. Similarly, in Hooper v. Proctor Health Care Inc., 804 F.3d 846 (7th Cir. 2015), the court held that where the employee's doctor cleared him to return to his job (as a psychiatrist) without restrictions, the employee could not claim that the employer failed to accommodate him.

In Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999), the court agreed that an individual normally must initiate the interactive process (including requesting reassignment if no accommodation exists in the current job. However, the Davoll court discussed an exception to this rule, which it called the "futile gesture doctrine." Specifically, if the individual knows that the request would be futile, s/he might not need to initiate the interactive process. For example, the court noted that if the individual "knows of an employer's discriminatory policy against reasonable accommodation, he need not ignore the policy and subject himself 'to personal rebuffs' by making a request that will surely be denied." In this case, since the plaintiffs "were well aware of Denver's policy of refusing to reassign disabled police officers to Career Service positions," they did not need to make this "futile" request. In Koessel v. Sublette County Sheriff's Dept., 717 F.3d 736 (10th Cir. 2013), the court similarly suggested that an employee's request for an accommodation is not required if the "employer has 'foreclosed the interactive process through its policies or explicit actions '" (citing Davoll). Along these lines, in Enica v. Principi, 544 F.3d 328 (1st Cir. 2008), the court suggested that an employee may not need to show that s/he requested an accommodation in those "situations where an employee feels too intimidated to object to an employer's refusal to accommodate." Likewise, in Nebeker v. National Auto Plaza, 2016 U.S. App. LEXIS 6103 (10th Cir. 2016)(unpublished), the court reaffirmed the futile gesture doctrine, but held that the employee did not "show any explicit actions that foreclosed the interactive process." In this case, the employee only presented evidence that her supervisor yelled at her "time and again" about her absences, but the supervisor never refused requested leave, and the employee never said she needed more leave. Interestingly, in Aldini v. Kroger Co. of Michigan, 2015 U.S. App. LEXIS 17748 (6th Cir. 2015)(unpublished), the court stated that, "in limited circumstances," an employee need not request accommodation "if such a request would be futile." In this case, however, although the supervisor allegedly told the employee that he "doesn't accommodate," he also said that he would get in touch with Human Resources. The court found that the supervisor's statements cannot "be viewed as a definitive rejection" of the employee's request, "let alone evidence that further requests would have been futile" because "contacting HR was only the beginning of a process to see whether Kroger could accommodate restrictions."

Content of Employee's Request for Accommodation

Of course, the next question is what exactly does the individual have to *say* when asking for a reasonable accommodation. In the past, the EEOC stated that, "if an employee requests time off for a reason related or possibly related to a disability (e.g., 'I need six weeks off to get treatment for a back problem'), the employer should consider this a request for ADA reasonable accommodation as well as FMLA leave." See EEOC Fact Sheet: "The FMLA, the ADA, and Title VII of the Civil Rights Act of 1964" at p. 8 (question 16). **This Fact Sheet is available on the internet at www.eeoc.gov.** Along these lines, in Complainant v. Donahoe (USPS), 2014 EEOPUB LEXIS 2159 (EEOC 2014), the EEOC suggested that the employee triggered the accommodation process by requesting FMLA leave for her medical condition.

However, more recently, the EEOC has stated that when an individual informs an employer that an adjustment or change is needed simply because of "a medical condition," that is enough to qualify as a reasonable accommodation request. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, No. 915.002 (10/17/02) at Question 1. For example, in Bruce v. Wolf (DHS), 2020 EEOPUB LEXIS 1234 (EEOC 2020), the EEOC reiterated that the employee triggers the interactive process by requesting "a modification or change at work because of a medical condition." In this case, the employee effectively asked for an accommodation by stating that he could not travel for work because he had medical restrictions resulting from PTSD. In Matilde M v. Colvin (SSA), 2017 EEOPUB LEXIS 113 (EEOC 2017), the EEOC held that the employee, a Social Security Service Representative had triggered the interactive process by requesting a new supervisor because of her mental illness, even though this would not be a required accommodation. Likewise, in Julius v. Disbrow (Air Force), 2017 EEOPUB LEXIS 1878 (EEOC 2017), the EEOC held that where the employee's doctor requested that the employer change the work area for the employee (a Materials Handler) because he was suffering allergic reactions and skin rashes from some unknown substance in the work area, that triggered the interactive process. In Agnus W v. Brennan (USPS), 2016 EEOPUB LEXIS 795 (EEOC 2016), the EEOC held that the employee triggered the interactive process when she told her supervisor that requiring her to continuously print placards, even in her "limited-duty" job, caused her hands to ache. In Adina P v. Brennan (USPS), 2016 EEOPUB LEXIS 336 (EEOC 2016), the EEOC noted that "generally, an individual with a disability must request a reasonable accommodation by letting the agency know the individual needs an adjustment or change at work for a reason related to a medical condition." In this case, the EEOC assumed that the employee's doctor's note returning her to work on light lifting duty was enough to trigger the interactive process. In Complainant v. Lynch (FBI), 2015 WL 6459920 (EEOC 2015), the EEOC reiterated this standard, finding that the employee had adequately triggered the accommodation process by informing the employer that, because of her mobility issues, she needed to use an elevator during an upcoming fire drill. In Johnson-Morgan v. Department of Labor, 2013 EEOPUB LEXIS 50 (EEOC 2013), the EEOC held that the employee adequately requested a reasonable accommodation by telling her Area Director that she needed a

different computer monitor because her monitor was hurting her eyes and causing headaches. In Feder v. Department of Justice, 2013 EEOPUB LEXIS 1349 (EEOC 2013), the EEOC held that the employee triggered the reasonable accommodation process by, among other things, asking to be moved to a quieter office area because of his noise sensitivity (which resulted from his experience as a Holocaust survivor). On the other hand, in Complainant v. Perdue (Agriculture), 2017 EEOPUB LEXIS 3108 (EEOC 2017), the EEOC held that the employee did not trigger the interactive process when she simply told her supervisor that she got nervous when she took employment tests (in this case, a Food Safety Regulatory Essentials test), but she did not indicate that this anxiety was in any way disabling.

Although an employee need not be terribly precise, s/he must be somewhat clear in indicating the need for accommodation because of a medical condition. For example, in Fisher v. Nissan North America, Inc., 951 F.3d 409 (6th Cir. 2020), the court held that the production line worker who was unable to continue in his job because of his severe kidney disease, triggered the interactive process when he said he would like to be transferred to an easier position. In McCray v. Wilkie, 2020 U.S. App. LEXIS 22082 (7th Cir. 2020), the court noted that the reasonable accommodation process was triggered when the employee "informed his supervisor that the van he was driving was causing him pain when he was driving." On the other hand, in Tielle v. Nutrition Group, 2020 U.S. App. LEXIS 14562 (3d Cir. 2020)(unpublished), the court held that where a food service worker was allowed to use her cane in the workplace, she did not also request the ability to push a food cart as an accommodation by simply telling her supervisor that, "sometimes it is just quicker to use the cart instead of the cane." Likewise, in Miller v. Saul, 2020 U.S. App. LEXIS 14878 (7th Cir. 2020)(unpublished), the court held that the employee's simply informing his supervisor that he was "undergoing counseling" was not enough to trigger the accommodation process. The court also appeared to have been swayed by the fact that the supervisor had asked the employee to let her know how she could support the employee in performing his job.

In Mestas v. Town of Evansville, 2019 U.S. App. LEXIS 26920 (10th Cir. 2019)(unpublished), the court noted that there "is no requirement that an employee use 'magic words' like 'ADA' or 'reasonable accommodation' when making a request; the employee must only make clear that 'the employee wants assistance for his or her disability'")(citation omitted). In this case, the employee's requests for leave because of his back problems, and use of a snow blower because of his back pain sufficiently triggered the ADA. In Kindschi v. Federal Express Corp., 2019 U.S. App. LEXIS 30938 (9th Cir. 2019)(unpublished), the court held that the employee triggered the accommodation process where she told her supervisors that her physical condition was causing here to be unable to arrive at work precisely on time. In Morrissey v. Laurel Health Care Co., 943 F.3d 1032 (6th Cir. 2019), the court held that when the employee told her employer that she could not work more than 12-hour shifts because of her disability, she gave "enough" notice, even though she did not specify her diagnosis. On the other hand, in Nunez v. Lifetime Products, 2018 U.S. App. LEXIS 3652 (10th Cir. 2018)(unpublished), the court held that the employee had not adequately requested a reasonable accommodation when he asked to be able to sit while working in order to improve his comfort and productivity. The court noted that even though a reasonable

accommodation request need not be in writing or "formally invoke" any "magic words," it still "must make clear that the employee wants assistance for his or her disability." In this case, the court stated that the employee's request was not tied "to a particular back problem or disability."

In Lewis v. University of Pennsylvania, 2019 U.S. App. LEXIS 23818 (3d Cir. 2019)(unpublished), the court held that where the employee, who had a skin condition, asked that he be exempted from the University Police Department's grooming requirement that he shave his face, that request triggered the interactive process. Likewise, in Ruggiero v. Mount Nittany Medical Center, 2018 U.S. App. LEXIS 15056 (3d Cir. 2018)(unpublished), the court held that the employee triggered the accommodation process when she brought in a note from her doctor asking for a modification of an employer policy (in this case, she requested an exemption to a policy requiring nurses need to receive a tetanus vaccine).

In Garrison v. Dolgencorp, LLC, 939 F.3d 937 (8th Cir. 2019), the court reiterated that the employee does not need to use "precise" or "magic" words to initiate the interactive process. Here, the court noted, that since the employer was aware of the employee's worsening medical conditions and the employee asked for a leave of absence, the interactive process was triggered. In Arana v. Temple University Health System, 2019 U.S. App. LEXIS 16960 (3d Cir. 2019)(unpublished), the court stated that "an FMLA leave request can sometimes count as an ADA accommodation." The court also noted, however, that "an employer ordinarily satisfies its duties under the ADA by granting the FMLA request." Similarly, in Capps v. Global, LLC, 847 F.3d 144 (3d Cir. 2017), the court "recognize[d] that a request for FMLA leave may qualify, under certain circumstances, as a request for a reasonable accommodation under the ADA." In this case, however, the court concluded that even if the employee's request for FMLA intermittent leave also triggered the ADA, there was no ADA claim where the employer granted that leave. On the other hand, in Williams v. Graphic Packaging International, Inc., 2019 U.S. App. LEXIS 32572 (6th Cir. 2019)(unpublished), the court held that the employee had not adequately requested accommodation when he told the employer before his FMLA leave started that he would "probably need some help" (such as a ground floor office) when he returned from his prostate cancer treatment, but that he was not yet sure.

In Yinger v. Postal Presort, 2017 U.S. App. LEXIS 10184 (10th Cir. 2017)(unpublished), the court held that where the employee told the employer he needed an extra week of leave for his heart-related infection, that "constituted an adequate request" for reasonable accommodation. In Lawler v. Peoria School District No. 150, 837 F.3d 779 (7th Cir. 2016), the court held that the employee, a special education school teacher who had been attacked by a student and developed PTSD, adequately sparked the interactive process when she brought in a doctor's note stating that she needed to be transferred to a different job where she would not be required to work with students who had behavioral/emotional disorders. In this case, the court noted that the "school district simply sat on its hands instead of following-up… or asking for more information." In Cash v. Lockheed Martin Corp., 2017 U.S. App. LEXIS 6332 (10th Cir. 2017)(unpublished), the employee, an

Electronics Technician with a hearing impairment, had been given a warning for poor performance, including interactions with his co-workers. He then brought in a letter to Human Resources from his audiologist stating that he had "significant hearing loss," and offering "strategies" for communicating with him and others with hearing loss. Although the employer argued that this letter was just "an advisory memorandum," not a request for accommodation, the court disagreed, noting that the letter "was clearly related to his hearing loss," requested co-workers to review "strategies for communicating" with the employee, and therefore, "triggered the reasonable accommodation process." Similarly, in Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 2016), the court held that the employee, a respiratory therapist who had a known spinal condition, had effectively requested reasonable accommodation when she told her supervisor could not complete the required physical component of CPR recertification until she finished four months of physical therapy (so that she would be cleared by her doctor for the physical test). In Cady v. Remington Arms Co., 2016 U.S. App. LEXIS 21592 (6th Cir. 2016)(unpublished), the court held that the employee, a handgun engineer, adequately requested reasonable accommodation when he told his supervisor that "he was concerned about his back, doing this up and down" when he had to retrieve materials from a truck, and that he felt he was "hurting his back" by standing on concrete for long periods of time.

In Foster v. Mountain Coal Co., 830 F. 3d 1178 (10th Cir. 2016), the court held when the employee told his manager that he needed time to go to his doctor to schedule neck surgery, that triggered the interactive process. The court rejected the employer's argument that the process had not been triggered because the employee did not state that he had already scheduled the surgery or state how many days of leave he would need. In Church v. Sears Holding Corp., 2015 U.S. App. LEXIS 5065 (3d Cir. 2015)(unpublished), the court (applying ADA standards to a state law claim) held that the employer did not fail to provide accommodation by refusing to allow the employee's husband's in-person assistance to discuss job modifications, where there was no evidence that the employee said this was needed because of her disability. In this case, the employee, who had memory and mobility issues, simply told the employer that she wanted her husband present so that she would "feel safe." In McCarroll v. Somerby of Mobile, 2014 U.S. App. LEXIS 23356 (11th Cir. 2014)(unpublished), the court held that a shuttle bus driver telling his supervisor that he was "too sore" to report to work was not enough to trigger the reasonable accommodation process. In Parsons v. Auto Club Group, 2014 U.S. App. LEXIS 8374 (6th Cir. 2014)(unpublished), the court held the employee had not said enough to request an accommodation by telling his supervisor that his sleep apnea "was coming back again" and he was having trouble getting his insurance company to pay for his medical device. In fact, the plaintiff stated that he told his supervisor just to "let him know," and that "there was nothing he could do about it." In Cloe v. City of Indianapolis, 712 F.3d 1171 (7th Cir. 2013), the court held that the employee never told her employer that her "mistake-prone written work" was related to her MS, and therefore, she could not properly claim that the employer failed to give her proofreading help as an accommodation. Similarly, in Lanier v. University of Texas Southwestern Medical Center, 2013 U.S. App. LEXIS 11836 (5th Cir. 2013)(unpublished), the court held that the employer was not liable for failure to provide

reasonable accommodation where the employee never "tied her request for an alternate on-call rotation to insomnia or a sleeping disorder of any kind; at most, she complained of being sleep deprived." The court stated that this could not be construed as a request for a reasonable accommodation. In EEOC v. C.R. England, Inc., 644 F.3d 1028 (10th Cir. 2011), the court held that the employee did not technically trigger the reasonable accommodation process where he simply asked for "home time" or "family time," but did not say this was needed because of his HIV status (even though the employer had been on notice earlier that the employee had HIV).

However, courts endorse the view that employers should not require the employee to use "magic" language, or even use the term "reasonable accommodation" in the request. For example, in Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 2016), the court noted that an employee is not required to use "the magic words 'reasonable accommodation'" for a statement to be considered a request for accommodation. In Summers v. Altarum Institute, 740 F.3d 325 (4th Cir. 2014), the court stated that an "employee's accommodation request, even an unreasonable one, typically triggers an employer's duty to engage in an 'interactive process' to arrive at a suitable accommodation collaboratively with the employee." In Colwell v. Rite Aid Corp., 602 F.3d 495 (3d Cir. 2010), the court reiterated that the ADA "does not require any formal mechanism or 'magic words' to notify an employer" that an accommodation is needed. Once the process is triggered, the court noted that it is a two-way street. In EEOC v. Chevron, 570 F.3d 606 (5th Cir. 2009), the court held that where a disability, the limitations and the necessary accommodations are not "open, obvious, and apparent to the employer," an "employee who needs an accommodation because of a disability has the responsibility of informing her employer, the employee does not need to mention the ADA "or use the phrase 'reasonable accommodation.'" The court noted that "plain English will suffice," and the employee must simply "explain that the adjustment in working conditions or duties she is seeking is for a medical condition-related reason." On the other hand, in Keeler v. Florida Dept. of Health, 2009 U.S. App. LEXIS 8880 (11th Cir. 2009)(unpublished), the court held that where the employee admitted that "nobody knew" of her disabilities when she asked for a job transfer, the employer was not liable for failure to accommodate. The court rejected the employee's argument that the employer "should have known" of her disability because she "took lots of notes, cried while speaking" to her employer and told the employer that her job was "stressful and overwhelming."

In EEOC v. Sears, 417 F.3d 789 (7th Cir. 2005), the court held that the interactive process is triggered even when "notice is ambiguous as to the precise nature of the disability or desired accommodation." The court stated that "it is sufficient to notify the employer that the employee may have a disability that requires accommodation." At that point, the employer can ask for clarification, but "cannot shield itself from liability by choosing not to follow up on an employee's requests for assistance, or by intentionally remaining in the dark." In this case, the court noted that the employee's notification to supervisors that she wanted to use a shorter route through a stockroom because the otherwise long walk was difficult for her was enough to put the employer on notice that she had leg problems and needed permission to use the shortcut.

In Palmer v. McDonald (VA), 2015 U.S. App. LEXIS 14677 (11th Cir. 2015)(unpublished), the court held that the employee may have a reasonable accommodation claim where, among other things, he told the employer he had cognitive problems and that he needed additional computer training to help him process claims, and time to get pen and paper to write down instructions. In EEOC v. LHC Group, Inc., 773 F.3d 688 (5th Cir. 2014), the court held that when the employee told her supervisors that she needed temporary help to use computer programs and remember her passwords in light of her high medication levels, this triggered the employer's duty to engage in the interactive process. Likewise, in Silva v. Hidalgo Police Department, 2014 U.S. App. LEXIS 13658 (5th Cir. 2014)(unpublished), the court noted that the plaintiff, a police officer, "initiated a discussion about reasonable accommodations" by requesting light duty/desk duty because of her broken leg. In Mobley v. Miami Valley Hospital, 2015 U.S. App. LEXIS 3105 (6th Cir. 2015)(unpublished), the court held where the employee provided a doctor's note with medical restrictions requiring a job change, that was enough to put the employer on notice of a need for accommodation. In Aldini v. Kroger Co. of Michigan, 2015 U.S. App. LEXIS 17748 (6th Cir. 2015)(unpublished), the court stated that the employee's doctor's note with lifting restrictions was a request for accommodation. Likewise, in Snapp v. United Transportation Union, 2013 U.S. App. LEXIS 22457 (9th Cir. 2013)(unpublished), the court held that the employee's doctor's note indicating he had an ongoing disability and needed accommodation could reasonably be seen as triggering the employer's "obligation" to engage in the interactive process. Likewise, in EEOC v. Chevron, 570 F.3d 606 (5th Cir. 2009), the court held that where the employee brought in a doctor's note releasing her to work at a location closer to her home, this should have been considered a proper accommodation request, where the employer knew she had been on leave because of her serious condition and that the release related to the condition. The court held that the employer was then "required to engage in the interactive process so that together they can determine what reasonable accommodations might be available." In this case, the court stated that the employer would have violated the law by allegedly saying "No. We just can't take this. This isn't going to work." In Kauppila v. Leavitt (HHS), 2007 EEOPUB LEXIS 1912 (EEOC 2007), the EEOC found that the employee had triggered the reasonable accommodation process by asking for a delay in her employment start date because of her need for surgery.

Federal courts have held that the individual must give sufficient notice both that a workplace modification is needed *and* that it is needed because of a condition that could be a disability. For example, in Granados v. J.R. Simplot, Inc., 2008 U.S. App. LEXIS 2593 (9th Cir. 2008)(unpublished), the court held that the plaintiff's simply mentioning to the employer that he was sleepy or groggy was not enough to trigger the interactive process. In Collins v. Prudential Investment and Retirement Services, 2005 U.S. App. LEXIS 148 (3d Cir. 2005)(unpublished), the employee told her supervisor that she "was seeking assistance from the OVR" which was assessing her "cognitive abilities." However, the evidence showed that the supervisor did not know what an OVR was or what an OVR did, and there was no indication that the employee might have a disability or might need an accommodation. In Montgomery v. Alcoa, Inc., 2001 U.S. App. LEXIS 8096 (6th Cir. 2001)(unpublished), the plaintiff claimed that the employer should have accommodated him because he disclosed on his pre-employment physical that he had

diabetes. However, the court disagreed, noting that "even if this information was passed on to the defendants," the employee "never informed them that he was limited by his diabetes or required any accommodation." Therefore, since he "never requested to be allowed to go home when he needed to inject insulin," the court concluded that the employer was "justified in discharging him for excessive absenteeism."

Similarly, in Russell v. TG Missouri Corp., 340 F.3d 735 (8th Cir. 2003), the plaintiff left her post in the middle of her shift, even after she was told that this would result in an "unscheduled absence." Although she told her supervisor, "I need to leave, and I need to leave right now," she did not indicate that this was because of her bipolar disorder. As a result, the court held that "it simply cannot reasonably be inferred that [the employer] failed to accommodate her disability." In Estades-Negroni v. The Associates Corp. of North America, 345 F.3d 25 (2003), aff'd on rehearing, 2004 U.S. App. LEXIS 15525 (1st Cir. 2004), the court held that the employee did not trigger the employer's obligation to provide reasonable accommodation where her request for a reduced workload or an assistant were not linked to any medical condition. Rather, these requests simply came after the employer allegedly increased the employee's workload. The court noted that the employee did not repeat these requests after she was later diagnosed with depression.

In Reed v. Lepage Bakeries, Inc., 244 F.3d 254 (1st Cir. 2001), the court noted that "the ADA's reasonable accommodation requirement" must be "triggered by a request" which is "sufficiently direct and specific," and which "must explain how the accommodation requested is linked to some disability." In this case, the court found that the plaintiff's request to be able to "walk away" from conflicts gave "scant indication that, due to a disability, she needed some special sort of accommodation," especially where she did not explain that her inability to handle conflict was due to her bipolar disorder.

On the other hand, some courts have been much tougher on employees. In many cases, these decisions do not seem wise to follow in terms of formulating an employer's best practices. For example, in Waggel v. George Washington University, 957 F.3d 1364 (D.C. Cir. 2020)(unpublished), the court held that the employee's requests for FMLA leave were not enough to trigger the ADA process because the FMLA's "structure," eligibility criteria, and "scope of entitlements" (for example, to take leave for a family member) are different from the ADA. [Fram Note: Oddly, the court seems to have ignored the fact that employee was unquestionably requesting FMLA leave because of her own cancer.} In Miceli v. JetBlue Airways Corp., 914 F.3d 73 (1st Cir. 2019), the court held that the employee had not requested accommodation for her disability-related absences by simply expressing "frustration" at the company's coding of her FMLA absences and writing an email referring "to having a disability" and expressing "for those of us with disabilities to be met with compassion and reasonable accommodations made if difficulties are faced." The court stated that a reasonable accommodation request "must illuminate the linkage between the requestor's disability and the requested accommodation." In Adigun v. Express Scripts, 2018 U.S. App. LEXIS 21864 (11th Cir. 2018)(unpublished), the court held that the employee's FMLA leave request was not equivalent to a reasonable accommodation request where her FMLA certification only stated that her heart condition would last indefinitely and provided no indication of when, if ever, she would be able to return to work. In Waggoner v. Carlex Glass America, LLC,

2017 U.S. App. LEXIS 4621 (6th Cir. 2017)(unpublished), the court held that even though the employee told the employer he had bipolar disorder (when he was disciplined for abusive, threatening conduct), this was not enough to spark the interactive process where the employee later applied for a transfer. The court noted, for example, that the employee never stated that he was requesting a particular position to avoid being near a supervisor who "might trigger his bipolar disorder." The court held that, although no magic words are needed, "the employee must 'make it clear' both that he is making a request and that he is doing so because of his disability." In Patton v. Jacobs Engineering Group, Inc., 863 F.3d 419 (5th Cir. 2017), the court held that the employee did not trigger the accommodation process by asking to be moved to a quieter area of the office to alleviate his "nervous system problems" in order to decrease his severe stuttering, telling his superiors that his stuttering and anxiety problems "all go together." Despite these statements, the court still found that even though it "is reasonable to infer that based on this request" that the employer "was on notice that noise aggravated Patton's anxiety, which in turn aggravated his stuttering," this "is not enough" because a jury "must be able to infer" the employer's "knowledge of the "limitations experienced by the employee as a result of [his] disability." The court found it determinative that the employee did not tell the employer that his "disability caused his noise sensitivity, nor was this causal relationship obvious." In Tennial v. UPS, 840 F.3d 292 (6th Cir. 2016), the court held that to trigger the interactive process, an employee must "make it clear from the context that the request is being made in order to conform with existing medical restrictions.'" In this case, the employee saying to his supervisor that he wanted to tape record his supervisor's instructions because of "my ADA deal" was not enough to indicate "that the recorder would help accommodate his disability." Similarly, in Deister v. Auto Club Insurance Association, 2016 U.S. App. LEXIS 8792 (6th Cir. 2016)(unpublished), the court held that the employee did not adequately request an accommodation by telling his supervisor, "you need to review my medical records," and that he "wanted a meeting to discuss his options regarding his condition and employment." The court noted that, although an employee "need not use the word "accommodate" or "disability," at a minimum he must "make it clear from the context that the request is being made in order to conform with existing medical restrictions." Seemingly at odds with most courts, in Acker v. General Motors, 853 F.3d 784 (5th Cir. 2017), the court held that an FMLA leave request does not equate to an ADA reasonable accommodation request because "an employee seeking FMLA leave is by nature arguing that he cannot perform the functions of the job, while an employee requesting a reasonable accommodation communicates that he can perform the essential functions of the job."

Whether Employer Can Require that Reasonable Accommodation Requests Be Written and/or Comply with Other Procedures

The EEOC has stated that requests for accommodation do not need to be in writing. Although the employer may ask the individual "to fill out a form or submit the request in written form," the employer cannot ignore the oral request. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, No. 915.002 (10/17/02), at Question 3. Interestingly, however, EEOC's internal procedures on

reasonable accommodation use to require employees to submit a written request confirming any oral request for accommodation. Internal EEOC "Procedures for Providing Reasonable Accommodation for Individuals with Disabilities" (2/2001) at III ("employees seeking a reasonable accommodation **must follow up an oral request either by completing the attached 'Confirmation of Request' form or otherwise confirming their request in writing (including by e-mail) to the Disability Program Manager. . . . While the written confirmation should be made as soon as possible following the request, it is not a requirement for the request itself. EEOC will begin processing the request as soon as it is made, whether or not the confirmation has been provided."**)(bold in original). Courts would likely agree with EEOC's position. For example, as noted earlier, in Parkinson v. Anne Arundel Medical Center, 2003 U.S. App. LEXIS 22442 (4th Cir. 2003)(unpublished), the court noted that requests for accommodation need not necessarily be in writing.

In Gleed v. AT&T Mobility Services, LLC, 2015 U.S. App. LEXIS 9450 (6th Cir. 2015)(unpublished), the court dismissed the employer's argument that it was not required to provide reasonable accommodation because the employee failed to comply with the employer's specific procedures for requesting an accommodation (first telling his supervisor about the need for accommodation, then calling the "Integrated Disability Service Center"). The court noted that the employer did not dispute that the employee had never seen the procedures, nor was he told that these were the employer's procedures.

On the other hand, in Waggel v. George Washington University, 957 F.3d 1364 (D.C. Cir. 2020)(unpublished), the court held that the employee, a medical resident with cancer, had not triggered the reasonable accommodation interactive process where she was advised to contact the University's EEO office to formally request ADA leave and she apparently never submitted forms to initiate the process. In Vitti v. Macy's Inc., 2018 U.S. App. LEXIS 36232 (2d Cir. 2018)(unpublished), the court considered a situation where the employee was informed that in order to get a modified schedule, she needed to actually make a request for reasonable accommodation through the human resources department. Interestingly, the court stated that because she did not follow this procedure, she did not "request" an accommodation, despite the fact that the employer knew she needed the schedule modification for her mental health therapy appointments. Similarly, in Miceli v. JetBlue Airways Corp., 914 F.3d 73 (1st Cir. 2019), in holding that the employee never requested reasonable accommodation, the court found it relevant that the employer had a specific process for requesting accommodation (an online application) and the employee did not follow that process.

Employer's Duty to Engage in Interactive Process When Accommodation is Requested

Once an accommodation has been requested, the employer should initiate an interactive process with the individual. In Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000), vacated on other grounds, 535 U.S. 391, 122 S. Ct. 1516 (2002), the court noted that the interactive process requires employers to "analyze job functions to establish the essential and nonessential job tasks," to "identify the barriers to job performance" by consulting

with the employee to learn "the precise limitations" and to learn "the types of accommodations which would be most effective." In Enica v. Principi, 544 F.3d 328 (1st Cir. 2008), the court stated that the interactive process is "a meaningful dialogue with the employee to find the best means of accommodating that disability."

Courts analyze the specific actions employers perform in this process. For example, in Petti v. Ocean County Board of Health, 2020 U.S. App. LEXIS 10082 (3d Cir. 2020)(unpublished), the court held that the employer properly engaged in the interactive process after the employee complained about air quality by conducting testing, moving the employee to another location while investigating her work space safety, providing requested leave, and attempting to meet further with the employee. In Gonzalez v. UPS, 2019 U.S. App. LEXIS 22778 (5th Cir. 2019)(unpublished), the court held that the employer engaged in the interactive process where there was evidence that it informed the employee about his ADA rights, asked for input from the employee and his doctor about his limitations and proposed accommodations, met with the employee about its conclusions and continued looking for six months for open positions. In Ruggiero v. Mount Nittany Medical Center, 2018 U.S. App. LEXIS 15056 (3d Cir. 2018)(unpublished), the court, citing earlier cases, acknowledged that an employer can show good faith in the interactive process in "many ways, such as: meeting with the employee; requesting information about the employee's condition and limitations; asking the employee what accommodation she wants; showing some sign of having considered her request; and offering and discussing available alternatives when the request is too burdensome." Similarly, in Sessoms v. University of Pennsylvania, 2018 U.S. App. LEXIS 16611 (3d Cir. 2018)(unpublished), the court held that the employer engaged in a good faith interactive process where supervisors met with the employee, considered her requests (for modified hours and a change to a lower stress job) and offered possible accommodations, including a part-time work schedule. In Faidley v. UPS, 889 F.3d 933 (8th Cir. 2018), the court held that the employer effectively participated in the interactive process by meeting with the employee to assess accommodations consistent with his medical restrictions on overtime work, identified possible reassignments (which, as it turns out, the employee did not get because of seniority), and offered the employee a part-time job (which he rejected). In McGlone v. Philadelphia Gas Works, 2018 U.S. App. LEXIS 12480 (3d Cir. 2018)(unpublished), the court stated that "there is no singular way to engage in the interactive process," and the employer was not liable simply because it may not have reviewed the employee's case at its monthly "Employment Utilization Committee" meeting. The court noted the "ample evidence" of the employer's actions, including its consultations with the employee, his doctors, and its own Medical Director to find modified work for the employee who had a knee injury. Similarly, in Cash v. Lockheed Martin Corp., 2017 U.S. App. LEXIS 6332 (10th Cir. 2017)(unpublished), the employee with a hearing impairment argued that the employer did not effectively engage in the interactive process where it did not include the employee in a meeting to discuss strategies for effectively communicating with employees with hearing loss. The court held that a "face-to-face" meeting with the employee is not required. Rather, the "critical feature of the process" is to identify limitations and possible accommodations. In this case, the court held that the employer did this by analyzing the employee's limitations from his hearing loss, reviewing his doctor's

suggestions, and meeting with co-workers to discuss strategies. In Faidley v. United Parcel Service, 853 F.3d 447(8th Cir. 2017), the court held that the employer made a good faith effort to seek an accommodation where it met with the employee, "identified positions that he and his doctor thought he could perform," and considered other possible positions. In Horn v. Knight Facilities Management-GM, Inc., 2014 U.S. App. LEXIS 3797 (6th Cir. 2014)(unpublished), the court held that the employer effectively engaged in the interactive process by seeking information from the employee, follow-up telephone conversations with her doctor, and discussions with the union. The court stated that not taking advantage of additional avenues of interaction (such as in-person meetings with the doctor) does not show that the employer "failed to engage in the interactive process, much less that it acted in bad faith." In Anderson v. JP Morgan Chase & Co., 2011 U.S. App. LEXIS 5885 (11th Cir. 2011)(unpublished), the court held that the employer "engaged fully in an interactive process" where it attempted to move the employee to different work stations (because of her alleged allergy to carpet cleaner), allowed her to take paid leave, provided her with fans, offered to take out the carpet from her workspace, cleaned her carpet with water, tested her air quality, and attempted to discuss her condition with her doctor." In White v. Interstate Distributor Co., 2011 U.S. App. LEXIS 17642 (6th Cir. 2011)(unpublished), the court held that the employer effectively engaged in the interactive process where the employer spoke with the employee by phone about his restrictions and possible accommodations. The court noted that, "the ADA does not require that an in-person meeting occur, provided that the interaction is otherwise satisfactory."

On the other hand, in Fisher v. Nissan North America, Inc., 951 F.3d 409 (6th Cir. 2020), the court held that the employer did not effectively engage in the interactive process when the supervisor, responding to the production line worker's request for reassignment, told him, "I feel for you, but my hands are tied," and stated that the employee's request for part-time work was "not an option." The court also stated that the employer has a "continuing mandatory duty of good-faith participation in the interactive process" which does not end simply because the employer has provided accommodations in the past, such as leave. In McCray v. Wilkie, 2020 U.S. App. LEXIS 22082 (7th Cir. 2020), the court held that the employer's failure to have a "dialogue" with the employee about what "could be done" and "on what timeline" to accommodate the pain he felt while driving, "could be understood to violate the VA's duty to engage in an interactive process with its employee in an effort to arrive at an appropriate accommodation." In Garrison v. Dolgencorp, LLC, 939 F.3d 937 (8th Cir. 2019), the employer failed in its duty when the employee asked for a leave of absence because of her medical condition and the supervisor simply told her to "read the employee handbook." The court noted that once the interactive process was triggered, the employer had an obligation to "take some initiative" and identify a reasonable accommodation" (citation omitted). Likewise, in Mosby-Meachem v. Memphis Light, Gas & Water Division, 883 F.3d 595 (6th Cir. 2018), the court held that the company may have violated its duty to interact where it simply stood "firm" on its policy that employees could not telecommute regardless of circumstances. In this case, the court found that allowing an attorney to telecommute for 10 weeks could have been a reasonable accommodation. In Sheng v. M&T Bank Corp., 848 F.3d 78 (2d Cir. 2017), the court noted that an "offer of an accommodation

conditioned upon the dropping of monetary claims does not fulfill the requirements of the ADA as to an interactive process. The Act clearly imposes a duty to provide an accommodation in job requirements, if feasible." In Dawson v. AKAL Security, Inc., 2016 U.S. App. LEXIS 15053 (9th Cir. 2016)(unpublished), the court held that placing an employee on involuntary unpaid leave for two months while conducting the interactive process could "constitute a failure to engage" in that process. In Lawler v. Peoria School District No. 150, 837 F.3d 779 (7th Cir. 2016), the employee, a schoolteacher, asked for a transfer as a reasonable accommodation, and the school district initially gave her two weeks of leave while assessing the situation. The court held that where the school district simply assumed she didn't want the transfer anymore because she did not reiterate her request, the district broke down the interactive process. In Spurling v. C&M Fine Pack, Inc., 739 F.3d 1055 (7th Cir. 2014), the court held that after the employee brought in a doctor's note indicating that her sleepiness on the job was because of narcolepsy, the employer failed to effectively engage in the interactive process. The court noted that the employer "did not seek further clarification from either" the employee or her doctor "and disregarded the medical evaluation altogether." In Cox v. Wal-Mart Stores, Inc., 2011 U.S. App. LEXIS 13829 (9th Cir. 2011)(unpublished), the court held that the employer may *not* have engaged in the interactive process in good faith where it refused to allow the employee to submit paperwork to support her reasonable accommodation request because she had missed the company's five-day deadline for such paperwork.

This interaction is meant to identify the individual's functional limitations and the potential reasonable accommodation that is needed. See 29 C.F.R. § 1630.2(o) and 1630.9, Appendix. In addition, both the EEOC and courts have held that this interaction identifies whether the accommodation is truly needed *because of* the disability. For example, in Chara S v. Castro (HUD), 2016 EEOPUB LEXIS 305 (EEOC 2016), the EEOC found that a Staff Assistant could not show a medical basis for her request for telework as an accommodation. In Earl v. Sessions (DOJ Federal Bureau of Prisons), 2017 EEOPUB LEXIS 1877 (EEOC 2017), the EEOC found that although the employee claimed that he needed to be near his California doctors as an accommodation for his rectal cancer, he had voluntarily moved to Florida, and had admittedly received treatment outside of California. Similarly, in Featherstone v. U.S. Postal Service, 2013 EEOPUB 1937 (EEOC 2013), the employee claimed that she needed a daytime shift because of her medications. However, the EEOC decided that the employee did not show a nexus between her disability and her shift request because her doctor did not explain why she could not work the nightshift and still take her medication. In Linn v. Shulkin (VA), 2017 EEOPUB LEXIS 1751 (EEOC 2017), the EEOC held that where a nurse demanded a transfer because of both safety concerns and micromanagement by her supervisor, that was not a reasonable accommodation request because it was not connected to her condition (depression).

Courts agree with this position. For example, in Youngman v. Peoria County, 947 F.3d 1037 (7th Cir. 2020), a youth counsellor at a detention facility needed to be relieved of occasional control duties because of his motion sickness, which he claimed resulted from his disability, hypothyroidism. The court, however, rejected his argument, holding that he had not sufficiently shown a connection between the motion sickness and the hypothyroidism. Specifically, the court stated that the employer did not violate that law

because the employee did not show that "his motion sickness is caused by a condition that qualifies as a disability under the ADA." Similarly, in McDonald v. UAW-GM Center for Human Resources, 2018 U.S. App. LEXIS 16752 (6th Cir. 2018)(unpublished), the court held that the employee did not demonstrate that her requested accommodation, a longer lunch break to exercise, was necessary to accommodate her disability. In this case, the court noted that the employee's doctor's note was "too vague" to show the need for an extended lunch break, or that the break be at a certain time of day. In Taylor-Novotny v. Health Alliance Med. Plans, Inc., 772 F.3d 478 (7th Cir. 2014), the court held that the employer was not required to allow the employee with MS to use "badge scans" to report her arrival time (rather than requiring her to actually notify her supervisor when she was late) because the evidence of her MS symptoms only related to her fatigue, and did not indicate that such an accommodation was needed because of her condition. In Obnamia v. Shinseki (Veterans Affairs), 2014 U.S. App. LEXIS 11697 (6th Cir. 2014)(unpublished), the court found that the employee had not shown that her request for a private office was needed because of her hearing impairment; rather, her request "mentioned harassment by her coworkers." Similarly, in Hunter v. Home Depot USA, Inc., 2008 U.S. App. LEXIS 7087 (9th Cir. 2008)(unpublished), the court held that the plaintiff was not entitled to work more hours as a reasonable accommodation where this request was because of financial reasons, not because of a disability. In Smith v. U.S. Postal Service, 2005 EEOPUB LEXIS 43 (EEOC 2005), the EEOC held that the employee had not shown that his request for a modified schedule was really needed because of his diabetes. Rather, according to the Commission, there was evidence that the employee was unhappy with his schedule for personal reasons, including his inability to attend his son's baseball games. In Edmonson v. Potter, 2004 U.S. App. LEXIS 26683 (4th Cir. 2004)(unpublished), the court held that the employee was not entitled to schedule changes "for her personal convenience, i.e., to accommodate her babysitter and care for her brother, and not to accommodate an alleged disability." Likewise, in Gaines v. Runyon, 107 F.3d 1171 (6th Cir. 1997), a Rehabilitation Act case, the court held that the plaintiff's requested accommodation of reassignment to a particular shift was not needed because of his epilepsy; rather, the employee's medical documentation showed that he simply needed a straight shift (which he already *had*) because of his need for a consistent sleep pattern.

The EEOC has stated that the employer's response to a reasonable accommodation request should be "expeditious." The amount of time it reasonably takes depends on issues such as whether the employer has complete control over possible modifications (for example, widening an employer-owned parking space) or whether the employer must order equipment from a third party (for example, adaptive equipment for a blind employee). See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 10. In Michelle G v. Lew (Treasury), 2016 EEOPUB LEXIS 1247 (EEOC 2016), the EEOC noted that in determining "whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors include: (1) the reason(s) for delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide." In this case, the EEOC held that where an IRS Correspondence Examination Technician needed a

quiet work area because of her cognitive issues, there was an "egregious delay" where it took the Agency 18 months to provide that accommodation. In Elsa v. Bridenstine (NASA), 2020 EEOPUB LEXIS 838 (EEOC 2020), the EEOC held that a delay of 75 days between the employee's request for telework and the grant of the accommodation was "unreasonable." Likewise, in Ria v. Brennan (USPS), 2020 EEOPUB LEXIS 273 (EEOC 2020), the EEOC held that the employer violated the law by taking two months to provide the employee with an accommodation, in this case, to work in an air-conditioned building because of the employee's medical restrictions. In Complainant v. McDonald (VA), 2014 EEOPUB LEXIS 2034 (EEOC 2014), the EEOC held that any delay in providing an accommodation was because the employer was "waiting on appropriate requested documentation" from the employee's health care professional, and was, therefore, not inappropriate.

Importantly, the EEOC stated that the COVID-19 pandemic "has disrupted normal work routines" and "may result in delay in discussing requests and in providing accommodation." EEOC's "Pandemic Preparedness" Guidance, Section III(B)(14). Although the EEOC noted that employers "are encouraged to use interim solutions to enable employees to keep working as much as possible," this Guidance seems to give employers some flexibility in the timing of when a delay will be considered unreasonable.

Oddly, in Beatriz v. Shulkin (VA), 2017 EEOPUB LEXIS 1989 (EEOC 2017), the EEOC held that it was not an unreasonable delay for the employer to take two months to finalize its approval for telework for an employee with breast cancer. The Commission found this amount of time excusable because "additional items had to be addressed" by Human Resources before telework could begin, including reviewing the decision for "technical deficiencies," obtaining new signed paperwork, processing paperwork, responding to the employer's Director's "issues," and assigning a computer to the employee.

Courts agree that "unreasonable delay" is actionable, but do not seem to require that the accommodation be made immediately, just as quickly as possible. In McCray v. Wilkie, 2020 U.S. App. LEXIS 22082 (7th Cir. 2020), the court held that "an unreasonable delay in providing an accommodation for an employee's known disability can amount to a failure to accommodate his disability." The court explained that, "whether a particular delay qualifies as unreasonable necessarily turns on the totality of the circumstances, including, but not limited to, such factors as the employer's good faith in attempting to accommodate the disability, the length of the delay, the reasons for the delay, the nature, complexity, and burden of the accommodation requested, and whether the employer offered alternative accommodations." In this case, the court found that an 11-month delay in providing a new van could be considered "unreasonable." In Brumley v. UPS, 909 F.3d 834 (6th Cir. 2018), the court held that where the employee originally brought in a doctor's note with lifting restrictions, but later brought a note lifting those restrictions (apparently because the employee was frustrated that her requests were not immediately granted), the company had no reasonable accommodation obligation. Despite the employee's contention in her lawsuit, the court held that although an employer must initiate the interactive process when an accommodation is requested, it need not

"immediately" grant the employee's request. In Luke v. Florida A&M University, 2016 U.S. App. LEXIS 23038 (11th Cir. 2016)(unpublished), the court held that although there was "some delay," there was not an unreasonable delay in providing the plaintiff, a campus security officer, with a modified duty belt and a modified uniform. Although the court did not indicate how long the delay lasted, it pointed out that the employer did not require the employee to wear her regular belt (except on one occasion), did not require her to wear the standard uniform, provided a "temporary accommodation" by assigning her to a dispatch position where she did not need the accommodations, and "was working on obtaining the requested items so that they would be available" to the employee "when she returned from her medical leave." The court also found it significant that employee "was not rendered unable to work as a result of the delays."

In Adams v. Anne Arundel County Public Schools, 789 F.3d 422 (4th Cir. 2015), the court held that the employer acted "in a timely manner" in reassigning the employee within one week of his return to work after taking medical leave. In Cloe v. City of Indianapolis, 712 F.3d 1171 (7th Cir. 2013), the court held that a delay (of up to one month) in providing the employee with an in-office printer was not unreasonable for a government agency responsible for "spending taxpayer money."

On the other hand, in Hill v. Clayton County School District, 2015 U.S. App. LEXIS 13793 (11th Cir. 2015)(unpublished), the court held that requiring the employee with a respiratory impairment to wait two months for an air conditioned bus may not have been reasonable. The court dismissed the employer's "sparse" argument that providing such a bus to the employee any earlier would have caused an undue hardship because "it would have had to upset its seniority-sensitive bus-allocation process." In Johnson-Morgan v. Department of Labor, 2013 EEOPUB LEXIS 50 (EEOC 2013), the EEOC held that the employer "caused an undue delay" in providing a flat-screen monitor to the employee where the Area Director took approximately three months to provide the monitor, despite the fact the employer had such a monitor available. In Shealey v. Berrien (EEOC), Agency No. 200300055 (EEOC 2011), the Commission held that the Chicago office of the EEOC actually violated the law by "unnecessarily delaying its response" to the employee's request for accommodation. The Commission stated that in determining whether a delay is "unnecessary," it would look at the reasons for the delay, the length of the delay, who was responsible for the delay, what the employer did to avoid the delay, and whether the accommodation was simple or complex. In this case, the Commission held that the EEOC's nine-month delay in responding effectively to the accommodation request for a reassignment because of the employee's mental issues "constituted a violation" of the law.

One question that often arises is how long must the employer continue trying to come up with an accommodation? Interestingly, in Sharbono v. Northern States Power Co., 902 F.3d 891 (8th Cir. 2018), the court held that once the employer was informed by an industry expert that an accommodation could not be made that would allow the employee to work (in this case, a steel-toed boot that met the individual's needs and the industry's safety standards), "it was reasonable for the company to discontinue its efforts" to accommodate the employee.

Courts have generally held that an employer's failure to initiate the interactive process is not itself a "per se" violation of the ADA for which there is automatic liability. For example, in Kassa v. Synovus Financial Corp., 2020 U.S. App. LEXIS 3219 (11th Cir. 2020)(unpublished), the court noted that the employer cannot be liable for failing to engage in the interactive process if the employee cannot "satisfy his burden of identifying an accommodation that would be reasonable." In Trahan v. Wayfair Maine, LLC, 957 F.3d 54 (1st Cir. 2020), the court held that, "liability for failure to engage in an interactive process depends on a finding that the parties could have discovered and implemented a reasonable accommodation through good faith efforts." In this case, the court held that there was "no evidence sufficient to ground a reasonable inference that further dialogue" would have led to a reasonable accommodation. In Sansone v. Brennan, 917 F.3d 975 (7th Cir. 2019), the court noted that "[w]hile the 'interactive process' is important, it is a means for identifying a reasonable accommodation rather than an end in itself," and an employer "cannot be liable solely for refusing to take part in it." Similarly, in Ford v. Marion County Sheriff's Office, 942 F.3d 839 (7th Cir. 2019), the court stated that a problem in the interactive process (in this case, an allegation that the HR professional was terse and unhelpful) is not itself "actionable," because the ADA "looks to ends, not means." In Johns v. Brennan, 2019 U.S. App. LEXIS 4353 (9th Cir. 2019)(unpublished), the court held that "employers are obligated by federal law to engage in an interactive process," but the employer is only liable "if a reasonable accommodation would have been possible." Likewise, in Stansbury v. City of Annapolis, 2019 U.S. App. LEXIS 18418 (4th Cir. 2019)(unpublished), the court held that "liability for failure to engage in an interactive process" depends on a conclusion that a reasonable accommodation actually existed. In Lincoln v. BNSF Railway Co., 900 F.3d 1166 (10th Cir. 2018), the court held "an employee cannot maintain a failure to accommodate claim based solely on an employer's failure to engage in the interactive process." In Faulkner v. Douglas County, Nebraska, 906 F.3d 728 (8th Cir. 2018), the court stated that although an "employer must make a good faith effort to assist the employee in finding an accommodation," if a plaintiff "cannot show there was a reasonable accommodation available," the employer "is not liable for failing to engage in the good-faith interactive process." In Martinez v. American Airlines, 2018 U.S. App. LEXIS 7336 (7th Cir. 2018), the court held that not engaging in the interactive process does not "establish a violation of the ADA" unless a reasonable accommodation existed and "the employer prevented its identification by failing to engage in the interactive process." In Everett v. Grady Memorial Hospital Corp., 2017 U.S. App. LEXIS 15264 (11th Cir. 2017)(unpublished), the court held that where no reasonable accommodation exists, there is no basis for imposing liability for failure to engage in the interactive process. In Sheng v. M&T Bank Corp., 848 F.3d 78 (2d Cir. 2017), the court held that "there is no valid independent claim under the ADA for failure to engage in an interactive process." The court noted that this is because an ADA violation requires an individual to show that s/he is "qualified" (that is, able to perform the job with some accommodation). Likewise, in Wenc v. New London Board of Education, 2017 U.S. App. LEXIS 15801 (2d Cir. 2017)(unpublished), the court similarly stated that, "an employer cannot be liable for 'failing to engage in a sufficient interactive process' when the employee is unable to perform the essential functions of his job."

In Alamillo v. BNSF Railway Co., 869 F.3d 916 (9th Cir. 2017), the court held that to bring a claim "for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred." Specifically, the court stated that California law (FEHA), which tends to be broader than the ADA, "does not impose liability for failure to engage in the interactive process when no reasonable accommodation is possible." In Lang v. Wal-Mart, 813 F.3d 447 (1st Cir. 2016), the court held that the failure to engage in the interactive process "is of no moment" if the employee could not perform the essential functions of the job (with an accommodation if one exists). In EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015), the court noted that failure to "put sufficient effort into the 'interactive process'" does not lead to liability if the employee would not be able to perform the job's essential functions with an accommodation. In Molden v. East Baton Rouge Parish School Board, 2017 U.S. App. LEXIS 19598 (5th Cir. 2017)(unpublished), the court stated that "under the interactive process theory, an employer violates the ADA" when failure to engage in the process "leads to a failure to reasonably accommodate an employee." In this case, where the employer actually had provided an accommodation, the court held that this "interactive process theory" claim failed. In Solomon v. School District of Philadelphia, 2013 U.S. App. LEXIS 16638 (3d Cir. 2013)(unpublished), the court noted that although "an employer who fails to engage in the interactive process runs a serious risk that it will erroneously overlook an opportunity" to provide accommodation, "failure to engage in the interactive process, in itself, does not constitute" an ADA violation."

On the other hand, in some cases, Courts of Appeals have expressly stated or suggested that the interactive process is a mandatory requirement. As noted above, in Turner v. Association of Apartment Owners of Wailea Point Village, 2018 U.S. App. LEXIS 17644 (9th Cir. 2018)(unpublished), the court held that an employer can violate "its duty regarding the mandatory interactive process" by failing to explore "other possible accommodations once it becomes aware that current accommodations are ineffective." In Hostettler v. College of Wooster, 2018 U.S. App. LEXIS 19612 (6th Cir. 2018), the court held that the employer "has a duty to engage in an interactive process," it "must" identify the "precise limitations" and "potential reasonable accommodations that could overcome those limitations," and it must engage in a good faith individualized inquiry to determine whether a reasonable accommodation can be made. In this case, the court held that even though the employer met with the employee four times, the employer may have violated its statutory duty where there was disputed evidence as to what occurred during these meetings. Likewise, in Hargett v. Jefferson County Board of Education, 2017 U.S. App. LEXIS 21799 (6th Cir. 2017)(unpublished), the court stated that the "interactive process is mandatory." In Phillips v. Victor Community Support Services, Inc., 2017 U.S. App. LEXIS 11824 (9th Cir. 2017)(unpublished), the court stated that the "employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations." In this case, the court found that because the employee's "inadequate effort and lack of communication" resulted in the breakdown of this process, the employer did not violate the ADA. Similarly, in Roberts v. Permanente Medical Group. Inc., 2017 U.S. App. LEXIS 7948 (9th Cir. 2017)(unpublished), the court suggested that there could be

liability for a breakdown in the interactive process, noting that such liability "hinges on the objective circumstances surrounding the parties' breakdown in communication and responsibility for the breakdown lies with the party who fails to participate in good faith." In this case, the court found that the employee was responsible for the breakdown because she "refused to respond to repeated attempts" by the employer "to obtain information regarding her disabilities and limitations." In Delaval v. Ptech Drilling Tubulars, 2016 U.S. App. LEXIS 9683 (5th Cir. 2016), the court stated that, "Once an accommodation is requested, an employer must engage in the 'interactive process,' or a flexible dialogue, with the employee with the goal of finding an appropriate accommodation" and an "employer that fails to engage in the interactive process in good faith violates the ADA." In this case, however, the court found that the employer interacted, but the employee broke down the process by failing to provide medical documentation. In EEOC v. LHC Group, Inc., 773 F.3d 688 (5th Cir. 2014), the court held that "once the employee presents a request for an accommodation, the employer is required to engage in an interactive process," which the court described as a "statutory duty to at least discuss accommodation." In Snapp v. United Transportation Union, 2013 U.S. App. LEXIS 22457 (9th Cir. 2013)(unpublished), the court stated that if an employee has given notice of a disability and need for accommodation, "there is a mandatory obligation to engage in an informal interactive process 'to clarify what the individual needs and identify the appropriate accommodation'" (citation omitted). The court noted that "failure to do so would constitute discrimination under the ADA." In Calero-Cerezo v. U.S. Department of Justice, 355 F.3d 6 (1st Cir. 2004), the court noted that the interactive process requires "a great deal of communication between the employee and employer" and that the "employer's refusal to participate in the process may itself constitute evidence of a violation of the statute."

Interestingly, in Anthony v. Trax International Corp., 955 F.3d 1123 (9th Cir. 2020), the court noted that it has "held that an employer has a mandatory obligation to engage in an interactive process with employees in order to identify and implement appropriate reasonable accommodations,' which can include reassignment." However, in this case, where the individual did not even satisfy the job's prerequisites, the employer did not have this obligation because "an employer is obligated to engage in the interactive process only if the individual is 'otherwise qualified'" (in this case, meeting the basic non-discriminatory pre-requisites of the job).

Oddly, in Hansen v. VCE Robinson Nevada Mining Co., 2016 U.S. App. LEXIS 15054 (9th Cir. 2016)(unpublished), the court stated that, "an employer is liable for failing to provide reasonable accommodation only if it is responsible for the breakdown in the interactive process."

The EEOC has agreed with the majority of courts that there is no independent liability for simply failing to engage in the interactive process. In Aline v. Barr (DOJ), 2020 EEOPUB LEXIS 428 (EEOC 2020), the EEOC held that an employer could not "be held liable solely for a failure to engage in the interactive process" because "the interactive process is not an end in itself." Rather, the Commission noted, "the sole purpose of the interactive process is to facilitate the identification of an appropriate reasonable

accommodation." In Alonso v. Dhillon (EEOC), 2020 EEOPUB LEXIS 161 (EEOC 2020), the EEOC noted that "failure to engage in the interactive process does not constitute a violation" of the law, but rather that "liability depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the individual with a disability to perform the essential functions of the job." In Harvey G v. Jewell (Interior), 2016 EEOPUB LEXIS 309 (EEOC 2016), the EEOC reiterated that the "failure to engage in the interactive process does not, in itself, constitute a violation" of the law. Rather, "liability depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation."

Although the failure to engage in the interactive process might not be an independent ADA violation, the employer may lose its summary judgment motion by failing to engage in this process. For example, in Johns v. Brennan, 2019 U.S. App. LEXIS 4353 (9th Cir. 2019)(unpublished), the court held that since there was a dispute about whether the employer engaged in the interactive process, the employer lost its motion for summary judgment on the employee's reasonable accommodation claim. In this case, the employer apparently engaged in the interactive process on the employee's request for leave, but allegedly failed to engage in the process on the postal worker's request for an accommodation that would enable her to return to her job. In Snapp v. United Transportation Union, 889 F.3d 1088 (9th Cir. 2018), the court stated that "a denial of summary judgment is appropriate where there has been a failure to engage in the interactive process." Similarly, in EEOC v. LHC Group, Inc., 773 F.3d 688 (5th Cir. 2014), the court denied the employer's summary judgment motion where the employee's supervisor "kept silent and walked away," when the employee triggered the interactive process. Similarly, in Valdez v. Brent McGill and Mueller Supply Co., Inc., 2012 U.S. App. LEXIS 2783 (10th Cir. 2012)(unpublished), the court noted that an employer would be "well advised" to engage in the interactive process if it hopes to win a case on summary judgment. In Haneke v. Mid-Atlantic Capital Management, 2005 U.S. App. LEXIS 8186 (4th Cir. 2005)(unpublished), the court held that where there was evidence that the employer may not have effectively engaged in the interactive process, its motion for summary judgment would be denied. The EEOC has taken the position that an employer should lose its motion for summary judgment if it did not engage in the interactive process. EEOC's Amicus Curiae Brief in Wilson v. Noco Motor Fuels, Inc., Nos. 00-7919 & 00-7696 (Brief filed in Second Circuit, 11/29/00), at 15.

Interestingly, in Jones v. Service Electric Cable TV, Inc., 2020 U.S. App. LEXIS 12061 (3d Cir. 2020)(unpublished), the court noted that, although failure to engage in the interactive process is not itself unlawful, it "has bearing on whether" the individual's accommodation request is "reasonable." Along these lines, the court noted that once the employee requests an accommodation, "the burden" is on the employer to seek additional information it needs. Relatedly, in Sheng v. M&T Bank Corp., 848 F.3d 78 (2d Cir. 2017), the court held that although there is no independent cause of action for failure to engage in the interactive process, "an employer's failure to engage in a good faith interactive process can be introduced as evidence tending to show disability discrimination."

On the other hand, in Snowden v. Trustees of Columbia University, 612 Fed. Appx. 7 (2d Cir. 2015), the court held that failure to engage in the interactive process "does not allow a plaintiff to avoid summary judgment unless she also establishes that, at least with the aid of some identified accommodation, she was qualified for the position at issue" (citation omitted). Likewise, in Donahue v. Consolidated Rail Corporation, 224 F.3d 226 (3d Cir. 2000), the court expressly held that failure to engage in good faith in the interactive process is not alone sufficient to defeat a motion for summary judgment. In that case, the court noted that to defeat a motion for summary judgment, the plaintiff must present at least some evidence that an accommodation actually existed. Along these lines, in Timmons v. UPS, Inc., 2009 U.S. App. LEXIS 2081 (9th Cir. 2009)(unpublished), the court noted that summary judgment in a reasonable accommodation case will be denied unless the employer can show that "(1) reasonable accommodation was offered and refused; (2) there simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation; or (3) the employer did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith."

Documenting Disability When Reasonable Accommodation is Requested

If someone requests reasonable accommodation, the employer may generally ask him/her for information about the disability. For example, the employer is entitled to know that the individual has a *covered disability* and that s/he needs an accommodation *because of* the disability. The EEOC has specifically issued policy to this effect. In its "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations" (10/10/95), the EEOC said that if someone requests reasonable accommodation and the disability and/or the need for accommodation is not obvious, an employer may ask for reasonable documentation about the individual's disability and functional limitations. **This Guidance is available on the internet at www.eeoc.gov.** In its "Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at Question 6, the EEOC reiterated that an employer may require documentation "to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. However, since the employer cannot ask for unrelated information, "in most situations, an employer cannot request a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation." For example, in cases where a disability is not obvious, an employer "may ask the employee for documentation describing the impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's ability to perform the activity or activities." The EEOC has also stated that an individual "can be asked to sign a limited release allowing the employer to submit a list of specific questions" to the individual's "health care or vocational professional." In Complainant v. Brennan (USPS), 2016 EEOPUB LEXIS 77 (EEOC 2016), the Commission found that the employee was not entitled to a reasonable accommodation for her "mental" condition, where she submitted only a document that

she was receiving treatment from a doctor, but offering no information about "what the treatment was for," or even if the condition "impacted her ability to perform any major life activity." In Lowell H v. McDonald (VA), 2016 EEOPUB LEXIS 954 (EEOC 2016), the EEOC held that as part of the interactive process, the employer could ask the employee with a wrist impairment for "medical documentation that includes information about the disability, the activities it limits, and the need for accommodation if the disability and/or need for accommodation is not obvious." In Complainant v. Mabus (Navy), 2015 EEOPUB LEXIS 43 (EEOC 2015), the EEOC held that where the employee requested reasonable accommodation (in this case, part-time work, telecommuting, worksite parking, etc.), the employer was entitled to ask for, among other things, medical information specifying the medical conditions, prognosis, limitations, and duration. In Complainant v. McHugh (Army), 2015 EEOPUB LEXIS 173 (EEOC 2015), the EEOC held that when the employee requested extensive leave as an accommodation, the employer was entitled to ask for information about, among other things, the nature, severity, and duration of the impairment, and the extent to which activities were limited. Similarly, in Kocher v. Social Security Administration, 2013 EEOPUB LEXIS 1918 (EEOC 2013), the EEOC held that employer had the right to ask for prognosis or diagnosis where these were unclear. In this case, the employee's doctor refused to provide this information because of privacy concerns.

However, of course, an employer cannot ask for more information than it needs. In Complainant v. Lynch (FBI), 2015 WL 6459920 (EEOC 2015), the EEOC held that where the employee with mobility impairments had taken leave for surgery, had submitted doctors' notes, and where others had observed her in pain when walking in the office, the Agency could not "needlessly continue" to ask "for more documentation of her condition" to determine whether she had a disability. Similarly, in Julius v. Disbrow (Air Force), 2017 EEOPUB LEXIS 1878 (EEOC 2017), the EEOC held that the employer could not ask the employee for additional medical documentation where his severe skin rashes were obvious and he had already submitted a doctor's note asking that his work area be changed to avoid exposure to substances in that area.

In addition, the EEOC has written that an employer may require the individual to go the health professional of the employer's choice if the individual provides insufficient information." In such a case, however, the EEOC has cautioned that the employer "should explain why the documentation is insufficient," "allow the individual to provide the missing information," and "pay all costs associated with the visit(s)" to the employer-chosen health professional. Guidance at p. 13-16.

Courts agree that employers are permitted to ask about disability when someone requests reasonable accommodation. For example, in Pettis v. House of Ruth Maryland, Inc., 2005 U.S. App. LEXIS 16890 (4th Cir. 2005)(unpublished), the court held that the employer acted lawfully in asking the employee about the nature and extent of her condition after the employee requested an accommodation. Of course, the employer should only ask for information that is truly needed to assess disability, restrictions, and accommodations. In Ward v. McDonald (Veterans Affairs), 762 F.3d 24 (D.C. Cir. 2014), the court noted that an "individual seeking accommodation need not provide medical evidence of her condition in every case," for example, cases where the disability is obvious.

It is important to remember that the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits an employer from requiring an individual to provide genetic information. If a medical professional provides genetic information to the employer in connection with responding to an ADA request for information, the employer could be held liable under GINA unless the employer is deemed to have "inadvertently" obtained the information. In order to best argue that the acquisition of the information was "inadvertent," the EEOC has stated that an employer should include the following in a statement to the medical professional:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

29 C.F.R. 1635.8(b)(1)(B).

If an employer wants an employee to "re-certify" that s/he still has a disability and/or still needs a currently-provided reasonable accommodation, this is likely to be considered a disability-related inquiry, which must be job-related and consistent with business necessity. For example, in Lewis v. University of Pennsylvania, 2019 U.S. App. LEXIS 23818 (3d Cir. 2019)(unpublished), the court held that the University Police Department's asking an employee to submit medical certification every 60 days to support an exemption from a no-beards policy was a disability-related inquiry of an employee. Therefore, the employer needed a job-related reason for the requirement.

Demonstrating Good Faith in Attempting to Accommodate

Certainly, the amount of effort an employer puts forth in attempting to accommodate bears a direct relationship to potential damages if it improperly fails to accommodate. For example, the Civil Rights Act of 1991 excludes certain damages in cases where the employer can show good faith in attempting to accommodate. Specifically, the statute states that in reasonable accommodation cases, punitive and certain compensatory damages:

> may not be awarded . . . where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective

opportunity and would not cause an undue hardship on the operation of the business.

42 U.S.C. 1981A.

In Jacobs v. N.C. Administrative Office of the Courts, 780 F.3d 562 (4th Cir. 2014), the court held that where the employer refused to discuss a reasonable accommodation with the employee until she returned from leave (and when she returned, she was immediately fired), that was evidence of "bad faith." In Buboltz v. Residential Advantages, Inc., 523 F.3d 864 (8th Cir. 2008), the court, while noting that failure to engage in the interactive process is not actionable unless a reasonable accommodation actually existed, stated that "[w]hen an employer fails to engage in an interactive process, that is prima facie evidence of bad faith."

In a case that is very helpful to employers, Keyhani v. Trustees of the University of Pennsylvania, 2020 U.S. App. LEXIS 14059 (3d Cir. 2020)(unpublished), the court held that where the employee was accommodated in a manner consistent with her doctor's recommendations (for example, a modified schedule), the employee's "preference" for the other "alternative" accommodation "provided by her doctors" (in this case, work-at-home) "is not sufficient to establish that defendant failed to act in good faith."

Employee's Failure to Cooperate in Providing Medical Documentation and/or Identifying a Reasonable Accommodation

Failing to cooperate in the interactive process can be fatal to an individual's ADA claim for reasonable accommodation. Cooperation can include a number of things, such as being willing to try an accommodation, being willing to discuss alternatives, and providing needed documentation. The EEOC has stated that during the interactive process, the individual "does not have to be able to specify the precise accommodation" needed, but "s/he does need to describe the problems posed by the workplace barrier." See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 5.

In Myung v. Spencer (Navy), 2020 EEOPUB LEXIS 1213 (EEOC 2020), the EEOC held that the employee, an Administrative Specialist for the Space and Naval Warfare Systems Center Command, was not entitled to telework as an accommodation where she failed to cooperate in the interactive process, by failing to "provide 'reasonable documentation,' or even respond to the Agency's detailed request for medical documents to support her accommodation." Although the employee claimed that she had already provided disability-related information when she first applied for the job, the EEOC found that this was insufficient to support her specific reasonable accommodation request. Likewise, in Micha v. McCarthy (Army), 2020 EEOPUB LEXIS 1103 (EEOC 2020), the EEOC found that the employee, a nursing assistant, was not entitled to reasonable accommodation where she "had not provided requested updated medical information addressing conflicting medical documentation." In Roxanne v. Brennan (USPS), 2020 EEOPUB LEXIS 596 (EEOC 2020), the EEOC suggested that the employee, who had a foot impairment, was responsible for the breakdown in the interactive process by refusing

to discuss anything other than allowing her to wear Crocs in the workplace, despite the employer's contention that this was not safe footwear for a Maintenance Support Clerk at a mail distribution center. In Alonso v. Dhillon (EEOC), 2020 EEOPUB LEXIS 161 (EEOC 2020), the EEOC noted that "employer liability may be avoided where failure of the requesting individual to engage in the interactive process results in the parties being unable to identify an effective accommodation." In this case, however, the EEOC held that the employee, a Human Resource Program Manager, did not breakdown the process simply by missing an accommodation meeting, especially where the employee claimed that he hadn't received notice of the meeting and the employer already had received a doctor's note detailing what accommodation was needed. In Complainant v. Brennan (USPS), 2016 EEOPUB LEXIS 77 (EEOC 2016), the Commission found that even if the employee had a mental disability, she was not entitled to a reasonable accommodation (in this case, she requested a modified schedule and a change of supervisor) where she failed to respond to the employer's request for supporting medical documentation and she failed to attend a meeting scheduled to discuss her requests. In Liz M v. Colvin (SSA), 2016 EEOPUB LEXIS 362 (EEOC 2016), the employee, a Case Technician with a mental disability in the office's disability review division, asked that she not be required to work at the office's front desk because this caused her to feel "over-stimulated" and that she not be required to monitor hearings "because she could not listen to the 'sad stories of claimants.'" The EEOC concluded that she was not entitled to these accommodations where she refused to meet with the employer to discuss her requests and failed to support her requests with documentation from her medical providers. Similarly, in Complainant v. Mabus (Navy), 2015 EEOPUB LEXIS 43 (EEOC 2015), the EEOC held that the employer did not fail to provide reasonable accommodation to the employee, a Contract Specialist, where the employee provided only "general" and "vague" medical documentation supporting his request for part-time work, work-at-home, and parking, among other things. The EEOC held that the employee (and his doctor) refused to respond to the employer's requests for more detailed documentation about his conditions, limitations, and work restrictions.

Courts agree that individuals must cooperate in the interactive process. For example, in Petti v. Ocean County Board of Health, 2020 U.S. App. LEXIS 10082 (3d Cir. 2020)(unpublished), the employee complained of air quality problems because of workplace construction. The court held that the employee broke down the interactive process when, after extensive air quality testing by the employer, the employee failed to respond to the employer's offer to meet to discuss options, insisting that the "only solution" was transfer to another location. In Hoskins v. GE Aviation, 2020 U.S. App. LEXIS 3770 (5th Cir. 2020)(unpublished), the court held that where the employee failed to respond to the employer's repeated requests for "adequate documentation" to substantiate her anxiety-related disability (aside from own self-diagnosis) and to clarify her needed accommodations, the employee has "caused the interactive process to break down" and loses her right to accommodation. Likewise, in Keen v. Merck Sharp & Dohme Corp., 2020 U.S. App. LEXIS 19890 (7th Cir. 2020)(unpublished), the court held that the employee, a pharmaceutical sales representative, was not entitled to her request for "an early or late start" schedule modification where she failed to provide requested medical documentation to support the request. The court noted that, "an employer may reasonably request medical support to determine necessary accommodations and deny a

request if the employee does not produce it." In Garcia v. Salvation Army, 918 F.3d 997 (9th Cir. 2019), the court stated that where, among other things, the employee failed to provide requested medical information to support her claim for an accommodation, the employer "was not required to continue an interactive process." In Barton v. Unity Health System, 2019 U.S. App. LEXIS 15677 (2d Cir. 2019)(unpublished), the court seemed to suggest that the employee broke down the interactive process by refusing to discuss anything other than reassignment, while the employer was searching for accommodations that could allow her to continue in her job. Similarly, in Yochim v. Carson, 935 F.3d 586 (7th Cir. 2019), the court noted that the employee refused to even talk about the employer's proposed schedule modification accommodation, instead insisting that she be allowed to work at home. The court stated that it was the employee's "own insistence on teleworking three or more days a week and her refusal to remain open to anything less that doomed the interactive process." In McNeil v. Union Pacific Railroad Co., 936 F.3d 786 (8th Cir. 2019), the court held that the employee broke down the interactive process where she knew that the employer misunderstood her "no overtime" restriction to be permanent, but she "never arranged for a follow-up communication from her doctor" to clarify that the restriction was temporary.

In Trautman v. Time Warner Cable Texas, 2018 U.S. App. LEXIS 34933 (11th Cir. 2018)(unpublished), the court held that where the employee thwarted the interactive process, she lost her reasonable accommodation claim. In this case, after the employer denied the employee's request to work from home after 2:00 p.m., she made "an even more aggressive request to leave work at 11:00 a.m.," and refused to discuss the employer's suggested alternatives (leaving work at 4:00 p.m., ride-sharing options, additional breaks to mitigate anxiety, etc.). Instead, she "unilaterally decided to end her workday at 2:00 p.m." The court noted, "[t]hat's not the stuff of flexible, interactive discussions." In McDonald v. UAW-GM Center for Human Resources, 2018 U.S. App. LEXIS 16752 (6th Cir. 2018)(unpublished), the court held that where the employee simply quit before her accommodation request was resolved, she was "to blame for a breakdown in the interactive process." Likewise, in Tarpley v. City Colleges of Chicago, 2018 U.S. App. LEXIS 29618 (7th Cir. 2018)(unpublished), the court held that where the employee resigned before the employer decided whether to allow her to work at home as an accommodation, she could not demonstrate that her reasonable accommodation request was denied. In Gordon v. Acosta Sales and Marketing, 2015 U.S. App. LEXIS 14753 (5th Cir. 2015)(unpublished), the court held that where the employee "withdrew" from the interactive process by resigning, this was "fatal" to his reasonable accommodation claim. In this case, the employee with urinary issues caused by medications asked for reassignment. When the employer offered him an alternate accommodation (assignments with access to bathrooms), he simply resigned "rather than responding to the employer" or "explaining why an alternative accommodation was necessary." In Minter v. D.C., 809 F.3d 66 (D.C. Cir. 2015), the court held that the employer did not fail to provide a modified schedule as a reasonable accommodation where it requested more information about what was needed and the employee failed to provide any additional documentation. Interestingly, in Demarce v. Robinson Property Group, 2016 U.S. App. LEXIS 5229 (5th Cir. 2016), the court found that where the employee, a casino dealer, refused to complete the training required for her requested

accommodation (working a particular gambling table), the employee could not claim that employer failed to participate in the reasonable accommodation process. In Ward v. McDonald (Veterans Affairs), 762 F.3d 24 (D.C. Cir. 2014), the court held that the employee was responsible for the breakdown in the interactive process. In this case, the employee's doctor's note, requesting work from home was vague about how much the employee would be able to work, and the employer requested more information. The employer repeatedly attempted to get clarification of the employee's restrictions and needs, but the employee did not provide the information. The court noted that the employee was "the author of her misfortune." In EEOC v. Kohl's Department Stores, Inc., 774 F.3d 127 (1st Cir. 2014), the court stated that the employer will not be held responsible for failing to provide reasonable accommodation if the employee is responsible for the breakdown in the interactive process. In this case, after the employer told the employee with diabetes that it could not provide her requested straight-day shift schedule, the employee left the meeting. The employee refused to discuss alternate accommodations with the employer, cleaned out her locker, left the building, and would not return the employer's phone calls. Noting that the employee's refusal to cooperate with the employer in the interactive process may have been due to poor advice by someone at the EEOC, the court stated that, "one would expect that the EEOC should know that an employee's failure to cooperate in an interactive process would doom her ADA claim." In Goos v. Shell Oil Co., 2011 U.S. App. LEXIS 20260 (9th Cir. 2011)(unpublished), the court held that the employee may have been responsible for the breakdown in the interactive process where, among other things, she would not allow her doctor to talk to the employer about her depression.

The breakdown in the interactive process can also occur if the employee does not make a good faith effort to succeed with the accommodation. For example, in Dillard v. City of Austin, 837 F.3d 557 (5th Cir. 2016), the court held that where the employee accepted a reassigned position for which he was not qualified, and where the city offered him training for the position, he was required "to make an honest effort to learn and carry out the duties of his new job with the help of the training the City offered him." The court noted that where "he did not attempt to fill his new role in good faith," he cannot claim that the city should have continued searching for alternate positions, since he was responsible for the breakdown in the reasonable accommodation process.

It appears that the employee will be held responsible for the actions or inactions of his/her doctor. For example, in Hoppe v. Lewis University, 692 F.3d 833 (7th Cir. 2012), the court held that the employee, a philosophy professor, did not "uphold her end of the bargain" in the interactive process. Specifically, although her doctor asked that her office be relocated because of her anxiety disorder, the doctor's letter did not identify a suitable location or provide information on her restrictions. When the University asked for clarification, a second letter also failed to provide the information. The court also noted that the employee turned down three separate relocation proposals by the University.

Importantly, it appears that an employer may require cooperation in determining whether an accommodation continues to be needed or whether an individual is qualified. For example, in Johnson v. Cleveland City School District, 2011 U.S. App. LEXIS 22933 (6th Cir. 2011)(unpublished), the court held that where the employee's doctor had

previously submitted a note stating that the employee could not discipline students, the employer was entitled to seek an updated note providing clarification when the employee later claimed that she was qualified for a reassignment which required this function. In this case, the employee failed to appropriately respond to the employer's request for this documentation. In Jefferson v. MillerCoors, LLC, 2011 U.S. App. LEXIS 18588 (5th Cir. 2011)(unpublished), the employer requested updated medical restrictions from all employees with permanent disabilities. Where the employee repeatedly failed to provide the requested update of his restrictions, the court held that the employee was responsible for the breakdown in the interactive process. In Kennedy v. Superior Printing Co., 215 F.3d 650 (6th Cir. 2000), the employer requested updated medical information from the plaintiff in order to verify that he was still entitled to a modified schedule (which the employer had provided for over one year). Although the plaintiff maintained that the employer was simply trying to obtain information to defend its decision not to accommodate, the court concluded that the employer was entitled to require the employee to "provide medical documentation sufficient to prove that he had a condition requiring accommodation." The court pointed out that since the plaintiff failed to cooperate with the employer's repeated requests for "medical documentation demonstrating the need for accommodation" and since the employee failed to show up for two independent medical examinations, the employer did not violate the ADA by refusing to provide the requested accommodation.

Telling Other Employees That an Employee is Receiving Accommodation

A difficult practical question that frequently arises in the workplace is what -- if anything -- an employer may tell other employees about one employee's reasonable accommodation. It is important to remember that the ADA prohibits employers from disclosing an employee's "medical" information (with limited exceptions). Therefore, the hard question is whether the mere fact that someone is receiving reasonable accommodation is "medical" information. Some disability-rights advocates have argued that disclosing that someone is receiving an ADA reasonable accommodation essentially *reveals* that the individual has a disability.

Certainly, the safest approach an employer can take is to simply *not* disclose this fact to other employees. Of course, that is easier said than done, since other employees -- or unions -- may insist on knowing why one employee gets to perform the job in a different manner (or under different policies). Therefore, an employer may simply need to say *something*. There is a strong argument that an employer would not violate the ADA by telling other employees that, in order to comply with federal law, it has made a modification for the particular employee, but that federal law prohibits the employer from further disclosure. This broad statement arguably does not disclose that the individual has a disability because a number of federal laws impose a variety of workplace requirements (e.g., requirements under the Occupational Safety and Health Act or the Family and Medical Leave Act of 1993). In fact, the EEOC's position is that although an employer may not tell employees that it is providing a reasonable accommodation for an employee, the employer may "explain that it is acting for legitimate business reasons or in compliance with federal law." EEOC Enforcement Guidance on the ADA and Psychiatric

Disabilities, No. 915.002 (3/25/97), at p. 18. **This Guidance is available on the internet at www.eeoc.gov.** In Williams v. Astrue (SSA), 2007 EEOPUB LEXIS 4206 (EEOC 2007), the Commission further discussed what an employer may do in responding "to a question from an employee about why a coworker is receiving what is perceived as 'different' or 'special' treatment." The EEOC stated that the employer might explain "that it has a policy of assisting any employee who encounters difficulties in the workplace," that "many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy." Of course, an employer can always decide that it is willing to take the additional risk of disclosing more specific information (in order to maintain workplace peace).

Another interesting issue is what an employer may tell a supervisor to whom an employee is being reassigned as an accommodation. In an informal guidance letter, the EEOC has stated that if a manager/supervisor is normally involved in interviewing applicants, s/he may be informed "that an employee with a disability is to receive the position as a reassignment." The EEOC elaborated that "it should normally be sufficient to inform the manager/supervisor that the employee has a disability, and that the ADA requires that s/he be given the position as a reassignment as long as s/he is qualified."[5]

Employer's Right to Choose the Accommodation

An employer's obligation is to provide an effective accommodation -- not *necessarily* the accommodation that the individual most wants. See Appendix to 29 C.F.R. § 1630.9. Indeed, the EEOC has consistently stated that although an employer must give an "effective" accommodation, it need not be the "best" accommodation.[6] For example, in Irvin v. Saul (SSA), 2020 EEOPUB LEXIS 1170 (EEOC 2020), the EEOC noted that "if there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective." Likewise, in Ying v. Brennan (USPS), 2020 EEOPUB LEXIS 1272 (EEOC 2020), the employee, a Disability Compliance Specialist with asthma, alleged that she was denied accommodation because she was not granted her request for full-time telework. Her doctor's note, however, suggested that she needed to either work at home or in an environment that did not trigger her asthma, and in this case, the employer offered the employee an alternative worksite with better air quality. The Commission found against the employee because, "although protected individuals are entitled to reasonable accommodation under the Rehabilitation Act, they are not necessarily entitled to their accommodation of choice." In Michelle G v. Lew (Treasury), 2016 EEOPUB LEXIS 1247 (EEOC 2016), the EEOC stated that the employer, in providing leave as an accommodation could choose between requiring the employee to use accrued leave rather than leave without pay because an "employer may choose between effective accommodations." In Cathy M v. James (Air Force), 2016 EEOPUB LEXIS 976 (EEOC 2016), the EEOC held that the Air Force complied with the law by offering the employee, a Food Service Officer with insomnia and carpal tunnel syndrome, a flexible schedule allowing her to arrive and leave as early as possible "without compromising her attendance during core hours." Although the employee wanted to

telework, the EEOC stated that while she "is entitled to an effective accommodation, she is not entitled to the accommodation of her choice."

Courts agree. For example, in Keen v. Merck Sharp & Dohme Corp., 2020 U.S. App. LEXIS 19890 (7th Cir. 2020)(unpublished), the court held that the employer was "not required to approve the exact accommodation" that the employee wanted, in this case, a particular type of car for her sales calls. The court noted that the employer consulted with the employee's doctor, made modifications to her current vehicle, and even "offered to let her to drive any car she paid for herself and reimburse her for mileage." In D'Onofrio v. Costco Wholesale Corp., 2020 U.S. App. LEXIS 20869 (11th Cir. 2020), the court held that regardless of whether the deaf employee preferred an in-person interpreter, the employer could provide "a supposedly less preferable medium," video remote interpreting (VRI) if it was effective. Likewise, in Yochim v. Carson, 935 F.3d 586 (7th Cir. 2019), the court held that although the employee wanted to work full-time at home, the employer adequately offered a reasonable accommodation by suggesting a schedule modification to address her medical requirements that she attend therapy appointments and avoid commutes on crowded trains. In Solloway v. Clayton, 2018 U.S. App. LEXIS 16588 (11th Cir. 2018)(unpublished), the court held that an employee is not necessarily entitled to the accommodation of the employee's choice. In this case, the employee with PTSD (caused by a brutal attack) needed to avoid contact with her former supervisor after she learned he had a history of discipline for pornography. Although the employee wanted full-time telework, the employer "successfully" accommodated the employee by allowing part-time telework for the employee and requiring part-time telework for the former supervisor so that they avoided contact. In Khoury v. United States Army, 2017 U.S. App. LEXIS 1500 (3d Cir. 2017)(unpublished), the court held that where the employee requested first-class air travel so that he could stretch because of injuries, the employer could choose to provide train travel with a sleeper-car upgrade where it achieved the same purpose. In Tennial v. UPS, 840 F.3d 292 (6th Cir. 2016), the court held that the employer did not violate the ADA by offering to put instructions in writing despite the fact that the employee wanted to use a tape recorder when his supervisor gave him instructions. The court noted that the employee failed "to explain why this would not constitute a reasonable accommodation." Similarly, in Noll v. IBM, 787 F.3d 89 (2d Cir. 2015), the court held that although the employee wanted the company to caption all of its intranet training videos, the company could instead choose to provide interpreting services as needed for the employee who understood American Sign Language. Likewise, in Swanson v. Village of Flossmoor, 794 F.3d 820 (7th Cir. 2015), the court held that the employer complied with the ADA by permitting the employee, a Detective who had a stroke, to use leave and work a part-time schedule, despite the employee's claim that he preferred light duty. In Hamedl v. Verizon Communications, 2014 U.S. App. LEXIS 3058 (2d Cir. 2014)(unpublished), the court stated that an employer has the right to choose among effective accommodations. In this case, the court held that the employer offered an effective accommodation (a modified schedule starting at 5:30 a.m. so the employee could avoid traffic because of his back pain), even though it was not the schedule the employee wanted (a midnight shift). Similarly, in Diaz v. City of Philadelphia, 2014 U.S. App. LEXIS 8299 (3d Cir. 2014)(unpublished), the court held that an employee is not entitled to the

"accommodation of her choosing." In this case, the plaintiff claimed that there were other positions she would have preferred over the position that she was given as an accommodation. In Solomon v. School District of Philadelphia, 2013 U.S. App. LEXIS 16638 (3d Cir. 2013)(unpublished), the court held that the employer acted lawfully by offering the employee, a teacher who could not climb stairs, elevator access to an upper-level classroom, despite her desire for a first-floor classroom. The court noted that although "an employer has a duty to offer a reasonable accommodation to a qualified employee, 'an employee cannot make [the] employer provide a specific accommodation if another reasonable accommodation is instead provided'" (citation omitted). Likewise, in Gratzl v. Office of the Chief Judges, 601 F.3d 674 (7th Cir. 2010), the court noted that the employer gets to decide which accommodation to provide. In this case, the employer (a court) offered to let the court reporter with incontinence work in a courtroom close to restrooms, avoid jury trials, and give a "high-sign" to signal that she needed to take a break. The plaintiff refused the accommodation because, among other things, she felt embarrassed to state when she needed a break. The court held that since the employee was rejecting an effective accommodation for her own personal reasons, the employer could not be liable for failure to accommodate.

This also means that an employer may provide an accommodation that requires an employee to remain on the job (for example, a reallocation of marginal functions or a temporary transfer) despite the employee's request for "leave" as an accommodation. See EEOC Enforcement Guidance: Workers' Compensation and the ADA, No. 915.002 (9/3/96), at p. 18; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 10/17/02) at Question 9.

On the other hand, an employer may not choose an ineffective accommodation over an effective accommodation. In Elsa v. Bridenstine (NASA), 2020 EEOPUB LEXIS 838 (EEOC 2020), the EEOC held that "while an employer may choose between effective accommodations, forcing an employee to take leave when another accommodation would permit an employee to continue working is not an effective accommodation." Likewise, in Jona v. Pompeo (Department of State), 2020 EEOPUB LEXIS 391 (EEOC 2020), the EEOC held that the employer could not choose leave rather than allowing "situational telework" when her physical symptoms precluded her from coming to the office. Along these lines, in an informal guidance letter, the EEOC wrote that an employer could not choose "leave" as the accommodation if the employee requested "to work at home for a fixed period of time" because work-at-home is the more effective accommodation.[7]

Of course, an employee is free to refuse an accommodation offered by the employer. See Appendix to 29 C.F.R. § 1630.9(d). Nonetheless, the employer has certainly met its ADA obligations by *offering* an effective accommodation. In addition, the EEOC and courts have specifically stated that although an individual cannot be forced to accept a reasonable accommodation, if s/he cannot perform the job without it, s/he will not be considered "qualified" under the law. 29 C.F.R. § 1630.9(d); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 11.[8] For example, in McDonald v. UAW-GM Center for Human Resources, 2018 U.S. App. LEXIS 16752 (6th Cir. 2018)(unpublished), the court stated that the employer did not need to offer "a counter accommodation" when the employee rejected

the employer's proposed accommodation based on her "preference." In this case, the employee, who claimed she needed an extended time to exercise in the employer's gym during her lunchtime, turned down the employer's offer that she arrive early at work to exercise in the gym. In Scott K v. Johnson (Homeland Security), 2016 EEOPUB LEXIS 1048 (EEOC 2016), the EEOC found that the employer met its reasonable accommodation obligations where it offered the Secret Service Criminal Investigator an equivalent job within the medical restrictions related to his back injury and he declined the reassignment. In Minnihan v. Mediacom Communications Corp., 779 F.3d 803 (8th Cir. 2015), the court held that where the employee could no longer perform his essential driving function, the employer complied with the law by offering him a reassignment that did not require driving. In this case, where the employee declined to show up for his new job, he could not lawfully claim that the employer failed to provide an accommodation. In Yovtcheva v. City of Philadelphia Water Department, 2013 U.S. App. LEXIS 9247 (3d Cir. 2013)(unpublished), the court held that the employee was not qualified where she refused to even try the reasonable accommodation (a partial-face respirator) that the employer offered because of her health problems caused by exposure to a particular chemical in the workplace. The court noted that although an individual "is not required to accept an accommodation, " if s/he rejects one "that is necessary to enable the individual to perform the essential functions of the position," then s/he "will not be considered qualified."

It is important to remember, however, that an individual may have the right to turn down an accommodation if it is ineffective or if a more effective one exists. For example, in Architect of the Capitol v. Office of Compliance, 361 F.3d 633 (Fed. Cir. 2004), the court held that the employee had a right to refuse reassignment to a vacant elevator operator position in favor of a vacant subway operator position because the elevator position would have aggravated her asthmatic condition (because of the fumes in an elevator). In Hoskins v. Oakland County Sheriff's Department, 227 F.3d 719 (6th Cir. 2000), the court noted that the plaintiff's refusal to accept a lower-level position would not preclude her from being covered under the ADA if she could demonstrate that an equivalent position for which she was qualified had been available.

Reasonable Accommodations for Temporary Workers

In the case of temporary workers, several issues arise concerning reasonable accommodation. One common question is whether the temporary agency or the client company has the obligation to provide accommodations. According to the EEOC, during the application process, the staffing firm is the applicant's prospective employer "because it has not yet identified the client for which the applicant will work." Therefore, the staffing firm has the obligation to provide accommodations for the application process. EEOC Enforcement Guidance on the Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms (12/22/00), at C(6). **This Guidance is available on the internet at www.eeoc.gov.** Once a worker has been referred to a client, both the staffing firm and the client may have the obligation to accommodate if both qualify as joint employers. Id, at C(7). The EEOC recommends that, from a practical perspective, the two companies specify in their contracts with each

other who will provide accommodations for referred workers. Importantly, the EEOC also has stated that if a reasonable accommodation cannot be provided quickly enough to allow the temporary assignment to be completed in a timely manner, the staffing agency and/or client may have a good undue hardship claim. Id. at C(8). In addition, the EEOC has stated that, from a cost perspective, if an accommodation would be too expensive for one company to provide, that entity must show that it "made good faith, but unsuccessful, efforts to obtain contribution from the other entity." Id. at C(9). If an accommodation cannot be provided by one entity because it is completely in the control of the other entity, the first entity may show undue hardship by showing that it "made good faith, but unsuccessful efforts to obtain the other's cooperation in providing the reasonable accommodation." Id. at C(10).

Types of Reasonable Accommodation

Unpaid Leave as a Reasonable Accommodation

Whether Leave is a Reasonable Accommodation

Courts have held that unpaid leave *is* a form of reasonable accommodation. Unpaid leave may be an appropriate reasonable accommodation when an individual expects to return to work after getting treatment for a disability, recovering from an illness, or taking some other action in connection with his/her disability, such as training a guide dog.

The EEOC has consistently taken the position that unpaid breaks or leave can be a reasonable accommodation. Appendix to 29 C.F.R. § 1630.2(o); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 16. In Irvin v. Saul (SSA), 2020 EEOPUB LEXIS 1170 (EEOC 2020), the EEOC found that the employer's obligation to provide "additional breaks" for the employee with narcolepsy, "albeit without compensation but with the ability to make up the time used, were a reasonable accommodation." In Complainant v. McHugh (Army), 2015 EEOPUB LEXIS 173 (EEOC 2015), the EEOC held that an employer "should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave."

In addition, almost all courts have held that leave is a form of reasonable accommodation in particular circumstances. For example, in Kachur v. Nav-Lvh, LLC, 2020 U.S. App. LEXIS 17893 (9th Cir. 2020)(unpublished), the court noted that "an extended medical leave" beyond FMLA leave "may be a reasonable accommodation if it does not pose an undue hardship." The court stated that "critically," the employee only needs to show that the leave "could plausibly" enable him to perform the job, not that it "is certain or even likely to be successful." In Bolden v. Lowes Home Centers, 2019 U.S. App. LEXIS 26019 (6th Cir. 2019)(unpublished), the court held that "medical leave" is a reasonable accommodation. In Murphy v. Samson Resources Co., 2013 U.S. App. LEXIS 9328 (10th Cir. 2013)(unpublished), the court noted that a leave of absence may be a required accommodation. In Valdez v. Brent McGill and Mueller Supply Co., Inc., 2012 U.S.

App. LEXIS 2783 (10th Cir. 2012)(unpublished), the court also held that a "leave of absence may be a reasonable accommodation as long as the employee's request states the expected duration of the impairment." Similarly, in Carroll v. City of Stone Mountain, 2013 U.S. App. LEXIS 23633 (11th Cir. 2013)(unpublished), the court agreed that "a leave of absence can be a reasonable accommodation." In Reza v. International Game Technology, 2009 U.S. App. LEXIS 23875 (9th Cir. 2009)(unpublished), the court held that the employer had provided a reasonable accommodation by extending the employee's medical leave. In Basith v. Cook County, 241 F.3d 919 (7th Cir. 2001), the court noted that providing the employee with a medical leave of absence "qualifies as a reasonable accommodation." Similarly, in Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998), the court found that temporary leave for the employee's physician "to design an effective treatment program" for her depression was a possible accommodation.

Another question that arises is how much leave an individual must be given as a reasonable accommodation. This is likely to be fact-specific -- depending on whether a particular amount of time imposes an undue hardship on the employer and on whether the individual is still considered "qualified." For example, in Echevarria v. Astrazeneca Pharmacuticals, 2017 U.S. App. LEXIS 7774 (1st Cir. 2017), the court held that, although leave is unquestionably an accommodation, the employee's request for 12 additional months (after she had already taken five months) was not facially "reasonable" because "the sheer length of the delay … jumps off the page." The court noted, however, that it was not deciding that "a request for a similarly lengthy period of leave will be an unreasonable accommodation in every case." In Sanchez v. Vilsack, 695 F.3d 1174 (10th Cir. 2012), the court reiterated its position that a leave of absence for medical care would be a reasonable accommodation, specifically noting other decisions which have held that several months of leave were required under the facts of those cases. In Cleveland v. Federal Express Corp., 2003 U.S. App. LEXIS 24786 (6th Cir. 2003)(unpublished), the court held that there is no "bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation" and, therefore, the plaintiff's requested six-month leave could be a reasonable accommodation for her lupus. In Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999), the court suggested that it might not be an undue hardship for an employer to hold a job open for a lengthy period of time where its own benefits policy allowed employees to take up to one year of leave and it regularly hired seasonal employees to fill positions. However, in Melange v. City of Center Line, 2012 U.S. App. LEXIS 11175 (6th Cir. 2012)(unpublished), the court suggested that an employer is not generally required to hold a position open for longer than one year. Similarly, in Robert v. Board of County Commissioners of Brown County, 691 F.3d 1211 (10th Cir. 2012), the court held that an employee is only entitled to "leave" as an accommodation if s/he will be able to perform the job "in the 'near future.'" Although the court did not specify how long is too long, it noted another court's determination that six months is too long.

In contrast to most courts, in Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017), the court held that "long-term medical leave" is not a reasonable accommodation because an employee who needs such leave "cannot work and thus is not a 'qualified individual' under the ADA." The court stated that, "an extended leave of absence does not give a disabled individual the means to work; it excuses his not

working." Specifically, the court stated that a "multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA." Interestingly, the court stated that, "a short leave of absence—say, a couple of days or even a couple of weeks—may, in appropriate circumstances, be analogous to a part-time or modified work schedule" and, therefore, be a required accommodation. In this case, the court held that the furniture manufacturer did not have to provide the employee 2-3 months of medical leave beyond his FMLA leave because of his disc compression surgery which was performed while he was on FMLA leave. In Golden v. Indianapolis Housing Agency, 2017 U.S. App. LEXIS 20257 (7th Cir. 2017)(unpublished), the court reaffirmed this view, holding that "an employee who requires a multi-month period of medical leave" for breast cancer (in this case six months in addition to her FMLA leave) "is not a qualified individual."

Courts have held that holding certain jobs open for just over several months can cause an under hardship. For example, in Winnie v. Infectious Disease Associates, P.A., 2018 U.S. App. LEXIS 31609 (11th Cir. 2018)(unpublished), the court held that providing a 4-month leave of absence for an IV nurse caused an undue hardship because of the specialized nature of the medical practice, the high skill-level of the nurses (who used "special needles" to inject "extremely potent drugs"), the patient demand was "at an all-time high," and the center was understaffed with only four nurses. In Hwang v. Kansas State University, 753 F.3d 1159 (10th Cir. 2014), the court held that the employer was not required to provide more than six months of leave as an accommodation to an Associate Professor with cancer. The court noted that although "a brief absence" from work can be a reasonable accommodation, an employer almost never needs to give more than six months of leave. The court also noted that "extensive time off" would be "more problematic" for an emergency medical professional than for a tax preparer who is not subject to an imminent deadline. In Epps v. City of Pine Lawn, 353 F.3d 588 (8th Cir. 2003), the court held that a six-month leave of absence was not a required reasonable accommodation for a policeman with a small municipality which could not reallocate his job duties among its small staff of fifteen to twenty-two police officers. The court noted that "an employer is not required to hire additional people or assign tasks to other employees to reallocate essential functions that an employee must perform."

Because leave is an accommodation so that the employee will be able to come back to work, if there is no evidence that the employee will return to the job, leave would likely not be a required accommodation. For example, in Gamble v. JP Morgan Chase & Co., 2017 U.S. App. LEXIS 8376 (6th Cir. 2017)(unpublished), the court held that the employee was not qualified where "the evidence suggests that [he] had no intention of returning to work" at the company when his long-term disability leave ended.

The EEOC has stated that if holding a position open for the needed leave period would pose an undue hardship:

> the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 18.

Importantly, the EEOC has stated that an individual cannot be penalized for work missed during leave which was taken as a reasonable accommodation. For example, in Complainant v. Donahoe (USPS), 2014 EEOPUB LEXIS 1968 (EEOC 2014), the EEOC stated that an "employer may not penalize an employee who missed work during leave taken as a reasonable accommodation. To do so would constitute retaliation for the employee's use of a reasonable accommodation. Likewise, the EEOC has written that a salesperson cannot be penalized for below-average sales if that lower performance was the result of ADA-required leave. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 19.

It is also helpful to remember that in Murray v. AT&T Mobility LLC, 2010 U.S. App. LEXIS 7734 (7th Cir. 2010)(unpublished), the court held that leave given as a reasonable accommodation can be charged against an employee's FMLA balance.

Importantly, in Mois v. Wynn Las Vegas LLC, 2017 U.S. App. LEXIS 19661 (9th Cir. 2017)(unpublished), the court held that the employer may not have effectively engaged in the interactive process where it allegedly did not attempt "to discover the precise limitations and types of accommodations which would be most effective" for the employee's injury, instead simply placing the employee on leave. On the other hand, in Wenc v. New London Board of Education, 2017 U.S. App. LEXIS 15801 (2d Cir. 2017)(unpublished), the court held that the employer did not violate the ADA by providing leave (rather than returning the employee to his school teacher job) where his doctor's note stated that it was in the teacher's "best interest to be out of work."

Whether Employee's Job Must be Held Open During Leave

Although there is general agreement that unpaid leave is a form of reasonable accommodation, there is *disagreement* on what this means -- specifically, whether it means that an employee's job must actually be held open. The EEOC takes the position that unpaid leave means holding the employee's job open, unless doing so would cause an undue hardship. See EEOC Fact Sheet: "The FMLA, the ADA, and Title VII of the Civil Rights Act of 1964" at p. 7 (question 14), and EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 18. Along these lines, in Yinger v. Postal Presort, 2017 U.S. App. LEXIS 10184 (10th Cir. 2017)(unpublished), the court held that the employer did not effectively grant the employee's request for leave where, among other things, the company did not hold open his position. On the other hand, in Brunckhorst v. City of Oak Park Heights, 914 F.3d 1177 (8th Cir. 2019), the court seemed to hold that an employer is not required to hold open the position of an employee (in this case, a Senior Accountant who had exhausted his FMLA leave) as a reasonable accommodation. The court stated that the EEOC's position to the contrary "is not binding authority."

Leave for a Definite vs. Indefinite Time

Another question regarding unpaid leave is whether an employer has to hold the job open for an *indefinite* period of time. This situation arises when an employee says s/he simply doesn't have any idea when s/he can come back. The situation also arises if an employee continually requests more and more leave after the expiration of prior leave; this pattern arguably reflects a request for indefinite leave.

Although, over the years, the EEOC has been somewhat inconsistent on the issue of indefinite leave as a reasonable accommodation, it most recently stated that, "indefinite leave -- meaning that an employee cannot say whether or when she will be able to return to work at all - will constitute an undue hardship, and so does not have to be provided as a reasonable accommodation." Employer-Provided Leave and the Americans with Disabilities Act (EEOC 2016 "Resource Document").

Most courts have held that an employer does *not* have to provide *indefinite leave* as a reasonable accommodation. For example, in Hoskins v. GE Aviation, 2020 U.S. App. LEXIS 3770 (5th Cir. 2020)(unpublished), the court noted that indefinite leave "is manifestly not a reasonable accommodation." In Monroe v. Florida Department of Corrections, 2019 U.S. App. LEXIS 34114 (11th Cir. 2019)(unpublished), the court noted that since the employee's doctor could not give an estimated date when the employee, a corrections officer with PTSD, could return to work, such indefinite leave is "inherently unreasonable." In Ruiz v. Paradigmworks Group, Inc., 2019 U.S. App. LEXIS 28836 (9th Cir. 2019)(unpublished), the court noted that reasonable accommodation "does not require the employer to wait indefinitely for an employee's medical condition to be corrected" (citation omitted). Interestingly, however, as discussed below in more detail, this court took the position that the "mere fact that a medical leave has been repeatedly extended does not necessarily establish that it would continue indefinitely" (citation omitted). In Kieffer v. CPR Restoration & Cleaning Services, LLC, 2018 U.S. App. LEXIS 12560 (3d Cir. 2018)(unpublished), the court held that where the employee's request was "neither a leave for a definite period, nor a return in the near future," the request was not a required accommodation. In Winston v. Ross (Department of Commerce), 2018 U.S. App. LEXIS 4788 (10th Cir. 2018)(unpublished), the court noted that for a leave request to be a reasonable accommodation, the employee must provide evidence as to when her medical condition will "improve to the point where she would be able to perform the essential functions of her job. In Billups v. Emerald Coast Utilities Authority, 2017 U.S. App. LEXIS 21199 (11th Cir. 2017)(unpublished), the court held that to be "reasonable," requests for leave must allow employees to "perform the essential functions of their jobs presently or in the immediate future." In this case the employee, a Utility Service Technician, who injured his shoulder while working for the wastewater plant, had requested an indefinite amount of leave while he underwent surgery and lengthy therapy. The court noted that nothing "requires an employer to wait for an indefinite period" for "an accommodation to achieve its intended effect." Likewise, in Cooley v. East Tennessee Human Resource Agency, Inc., 2017 U.S. App. LEXIS 26345 (6th Cir. 2017)(unpublished), the court held that "for an additional leave of absence to be a reasonable accommodation under the ADA, the employee must,

at a minimum, provide the employer with an estimated, credible date when she can resume her essential duties." In this case, the employee, a injured bus driver, did not provide her municipal employer of a date when she would be able to return, only that "she was taking hydrocodone only at night and was being weaned off of it by her physician."

In Maat v. County of Ottawa, 2016 U.S. App. LEXIS 14882 (6th Cir. 2016)(unpublished), the court specifically noted that indefinite leave is not a reasonable accommodation. In this case, the court stated that even though the employee requested a six-week period of leave, the request was still indefinite because she had already worked on a reduced schedule for nearly seven months and her doctor indicated that at the end of the leave, the prognosis was still uncertain and she would need to undergo further testing and surgery. In Lancaster v. Sprint, 2016 U.S. App. LEXIS 21037 (10th Cir. 2016)(unpublished), the court held that "an extended, indeterminate leave of absence" does "not qualify as a reasonable accommodation as a matter of law."

In Luke v. Florida A&M University, 2016 U.S. App. LEXIS 23038 (11th Cir. 2016)(unpublished), the court held that the employer did not fail to provide accommodation by refusing to extend the employee's medical leave for one week (which would have allowed her to become eligible for additional FMLA leave). The court noted that leave is "unreasonable" if will not lead to job performance "in the present or in the immediate future." In this case, the employee, a campus officer, had already been on medical leave for nine months, and there was no evidence that she "would have been able to perform her job duties even after an additional 12 weeks of FMLA leave." Rather, her doctor had reported that she needed "at least another six months" in order to return to her patrol duty (which was an essential function of her job).

Likewise, in Jarrell v. Hospital for Special Care, 2015 U.S. App. LEXIS 16827 (2d Cir. 2015)(unpublished), the court held that indefinite leave to be treated for a mental health issue was not a reasonable accommodation. In this case, the employee's doctor's note stated that the employee needed "at least another 14 weeks of leave," the employee stated that whether he would be able to come back to work at that time "depended on his medical team," and he did not try to "ascertain from his doctors" more definite information. In Dorsey v. Boise Cascade Co., 2015 U.S. App. LEXIS 13783 (5th Cir. 2015)(unpublished), the court held that "indefinite leave" until a worker recovers enough to work is not a reasonable accommodation. In Petrone v. Hampton Bays Union Free School District, 2014 U.S. App. LEXIS 9775 (2d Cir. 2014)(unpublished), the court held that the schoolteacher's requested leave of absence was not reasonable where he had no anticipated date of return to his job. In Wilson v. Dollar General Corp., 717 F.3d 337 (4th Cir. 2013), the court stated that, "in leave cases, the accommodation must be for a finite period of leave." In Larson v. United Natural Foods West, Inc., 2013 U.S. App. LEXIS 9956 (9th Cir. 2013)(unpublished), the court held that "an indefinite, but at least six-month long" leave of absence was not a reasonable accommodation. Likewise, in Henry v. United Bank, 686 F.3d 50 (1st Cir. 2012), a Massachusetts state law case applying ADA standards, the court held that it is not "reasonable" for an employee to request indefinite leave. Therefore, the employer was not required to show that this

caused an undue hardship. In this case, the employee had been unable to work for a number of months, and submitted a doctor's note stating that she needed leave "until further notice." In Peyton v. Fred's Stores of Arkansas, 561 F.3d 900 (8th Cir. 2009), the court held that "indefinite" leave is not a reasonable accommodation. As a result, the employer did not need to hold open the employee's Manager job where she "had no idea when, if ever, she would be able to return" after her cancer treatment.

Courts seem to analyze repeated extensions of leave requests as indefinite leave. For example, in Gardenhire v. Manville, 2018 U.S. App. LEXIS 2933 (10th Cir. 2018)(unpublished), the court held that although "a reasonable allowance of time for medical care and treatment" may be a reasonable accommodation, an employer is "not required to wait indefinitely" for the employee to recover. In this case, the employee had asked for several extensions of leave for his arm to heal from an ice skating injury. In Whitaker v. Wisconsin Department of Health Services, 849 F.3d 681 (7th Cir. 2017), the court stated that although unpaid leave could be a reasonable accommodation, the employee must be able to show that s/he "likely would have been able to return to work on a regular basis." In this case, the employee could not make this showing where she "repeatedly requested additional medical leave when her leave was about to expire," and she did not explain how additional "treatment" would be effective at enabling "her to return to work regularly." In Williams v. AT&T Mobility Services, LLC, 847 F.3d 384 (6th Cir. 2017), the court noted that although additional leave is an accommodation, it is "unreasonable" to require an employer to keep a job open indefinitely. In this case, the customer service representative's history of repeatedly needing extensive periods of leave (in some cases, many months), and often failing to return to work on the dates estimated by her health care providers, demonstrated that future leave requests were indefinite. Similarly, in Gardner v. School District of Philadelphia, 2015 U.S. App. LEXIS 21941 (3d Cir. 2015)(unpublished), the court held that although leave to return to work is an accommodation, the plaintiff was not "qualified" where, after extensive FMLA and other absences, he wanted to continue extending his leave by using his "sick leave and wage continuation benefits." In this case, the court held that although "the School District has authorized in abundance" sick leave benefits, there was no evidence that the employee would be able to perform his job functions "in the near future." The court stated that an employer "is under no obligation to maintain the employment of a plaintiff whose proposed accommodation for a disability is 'clearly ineffective.'" In Brannon v. Luco Mop Co., 521 F.3d 843 (8th Cir. 2008), the court held that an employee's third request for additional leave was not a request for "reasonable accommodation that would permit her to perform the essential function of regular work attendance," where each request "further postponed her return-to-work date." The court noted that although leave is a possible accommodation, an employer is not required to provide "an unlimited absentee policy." Similarly, in Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001), the court noted that an employee cannot "repeatedly invoke[]" leave as an accommodation "where there are plausible reasons to believe" that leave would not be effective, such as "the fact that a prior leave was granted and was unsuccessful."

The EEOC seems to generally agree with this approach. For example, in a "Fact Sheet" on Conduct issues, the EEOC has noted that when an employee has sought a second six-

week extension of leave (after an initial 12-week leave), the employer may ask the doctor about "why the doctor's earlier predictions on return turned out to be wrong," and for "a clear description of the employee's current condition, and the basis for the doctor's conclusion that only another six weeks of leave are required." EEOC Fact Sheet "Applying Performance and Conduct Standards to Employees with Disabilities" (2008) at Example 39. **This Fact Sheet is available on the internet at www.eeoc.gov**. The EEOC stated that if the doctor "states that the employee's current condition does not permit a clear answer as to when he will be able to return to work," then this "supports a conclusion that the employee's request has become one for indefinite leave." Importantly, the EEOC concluded that "this poses an undue hardship and therefore the employer may deny the request."

Along these lines, in Ruiz v. Paradigmworks Group, Inc., 2019 U.S. App. LEXIS 28836 (9th Cir. 2019)(unpublished), the court noted that "an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer." Therefore, if an employer is going to claim that the employee needed indefinite leave, it should evaluate whether the extent of leave is truly open-ended. In Haschmann v. Time Warner Entertainment Co., 151 F.3d 591 (7th Cir. 1998), the court noted that the employer could not claim that the employee needed indefinite leave where the employer did not even call the employee's doctor or ask an independent physician to evaluate the employee.

Some courts have suggested that indefinite leave might sometimes be a reasonable accommodation. In Kachur v. Nav-Lvh, LLC, 2020 U.S. App. LEXIS 17893 (9th Cir. 2020)(unpublished), the court held that an accommodation that fails to provide an "end date of his leave" is not "per se unreasonable." In this case, the employee had taken 16 weeks of leave, asked for an additional month, and his doctor testified that he would need monthly appointments and that it was not clear how long the healing process would take. The court suggested that "recovery time of unspecified duration" could be a reasonable accommodation unless the employer can show that it causes an undue hardship. Likewise, in Cleveland v. Federal Express Corp., 2003 U.S. App. LEXIS 24786 (6th Cir. 2003)(unpublished), the court suggested that indefinite leave could be a reasonable accommodation unless the employer can show that it causes an undue hardship.

Leave for Unreliable/Unpredictable Attendance

Yet another related issue is whether unpaid leave must be provided for someone whose attendance is unreliable and/or unpredictable. There is broad agreement among the courts that reliable attendance is required to perform most jobs. Therefore, most courts say that an employer does *not* have to provide leave for an employee who will be unable to maintain predictable attendance. For example, in Fisher v. Vizioncore, Inc., 2011 U.S. App. LEXIS 14908 (7th Cir. 2011)(unpublished), the court held that the employee's request for "an open-ended schedule with the privilege to miss workdays frequently and without notice, and to telecommute without manager approval" is "unreasonable." Likewise, in Amadio v. Ford Motor Company, 238 F.3d 919 (7th Cir. 2001), where the plaintiff had taken 23 medical leaves in three years, the court stated that an employer is

not required to give an "open-ended schedule that allows the employee to come and go as he pleases." In Hibbler v. Regional Medical Center at Memphis, 2001 U.S. App. LEXIS 13323 (6th Cir. 2001)(unpublished), when the plaintiff did not feel well on a number of occasions, she arrived at work late (an hour or more) without calling her supervisor. The court held that the employer was "not required to overlook or accommodate frequent unscheduled -- and unapproved -- absences." Similarly, in Earl v. Mervyns, Inc., 207 F.3d 1361 (11th Cir. 2000), as noted earlier, the court held that punctuality was an essential function of the plaintiff's job as a Store Area Coordinator; the plaintiff could not arrive at work on time because of her Obsessive Compulsive Disorder. The court held that the employer was not required to permit the plaintiff "to arrive at work at any time without reprimand."

On the other hand, EEOC's evolving position appears to be that intermittent, unpredictable leave may be a reasonable accommodation unless the employer can show that such leave would cause an undue hardship. In a 2016 "Resource Document" entitled Employer-Provided Leave and the Americans with Disabilities Act, the EEOC stated fully ten times that "intermittent leave" may be a possible reasonable accommodation unless it causes an undue hardship.

Modifying No-Fault Attendance Policies as a Reasonable Accommodation

Many employers have a "no-fault" attendance policy, where employees get a certain amount of leave (for example, three months or six months) and then they are fired -- regardless of the reason for the absence. This no-fault policy should not *itself* be considered an ADA violation. For example, in Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998), the court held that a uniformly-applied one-year leave policy does not violate the ADA.

However, an employer should be prepared to give an employee additional unpaid leave *if* s/he is covered under the ADA, s/he requests such leave, and the additional leave would not impose an undue hardship. For example, in Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000), the court expressly stated that "the company's apparent position that the ADA can never impose an obligation on a company to grant an accommodation beyond the leave allowed under the company's own [one year] leave policy is flatly wrong." Likewise, in Gantt, the court suggested that additional leave would have been appropriate if the individual had requested such leave. However, the court noted that the employer did not have to speculate about the need for extended leave simply because it knew the employee was being paid disability benefits and the employee told the personnel director that she intended to return to work whenever her doctor released her. The court noted that "[t]he last thing the Company heard" from the employee "was that she did not know" when she would be able to return to work, and reasonable accommodation does not require indefinite leave. Similarly, in EEOC v. Sisters of Providence Hospital, 1999 U.S. App. LEXIS 21541 (9th Cir. 1999)(unpublished), the hospital had a six-month leave of absence policy. The court stated that the employer was not liable for failing to provide reasonable accommodation where the employee exhausted his leave and never requested an extension to the

hospital's policy. See also EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 17 ("employer must modify its 'no-fault' leave policy" to provide additional leave unless another accommodation "would enable the person to perform the essential functions of his/her position" or "additional leave would cause an undue hardship").

If an employee requests additional leave, it may -- as a practical matter -- be difficult to show that providing additional short periods of leave (for example, two or three more weeks) would pose an undue hardship. However, as noted above, if an employee requests an indefinite amount of leave, an employer has an excellent argument that this is not an ADA-required reasonable accommodation.

Interestingly, in Hwang v. Kansas State University, 753 F.3d 1159 (10th Cir. 2014), the court stated that there is nothing "inherently discriminatory" in an "inflexible" six-month leave policy. The court noted that, "to the contrary, in at least one way an inflexible leave policy can serve to protect rather than threaten the rights of the disabled — by ensuring disabled employees' leave requests aren't secretly singled out for discriminatory treatment, as can happen in a leave system with fewer rules, more discretion, and less transparency." Similarly, in Wheat v. Columbus Board of Education, 2016 U.S. App. LEXIS 4988 (6th Cir. 2016)(unpublished), the court held that the employer was not required to exempt the employee from its contractual leave policy which granted employees up to two years of leave. In Melange v. City of Center Line, 2012 U.S. App. LEXIS 11175 (6th Cir. 2012)(unpublished), the court held that an employer did not violate the ADA by enforcing a CBA provision providing that after one year of leave, an employee would be terminated (where there was no indication that an employee was prohibited from asking for a reasonable accommodation).

Some EEOC offices have sued employers for maintaining a no-fault maximum leave policy unless the policy specifically states that additional leave may be requested as a reasonable accommodation. This seems flatly inconsistent with the EEOC's latest position stated in the Commission's Employer-Provided Leave and the Americans with Disabilities Act (EEOC 2016 "Resource Document"). In that document, the EEOC stated that, "employers are allowed to have leave policies that establish the maximum amount of leave an employer will provide or permit," but "they may have to grant leave beyond this amount as a reasonable accommodation…." Importantly, the EEOC did not say that the policy itself must explicitly state that exceptions will be provided as a reasonable accommodation. In fact, the EEOC stated only that employers who use "form letters" to "instruct an employee to return to work by a certain date or face termination…may wish to modify them to let employees know that if an employee needs additional unpaid leave as a reasonable accommodation for a disability, the employee should ask for it as soon as possible so that the employer may consider whether it can grant an extension without causing undue hardship."

Job Restructuring as a Reasonable Accommodation

The statute and regulations clearly state that an employer must "restructure" an employee's job as a reasonable accommodation. This generally means modifying the job to reallocate or redistribute nonessential job functions, or altering when and/or how a function is performed. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii), Appendix. For example, in Miller v. Illinois Department of Transportation, 643 F.3d 190 (7th Cir. 2011), the court held that it could have been a reasonable accommodation to allow the employee, a bridge repairer with acrophobia, to avoid working at heights where these tasks were not essential because the employer routinely allowed members of the crew to swap tasks.

It is important to remember that the EEOC and the courts have stated that an employer never has to reallocate essential functions as a reasonable accommodation. For example, in Edgardo v. Saul (SSA), 2020 EEOPUB LEXIS 433 (EEOC 2020), the EEOC held that the agency was "not required to reallocate or eliminate essential functions of a position," in this case, reallocating the Benefits Authorizer's essential function of "processing cases." In Lia v. Brennan (USPS), 2017 EEOPUB LEXIS 2083 (EEOC 2017), the EEOC stated that the employer did not have to provide "make do work" for an employee with a disability. Interestingly, at least one court has held that if an employer does provide such work, it may have met its reasonable accommodation obligation. In Kassa v. Synovus Financial Corp., 2020 U.S. App. LEXIS 3219 (11th Cir. 2020)(unpublished), the court held that the employer was not required to eliminate the essential function of answering customer service calls for an employee who alleged that he could not perform this function because of his anger management disorder. Similarly, in Harvin v. Manhattan & Bronx Surface Transit Operating Authority, 2019 U.S. App. LEXIS 11059 (2d Cir. 2019)(unpublished), the court held that the employee with carpal tunnel syndrome was not entitled to have her payroll duties assigned to other employees where these were essential functions of her job. In Morey v. Windsong Radiology Group, P.C., 2019 U.S. App. LEXIS 36961 (2d Cir. 2019)(unpublished), the court held that where performing an "HSG" examination was an essential function of a radiology technician's job, the employer was not required to "leave the HSG exams to the other technicians' where the employee could not use the necessary equipment because of her alleged disability. Likewise, in Greiner v. Macomb County, 2019 U.S. App. LEXIS 24595 (6th Cir. 2019)(unpublished), the court held that the employer was not required to assign essential functions (in this case, some of the physical duties of a highway maintenance position such as heavy lifting) to co-workers as a reasonable accommodation. In Best v. Duane Reade, 2018 U.S. App. LEXIS 7145 (2d Cir. 2018)(unpublished), the court held that the employer offered a reasonable accommodation for the employee's lifting restrictions by telling her she could "go do whatever she wanted around the store."

In Thaddeus G v. Vilsack (Agriculture), 2016 EEOPUB LEXIS 698 (EEOC 2016), the EEOC held that a colorblind employee, who could not differentiate between red and green was not able to perform his essential functions as a meat inspector because he could not "detect the differences between contaminants." The EEOC held, therefore, that the employer was not required to restructure this function out of the job. In Complainant

v. Yang, 2015 EEOPUB LEXIS 1201 (EEOC 2015), the EEOC found that the Commission did not fail to accommodate the employee, an Office Automation Assistant with carpal tunnel, where it modified her schedule but refused to "redistribut[e] her workload to other employees."

In Bush v. Compass Group USA, Inc., 2017 U.S. App. LEXIS 5248 (6th Cir. 2017)(unpublished), the court held that where lifting 50 pounds was essential for a Chef Manager, the employer was not required to assign this lifting duty to another employee. Likewise, in Flieger v. East Suffolk Boces, 2017 U.S. App. LEXIS 9637 (2d Cir. 2017)(unpublished), the court held that the employee, a special education teacher's assistant, was not qualified where her back injury made her unable to hold a student who was in danger of causing injury or physically assist students in wheelchairs (among other things). Finding that these were essential functions, the court found that it was not a reasonable accommodation to excuse her from performing these functions. In Tetteh v. WAFF Television, 2016 U.S. App. LEXIS 2634 (11th Cir. 2016)(unpublished), the court held that where lifting and operating a camera was essential for a photographer's job, the employer was not required to have "another photographer accompany her on assignments while she was recovering from her injuries" in order to perform the camera work. Likewise, in Medearis v. CVS Pharmacy, Inc., 2016 U.S. App. LEXIS 6033(11th Cir. 2016)(unpublished), the court held that the employer did not have "add more employee hours" for another employee to perform the manager's essential lifting functions. In Lang v. Wal-Mart, 813 F.3d 447 (1st Cir. 2016), the court held that where manually lifting up to 60 pounds was essential, the employee's "proposed accommodation — excusing her from manual lifting — is a non-starter" because "an employer is not required to accommodate an employee by exempting her from having to discharge an essential job function." Similarly, in Belasco v. Warrensville, 634 Fed. Appx. 507 (6th Cir. 2015)(unpublished), the court held that the school teacher, who was unable to deal with disruptive students, was not entitled to a "teacher's aide" as an accommodation where this would shift "essential functions onto others." Likewise, in Newell v. Alden Village Health Facility for Children and Young Adults, 2016 U.S. App. LEXIS 10024 (7th Cir. 2016), the court held the care facility was not required to allow the rehabilitation specialist to work only with "high functioning nonaggressive residents" because handling all residents was an essential function of her job.

In Stern v. St. Anthony's Health Center, 788 F.3d 276 (7th Cir. 2015), the court held that supervisory responsibilities were essential to the employee's job as the Chief Psychologist. In this case, where the employee could not perform these duties because of his memory loss (forgetting to get pre-approvals, document records, etc), the employer was not required to reassign these duties to another employee as a reasonable accommodation. Likewise, in Minnihan v. Mediacom Communications Corp., 779 F.3d 803 (8th Cir. 2015), the court held that because driving was an essential function of a Technical Operations Supervisor's job (where, among other things, he was required to go to job sites to inspect technicians' work, and to observe installations and service calls), the employer was not required to restructure the job to eliminate driving. In Osborne v. Baxter Healthcare Corp., 798 F.3d 1260 (10th Cir. 2015), the court held that the employer was not required to restructure the essential functions of a phlebotomist's job to

eliminate her duty to monitor patients (and instead, to let her assist with medical histories, sample preparations, etc.). However, the court discussed the employer's responsibility to analyze accommodations that would allow the deaf employee to perform that monitoring function (such as visual alerts on the machine, instead of auditory alerts). Similarly, in Turner v. EastConn Regional Education Service Center, 2014 U.S. App. LEXIS 24085 (2d Cir. 2014)(unpublished), the court held that the school was not required to relieve a teacher of autistic children from her duties involving contact with potentially aggressive students because that was an essential function of her job. In Hill v. Walker, 737 F.3d 1209 (8th Cir. 2013), the court held that the State was not required to allow the employee, a Family Services Worker, to recuse herself from a particularly stressful case, since handling stressful cases was an essential job function. In Gober v. Frankel Family Trust, 2013 U.S. App. LEXIS 15782 (5th Cir. 2013)(unpublished), the court held that since "being on call" was essential for an apartment complex Maintenance Foreman, the employer did not need to reallocate this duty to another employee.

Along these lines, EEOC and courts have held that an employer does not need to lower quality or productivity standards. For example, in Edgardo v. Saul (SSA), 2020 EEOPUB LEXIS 433 (EEOC 2020), the EEOC held that the agency was not required to lower the production standard (i.e., how many cases a Benefits Authorizer had to process each day) for an employee with an impairment causing him to have double vision. Here, even with accommodation, the employee's production rate was 1.72 cases per day and the agency's quota was at least four cases per day. Likewise, in Lowell H v. McDonald (VA), 2016 EEOPUB LEXIS 954 (EEOC 2016), the employee, a Claims Examiner, had a wrist impairment and could not meet the agency's recently-raised case-processing quota. The EEOC held that the agency was not required to lower his production standards as an accommodation. The EEOC said that although the agency was required to give him "accommodations which would reasonably enable him to meet those metrics," it met this obligation by offering him "part-time work, frequent breaks, use of leave, and an ergonomic keyboard," but the employee was still unable to meet his quota. The EEOC also held that the agency was not required to give the employee "less-complex cases" because processing these cases was an essential function of his job. In Kenneth W. v. Colvin (Social Security), 2016 EEOPUB LEXIS 1753 (EEOC 2016), the EEOC held that the employee, an attorney in the agency's Appellate operation, was not qualified. In this case, despite the employer's providing "distraction-free" seating (because of the employee's gastrointestinal issues), he could not meet the agency's production standards for completing his assignments within a required timeframe. In Complainant v. Brennan (USPS), 2015 EEOPUB LEXIS 487 (EEOC 2015), the EEOC held that the Postal Service was not required to give a mail carrier two additional hours to deliver mail because "doing so clearly would result in lowered productivity." In this case, the employee said he needed the additional time because his asthma precluded him from performing his duties (according to postal service standards) in heat or when the pollen count was too high. In Lewis v. Gibson (VA), 2015 U.S. App. LEXIS 14302 (4th Cir. 2015)(unpublished), the court held that the employer was not required to decrease performance standards or provide the employee with a "reduced workload" as an accommodation. Likewise, in Craddock v. Lincoln National Life Insurance Co., 2013 U.S. App. LEXIS 14797 (4th Cir. 2013)(unpublished), the court noted that an employee's

suggestion that the employer "tolerate lower performance regarding quality and quantity" is not a reasonable accommodation. Similarly, in Hoffman v. Caterpillar, Inc., 256 F.3d 568 (7th Cir. 2001), the court noted that the employer would not have to "tolerate a drop in productivity" if an employee could not operate a high-speed scanner as quickly as needed. The EEOC has held the same way. In Complainant v. McDonald (Veterans Affairs), 2014 EEOPUB LEXIS 2152 (EEOC 2014), the EEOC held that an employer "is not required … to lower the performance standards of a position to accommodate an individual with a disability. In this case, the employee, a Medical Resident, had been on probation for substandard performance.

Importantly, in Reyazuddin v. Montgomery County, 789 F.3d 407 (4th Cir. 2015), the court suggested that if an employer is arguing that an employee would not be able to meet productivity standards with an accommodation (in this case, a modification to allow a blind employee to work in a call center), the employer must present concrete (as opposed to simply "speculative") evidence concerning the respective productivity results.

One interesting question is whether an employer who has (in the past) gone beyond the ADA's requirements must continue doing that. Most courts will not punish employers for having provided more than required by the law. For example, in D'Onofrio v. Costco Wholesale Corp., 2020 U.S. App. LEXIS 20869 (11th Cir. 2020), the court noted that an employer "is not obligated to continue providing" an accommodation when it exceeds "what is legally required under the ADA." In this case, the employer permitted the employee to avoid many direct communications with her allegedly hostile supervisor. In McNeil v. Union Pacific Railroad Co., 936 F.3d 786 (8th Cir. 2019), the court held that the employer's "willingness" to temporarily accommodate the employee's "no overtime" restriction did not mean that overtime was not an essential function. The court noted that an employer does not "concede that a job function is 'non-essential' simply by voluntarily assuming the limited burden associated with a temporary accommodation, nor thereby acknowledge that the burden associated with a permanent accommodation would not be unduly onerous" (citation omitted). In Higgins v. Union Pacific Railroad Co., 931 F.3d 664 (8th Cir. 2019), the court held that the employer's temporarily excusing the Locomotive Engineer from regular attendance because of his back pain did not mean that attendance was not essential. The court noted that an employer "does not concede that a job function is 'non-essential' simply by voluntarily assuming the limited burden associated with a temporary accommodation" (citation omitted). Likewise, in Hartwell v. Spencer, 2019 U.S. App. LEXIS 33820 (11th Cir. 2019)(unpublished), the employee, a firefighter, argued that allowing him to consistently arrive late for work was a reasonable accommodation because the employer had allowed this for several years. However, the court disagreed, noting that, "just because an employer has, in the past, done more than required to accommodate an employee who cannot fulfill all the requirements of his job does not mean that the employer must continue to do so."

In Faulkner v. Douglas County, Nebraska, 906 F.3d 728 (8th Cir. 2018), the court held that even though the employer let the corrections officer work for several years in a light duty position with no inmate contact because of her work-related shoulder injury, it was still an essential function of a corrections officer's job to be able to "restrain offenders or

stop disturbances with use of force." In Sepulveda-Vargas v. Caribbean Restaurants, 888 F.3d 549 (1st Cir. 2018), the court held that the employer did not concede that rotating shifts was not essential where it temporarily allowed the employee, an assistant manager, to work a straight shift because of his PTSD (caused by a workplace robbery and assault). The court noted that to hold otherwise would "unacceptably punish" employers for going beyond the ADA's requirements. Similarly, in Mielnicki v. Wal-Mart Stores, 2018 U.S. App. LEXIS 16594 (10th Cir. 2018)(unpublished), the court held that an employer who goes "beyond what is required under the ADA to permit an employee to perform only some of the essential functions of the position is not then estopped from insisting that the employee perform all of the essential functions of her job." In this case, the employer had not required a maintenance associate with a developmental disability to clean the men's restroom for years, but now needed her to perform that duty after another associate quit. In Reyazuddin v. Montgomery County, 2018 U.S. App. LEXIS 32957 (4th Cir. 2018)(unpublished), the court held that although an employer is never required to reallocate essential functions, "courts should not discourage employers from going beyond" the law's requirements (in this case, not requiring the employee to answer certain calls that were not feasible given her visual impairment). Likewise, in Lipp v. Cargill Meat Solutions Corp., 911 F.3d 537 (8th Cir. 2018), the court held that allowing the employee to take excessive leave in the past does not require the employer to continue that practice. The court noted that an employer "must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation."

In Boyle v. City of Pell City, 866 F.3d 1280 (11th Cir. 2017), the court held that where the employer allowed the employee, a Heavy Equipment Operator with a back impairment, to perform Foreman duties (while the Foreman voluntarily agreed to temporarily perform heavy tasks), this did not obligate the employer to continue this practice. The court stated that, "when an employer provides a greater accommodation than that required" under the law, it "incurs no legal obligation to continue doing so." The court noted that the Foreman position was never "vacant" during this time, and even if it had been, there would have been no obligation to promote the employee to this position. Likewise, in Minnihan v. Mediacom Communications Corp., 779 F.3d 803 (8th Cir. 2015), the court held that the employer did not concede that driving was not essential for a Technical Operations Supervisor simply because it temporarily agreed to excuse him from driving (because of his seizure disorder). The court noted that to hold otherwise would punish employers for going beyond the ADA's requirements. In Rabb v. School Board of Orange County, 2014 U.S. App. LEXIS 20757 (11th Cir. 2014)(unpublished), the employee, a schoolteacher, argued that the employer needed to create a part-time schoolteacher job as an accommodation based, in part, on the fact that the county created a part-time tutoring position for her in the past. The court disagreed, noting that it would not "punish" an employer for its "generosity" in the past, where the employer went beyond the demands of the law. In Davis v. New York City Health and Hospitals Corp., 2013 U.S. App. LEXIS 1648 (2d Cir. 2013)(unpublished), the court held that an employer's willingness to excuse an employee's "temporary inability to perform a job function while the employee recovers from some injury, does not render the job function inessential or support a conclusion that it can be eliminated permanently. " In

this case, the hospital apparently did not require a head nurse to perform certain physical tasks such as lifting, pushing, and pulling. In Knutson v. Schwan's Home Service, 711 F.3d 911 (8th Cir. 2013), the court did not punish the employer simply because the employer allowed a Manager to stay in his position for nine months after he was no longer DOT-Qualifed, despite the employer's argument that such a qualification was essential for the job. The court noted that the employer had been "optimistic" that the employee's eye condition would improve and the employee would again become DOT-Qualified. Similarly, in Robert v. Board of County Commissioners of Brown County, 691 F.3d 1211 (10th Cir. 2012), the court held that the employer's "willingness to excuse" the employee from her fieldwork for several months did not mean that the fieldwork was not essential. The court noted that an employee "cannot use her employer's tolerance of her impairment-based, ostensibly temporary nonperformance of essential duties as evidence that those duties are nonessential. To give weight to such a fact would perversely punish employers for going beyond the minimum standards of the ADA by providing additional accommodation to their employees."

Interestingly, in Kotaska v. Federal Express Corp., 2020 U.S. App. LEXIS 22310 (9th Cir. 2020), the court held that a job function might not be "essential if an employee who cannot perform the function nevertheless succeeded at the job for a long period." In this case, however, the court concluded that performing a package handler job with a 15-pound lifting restriction for only three weeks was not enough time to conclude that lifting heavier weights was not essential.

The EEOC has stated that "the fact that an employer temporarily excused performance of one or more essential functions" (in this case, because of COVID-19) "does not mean that the employer has permanently changed a job's essential functions. EEOC's COVID-19 "Outreach Webinar" (3/27/20), Question 21.

On the other hand, in Hostettler v. College of Wooster, 2018 U.S. App. LEXIS 19612 (6th Cir. 2018), the court disagreed with the employer's position that a full-time schedule was an essential function of a human resource employee's job where the employer had been allowing the employee to perform the job on a part-time schedule and had given the employee a positive performance review (with no indication that the employee "was needed on a full-time basis"). Likewise, in Camp v. Bi-Lo, LLC, 2016 U.S. App. LEXIS 19053 (6th Cir. 2016)(unpublished), the court suggested that an "informal arrangement" where co-workers performed the heavy lifting could lead to the conclusion that such lifting was not an essential function for a grocery store clerk. Similarly, as noted earlier, in McMillan v. City of New York, 711 F.3d 120 (2d Cir. 2013), the court held that punctual arrival at the workplace might not be an essential function for a case worker with the City's Human Resources Administration. The court relied on several facts, including that the employer had "explicitly or implicitly approved" the employee's late arrivals in the past. In Estate of Fernando Mendez v. City of Chicago, 2006 U.S. App. LEXIS 6353 (7th Cir. 2006)(unpublished), in analyzing whether patrolling a garage was an essential function of a watchman's job, the court noted that "if the City had agreed that Mendez could remain at the Kedzie location without patrolling the garage, then that could indicate that patrolling the garage was not an essential job function." In Brown v. City of

Tucson, 336 F.3d 1181 (9th Cir. 2003), the court noted that the employer's "apparent willingness to allow" the plaintiff (a detective) "to avoid night-time call-out" because of her mental disorder "indicate that it was not an essential function" of her job. Similarly, in Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001), the court considered whether climbing was an essential function of a cable repairman's job, where the company had excused him from climbing because of his panic disorder. The court found that although the employee might have climbed 50% of the time before his diagnosis, he did not have to climb for 3-1/2 years after his diagnosis with "no adverse consequences for his employer." Therefore, the court held, climbing might not be an essential function of his job.

It is important to remember that if an employer makes a unilateral job modification that it thinks the employee needs because of a disability, it should not later "punish" the employee because of this job modification. In Caldwell v. KHOU-TV, 850 F.3d 237 (5th Cir. 2017), the court held that where the employer unilaterally limited the employee's duties because it believed he could not perform some tasks because of his leg injuries, this may have resulted in discrimination where the employee was later terminated in a reduction-in-force because it felt his lighter duties demonstrated substandard performance.

Transitional Duty as a Reasonable Accommodation

Since an employer never has to reallocate essential functions, it never has to *create* a new job -- such as a transitional or light duty job in which the employee is no longer performing his/her essential functions. For example, in Hunt v. Monro Muffler Brake, 2019 U.S. App. LEXIS 12606 (6th Cir. 2019)(unpublished), the court held that where lifting 50 pounds was an essential job function, it was not "reasonable" for the employer to have to create a "light-duty accommodation" for him by eliminating that function. Likewise, in Garvey v. Sullivan, 2019 U.S. App. LEXIS 14679 (2d Cir. 2019)(unpublished), the court noted that a police department is not required to create a light duty desk position as a reasonable accommodation for a police officer who could not perform his physical tasks. In Beckman v. Wal-Mart Stores, 2018 U.S. App. LEXIS 17622 (6th Cir. 2018)(unpublished), the court held that the employer is not required to provide light duty work as an accommodation if it eliminates an essential function of the job (in this case, a requirement that a loader lift 60 pounds). In Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017), the court held that the employer was not required to create a light duty job for an employee with a back impairment, even though employers sometimes do this for employees with work injuries as "acts of grace." Similarly, in Otto v. City of Victoria, 685 F.3d 755 (8th Cir. 2012), the court held that the employer was not required to limit the employee to sedentary duties where his maintenance job required a number of essential heavy duty tasks on city streets, and in parks and buildings. Similarly, as noted earlier, in Shin v. University of Maryland Medical System Corp., 2010 U.S. App. LEXIS 5177 (4th Cir. 2010)(unpublished), the court held that the plaintiff, a doctor who was unable to attend to as many patients as required, was not entitled to his requested accommodation of a reduced patient workload and more time to complete his work. The court noted that the ADA does not require

employers to provide such "light duty" as an accommodation. In Stephenson v. United Airlines, 2001 U.S. App. LEXIS 11400 (9th Cir. 2001)(unpublished), the court noted that "employers need not create special light duty positions" under the ADA. The EEOC has agreed that an employer does *not* have to create light duty jobs unless the "heavy duty" tasks were only marginal functions which can be reallocated to other workers as a reasonable accommodation. In most cases, the "heavy duty" tasks are not marginal functions; therefore, the employer is not required to restructure the job to reallocate the functions. See EEOC Technical Assistance Manual, Ch. 9.4.

Of course, if the employer has existing light duty jobs -- as many employers do -- it may have to consider *reassigning* the employee with a disability (as discussed below) to one of those jobs if that is needed as a reasonable accommodation. The EEOC has taken the position that "if an employer already has a vacant light duty position for which an injured worker is qualified, it might be a reasonable accommodation to reassign the worker to that position." EEOC Technical Assistance Manual, Ch. 9.4.

One common question is whether an employer can create a light duty job for only a temporary period. The EEOC has stated that "an employer is free to determine that a light duty position will be temporary rather than permanent." EEOC Enforcement Guidance: Workers' Compensation and the ADA, No. 915.002 (9/3/96), at p. 22. In Complainant v. McDonald (VA), 2015 EEOPUB LEXIS 198 (EEOC 2015), the EEOC held that although the Veterans Administration put the employee in a temporary light duty job because of his lifting restrictions, it was not required "to transform its temporary light or limited-duty assignments into permanent jobs to accommodate an employee's disability." Courts have agreed with this position. For example, in Faulkner v. Douglas County, Nebraska, 906 F.3d 728 (8th Cir. 2018), the court disagreed with the employee that the employer should have allowed her to work indefinitely in a light-duty assignment, where the collective bargaining agreement stated that such assignments were for a maximum period of 180 days. In Frazier-White v. Gee, 2016 U.S. App. LEXIS 6318 (11th Cir. 2016), the court held that the employer was not required to indefinitely extend the employee's temporary light duty assignment as an "inactive records desk clerk" where she continued to be unable to perform her security-related duties at the sheriff's detention center because of an injury. Likewise, in Meade v. AT&T Corp., 2016 U.S. App. LEXIS 14256 (6th Cir. 2016)(unpublished), the court held that contrary to the employee's argument, the employer was not required to indefinitely continue his temporary light-duty position where could not perform the essential functions of his facilities job due to his inability to climb and work outside in the cold. The court stated that "an employer need not create a permanent light-duty " or shift essential functions to another employee. In Graves v. Finch Pruyn & Co., 457 F.3d 181 (2d Cir. 2006), the court held that since the ADA does not require creating a new sedentary position for an employee with a mobility impairment, it also does not require the employer to keep the employee in that position for any longer than it chooses. Likewise, in Johns v. Laidlaw Education Services, 2006 U.S. App. LEXIS 25513 (7th Cir. 2006)(unpublished), the court noted that an employer "does not have to convert temporary positions into permanent ones." In Buskirk v. Apollo Metals, 307 F.3d 160 (3d Cir. 2002), the court noted that an employer is not "required to transform a temporary light duty position into a permanent position."

In Beaver v. Titan Wheel International, 2001 U.S. App. LEXIS 7634 (7th Cir. 2001)(unpublished), the plaintiff claimed that he was permanently reassigned to a lighter wheel assembly job because of his leg amputation, while the employer claimed that the assignment was only temporary. Although the court stated that it would not punish an employer for doing a good deed such as a temporary placement, the facts indicated that the assignment was not clearly temporary. Specifically, the court noted that the plaintiff had been assigned to the lighter job for nearly 1-1/2 years, and "there were no meaningful discussions" between the employer and the employee as to whether the new job was temporary or permanent. Therefore, the employer lost its motion for summary judgment on this point. Accordingly, if an employer wants the light duty job to be temporary, it should make this fact clear during the interactive process.

Along these lines, some employers limit the period of light duty jobs to the employee's "maximum medical improvement" or limit the jobs to employees who eventually will be able to return to their jobs. Employers have a good argument that this practice is lawful since the employer did not have to even create the positions at all. For example, in Smith v. Global Staffing, 621 Fed. Appx. 899 (10th Cir. 2015), the court seemed to suggest that the employer did not violate the ADA by creating a modified duty job for the employee that lasted until his maximum medical improvement and resolution of his workers' compensation issues. In Ivey v. First Quality Retail Service, 2012 U.S. App. LEXIS 19860 (11th Cir. 2012)(unpublished), the court held that it did not violate the ADA to create a light duty job on a temporary basis to "employees with work-related injuries who were expected to recover." In Delgado v. Certified Grocers Midwest, Inc., 2008 U.S. App. LEXIS 13497 (7th Cir. 2008)(unpublished), the court disagreed with the plaintiff that the employer's allowing him to work in a light-duty position for longer than the contractual requirement was evidence that the position was not "temporary." The court noted that it would not "punish" an employer for maintaining a "flexible rehabilitation program" and for often allowing employees to remain on light duty for "as long as they were reasonably expected to fully recuperate." In Collins v. Yellow Freight System, 2004 U.S. App. LEXIS 6158 (6th Cir. 2004)(unpublished), the court suggested that limiting a modified work program to employees who were "temporarily" disabled from an on-the-job injury does not violate the law. In this case, the employee had a permanent, non-work-related back injury.

Another difficult -- and controversial -- question is whether an employer can reserve light-duty jobs for on-the-job injuries. A strong argument can be made that this does not violate the ADA because it does not discriminate *based on* disability. Rather, it discriminates based on *where* someone was injured, but anyone with any type of disability can get the light duty job if s/he has a workplace injury. Employers should keep in mind that disability-rights advocates are likely to challenge these policies using a disparate impact argument (i.e., the policy has a disparate impact against certain types of disabilities that are not typically workplace injuries, such as cancer and AIDS). In addition, the policies might be challenged under Title VII of the Civil Rights Act of 1964 using the theory that they discriminate against pregnant women.

The EEOC has taken the position that an employer *cannot* reserve existing light duty jobs for on-the-job injuries; rather, the employer must consider reassigning *any* disabled employee (e.g., including those without on-the-job injuries) to such an existing job if it is vacant and if it is needed by the employee as a reasonable accommodation. EEOC Enforcement Guidance: Workers' Compensation and the ADA, No. 915.002 (9/3/96), at p. 22. **This Guidance is available on the internet at www.eeoc.gov.** Interestingly, however, the EEOC also has stated that an employer *may* create light duty positions solely for employees who are injured on the job. EEOC Enforcement Guidance: Workers' Compensation and the ADA, No. 915.002 (9/3/96), at p. 20. More recently, however, the EEOC has further confused the issue by suggesting that this later approach might itself be illegal. In an informal guidance letter, the EEOC has stated that "[w]hether a policy of creating light duty positions for employees who are injured on the job while not creating the same for employees with disabilities that are not caused by work-related injuries would have an adverse impact on employees with disabilities must be determined on a case-by-case basis."[9]

One federal court of appeals to address the issue did not adopt the approach taken by the EEOC. In Dalton v. Subaru-Isuzu, 141 F.3d 667 (7th Cir. 1998), the court considered whether the employer could reserve light-duty positions for employees recuperating from recent injuries who had temporary disabilities. The court stated these positions could be reserved for such employees, noting that "[n]othing in the ADA requires an employer to abandon its legitimate, nondiscriminatory company policies defining job qualifications, prerequisites, and entitlements to intra-company transfers." On the other hand, although not directly analyzing the issue, in Stephenson v. United Airlines, 2001 U.S. App. LEXIS 11400 (9th Cir. 2001)(unpublished), the court suggested that such a policy – limiting light-duty jobs to work-related injuries – might be illegal. The court stated that United's "argument that its light or modified duty was non-discriminatory because it applied equally to all employees neglects to consider its duties under the ADA. An employer may not unilaterally adopt a policy exempting it from its obligations under the ADA even if the policy is otherwise uniformly applied to all employees."

In Young v. UPS, 135 S. Ct. 1338, 191 L. Ed. 2d 279 (2015), the U.S. Supreme Court analyzed whether an employer must create light duty jobs for pregnant employees if it creates light duty jobs for on-the-job-injuries. The Court held that there is no per se requirement, but rather that it will look at other factors, such as whether the employer creates these jobs for additional classes of employees (for example, more than just employees with on-the-job injuries).

Employers will generally not be punished for having been more generous in the past than the ADA requires regarding the offer of light-duty jobs. For example, in Wade v. Brennan, 2016 U.S. App. LEXIS 7961 (5th Cir. 2016)(unpublished), the court held that the employer did not need to create a light duty job for the employee who could not perform the standing required for her position, despite the fact that it allowed her to perform light duty tasks for 10 years. In Skotnicki v. University of Alabama, 631 Fed. Appx. 896 (11th Cir. 2015), the court held that the employer was not required to create a new lighter-duty nursing position for the employee, even though it had offered to create

such a position two years earlier for her (which she declined). The court held that it would not punish an employer for generously going beyond the ADA's requirements by deeming the employer "to have conceded the reasonableness of so far-reaching an accommodation."

Changing an Employee's Supervisor as a Reasonable Accommodation

The EEOC has stated an employer is not required to change an employee's supervisor as a reasonable accommodation. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 33. Along these lines, in Major v. Weichert (OPM), 2020 EEOPUB LEXIS 790 (EEOC 2020), the employee with depression and anxiety claimed that his supervisor was "a source and trigger of the symptoms" and asked for reassignment as a reasonable accommodation. The EEOC held that the employee's "request for reassignment essentially amounted to a request to change his supervisor," and that "an employer does not have to provide an employee with a new supervisor as a reasonable accommodation." In both Lelah v. Shulkin (VA), 2017 EEOPUB LEXIS 1743 (EEOC 2017), and Matilde M v. Colvin (SSA), 2017 EEOPUB LEXIS 113 (EEOC 2017), the EEOC held that "reassignment to a new supervisor" is not a required reasonable accommodation. Similarly, in Complainant v. Colvin (SSA), 2015 EEOPUB LEXIS 934 (EEOC 2015), the EEOC held that Social Security Administration did not need to provide the employee, who had depression and a stress disorder, with a new supervisor as a reasonable accommodation. Likewise, in Steinmetz v. Potter (USPS), 2005 EEOPUB LEXIS 5999 (EEOC 2005), the EEOC held that "an employer does not have to provide an employee with a new supervisor as a reasonable accommodation."

Courts seem to agree. In D'Onofrio v. Costco Wholesale Corp., 2020 U.S. App. LEXIS 20869 (11th Cir. 2020), the court noted that the ADA "cannot interfere with an employer's choice of supervisors over a given employee." In this case, although the employee, who was deaf, apparently wanted to avoid communications directly with her allegedly hostile supervisor, the court stated that "any sort of accommodation that could be construed as essentially insulating" the employee from interacting with her supervisor would have been unreasonable under the ADA." Likewise, in Sessoms v. University of Pennsylvania, 2018 U.S. App. LEXIS 16611 (3d Cir. 2018)(unpublished), the court stated that "reasonable accommodation does not entitle an employee to a supervisor ideally suited to her needs." In this case, the court held that the employee's demand to be supervised by someone other than her current supervisor was "unreasonable." In Roberts v. Permanente Medical Group. Inc., 2017 U.S. App. LEXIS 7948 (9th Cir. 2017)(unpublished), the court held that the employee was not entitled to be "restricted from visual or verbal contact with her direct supervisor" as a reasonable accommodation because this "is effectively a request for a new supervisor" which "is per se unreasonable." Theilig v. United Tech Corp., 2011 U.S. App. LEXIS 6074 (2d Cir. 2011)(unpublished), the court stated that although "there is no per se rule against a change in supervisor," there "is a presumption . . . that a request to change supervisors is unreasonable, and the burden of overcoming that presumption (i.e., of demonstrating that, within the particular context of the plaintiff's workplace, the request was reasonable) therefore lies with the plaintiff" (citation omitted). In this case, the court held that where

the employee "requested to have no contact whatsoever with any co-worker or supervisor," he had not shown that this was a valid reasonable accommodation.

It could certainly be argued that although an employer does not need to change an employee's supervisor as a reasonable accommodation, it might be required to *reassign the employee* (as discussed later) to a different supervisor. However, EEOC and courts do not seem to agree that this is required. For example, in Belton v. Department of Veterans Affairs, 2013 EEOPUB 893 (EEOC 2013), the EEOC held that the employer "was not obligated" to reassign the employee away from his supervisor, even though the employee's symptoms from anxiety and depression were allegedly exacerbated by his supervisor. In Deister v. Auto Club Insurance Association, 2016 U.S. App. LEXIS 8792 (6th Cir. 2016)(unpublished), the court stated that, "an employer is not obliged to honor, as a 'reasonable accommodation,' an employee's request for assignment to a different supervisor." Similarly, in Cardenas-Meade v. Pfizer, Inc., 2013 U.S. App. LEXIS 307 (6th Cir. 2013)(unpublished), the court noted that, "while a reasonable accommodation under the ADA does include" reassignment, "requests for re-assignment to a new supervisor are disfavored." The court went on to note that while such a request should be considered, there is a "presumption" that "a request to change supervisors is unreasonable, and the burden of overcoming that presumption (i.e., of demonstrating that, within the particular context of plaintiff's workplace, the request was reasonable) therefore lies with the plaintiff." In this case, the court noted that although it did not need to reach the issue (because it determined that the employee did not have a disability), since she "was in a probationary initial training period as an employee and had already failed the required final examination, it is not clear that the benefits of such a transfer would have outweighed the associated administrative costs. In Ozlek v. Potter, 2007 U.S. App. LEXIS 29483 (3d Cir. 2007)(unpublished), the court held that the employee was not entitled to be transferred to a new supervisor as a reasonable accommodation. Likewise (although with a slight twist), in Coulson v. Goodyear Tire & Rubber Co., 2002 U.S. App. LEXIS 4623 (6th Cir. 2002) (unpublished), the employee wanted to be reassigned away from his co-workers. The court noted that although reassignment "is within the realm of possible reasonable (and therefore required) accommodation," an employer is not required to transfer an employee so that he does not have to work with certain employees, since courts "are not meant to act as a super-bureau of Human Resources." Likewise, in Bradford v. City of Chicago, 2005 U.S. App. LEXIS 573 (7th Cir. 2005)(unpublished), the court held that an employee, whose mental condition was allegedly aggravated by working with specific co-workers (whom he believed were afraid of him), was not entitled to an accommodation of reassignment away from those workers.

Even though an employer is not generally required to change the supervisor, a supervisor might be required to change certain supervisory methods as a reasonable accommodation. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 33. For example, in Bishop v. Georgia Department of Family and Children Services, 2006 U.S. App. LEXIS 5968 (11th Cir. 2006)(unpublished), the court held that closer supervision, including more frequent meetings between the employee and supervisor, can be a reasonable accommodation for someone with bipolar disorder because the evidence showed that this condition

"frequently interferes with your perception of yourself" and "the only way you can control it is to self adjust based on the cues provided to you by those around you."

Providing Assistant or Job Coach as a Reasonable Accommodation

Reasonable accommodation can include providing a qualified reader, interpreter, or other assistant so that the employee can perform his/her job. 29 C.F.R. § 1630.2(o)(2)(ii). For example, in Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013), the court held that if may have been a reasonable accommodation for the employer to provide the deaf lifeguard applicant with an interpreter for staff meetings and trainings. In Supinski v. UPS, Inc., 2011 U.S. App. LEXIS 2955 (3d Cir. 2011)(unpublished), the court noted that if heavy lifting was not an essential function of the job, the employer might be required to provide someone who could assist the employee in doing the lifting. In EEOC v. UPS Supply Chain Solutions, 2010 U.S. App. LEXIS 17918 (9th Cir. 2010), the court held that it might not have been an effective accommodation for the employer to provide written summaries of meetings, rather than providing an interpreter for a deaf employee, especially where the employee was not proficient in written English. In Lovejoy-Wilson v. Noco Motor Fuel, Inc., 2001 U.S. App. LEXIS 19511 (2d Cir. 2001), the plaintiff, a sales clerk, claimed that she was qualified to be an assistant manager despite the employer's claim that she could not drive herself to the bank to make bank deposits. The court held that the plaintiff's suggested accommodations, which included hiring a driver for her so that she could make the deposits, might be required since driving was not an essential job function.

However, an employer would not have to provide someone to actually *perform* the essential functions of the job for the employee with a disability. For example, in Gardea v. JBS USA, LLC, 915 F.3d 537 (8th Cir. 2019), the court held that "assistance from other mechanics" in performing the essential function of heavy lifting was not a required reasonable accommodation. In Stevens v. Rite Aid Corp., 851 F.3d 224 (2d Cir. 2017), the court found that the employee, a pharmacist, was not qualified where he could not perform the essential function of administering immunizations because of his needle phobia. The court held that the company was not required to hire a nurse to give the immunizations for him. In Hargett v. Jefferson County Board of Education, 2017 U.S. App. LEXIS 21799 (6th Cir. 2017)(unpublished), the court held that hall monitoring was an essential function of an elementary school teacher's job. In this case, the court held that the employer did not violate the ADA by declining the teacher's request for a teaching assistant or a volunteer parent to be available as needed for the monitoring.

As noted earlier, in Snowden v. Trustees of Columbia University, 612 Fed. Appx. 7 (2d Cir. 2015), the court found that where sorting and filing were essential for a mail clerk's job, she was not qualified where she could not perform those functions without "help" from another employee. In Lewis v. Gibson (VA), 2015 U.S. App. LEXIS 14302 (4th Cir. 2015)(unpublished), the court held that the employer was not required to provide an assistant as an accommodation if that assistant is going to be performing the employee's essential functions. Likewise, in EEOC v. Womble Carlyle Sandridge & Rice, LLP, 2015 U.S. App. LEXIS 10874 (4th Cir. 2015)(unpublished), the court held that where lifting more than 20 pounds was an essential function of a support assistant's job (and

where she was sometimes required to work alone), the employer was not required to provide someone to help the assistant with her lifting tasks. In Williams v. Revco Discount Drug Centers, Inc., 2014 U.S. App. LEXIS 725, (11th Cir. 2014)(unpublished), the court held that the employer, a pharmacy, was not required to hire a full-time assistant to perform the employee's standing duties. In Majors v. General Electric, 714 F.3d 527 (7th Cir. 2013), the court held that since lifting heavy objects was an essential function for a materials auditor, it was not a reasonable accommodation for the employer to have another employee do the lifting for her.

The EEOC also has taken the position that an employer may be required to provide a "temporary job coach to assist in the training of a qualified individual with a disability" as a reasonable accommodation. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (3/25/97), at p. 27.

Interestingly, in an informal guidance letter, the EEOC has written that "communicating through notes is an effective accommodation that would enable people who are deaf to perform many kinds of jobs." The EEOC further stated that, "many employers may prefer this accommodation to a sign language interpreter because it involves little or no expense."[10]

An employer may be required to provide a personal attendant in certain situations. For example, in Roberts v. Progressive Independence, Inc., 183 F.3d 1215 (10th Cir. 1999), the court indicated that a personal care attendant can be a reasonable accommodation for an individual with mobility impairments who is required to travel on a business trip.

Whether Employer Must Rescind Discipline as a Reasonable Accommodation

There is widespread agreement that reasonable accommodation does not include rescinding discipline. Rather, an employer may uniformly impose discipline, *even if* the employee later reveals that the misconduct was the result of a disability. This is because courts have generally held that an employer may hold all employees (those with and without disabilities) to the same performance and conduct standards. See 56 Fed. Reg. 35,733 (1990); EEOC Compliance Manual § 915.002 at 11, 12 fts. 11 & 12 (3/14/95). **This section of the EEOC's Compliance Manual is available on the internet at www.eeoc.gov.** In nationwide training conducted throughout 1996, EEOC headquarters trained EEOC investigators that reasonable accommodation does *not* include "[w]aiving warranted discipline, even if disability played a role in causing the conduct that is worthy of discipline." EEOC ADA Case Study Training (1996) C.S.1 at p. 5. Importantly, the EEOC has stated that a law firm "is not required to excuse performance problems" of an attorney "that occurred prior to the accommodation request," where the attorney had been counseled about his performance deficiencies and chose not to request accommodation prior to his notification that he was being terminated. This is so even if the attorney claims that he did not request an accommodation because of "a bad experience at a prior job when he requested accommodation." The EEOC noted that "once an employer makes an employee aware of performance problems, it is the employee's responsibility to request any accommodations to address and rectify them." EEOC's Fact Sheet "Reasonable Accommodations for Attorneys with Disabilities," (7/27/06).

Most recently, the EEOC has stated that an employer is not required to rescind the termination of an employee who engaged in a profane outburst against her supervisor, even if this resulted from the employee's bipolar disorder. The EEOC noted that this is the case even though the employee had notified the employer of her bipolar disorder several months prior to the incident, where she never asked for any reasonable accommodation prior to the insubordination. EEOC Fact Sheet "Applying Performance and Conduct Standards to Employees with Disabilities" (2008) at Example 20. **This Fact Sheet is available on the internet at www.eeoc.gov**. Along these lines, in Petititioner v. McDonald (VA), 2015 EEOPUB LEXIS 429 (EEOC 2015), the EEOC said that although the agency would be required to look prospectively at how an employee with a mental condition could comply with conduct rules, it did not need to excuse prior misconduct (rudeness and violent threats). In Complainant v. McDonald (Veterans Affairs), 2014 EEOPUB LEXIS 2152 (EEOC 2014), the EEOC held that the employer did not need to excuse a Medical Resident's prior misconduct (in this case, unprofessional conflicts with co-workers). The EEOC upheld the Administrative Judge's ruling that reasonable accommodation is prospective, and an employer is not required to excuse past misconduct even if caused by a disability." In Complainant v. Donahoe (USPS), 2014 EEOPUB LEXIS 2118 (EEOC 2014), the EEOC held that since reasonable accommodation is "always prospective," the employer need not forgive the plaintiff's tardiness, where she had been progressively disciplined and asked for accommodation only after she was discharged. Likewise, in Suppi v. Nicholson (VA), 2007 EEOPUB LEXIS 4238 (EEOC 2007), the EEOC found that the agency did not have to excuse a nurse's misconduct (which including urinating in the operating room), even if the misconduct was caused by her bipolar disorder. The EEOC noted that "even assuming" complainant's misconduct "was caused by her disability, an employer may discipline an employee with a disability for engaging in misconduct if it would impose the same discipline on an employee without a disability." The EEOC pointed out that the employee "did not request reasonable accommodation until after the performance deficiencies and conduct violations had already occurred," and that an agency is "not required to excuse past misconduct."

Courts generally appear to agree that reasonable accommodation does not include waiving discipline. For example, courts have held that reasonable accommodation does not include waiving discipline. For example, in Clark v. Champion National Security, Inc., 947 F.3d 275 (5th Cir. 2020), the court held that where the employee, an HR manager, never requested accommodation "for loss of consciousness due to diabetes," he could not ask for a "retroactive exception" to the employer's alertness rules when he was terminated for sleeping on the job. Likewise, in Trahan v. Wayfair Maine, LLC, 957 F.3d 54 (1st Cir. 2020), the court held that the employer was not required to rescind discipline as an accommodation. In this case, the employee, a customer service representative, acted unprofessionally with her coworkers (shouting an obscenity, slamming her phone and headset, rolling her eyes) and later claimed that this was the result of a PTSD trigger. The court stated that where, as in this case, an accommodation request "follows fireable misconduct, it ordinarily should not be viewed as an accommodation proposal at all," and that "nothing in the ADA demands that an employer

accord an employee — even an employee with a disability — such a second chance." In Guzman v. Brown County, 884 F.3d 633 (7th Cir. 2018), the court held that an Operator at a 911 Call Center could be terminated for her repeated tardiness, even if it was caused by undiagnosed sleep apnea. The court noted that, "even if" the employer was informed of the alleged disability prior to her actual termination, the "conduct for which [she] was terminated had already occurred, and "after the fact requests for accommodation do not excuse past misconduct."

In Dewitt v. Southwestern Bell Telephone Co., 845 F.3d 1299 (10th Cir. 2017), the court held that the employer was not required to excuse prior misconduct (in this case, hanging up on customers) as a reasonable accommodation. The court noted that, "retroactive leniency is not a 'reasonable accommodation' as defined by the ADAAA," regardless "of whether the misconduct resulted from the employee's disability." Importantly, the court noted that an employer is not required to "stay its disciplinary hand" for workplace misconduct simply because an employee asks for an accommodation at the "eleventh hour." Likewise, in Alamillo v. BNSF Railway Co., 869 F.3d 916 16267 (9th Cir. 2017), the court held that the employee's request that the employer "not terminate him for prior misconduct" does not "qualify as reasonable accommodation[] under California law" (which tends to be even more protective than the ADA). The court stated that a "second chance to control the disability in the future is not a reasonable accommodation." In Yarberry v. Gregg Appliances, 2015 U.S. App. LEXIS 15879 (6th Cir. 2015)(unpublished), the court held that the employee could legitimately terminate the employee for his bizarre misconduct (entering the store after hours, roaming around and using equipment, opening the safe, leaving without turning on the alarm), even though caused by a disability, and did not need to rescind the action. The court noted that if the employee had "not already engaged in misconduct meriting termination, it is possible that his requests for time off due to his hospitalization might have been timely and [the employer] would have been obliged to try to accommodate him." In Tate v. Addus Heatlhcare, Inc., 2014 U.S. App. LEXIS 963 (7th Cir. 2014)(unpublished), the court held that accommodation requests are prospective, and an employer is not required to "ignore the infraction" (in this case, sleeping on the job) that an employee has "already committed." The court stated where the employee had "not previously asked for an accommodation that might have averted the sleeping incidents," he "cannot complain of discipline" that was imposed on others who slept on the job." Likewise, in Green v. Medco Health Solutions of Texas, LLC, 2014 U.S. App. LEXIS 8096 (5th Cir. 2014)(unpublished), the court held that employers are not required "to ignore prior misconduct, including a violation of an attendance policy" as a reasonable accommodation. In Parsons v. Auto Club Group, 2014 U.S. App. LEXIS 8374 (6th Cir. 2014)(unpublished), the court reiterated that requesting accommodation "for the first time only after it becomes clear that an adverse employment action is imminent" can be "too little, too late." In this case, the court held that it was too late where the employee allegedly asked for an accommodation for his apnea after the employer had conducted a five-month investigation revealing extensive misconduct. In McCarroll v. Somerby of Mobile, 2014 U.S. App. LEXIS 23356 (11th Cir. 2014)(unpublished), the court held that where the employee, a shuttle bus driver for a senior living community, "did not request medical leave or a modification of [the] attendance policy until after his supervisors had

already made the decision to fire him," that was too late to trigger the reasonable accommodation obligation. In Jones v. Nationwide Life Insurance Co., 696 F.3d 78 (1st Cir. 2012), the court held that the employee could not make a valid accommodation request came after he "knew his employment was being terminated" because of his performance. Specifically, the court stated that "when an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be 'too little, too late.'" Similarly, in McElwee v. County of Orange, 700 F.3d 635 (2d Cir. 2012)(a Title II case applying Title I caselaw), the court specifically cited the EEOC's guidance for the notion that a "requested accommodation that simply excuses past misconduct (in this case, sexual harassment) is unreasonable as a matter of law, " and that since "reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability."

On the other hand, in Spurling v. C&M Fine Pack, Inc., 739 F.3d 1055 (7th Cir. 2014), the court held that the employer potentially violated the ADA by firing the employee after she had been suspended for sleeping on the job, where it started the ADA interactive process after suspension, but then disregarded her doctor's note (indicating possible disability) and fired her anyway. The court stated that "while it is true that" the employee presented the information "after receiving her Suspension Pending Termination, she did so at [the employer's] behest." Therefore, the employer "properly began the interactive process as envisioned by the ADA, but failed to carry it through."

Although an employer generally does not need to forgive an employee for breaking rules, it may have to provide reasonable accommodation so that the employee does not break those rules in the future. For example, suppose an employee has been disciplined for tardiness, and s/he later reveals that she has been tardy because she gets morning treatments for her disability. The employer does not need to rescind the past discipline, but may have to modify the employee's future work schedule so s/he can get her treatments without being tardy.

Of course, if the reason the employee broke the rules was because the employer refused to provide a reasonable accommodation, the employer may need to rescind the discipline. In Fisher v. Nissan North America, Inc., 951 F.3d 409 (6th Cir. 2020), the court suggested that an employer cannot enforce an absenteeism policy which the production line employee broke because of the employer's alleged "underlying failure to accommodate" his disability by providing extra breaks, a modified schedule, or reassignment.

At least one Court of Appeals, however, has suggested that an employer may not be able to fire an employee who broke conduct rules because of a disability. In Gambini v. Total Renal Care, Inc., 486 F.3d 1087 (9th Cir. 2007), a Washington State law case in which the court applied ADA standards, the employee was fired in part because of her violent outbursts. The court held that since these outbursts may have been caused by the employee's bi-polar disorder, it would have been correct to instruct the jury that an "employer cannot fire an employee for poor job performance if the poor job performance

was due to a mental disability and reasonable accommodation plausibly would have rectified the performance problem."

Work-at-Home as a Reasonable Accommodation

The EEOC and most courts take the position that *where* the work is performed is just another policy that may have to be modified for certain jobs. For example, in Complainant v. Azar (HHS), 2020 EEOPUB LEXIS 483 (EEOC 2020), the EEOC held that an Image Analyst for NIH, whose "job consisted of performing tumor measurements" which could be done on a computer, was entitled to work at home where her asthma was triggered by exposure to carpeted areas at her worksite ("as well as when people come from any carpeted area into her workspace"). In Jona v. Pompeo (Department of State), 2020 EEOPUB LEXIS 391 (EEOC 2020), the EEOC held that "situational telework" was the appropriate accommodation for an employee whose physical symptoms from Diabetes and Autonomic Neuropathy, often precluded her from driving to the workplace. In Complainant v. Bay (FERC), 2016 EEOPUB LEXIS 711 (EEOC 2016), the EEOC found that the employee was entitled to telework (or work at another location) during a loud construction period where her medical evidence showed that exposure to loud sounds precipitated her migraines. In Complainant v. Castro (HUD), 2015 EEOPUB LEXIS 449 (EEOC 2015), the EEOC held that it could be a reasonable accommodation for the agency to allow a Financial Analyst with a spine disorder to telecommute where his responsibilities involved reviewing compliance documents, responding to audits, and communicating with co-workers and housing authorities. In Blocher v. Department of Veterans Affairs, 2013 EEOPUB LEXIS 1126 (EEOC 2013), the EEOC held that the employer might have to modify its policy that Service Chiefs could not work at home. In Selma D v. Duncan (Education), 2016 EEOPUB LEXIS 1157 (EEOC 2016), the EEOC held that the agency could not show that allowing a Management Analyst with ADHD to work at home (or from a vacant private office) would cause an undue hardship. In this case, the analyst's doctor's note said she could not work in the agency's new cubical environment because of the distractions. Going one step further, in Harvey G v. Jewell (Interior), 2016 EEOPUB LEXIS 309 (EEOC 2016), the EEOC held that the employee, a power plant Engineer, could have been accommodated by allowing him to telecommute to a reassigned job, even if his current position could not be performed by telecommuting (because it required frequent travel to power plants).

Courts agree with this. For example, in Mosby-Meachem v. Memphis Light, Gas & Water Division, 883 F.3d 595 (6th Cir. 2018), the court held that allowing the employment lawyer to work from home was a possible accommodation where physical presence was not deemed to be an essential function of her job. In Solomon v. Vilsack (Dept. of Agriculture), 763 F.3d 1 (D.C. Cir. 2014), the court recognized that courts have held that "physical presence" at a specific time is not always an essential job function. Rather a "penetrating factual analysis" is required to determine whether a rigid on-site schedule is an essential function of the job in question. In Woodruff v. Peters, 482 F.3d 521 (D.C. Cir. 2007), the court held that work-at-home could be a possible accommodation for a supervisor who supervised a team that was allegedly "self-directed," the agency's handbook anticipated telecommuting for up to five days per week,

and the employee had been working at home (for part of each week) for several months. In Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001), the court expressly stated that "working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship." In this case, the court concluded that work-at-home might be a reasonable accommodation for a medical transcriptionist who could not reliably attend work at the employer's worksite because of her obsessive compulsive disorder. In Lalla v. Consolidated Edison Company of New York, Inc., 2002 U.S. App. LEXIS 6519 (2d Cir. 2002)(unpublished), the court held that although work-at-home could be a reasonable accommodation, the plaintiff's job – requiring "on-site inspection and other work on electric lines" – could not be performed at home.

The EEOC has stated in its "EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at Question 34, that an employer "must modify its policy concerning where work is performed" to allow an employee to work at home if this accommodation is effective and would not cause an undue hardship.

Importantly, in Lorita v. Wolf (Homeland Security), 2020 EEOPUB LEXIS 740 (EEOC 2020), the EEOC held that the employer did not violate the law by telling the employee that "pursuant to the telework policy, she needed to keep a log of accountable work completed on a daily basis." Along these lines, in Banim v. Florida Department of Business and Professional Regulation, 2017 U.S. App. LEXIS 8624 (11th Cir. 2017)(unpublished), the court held that the employer could require "Daily Activity Reports" from the employee who was allowed to work at home as an accommodation, where it required these reports from other employees who worked at home.

Of course, even if a court were to conclude that work-at-home can be a reasonable accommodation, it is still important to look at the actual job at issue in order to determine whether the person can *do* that job at home. The EEOC has acknowledged that certain jobs (a food server, a cashier) can only be performed at a work site, while other jobs (a telemarketer, a proofreader) may be able to be performed at home. The EEOC stated that certain considerations will be relevant to whether a job can be performed at home, such as "the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home." EEOC Guidance at pp. 46-47. The EEOC has also written that "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." EEOC Fact Sheet "Work-At-Home/Telework as a Reasonable Accommodation" (2/3/03). Along these lines, in Bruce v. Wolf (Homeland Security), 2020 EEOPUB LEXIS 1234 (EEOC 2020), the EEOC found that telework was not a required reasonable accommodation for a FEMA Emergency Management Specialist whose essential functions required deployment to disaster areas for 300 days per year. In Keri v. Wolf (Homeland Security), 2020 EEOPUB LEXIS 477 (EEOC 2020), the EEOC held that a Transportation Security Inspector with ADHD, responsible for conducting inspections,

investigations and passenger assessments, was not entitled to work from home performing the limited tasks of clerical and administrative duties. Likewise, in Ralph v. Wolf (Homeland Security), 2020 EEOPUB LEXIS 379 (EEOC 2020), the EEOC held that telework was not a required reasonable accommodation for an Intelligence Research Specialist whose "job duties required a secure environment to access sensitive information" and who needed to work in close proximity to criminal investigators. In Gabriele v. McCarthy (Army), 2020 EEOPUB LEXIS 816 (EEOC), the EEOC held that the employer did not have to provide full-time work at home to a Human Resource Specialist with leg issues and mental health disorders. The EEOC's conclusion seemed to be based in large part on the job description which "required her to conduct onsite visits; to provide technical advice and assistance to all levels of management on complex HR issues; to obtain information through onsite visits; and to attend meetings and conferences." Similarly, in Taren P v. Fanning (Army), 2016 EEOPUB LEXIS 925 (EEOC 2016), the EEOC held that the employee was not entitled to telework as a reasonable accommodation in a Contract Specialist position (despite the fact that she had been teleworking as a Procurement Analyst) because this new position "required extensive face-to-face contact with customers (continuous support), direction from management/leadership, mentoring of assigned employees (i.e. interns/fellows), administration of technical guidance, and the physical presence of the employee." Among other things, the EEOC noted that the "prescribed duties stated that the position would entail serving as the focal point for 'planning, developing, and executing complex contractual strategies,'" serving as "lead negotiator of multi-disciplined teams," guiding Contract Specialists "in developing solicitations and implementing complex and unique acquisition techniques," and establishing a "full range of contract administration action."

Courts agree that an employer has a right to look at the requirements of the job in determining whether work-at-home can be provided. For example, in Bilinsky v. American Airlines, Inc., 2019 U.S. App. LEXIS 23821 (7th Cir. 2019), the court held that physical presence may have become an essential function of a communications specialist's job because the company changed the job to require on-site crisis management, among other things. However, the court also suggested that "technological development and the expansion of telecommuting" is making telework more common and feasible. The court stated that employers should "assess what's reasonable under the statute under current technological capabilities, not what was possible years ago." In Morris-Huse v. Geico, 2018 U.S. App. LEXIS 27431 (11th Cir. 2018)(unpublished), the court held that the employer was not required to provide work-at-home as an accommodation to an employee where physical presence was an essential function of the job. In this case, the court held that a claims representative supervisor's job required on-site presence "because the job required her to interact with, coach, and lead a team of associates on a daily basis." In Everett v. Grady Memorial Hospital Corp., 2017 U.S. App. LEXIS 15264 (11th Cir. 2017)(unpublished), the court found that full-time work-at-home was not a required accommodation for the hospital's "Car Seat Program" coordinator where she needed to be on-site to perform her essential functions of teaching new parents, meeting with patients, and supervising staff. In Credeur v. Louisiana, 860 F.3d 785 (5th Cir. 2017), the court held that work-at-home was not required for an attorney where her job required "office attendance" because of her need to interact with

others and the alleged difficulty supervising her performance if she worked at home. In Abram v. Fulton County Government, 2015 U.S. App. LEXIS 1380 (11th Cir. 2015)(unpublished), where physical presence was essential for a front desk receptionist, the employee's request to work at home was not a required reasonable accommodation. In Doak v. Johnson (Homeland Security), 798 F.3d 1096 (D.C. Cir. 2015), the court held that a Management Program Analyst for the Coast Guard was not qualified where, "even with her desired schedule accommodation," she "would have been unable to perform an essential function of her job: being present in the office to participate in interactive, on-site meetings during normal business hours and on a regular basis." The court implicitly agreed with the employer that on-site attendance was required to review documentation that could not be "conveniently accessed remotely" for spontaneous meetings and that "the pace of work 'can sometimes be too fast for anything other than on-site presence.'" In Valdez v. Brent McGill and Mueller Supply Co., Inc., 2012 U.S. App. LEXIS 2783 (10th Cir. 2012)(unpublished), the court held that work-at-home would not be a required reasonable accommodation for a warehouse manager because although he could perform some functions with the use of technology, he would be unable to perform a number of functions requiring physical attendance such as inventory counts, interacting with customers, and supervising staff. In Robert v. Board of County Commissioners of Brown County, 691 F.3d 1211 (10th Cir. 2012), the court held that "when an individual can execute the essential functions of her job from home, working remotely may be a reasonable accommodation. When a disability renders an employee completely unable to perform an essential function, however, the only potential accommodation is temporary relief from that duty." In this case, the court found that the employee could not perform her job from home because she was required to do in-person field work. In Kiburz v. England (DON), 2010 U.S. App. LEXIS 1006 (3d Cir. 2010)(unpublished), the court held that the employer was not required to allow the employee, an Information Technology Specialist, to work from home where some of his essential functions, such as attending meetings and working with others, required him to be in the office. In Mulloy v. Acushnet Co., 460 F.3d 141 (1st Cir. 2006), the court held that the employer was not required to reasonably accommodate the employee by allowing him to work off-site, where his essential functions (including troubleshooting, training, supervising, and "supporting personnel") required actual attendance at the plant.

Interestingly, in Kassa v. Synovus Financial Corp., 2020 U.S. App. LEXIS 3219 (11th Cir. 2020)(unpublished), the court held that the customer service employee's request to work from home was not reasonable because the employer's "telephone system would not enable customer service calls to be routed to off-site employees." It is certainly possible that other courts would analyze whether these calls could be re-routed without this causing an undue hardship.

In addition, it is legitimate to ask whether work-at-home is truly needed as an accommodation, or whether another accommodation might work for the individual. The EEOC has written that an employer *may* choose to make an accommodation that would enable the employee to work full-time in the workplace rather than granting a work-at-home request. EEOC Fact Sheet "Work-At-Home/Telework as a Reasonable Accommodation" (2/3/03). In Chara S v. Castro (HUD), 2016 EEOPUB LEXIS 305

(EEOC 2016), the EEOC found that a Staff Assistant was not entitled to telework as an accommodation where there was no medical basis for this request.

The EEOC has stated that an employer might be required "to waive certain eligibility requirements" for an employee to be able to work at home (such as a seniority requirement) so that an employee can be given such work as a reasonable accommodation. EEOC Fact Sheet "Work-At-Home/Telework as a Reasonable Accommodation" (2/3/03). Along these lines, in Alonso v. Dhillon (EEOC), 2020 EEOPUB LEXIS 161 (EEOC 2020), the EEOC noted that it was incorrect for the employer to consider the employee's inadequate job performance in determining whether work-at-home could be a reasonable accommodation. The EEOC stated that an employee "would still be required to meet all performance requirements even with the accommodation of telework," and that the question is whether the employer "could have accommodated" the employee "without incurring an undue hardship, not whether Complainant's performance merited special privileges."

Who pays for an accommodation that the employee might need in order to work at home? The EEOC has stated that, "if an employee with a disability needs the same reasonable accommodation at a telework site that he had at the workplace, the employer should provide that accommodation, absent undue hardship." EEOC's "Pandemic Preparedness" Guidance, Section III(B)(14)(2009)(other parts of Guidance updated Spring 2020). Likewise, in its COVID-19 "Outreach Webinar" (3/27/20), the EEOC stated that the employer must provide an accommodation in the home setting, but that the needed accommodation might be different from what the employee needed at the worksite because the employee "may already have certain things in their home to enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace" (Question 20). The EEOC also stated that, "the undue hardship considerations might be different when evaluating a request for accommodation while teleworking," because, "for example, the fact that the period of telework may be of a temporary or unknown duration may render certain accommodations either not feasible or an undue hardship." Id.

During the COVID-19 pandemic, many employers allowed employees to work at home even though the employees may not have been performing all of the essential functions at home. The EEOC has stated that an employer does not need to continue telework as an accommodation if it was "choosing to excuse an employee from performing one or more essential functions." EEOC's COVID-19 'Outreach Webinar' (3/27/20), Question 21. However, at the same time, the EEOC stated that "the temporary telework experience could be relevant" to analyzing whether the employee was able to "satisfactorily perform all essential functions while working remotely." Id. at Question 22.

Modified Work Schedule as a Reasonable Accommodation

An employer may, in certain circumstances, have to modify an employee's work schedule if this is needed as a reasonable accommodation. 42 U.S.C. 12111(9); 29 C.F.R. § 1630.2(o)(2)(ii). There seems to be general agreement that a modified work schedule can include a number of modifications, such as altering arrival/departure times, providing

periodic breaks during the day, or changing when certain functions are done. The key -- in *all* cases -- is whether there is a nexus between the disability and the requested schedule; in other words, whether the modified schedule is truly needed *because of* the disability. For example, in Complainant v. Donahoe (USPS), 2014 EEOPUB LEXIS 2167 (EEOC 2014), the EEOC held that the employee had not shown that a "nexus existed" between his request for "working precisely three days per week, seven hours each day" and his heart condition.

A modified work schedule also can include letting an employee arrive late, leave early, or take breaks during the day because of incapacitation resulting from the disability. For example, in Kassa v. Synovus Financial Corp., 2020 U.S. App. LEXIS 3219 (11th Cir. 2020)(unpublished), the court held that the employee may have been entitled to take short breaks because of his anger management disorder so that he could answer customer service calls in a professional manner. As noted earlier, in Yochim v. Carson, 935 F.3d 586 (7th Cir. 2019), the court held that although the employee wanted to work full-time at home, the employer adequately offered a reasonable accommodation by suggesting a schedule modification to address her medical requirements that she attend therapy appointments and avoid commutes on crowded trains. In Solomon v. Vilsack (Dept. of Agriculture), 763 F.3d 1 (D.C. Cir. 2014), the court stated that a flextime schedule could, for certain jobs, be a possible accommodation. In this case, the court held that the employee, a budget analyst, might be able to show that (despite the employer's arguments) she could perform her job with such a schedule in light of her demonstrated ability to meet all of her work deadlines. In Valle-Arce v. Puerto Rico Ports Authority, 651 F.3d 190 (1st Cir. 2011), the court held that the human resources employee with fibromyalgia may have been entitled to a flexible schedule, allowing her to come to work as late as 9:00 a.m. (instead of 7:30 a.m.) because with such a schedule, she would have been "able to attend work regularly" and still complete 37.5 hours per week. In Livingston v. Fred Meyer Stores, Inc., 2010 U.S. App. LEXIS 15044 (9th Cir. 2010)(unpublished), the court held that a modified schedule during the autumn and winter seasons was a required accommodation for a store employee who could not drive after dark because of a vision impairment. In this case, the court found that such a schedule would not pose an undue hardship because the employer had easily provided the modified schedule the prior year to the employee. In EEOC v. Convergys Customer Management Group, Inc., 491 F.3d 790 (8th Cir. 2007), the court held that allowing a customer service employee an additional 15-minute window to return from lunch breaks would have been a reasonable accommodation, where the employee was unable to adhere to the rigid 30-minute breaks due to his mobility impairment and the lack of accessible parking. In Conneen v. MBNA America Bank, N.A., 334 F.3d 318 (3d Cir. 2003), the employer argued that arriving at work at 8:00 a.m. was an essential function of the job of a Marketing Production Manager, since managers must set a good example for other employees. The employer argued that the employee was not qualified where she could not report to work until 9:00 a.m. because of her depression. The court held that "setting a good example" was not enough to make the 8:00 schedule essential; therefore, a modified schedule would be a reasonable accommodation.

Interestingly, in McMillan v. City of New York, 711 F.3d 120 (2d Cir. 2013), the court noted that a request "to work unsupervised" after normal business hours (to make up for time not worked in the morning) "is not unlike a request to work from home." The court stated that although it is "potentially problematic" because it is unsupervised, it could be a reasonable accommodation depending on the job. The court noted that the employee had apparently been permitted to perform parts of his job unsupervised in the past.

Of course, if an employee is given additional breaks from work, the ADA generally would not require that the employer pay the employee for that time. [Fram Note: There could, however, be FLSA issues to consider in this regard.]

The EEOC and courts have held that an employer is not required to provide an "open-ended" work schedule as a reasonable accommodation. For example, the EEOC has stated that employers "need not grant open-ended schedules (e.g., the ability to arrive or leave whenever the employee's disability necessitates)." EEOC Fact Sheet "Applying Performance and Conduct Standards to Employees with Disabilities" (2008) at Question 20. **This Fact Sheet is available on the internet at www.eeoc.gov**. However, in this Fact Sheet, the EEOC also noted that if someone needed unpredictable leave (for example, because of seizures) only once every few months, that could be a reasonable accommodation. In Kendall v. Ashcroft (DOJ), 2005 EEOPUB 350 (EEOC 2005), the EEOC held that the employer was not required to let the employee, a Research Specialist with sleep disorders, "report to work whenever he was able." The Commission noted that such an accommodation "is not reasonable on its face" because it is not "feasible" for "an employer to excuse chronic erratic absenteeism and tardiness by an employee who cannot provide timely notice sufficient to enable the employer to ensure adequate staffing."

Along these lines, in Higgins v. Union Pacific Railroad Co., 931 F.3d 664 (8th Cir. 2019), the court held that where regular attendance was essential for a Locomotive Engineer, the employer did not need to allow him to take time off whenever necessary because of his back pain. In this case, the court held that the employee's request for an "unlimited absentee policy" is unreasonable as a matter of law. In Punt v. Kelly Services, 862 F.3d 1040 (10th Cir. 2017), the court held that where "physical presence at the workplace was the most essential function" of a temporary receptionist's job, a request for erratic leave (in this case, to not work at all "this week," and for time off for "appointments," "tests," and radiation) was "not plausibly reasonable on its face." In Boileau v. Capital Bank Financial Corp., 2016 U.S. App. LEXIS 7656 (6th Cir. 2016)(unpublished), the court held that the employee, a bank teller who had exhausted her FMLA leave, was not qualified under the ADA where she could not meet the regular attendance requirements for her job. In this case, the employee's own doctor stated that her lupus would "incapacitate her every one to two months for the duration of her life, with each episode of incapacity lasting from eight to twelve weeks." This case suggests that extensive, unpredictable intermittent leave might not be required once the employee's FMLA leave is exhausted. In Banks v. Bosch Rexroth Corp., 2015 U.S. App. LEXIS 7690 (6th Cir. 2015)(unpublished), the court held that allowing the employee, an assembler on a manufacturing line, "to leave work at her own discretion on 15 to 30 minutes' notice any time she felt her medicine was not being effective" for her sometimes

daily migraine headaches was not "reasonable." The court noted that "while there may be circumstances in which an accommodation permitting an employee to exercise discretion regarding her work hours would be reasonable, the record here does not support such a determination" because regular attendance was essential for her job. In Starts v. Mars Chocolate, 633 Fed. Appx. 221 (5th Cir. 2015)(unpublished), the court held that the employee was not "qualified" because his back problems, which manifested at unpredictable times, precluded him from regularly attending to his duties using machinery, even on a shorter shift. Likewise, in Likewise, in Crowell v. Denver Health and Hospital Authority, 2014 U.S. App. LEXIS 13965 (10th Cir. 2014)(unpublished), the court held that the employee's request to leave work during flare-ups "whenever the pain or the numbness occurred to the point that [she] could not type" was not a reasonable accommodation. The court stated that although a modified schedule could be an accommodation, "an unpredictable, flexible schedule that would permit Crowell to leave work whenever she has a medical episode is unreasonable as a matter of law." In Murphy v. Samson Resources Co., 2013 U.S. App. LEXIS 9328 (10th Cir. 2013)(unpublished), the court held that the employer was not required to give the employee a modified schedule, allowing her to make up time missed due to her migraines, because her job required punctual, timely performance of certain duties (preparing vouchers, recording invoices, processing payments, etc.) under close supervision. In Samper v. Providence St. Vincent Medical Center, 675 F.3d 1233 (9th Cir. 2012), the court held that since attendance at the work site was essential for a neo-natal nurse, the hospital was not required to permit a nurse with fibromyalgia to have a "work-when-able" schedule. The court stated that if the employer were required to allow the nurse to "simply miss work whenever she felt she needed to," this would "stretch[] the notion of accommodation beyond any reasonable limit." Likewise, in Pickens v. Soo Line Railroad Co., 2001 U.S. App. LEXIS 19333 (8th Cir. 2001), the court held that although a part-time or modified schedule might be a required accommodation, "we view Pickens' suggested method -- that he should be able to work only when he feels like working -- as unreasonable as a matter of law." In Palotai v. University of Maryland, 2002 U.S. App. LEXIS 12757 (4th Cir. 2002)(unpublished), the court held that even if the plaintiff had a disability, it was not a reasonable accommodation to eliminate the time constraints and deadlines from his job as a technician in a University greenhouse. The court noted that the rigid scheduling of tasks (such as spraying plants and ventilating the greenhouse) was essential since the plants would not properly grow unless the tasks were done in a timely manner.

On a related issue, in Popeck v. Rawlings, 2019 U.S. App. LEXIS 30735 (6th Cir. 2019)(unpublished), the court held that the employee's request for a schedule modification (to arrive late or leave early) because of her irritable bowel syndrome was not an effective reasonable accommodation because it would not have enabled her to perform her essential function of on-site attendance. The court noted that she would actually have required "vastly more flexibility and time off" than she proposed in light of her having missed nearly 60% of her workdays.

Although the EEOC has stated that an employer may have to allow an employee to work part-time as a reasonable accommodation,[11] it also has suggested that for some jobs, the

number of hours worked may itself be essential. For example, the EEOC has stated that, "a law firm may require attorneys with disabilities to produce the same number of billable hours as it requires all similarly-situated attorneys without disabilities to produce. Reasonable accommodation may be needed to assist an attorney to meet the billable hours requirement, but it would not be a form of reasonable accommodation to exempt an attorney from this requirement." This certainly suggests that the EEOC would consider the number of hours worked in certain jobs to be an essential part of that job. EEOC's Fact Sheet "Reasonable Accommodations for Attorneys with Disabilities," (7/27/06).

Federal court decisions have been conflicting on whether part-time work is a required accommodation. Some decisions such as Carter v. Pathfinder Energy Services, 662 F.3d 1134 (10th Cir. 2011) and Ralph v. Lucent Technologies, Inc., 135 F.3d 166 (1st Cir. 1998) are consistent with the EEOC's view that part-time work might be appropriate as a reasonable accommodation. In Carter, the court held that reasonable accommodation can include "part-time work" if the employee can perform the job's essential functions "'while working part-time'" (citation omitted). In this case, the court held that the employee, a "directional driller," may have been qualified even though he could only work for one 10-12 day assignment per month instead of two. Similarly, in both Parker v. Columbia Pictures Industries, 204 F.3d 326 (2d Cir. 2000) and Parnahay v. United Parcel Service, Inc., 2001 U.S. App. LEXIS 21487 (2d Cir. 2001)(unpublished), the courts stated that part-time work might be an accommodation for a full-time employee, as long as the employee "can demonstrate that he could perform the essential functions of his job while working part-time." In Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495 (7th Cir. 2000), the court noted that allowing an employee to work part-time for a temporary period can be an accommodation. In this case, the plaintiff, a used car manager with muscular dystrophy, wanted to return to work initially on a part-time basis. The court noted that "[e]mployees who have experienced serious medical problems often return to work part-time and increase their hours until they are working full time." Since another employee was available to fill in for the hours the plaintiff could not initially work, "gradual return to full-time work would have been a reasonable accommodation" under the ADA.

Many courts, however, have suggested that creating a part-time position is not necessarily required as an accommodation. For example, in Green v. BakeMark USA, LLC, 2017 U.S. App. LEXIS 5488 (6th Cir. 2017)(unpublished), the court held that working part-time (four hours/day) was not a reasonable accommodation where full-time work was essential for the employee's Operations Manager position. In Rabb v. School Board of Orange County, 2014 U.S. App. LEXIS 20757 (11th Cir. 2014)(unpublished), the court held that "while part-time work may be reasonable if the employer has part-time positions 'readily available,' there was no duty to create a part-time" teaching position where the employer did not have such positions. In White v. Standard Insurance Co., 2013 U.S. App. LEXIS 13368 (6th Cir. 2013)(unpublished), the court held that because working full-time was essential for the customer service agent's job, the employer "was not required to create a new part-time position where none previously existed." In Lileikis v. SBC Ameritech, Inc., 2003 U.S. App. LEXIS 25405 (7th Cir. 2003)(unpublished), the court held that full-time work was an essential function of a full-time directory assistance position. Therefore, "part-time work is not a reasonable

accommodation for a full-time job." In Lamb v. Qualex, Inc., 2002 U.S. App. LEXIS 5982 (4th Cir. 2002)(unpublished), the court considered whether a customer support employee, working for a photo equipment leasing company, could be given part-time work as a reasonable accommodation. The court concluded that full-time work was an essential function because the employer only hired full-time employees for these positions, and employees consistently worked full time performing their duties (which included visiting retail stores within their territories, providing training and sales support, and immediately responding to field emergencies). As a result, the court held that the employer need not provide part-time work as an accommodation, noting that when "an employer has no part-time jobs available, a request for part-time employment is not a reasonable one."

Shift Changes as a Reasonable Accommodation

On the one hand, a shift change can be viewed as a schedule modification which must be done unless it causes an undue hardship. In Petitioner v. Johnson (Homeland Security), 2014 EEOPUB LEXIS 1810 (EEOC 2014), the Department of Homeland Security argued that a border officer was not qualified where he was not able to work the required rotating shifts and overtime. The EEOC stated that timing is not an essential function because it is not a "duty" or "outcome" of the job, and therefore, must be modified unless it causes an undue hardship. Along these lines, in Colwell v. Rite Aid Corp., 602 F.3d 495 (3d Cir. 2010), the court held that when an employee has "disability-related difficulties in getting to work," the employer might be required to provide "a change to a workplace condition that is entirely within an employer's control and that would allow the employee to get to work and perform her job." The court stated that its decision "does not make employers responsible for how an employee gets to work," but may be required to modify something within its control, such as a shift change.

On the other hand, it can certainly be argued that, for many jobs, the shift -- or the *time* that the functions are performed -- is an *integral* (and essential) part of the particular job. For example, a midnight security guard simply cannot guard the building during the nighttime if s/he is not at his/her station during the nighttime hours. Therefore, the employer should not be forced to modify the shift as a reasonable accommodation. In fact, as noted above, in its "EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at Question 22, the EEOC acknowledged that "for certain positions, *the time during which an essential function is performed may be critical*." The EEOC stated that employers should therefore "carefully assess whether modifying the hours could *significantly disrupt* their operations -- that is cause undue hardship -- or whether the essential functions may be performed at different times with *little or no impact* on the operations or the ability of other employees to perform their jobs." Guidance at p. 33 (emphasis in original). Importantly, as noted above, the EEOC's most recent position seems to be that a shift cannot be considered an essential job function, and therefore, must be modified unless it causes an undue hardship. Still, an employer has the right to analyze whether such a modification is needed because of the disability. For example, in Complainant v. Donahoe (USPS), 2014 EEOPUB LEXIS 2187 (EEOC 2014), the EEOC held that the employee, a Mail Processing Clerk, was not entitled to a different shift as an accommodation where she did

not show that this was needed because of a medical condition. Rather, the EEOC found that the request was for "personal reasons, including that she felt it would be difficult to adjust to the new starting time, she and her family would be unhappy with the change, and [she] did not personally have the lifestyle to work" her scheduled shift.

Supporting this view, as noted earlier, in Spears v. Creel (Sheriff of Wakulla County, FL), 2015 U.S. App. LEXIS 6095 (11th Cir. 2015)(unpublished), the court held that "the ability to work shift hours and a consistent schedule" were essential for a Detention Deputy position in the Sheriff's office. In Kassa v. Synovus Financial Corp., 2020 U.S. App. LEXIS 3219 (11th Cir. 2020)(unpublished), the court implicitly suggested that shifts are an essential function when it held that the customer service employee was not entitled to work at nighttime where the employer did not have a "night shift position" on the employee's work team. In Jefferson v. MillerCoors, LLC, 2011 U.S. App. LEXIS 18588 (5th Cir. 2011)(unpublished), the employee, who was not able to operate a double-wide forklift, claimed that he was entitled to be transferred to another shift where he would not have to operate that forklift. The court held, however, that the employer did not need to transfer him to that position where it was already filled. Specifically, the court noted that, "for a job reassignment to be a reasonable accommodation, the position must exist and be vacant." Likewise, in Turco v. Hoechst Celanese Chemical Corp., 101 F.3d 1090 (5th Cir. 1996), the court held that there was no duty to create a "straight day-shift chemical operator position" for an employee with diabetes who could not work his rotating shift.

Despite the EEOC's current position, the EEOC's Technical Assistance Manual on Title I of the ADA seems to support the view that a shift change may not be required as a reasonable accommodation. In explaining "essential functions," the Manual states that if a company has a "floating" supervisor -- who substitutes for regular supervisors on various shifts -- then "the ability to work at any time of day is an essential function of the job." This is because "[t]he only reason this position exists is to have someone who can work on any of the . . . shifts in place of an absent supervisor." Technical Assistance Manual, Section 2.3(a). This example therefore suggests that the time a function is performed can itself be essential (based on the particular job) and would *not* have to be changed as a reasonable accommodation.

Even though an employer arguably does not need to modify the shift for certain workers, it might still be required to reassign the individual to another shift if there was a vacant position on the other shift.

"Irritant-Free" Environment as a Reasonable Accommodation

Employers must, of course, consider modifying a workplace as a reasonable accommodation. However, one difficult question is whether an employer is required to provide a workplace environment free of irritants, such as perfumes or other scents/irritants. Although there have been very few cases at the Court of Appeals level, it seems as though employers would not have such an obligation. For example, in Horn v. Knight Facilities Management-GM, Inc., 2014 U.S. App. LEXIS 3797 (6th Cir. 2014)(unpublished), the court held that the employee, a janitor, could simply not be

accommodated in her position where exposure to certain chemicals was inevitable and exposure to these chemicals violated her medical restrictions. Similarly, in Dickerson v. Department of Veterans Affairs, 2012 U.S. App. LEXIS 18848 (11th Cir. 2012)(unpublished), the employee had multiple chemical sensitivity, causing her severe reactions when exposed to a number of substances including cleaning supplies, smells, and other chemicals common to the workplace. The court held that the employee was not qualified because she could not perform the essential functions of her nursing job when she was near these substances (implicitly finding that the employer was not required to create a chemical free environment). In Buckles v. First Data Resources, Inc., 176 F.3d 1098 (8th Cir. 1999), the employee had rhinosinusitis, and experienced wheezing and other problems when he was exposed to perfumes, nail polish and other irritants; he requested, as a reasonable accommodation, an "irritant-free" environment. The court held that the employer was not required to "create a wholly isolated work space for an employee that is free from numerous possible irritants."

It appears that the EEOC may agree with this analysis. For example, in Nevada v. Barr (DOJ), 2020 EEOPUB LEXIS 552 (EEOC 2020), the EEOC found that the employee, who asked for a "scent-free" office did not show that the accommodations provided were not effective – in this case, an air purifier, changing her workstation, and reminding employees "at intervals to be mindful of their use of scented products in the office." The Commission also noted that "a request for a work environment that is entirely fragrance free" is "not a reasonable accommodation request" and would impose "an undue hardship." As noted earlier, in Complainant v. Bay (FERC), 2016 EEOPUB LEXIS 711 (EEOC 2016), the EEOC found that it was "simply unreasonable" when the employee "was essentially asking the Agency to provide her with the perfect work atmosphere at every moment." In this case, the EEOC summarized that the employee wanted, as an accommodation, for the employer to "entirely insulate her from sporadic imperfect air quality, imperfect office temperatures, crowded refrigerators, bad food quality, food odors, and window cleaning" (among other things). In Complainant v. U.S. Postal Service, 2013 WL5876916 (EEOC 2013), the employee, a Building Maintenance Mechanic, complained about migraines caused by exposure to fragrances; he asked for a "no-scent policy" as a reasonable accommodation. Instead, the employer talked to all employees, asked them to refrain from wearing strong fragrances, and offered the employee leave if/when he experienced migraines. The EEOC found this to be an effective accommodation. In Roberts v. Slater, 2000 EEOPUB LEXIS 6079 (EEOC 2000), an employee with Multiple Chemical Sensitivity asked the employer, the Department of Transportation, for a fragrance-free environment. The EEOC, in a formal agency decision, held that "an entirely fragrant free environment was not a reasonable request for accommodation, and would have imposed an undue hardship on the agency's operation." The EEOC noted that "enforcing such an accommodation would be impractical, especially when considering the employer's obligation to limit and rid a large number of scent producing agents one finds in the workplace."

The situation arguably would be different if the employee's disability was caused by one particular substance in the workplace, such as a co-worker's perfume or the smell of popcorn. For example, in Habluetzel v. Potter (USPS), 2006 EEOPUB LEXIS 4902

(EEOC 2006), the EEOC held that where the employee had a severe allergy to corn products, the employer was required to prohibit workers from making popcorn in the workplace. The Commission rejected the employer's argument that it did not have to ban popcorn because the employee's co-workers resented such a ban and that such a ban would be a "punishment" on the co-workers.

Interestingly, in Yovtcheva v. City of Philadelphia Water Department, 2013 U.S. App. LEXIS 9247 (3d Cir. 2013)(unpublished), the court held that it was a possible reasonable accommodation to offer the lab assistant a partial-face respirator because of her physical reaction to a particular chemical in the workplace.

Sometimes, an employee claims that he needs a workplace free of "irritating" management. In Mack v. State Farm Mutual Automobile Insurance Co., 2000 U.S. App. LEXIS 1012 (7th Cir. 2000)(unpublished), the plaintiff, an employee with obsessive compulsive disorder, wanted his employer to "'leave him alone,' and allow him to remain at his desk without interaction with management until he reaches retirement age." The court found that this was not a required accommodation under the ADA.

Providing Parking Spaces/Commuting Assistance as an Accommodation

Employers have an excellent argument that reasonable accommodation does *not* include providing commuting assistance for employees; the basis for this argument is that barriers in getting to work are not *workplace-created* barriers. In Gilliard v. Georgia Department of Corrections, 2012 U.S. App. LEXIS 25065 (11th Cir. 2012)(unpublished), the court stated that the employee "did not establish that her requested accommodations of an office and a parking space were 'reasonable' within the meaning of the ADA." In Parker v. Verizon Pennsylvania, Inc., 2009 U.S. App. LEXIS 2508 (3d Cir. 2009)(unpublished), the court noted that "commuting to and from work is not part of the work environment that an employer is required to reasonably accommodate," and the employer's "failure to accommodate" the plaintiff by limiting his commute "was not required." In Wade v. General Motors Corp., 1998 U.S. App. LEXIS 22626 (6th Cir. 1998)(unpublished), the court noted that an employer is not responsible for getting an employee to work. The court stated that if the plaintiff could not drive himself to work because of his vision impairment, "he should . . . find another means of transportation to and from work." In Webster v. Henderson, 2002 U.S. App. LEXIS 2877 (4th Cir. 2002)(unpublished), the postal service mail sorters claimed that the employer did not properly accommodate them by providing (among other things) parking spaces. The court disagreed, noting that "parking was not guaranteed for any postal employee," thereby implying that an employer need not provide parking as an accommodation. Even the EEOC -- in "Informal Guidance" letters -- has said that "an employer would not be required to provide transportation as a reasonable accommodation for an individual whose disability makes it difficult or impossible to commute to work."[13] EEOC's position is based on the rationale that an employer "is required to provide reasonable accommodations that eliminate barriers in the work environment, not ones that eliminate barriers outside of the work environment."[14] According to the EEOC's informal guidance, this also means that an employer is not responsible for transferring someone from an automobile to a wheelchair

upon arrival at the workplace because this "is part of the process of commuting to and from work." Id.

However, at least one Court of Appeals has taken a different position. In Nixon-Tinkelman v. New York City Department of Health and Mental Hygiene, 2011 U.S. App. LEXIS 16569 (2d Cir. 2011)(unpublished), the court held that, "in certain circumstances, an employer may have an obligation to assist in an employee's commute." The court noted that "there is nothing inherently unreasonable . . . in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work" (citation omitted). In this case, the court noted that the employer may have been required to transfer the employee to a location closer to her home, allow her to work from home or provide "a car or parking permit." In Lyons v. Legal Aid, 68 F.3d 1512 (2d Cir. 1995), the court held that the employer *may* have to provide a paid parking space near the employer's facility for someone with a disability, even though no paid parking was provided for other employees. Similarly, in Gronne v. Apple Bank for Savings, 2001 U.S. App. LEXIS 533 (2d Cir. 2001)(unpublished), the court noted that "in narrow circumstances, 'employer assistance with transportation to get the employee to and from the job'" can be a reasonable accommodation. In this case, the court concluded that the employer met or exceeded its ADA requirements by offering to pay half the cost of a private car service for an employee who claimed that she would be unable to drive to work."

Interestingly, in Feist v. Louisiana, 730 F.3d 450 (5th Cir. 2013), the court considered the employee's claim that she was entitled to a "free, on-site parking space" to accommodate her osteoarthritis. The court of appeals reversed the lower court's holding that an accommodation must facilitate the essential functions of the job, noting that accommodations that make a workplace "readily accessible" and "usable" are also required. After stating that "the requested reserved on-site parking would presumably have made her workplace 'readily accessible to and usable by'" the employee, the court remanded the case back to the lower court, but "express[ed] no opinion as to whether the proposed accommodation was reasonable. In Cloe v. City of Indianapolis, 712 F.3d 1171 (7th Cir. 2013), the court seemed to suggest that providing the employee with a permanent parking space in close proximity to the work site was an accommodation (where employees are already provided with parking at less desirable parking lots).

Certainly, *if* an employer offers commuting assistance to employees generally (such as a van pool or employer-provided parking), there is widespread agreement that the employer must make sure the perk is accessible to and usable by individuals with disabilities. For example, if the employer provides parking to employees, it would be a reasonable accommodation to provide a reserved space for someone with a mobility impairment who needs to park next to a curb cut. See Appendix to 29 C.F.R. § 1630.2(o); 6/29/98 Informal Guidance letter from Christopher J. Kuczynski, Assistant Legal Counsel (employer may have to provide a reserved, larger parking space for an employee who needs it because of disability). In Complainant v. Carter (DOD), 2016 EEOPUB LEXIS 44 (EEOC 2016), the Commission found that it would have been a reasonable accommodation to provide the employee, an elementary school administrator with knee

problems, a reserved parking space near the school so that he would not have to walk long distances across a gravel parking lot. In Marcano-Rivera v. Pueblo International, Inc., 232 F.3d 245 (1st Cir. 2000), the court held that it would have been a reasonable accommodation to allow the employee, who had no legs, to park in the store's handicapped parking spaces. Although the employer claimed to be treating the employee the same as other employees by requiring her to park in the employee parking lot (which did not have accessible spaces), the court noted that reasonable accommodation may require giving the individual with a disability more than is given to other employees.

Although opinion is mixed on whether employers must provide parking or commuting assistance (where these are not provided to employees without disabilities), there is agreement that an employer may have to eliminate workplace-created barriers (such as requirements concerning scheduling or where work is performed) for someone who cannot get to work because of a disability. For example, as noted earlier, an employer may have to provide a modified work schedule. The EEOC, in informal guidance letters, has said that an employer must modify workplace policies -- such as work schedules -- if that is needed as a reasonable accommodation for someone who has difficulty in getting to work on time because of a disability.[15] Along these lines, in Morris-Huse v. Geico, 2018 U.S. App. LEXIS 27431 (11th Cir. 2018)(unpublished), the court held that the employer addressed the employee's "inability to reliably drive long distances" by arranging for a "ridesharing agreement" with her co-workers, giving her a flexible schedule, and permitting her to transfer to another location.

"Firm Choice" and Accommodations for Alcoholics

The primary reasonable accommodation for an employee with alcoholism would be a modified work schedule so the employee could attend Alcoholics Anonymous meetings, or a leave of absence so the employee could get treatment for the alcoholism.
A common question by federal employers subject to the Rehabilitation Act is whether they must provide "firm choice" to an employee with alcoholism who has poor performance or who has engaged in misconduct because of his/her alcoholism. "Firm choice" generally entails a warning to the employee with employment problems that s/he will be disciplined if s/he does not receive alcohol treatment. The EEOC has stated that "federal employers are no longer required to provide the reasonable accommodation of firm choice under Section 501 of the Rehabilitation Act." Johnson v. Babbitt, Pet. No. 03940100, MSPB No. SF-0752-93-0613-I-1 (EEOC 3/28/96). The EEOC's rationale is that the Rehabilitation Act was amended in 1992 to apply ADA standards, and the ADA does not require an employer to excuse misconduct for poor performance, even if it is related to alcoholism. In its "EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at ft. 103, the EEOC reiterated that an employer "has no obligation to provide 'firm choice' or a 'last chance agreement' as a reasonable accommodation. However, at least one federal court has held the opposite.

A related question, of course, is whether a "last-chance agreement" is lawful. In Clifford v. County of Rockland, 2013 U.S. App. LEXIS 12435 (2d Cir. 2013)(unpublished), the court held that where the employer had terminated others for on-the-job intoxication, it

did not violate the ADA by allowing the plaintiff to return to work "on a showing that she posed no serious risk of relapse" (instead of terminating her). Likewise, In Ostrowzi v. Con-Way Freight, Inc., 2013 U.S. App. LEXIS 22091 (3d Cir. 2013)(unpublished), the court held that enforcing a last-chance agreement, requiring substance testing for an employee who violated workplace alcohol rules, was lawful (even if alcoholism is a disability). The court noted that the agreement (and subsequent discipline) was because of the employee's misconduct, not because of a disability. In Brock v. Lucky Stores, Inc., 2001 U.S. App. LEXIS 24990 (9th Cir. 2001)(unpublished), the employee was terminated after testing positive for cocaine use, but was reinstated under an agreement requiring strict attendance at drug-addiction recovery meetings. After the employee was terminated for later violating the agreement, he claimed that the agreement itself was illegal because it imposed employment conditions which were different from those for employees without disabilities. The court rejected the argument, noting that "all return-to-work agreements, by their nature, impose employment conditions different from those of other employees," and it did not want to discourage such agreements. In Longen v. Waterous Co., 347 F.3d 685 (8th Cir. 2003), the employee was terminated after violating the terms of a last-chance agreement (to which the employee agreed in lieu of termination). Noting that "courts have consistently found no disability discrimination in discharges pursuant to such agreements," the court stated that the agreement was valid because, among other reasons, the ADA places "no restrictions on what type of further constraints a party may place upon himself." See also EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at ft. 103 ("an employer may choose to offer an employee a 'firm choice' or a 'last chance agreement'" although it is not legally required to do so); 7/19/00 Informal Guidance Letter from Christopher J. Kuczynski, Assistant Legal Counsel ("although it *may* do so, an employer does not have to offer a 'firm choice' or a 'last chance agreement' to an employee who has engaged in misconduct because of a disability").

The ADA does *not* require any employer to provide an accommodation that "enables" the individual's addiction. For example, an employer never has to provide a flexible schedule to accommodate weekend drinking "binges." In addition, the employer does not have to excuse misconduct caused by the alcoholism (assuming the employer is uniformly enforcing its workplace conduct rules). Of course, the employer cannot disparately treat an alcoholic by more stringently enforcing workplace rules for that employee.

Reassignment as a Reasonable Accommodation

Whether Reassignment is a Reasonable Accommodation

Courts have held that an employer must reassign someone as a reasonable accommodation, based on the language of the statute. 42 U.S.C. § 12111(9)(B). For example, in Lincoln v. BNSF Railway Co., 900 F.3d 1166 (10th Cir. 2018), the court held that the ADA "places a duty on the employer to evaluate whether a disabled employee, who even with reasonable accommodation cannot return to his existing position" can be reassigned. Similarly, in Mack v. Chicago Transit Authority, 2018 U.S. App. LEXIS 21050 (7th Cir. 2018), the court held that despite the employer's contention, the ADA indeed requires reassigning a bus driver with a progressive vision impairment to

a vacant position that does not require driving. In Sanchez v. US Department of Energy, 870 F.3d 1185 (10th Cir. 2017), the court held that reasonable accommodation includes reassignment to a vacant position. In Rorrer v. City of Stow, 743 F.3d 1025 (6th Cir. 2014), the court stated that transferring "the employee to a vacant position with different responsibilities" is a reasonable accommodation. In Craddock v. Lincoln National Life Insurance Co., 2013 U.S. App. LEXIS 14797 (4th Cir. 2013)(unpublished), the court noted that the "ADA expressly recognizes 'reassignment to a vacant position' as a reasonable accommodation." Likewise, in Kleiber v. Honda of America Manufacturing, Inc., 485 F.3d 862 (6th Cir. 2007), the court noted that the ADA requires an employer "to consider transferring a disabled employee who can no longer perform his old job even with accommodation to a new position" for which the employee is qualified. In fact, in this case, the court noted that the ADA "countenances" an "accommodation within an accommodation." For example, the court stated, an employee may be entitled to reassignment "to another job (itself an accommodation) that she can perform with an (additional) accommodation." In Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999), the court held that reassignment is a reasonable accommodation (unless it causes an undue hardship) even if it conflicts with the City's civil service rules prohibiting reassignment between the "Classified Service" system and the "Career Service" system.

Reassignment can, of course, require employers to modify their established procedures for how employees obtain other jobs with the employer. For example, in Feldman v. Olin Corp., 692 F.3d 748 (7th Cir. 2012), the court held that "even when employment practices generally require bidding before being awarded a position, we have held that employers may be required to bypass procedural requirements like bidding in order to meet their obligations under the ADA of providing reasonable accommodations."

Although there are legitimate questions about the scope of an employer's reassignment obligation, some points are clear.

> **First**, reassignment is available only to current employees, not to applicants or former employees.[16] See Henneman v. Kitsap County, 2019 U.S. App. LEXIS 26277 (9th Cir. 2019)(unpublished)(ADA does not require, as a reasonable accommodation, for an employer to even reinstate an employee after he has voluntarily retired); Crano v. Graphic Packaging Corp., 2003 U.S. App. LEXIS 11286 (10th Cir. 2003)(unpublished)(where the plaintiff was no longer an employee since his need for indefinite leave exceeded the company's leave standards, he was not entitled to "reassignment" as an accommodation; rather, he was entitled to be considered for openings in the same manner as any non-employee applicant because reassignment is a right extended only to existing employees).
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> **Second**, an employer does not have to bump any employee from a job in order to create a vacancy. See, e.g., Waltherr-Willard v. Mariemont City Schools, 601 Fed. Appx. 385 (6th Cir. 2015)(employer need not displace existing language teacher at high school to create a position for French teacher with pedophobia); Spears v. Creel (Sheriff of Wakulla County, FL), 2015 U.S. App. LEXIS 6095 (11th Cir. 2015)(unpublished)(no requirement to bump a co-worker to create a

vacancy for a lieutenant in the Sheriff's office); Sneed v. City of Harvey, 2014 U.S. App. LEXIS 512 (7th Cir. 2014)(unpublished)(police department was not require to bump a desk-duty employee from his job to create a vacancy for a police officer who needed that position because of his PTSD).

Third, an employer does not have to promote an employee as a reassignment. See, e.g., Brown v. Milwaukee Board of School Directors, 855 F.3d 818 (7th Cir. 2017)(school district not required to promote Assistant Principal to a position with a higher salary and pay grade and "substantially increased responsibilities"); Swank v. Caresource Management Group Corp., 2016 U.S. App. LEXIS 15291 (6th Cir. 2016)(unpublished)(employer was not required to promote a nurse to a "team-lead" position); Curry v. Department of Veterans Affairs, 2013 U.S. App. LEXIS 10134 (11th Cir. 2013)(unpublished)(employer was not required to promote typist to nursing position which paid significantly more); Koessel v. Sublette County Sheriff's Dept., 717 F.3d 736 (10th Cir. 2013)(promotion is not required); Kallail v. Alliant Energy Corporate Services, 691 F.3d 925 (8th Cir. 2012)(despite employee's contention, the employer was not required to reassign her to an open position which would have been a promotion); Jenkins v. Cleco Power LLC, 487 F.3d 309 (5th Cir. 2007)(in reassigning an employee, "a disabled employee has no right to a promotion, to choose what job to which he will be assigned, or to receive the same compensation as he received previously"); Hedrick v. Western Reserve Care System and Forum Health, 355 F.3d 444 (6th Cir. 2004)(since the ADA "does not require an employer to offer an employee a promotion as a reasonable accommodation," the hourly, bargaining unit employee was not entitled to a salaried, non-bargaining unit position); Emerson v. Northern States Power Co., 256 F.3d 506 (7th Cir. 2001)(employer need not transfer employee into full-time position "because it would have been a promotion from part-time status to full-time status").

Fourth, an individual must only be reassigned to a job for which s/he is qualified (with an accommodation if necessary). See, e.g., Ford v. Marion County Sheriff's Office, 942 F.3d 839 (7th Cir. 2019)(Sheriff's Deputy did not need to be offered Dispatcher position for which she would need training); Denson v. Steak 'n Shake, Inc., 910 F.3d 368 (8th Cir. 2018)(Fountain Operator was not entitled to be reassigned to vacant positions that he was not qualified to perform, given the "sedentary" medical restrictions imposed by his doctor); McBride v. BIC Consumer Products, 583 F.3d 92 (2d Cir. 2009)(the employee was not entitled to reassignment to the vacant position which "required extensive secretarial experience and familiarity with a variety of business software" which she did not have).

When Reassignment May be Appropriate

In general, reassignment is considered when the employee cannot be accommodated in his/her current job, or if both the employer and the employee agree that reassignment is desired. See EEOC Enforcement Guidance: Workers' Compensation and the ADA,

No. 915.002 (9/3/96), at p. 17; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at "Reassignment." Courts seem to agree with the EEOC on this point. For example, in Reza v. International Game Technology, 2009 U.S. App. LEXIS 23875 (9th Cir. 2009)(unpublished), the court noted that reassignment was a proper accommodation when no other accommodation would have allowed the plaintiff to perform her job. In Bundy v. Chaves County Board of Commissioners, 2007 U.S. App. LEXIS 2825 (10th Cir. 2007)(unpublished), the court noted that reassignment "is an option to be considered only after other efforts at accommodation within the employee's existing job have failed." In Jenkins v. Cleco Power LLC, 487 F.3d 309 (5th Cir. 2007), the court noted that "when no reasonable accommodation can be made to the plaintiff's prior job, he may be transferred to another position." In Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001), the employer offered to reassign a cable installer (who could not climb because of panic disorder) to a warehouse position, while the employee wanted an accommodation so that he could continue to perform his installer job. The court held that if the employee could be accommodated in his installer job (for example, with a "bucket truck" so that he could reach high cable without climbing), then reassignment to the warehouse would "not satisfy the requirements of the ADA."

Reassignment may be required even in cases where the employee *could* perform his functions, but would get better treatment for his disability if he were reassigned to another location. See, e.g., Buckingham v. U.S., 998 F.2d 735 (9th Cir. 1993)(reassignment is a reasonable accommodation when treatment is better in another location).

Interestingly, in Parker v. Verizon Pennsylvania, Inc., 2009 U.S. App. LEXIS 2508 (3d Cir. 2009)(unpublished), the court seems to have held that rather than reassign an employee to permanent alternative position, the employer did not violate the ADA by providing to the employee "a temporary position to accommodate him while his restrictions existed."

Importantly, the individual must -- at some point in time -- have been a "qualified" employee in order to be entitled to reassignment. In Bruce v. Wolf (DHS), 2020 EEOPUB LEXIS 1234 (EEOC 2020), the EEOC found that a FEMA Emergency Management Specialist who was never able to perform his essential function of traveling to disaster regions (because of his PTSD) was "not eligible for reassignment because he was never qualified for the position for which he was hired." Specifically, the Commission noted that because the employee was never a "qualified" individual with a disability, he was not entitled to a reassignment.

The EEOC and courts seem to require the employer to be proactive in searching for reassignment. For example, in Felton v. Wolf (DHS), 2020 EEOPUB LEXIS 1195 (EEOC 2020), the EEOC rejected the employer's contention that the employee has the "burden to identify a vacant and funded position for which he is qualified." Rather, the Commission stated that the employer "is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time and it is obligated to

inform an employee about vacant positions for which a complainant may be eligible as a reassignment." In Bill v. Brennan (USPS), 2020 EEOPUB LEXIS 956 (EEOC 2020), the EEOC held that because the employer "is in the best position to know which jobs are vacant or will become vacant within a reasonable time," it is obligated to inform an employee about vacant positions for which the employee may be eligible as a reassignment." Along these lines, in Fisher v. Nissan North America, Inc., 951 F.3d 409 (6th Cir. 2020), the court held that where the production line employee put the employer on notice that he needed reassignment, the employer was "obliged" to identify positions for which the employee was qualified and consider the employee for those positions. Likewise, in Ford v. Marion County Sheriff's Office, 942 F.3d 839 (7th Cir. 2019), the court stated that the ADA required the employer "to canvass available positions" and if a vacant job existed that the employee could perform, "to offer it to her." In Johns v. Brennan, 2019 U.S. App. LEXIS 4353 (9th Cir. 2019)(unpublished), the court suggested that the employer must proactively search for vacant positions. In this case, the employer lost its summary judgment motion where, "even if" the employee's original accommodation request was "unreasonable," the employer did not demonstrate "that there were no other vacant positions for which" the employee "was otherwise qualified." In Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc., 439 F.3d 894 (8th Cir. 2006), the court found that the employer may have failed to properly engage in the interactive process because (among other things) it did not contact the employee about available positions.

Although a risky position for an employer to pursue, some courts seem to have held that an individual must actually request reassignment to trigger the employer's reassignment obligations. For example, in Bush v. Compass Group USA, Inc., 2017 U.S. App. LEXIS 5248 (6th Cir. 2017)(unpublished), the court held that the employer was not required to reassign an employee to an equivalent position where he "violated company policy by failing to inform Tardy that he was requesting a transfer," and therefore violated "legitimate, non-discriminatory employment policies" (in this case, the "non-discriminatory transfer policy"). In Roddy v. City of Villa Rica, 2013 U.S. App. LEXIS 20324 (11th Cir. 2013)(unpublished), the court held that the employee, a police officer, was not entitled to reassignment to an investigator position where he did not make "a specific demand for that accommodation."

In an interesting twist to these factual scenarios, in McNeil v. Union Pacific Railroad Co., 936 F.3d 786 (8th Cir. 2019), the court held that the employer did not fail to reassign the employee where it arranged for a staff member to help the employee find an alternative position, but the employee failed to take advantage of the assistance by calling the staff member.

Reassignment to a Position that is "Vacant" and "Equivalent"

The EEOC has said that when reassigning an employee, the reassignment must be to a vacant position that is equivalent in terms of pay, status, geographic location, etc. if the employee is qualified for the position. In Reyazuddin v. Montgomery County, 789 F.3d 407 (4th Cir. 2015), the court held that even though the reassigned position was

equivalent in pay, it would not be equivalent if the tasks were simply "make-work" instead of "real, meaningful work." In Simmons v. New York City Transit Authority, 2009 U.S. App. LEXIS 17138 (2d Cir. 2009)(unpublished), the court held that the employer may have erred in reassigning the employee, a train operator, to a bus cleaner position, when more comparable positions were available.

It is important to remember that, if there is no vacancy for an equivalent position, the employer must look for lower-level vacancies. 29 C.F.R. § 1630.2(o)(2)(ii), Appendix.. For example, in Fisher v. Nissan North America, Inc., 951 F.3d 409 (6th Cir. 2020), the court held that as part of its reassignment obligation, an employer is required to consider even jobs "that would represent a demotion." Likewise, in Ford v. Marion County Sheriff's Office, 942 F.3d 839 (7th Cir. 2019), the court noted that a "demotion can be a reasonable accommodation" when the employee cannot be accommodated in her job or an equivalent job. In Stern v. St. Anthony's Health Center, 788 F.3d 276 (7th Cir. 2015), the court noted that reassignment could include "reassigning a disabled employee to a job that would represent a demotion." In this case, however, there was no vacant position (equivalent or demotion) that the employee, a psychologist, was qualified to perform. Likewise, in Koessel v. Sublette County Sheriff's Dept., 717 F.3d 736 (10th Cir. 2013), the court noted that an employer must consider an employee for "lateral transfers or, if none are available, demotions." In Wilkerson v. Shinseki, 2010 U.S. App. LEXIS 11135 (10th Cir. 2010), the court stated that offering a lower level job as an accommodation is appropriate "if there are no reasonable accommodations either in the old job or in another vacant lateral position." In this case, the employer (the VA) transferred the boiler plant operator to a lower level position because he could not perform his job and there were no equivalent positions. In Liner v. Hospital Service District, 2007 U.S. App. LEXIS 8261 (5th Cir. 2007)(unpublished), the court held that the employer did not make a good faith effort to accommodate the employee (who could no longer perform his job because of disability), where it told him to look on the internet for other positions with the employer and that he would be treated like any other applicant, and it did not offer him lower level vacant positions "because it did not want to embarrass" him.

"Vacant" means that the position is available when the employee asks for reasonable accommodation, or that it will soon be available (for example, it will be available within the next couple of months). For example, in Faidley v. United Parcel Service, 853 F.3d 447 (8th Cir. 2017), the court held that a "Feeder Driver" position, even though not open at the time the Delivery Driver needed reassignment, could still have been considered vacant if the employer reasonably anticipated that it would become vacant in the fairly immediate future. On the other hand, in Audette v. Town of Plymouth, 858 F.3d 13 (1st Cir. 2017), the court held that there was no "vacancy" where the employer had no intention to hire someone to perform the recordkeeping duties for which the employee wanted reassignment, despite the fact that an employee had retired from that position. Likewise, in Meade v. AT&T Corp., 2016 U.S. App. LEXIS 14256 (6th Cir. 2016)(unpublished), the court held that a position is not vacant (and therefore unavailable for reassignment) when the employer "had decided not to hire anyone to fill the position," instead deciding to contract out for the particular services. In Wade v. Brennan, 2016 U.S. App. LEXIS 7961 (5th Cir. 2016)(unpublished), the court held that a

light duty "position" was not a vacant, existing position where it was "unfunded," "merely a collection of tasks," and created as desired by the employer.

In Harvin v. Manhattan & Bronx Surface Transit Operating Authority, 2019 U.S. App. LEXIS 11059 (2d Cir. 2019)(unpublished), the court held that the employee with carpal tunnel syndrome was not entitled, as a reasonable accommodation, to be transferred back to her former position (which required less typing) where this position was not vacant. In Wells v. Chrysler Group LLC, 2014 U.S. App. LEXIS 9164 (6th Cir. 2014)(unpublished), the court held that Chrysler was not required to reassign the employee to a position "that was not vacant at the time" or "to shift responsibilities among other employees in order to create a position that is not already in existence." In Koessel v. Sublette County Sheriff's Dept., 717 F.3d 736 (10th Cir. 2013), the court stated that "employers are only required to reassign employees to existing vacant positions," which means that "a similarly situated, non-disabled employee would be able to apply for it." In Sapp v. Donohoe, 2013 U.S. App. LEXIS 18845 (5th Cir. 2013)(unpublished), the court held that the plaintiff was not able to show that she was entitled to reassignment as an accommodation where she "failed to introduce evidence of any such position that was available contemporaneously with the time periods" that she claimed to need reassignment. In McFadden v. Ballard Spahr Andrews & Ingersoll, LLP, 2010 U.S. App. LEXIS 13224 (D.C. Cir. 2010), the court held that the employee was not entitled to reassignment to the receptionist position because that position was not "vacant." In this case, the court noted that the position was not vacant because it was being held open for the regular receptionist who was out on medical leave.

The EEOC has stated that an employer does not have to offer a job that it knows will open in six months because "six months is beyond a 'reasonable amount of time.'" EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at "Reassignment." Arguably, this rule does not require an employer to keep an individual on leave while waiting for an opening; rather, the employer would look at what was vacant (or what it knew would become vacant) *at the time* the individual needed the reassignment. Along these lines, in Bell v. Board of Education of Proviso Township, 2016 U.S. App. LEXIS 17356 (7th Cir. 2016)(unpublished), the court held that the employee, a Bookroom Clerk, was not entitled to be reassigned to an "Attendance Secretary" job where it did not know, at the time of the Bookroom Clerk's termination, that the Attendance Secretary would be retiring. In Bristol v. Board of County Commissioners of the County of Clear Creek, 281 F.3d 1148 (10th Cir. 2002), the court held that the determination of whether a position is vacant is made as of the time of the request for reasonable accommodation. In this regard, a position is vacant "only if the employer knows, at the time the employee asks for a reasonable accommodation, that the job opening exists or will exist in the fairly immediate future." As a result, a position is not vacant if "the employer did not know at the time the employee asks for a reasonable accommodation that the position would become vacant in the fairly immediate future, even if it did in fact open up a reasonable time after the employee's request had been made." In this case, the court rejected the plaintiff's claim that he should have been reassigned from his "jailor" position to a "dispatcher" position which unforeseeably opened up soon after his request for reassignment. In Turner v. City

of Paris, KY, 2013 U.S. App. LEXIS 16260 (6th Cir. 2013)(unpublished), the court seemed to suggest that a short period of time is around one week. The court specifically noted that employers "are not required to keep a disabled employee 'in the hope that some position may become available some time in the future'" (citation omitted). Likewise, in Hedrick v. Western Reserve Care System and Forum Health, 355 F.3d 444 (6th Cir. 2004), the court held that the employer was not required to offer a "case manager" job to a nurse (even though it was an equivalent position) where it was not vacant at the time she required reassignment and the employer did not know that it would become available three months later.

In Duvall v. Georgia-Pacific Consumer Products, L.P., 2010 U.S. App. LEXIS 11791 (10th Cir. 2010), the court held that "vacant" means "available to a similarly-situated non-disabled employee." In this case, the court held that the position that the plaintiff wanted was not vacant because it was currently held by a contracted temporary employee and the company's intent was to permanently contract out the job. Along these lines, in Complainant v. Donahue (USPS), 2014 EEOPUB LEXIS 1877 (EEOC 2014), the EEOC held that reassignment is only required as a reasonable accommodation to a "vacant, funded position." In this case, the EEOC found that there was no such position available for which the employee was qualified.

In Albert v. Smith's Food & Drug Centers, Inc., 356 F.3d 1242 (10th Cir. 2004), the court noted that generally, an employer has no duty to inform an employee of positions that open after the employee's last day of work. The court agreed that, most of the time, "an employer's duty to identify vacant positions arises when the employee requests reassignment and ends after the employer determines that no positions are available or will become available in the fairly immediate future." The situation is different, however, if the interactive process is still on-going (as it was in this case).

One interesting question is whether an employer could argue that a job is not "vacant" because someone else is entitled to fill the position under employer policies. This, of course, is different from arguing that it is not "reasonable" to modify seniority policies (discussed below). In Roberts v. Cessna Aircraft Co., 2008 U.S. App. LEXIS 17645 (10th Cir. 2008)(unpublished), the court noted that a position would not be considered vacant if another employee has "a vested priority right" to the position.

Importantly, in Dark v. Curry County, 451 F.3d 1078 (9th Cir. 2006), the court suggested that an employer needs to continue to attempt to reassign an employee for a "reasonable" period. The court noted that the reasonable accommodation obligation is "a continuing duty that is not exhausted by one effort." The court, therefore, seemed to agree with the plaintiff that the employer needed to consider reassignment to positions "which became available" after the plaintiff's termination.

Interestingly, in Dunderdale v. United Airlines, Inc., 807 F.3d 849 (7th Cir. 2015), the court held that it was the employee's "duty to search" the company's job openings for a vacant position. In this case, the court held that the employee did not present evidence of a vacant position.

Whether Employer Must Modify Seniority Policies in Reassigning an Employee

In U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 122 S. Ct. 1516 (2002), the U.S. Supreme Court held that it would "ordinarily be unreasonable" for an employer to be required to modify its seniority policies so that an employee with a disability could be reassigned. The Court noted that "it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system." The Court stated that seniority systems provide "important employee benefits by creating, and fulfilling employee expectations of fair, uniform treatment." Importantly, the Court noted that "the relevant seniority system advantages, and related difficulties that result from violations of seniority rules, are not limited to collectively bargained systems." In deferring to seniority, however, the Court simply created a rebuttable presumption in favor of these policies. Specifically, the Court held that a plaintiff might be able to show "special circumstances" demonstrating that an accommodation which trumps seniority is still "reasonable." This would include situations where seniority is not such an expected right, such as systems where an employer retains "the right to change the seniority system unilaterally [and] exercises that right fairly frequently, reducing employee expectations that the system will be followed," or seniority systems which already contain exceptions so that "one further exception is unlikely to matter."

Post-U.S. Airways cases have, of course, followed these guidelines. For example, in Fisher v. Nissan North America, Inc., 951 F.3d 409 (6th Cir. 2020), the court noted that the employer was not required to "trump the rules of a seniority system" unless there are special circumstances, such as the employer's "failure to abide by its seniority system." In McGuire v. United Parcel Service, 2019 U.S. App. LEXIS 9196 (11th Cir. 2019)(unpublished), the court held that the employer did not violate the ADA by refusing to place the employee, who needed reassignment, into a position which other employees were entitled to because of seniority under the collective bargaining agreement. In Dunderdale v. United Airlines, Inc., 807 F.3d 849 (7th Cir. 2015), the court held that the employer could assign a position (or, in this case, take an employee out of a position) based on a bona fide seniority system. The court noted that this would not be the case if the employer unilaterally and frequently changed the seniority system or if the system contained "significant exceptions such that an additional exception is 'unlikely to matter.'" In Medrano v. City of San Antonio, 2006 U.S. App. LEXIS 10495 (5th Cir. 2006)(unpublished), the court held that the employer was not required to modify its seniority system to give the employee, a parking attendant, a day-shift job over more senior employees. The court noted that it would analyze the seniority system practices in place as of the time of the employment action (as opposed to the historical practices), and that there had been no recent exceptions to the seniority system. In Stamos v. Glen Cove School District, 2003 U.S. App. LEXIS 21956 (2d Cir. 2003)(unpublished), the court held that the plaintiff, a teacher, was not entitled to reassignment to a middle school position where she could not show she was entitled to such a position "on the basis of her seniority and qualifications." The court stated that an employer is generally not required to violate a seniority system. Importantly, in Dilley v. Supervalu, Inc., 296 F.3d 958 (10th Cir. 2002), the employer refused to reassign an individual to a position because of the possibility that another employee with greater seniority might later want that position. The court held that although an employer is not required "to provide an accommodation

that would violate a bona fide seniority system under the terms of a collective bargaining agreement," there must be a "direct violation of a seniority system," not just "a potential violation."

Interestingly, in D'Eredita v. ITT Water Technology, Inc., 2017 U.S. App. LEXIS 1372 (2d Cir. 2017)(unpublished), the employee argued that he was entitled to be reassigned to a position governed by a collective bargaining agreement's seniority rules (giving the position to the most senior qualified applicant) even though he did not have the requisite seniority. The employee claimed that the seniority rules should not be honored because the company had made a past exception to those rules by giving a position to the second-most senior applicant. However, the court held that the employee did not show, in that situation, that the most senior applicant was "qualified" (and, therefore, that the "exception" was inconsistent with the bargaining agreement). Importantly, the court also noted that "a single exception," as alleged in this case, would not be enough to invalidate seniority rules for ADA reassignment purposes.

The EEOC's most recent position on modifying seniority is that it is generally "unreasonable" to "reassign an employee with a disability if doing so would violate the rules" of a collectively-bargained or non-collectively-bargained seniority system. This is because such seniority systems "give employees expectations of consistent, uniform treatment" which "would be undermined if employers had to make the type of individualized, case-by-case assessment required by the reasonable accommodation process." However, the EEOC has stated that "if there are 'special circumstances' that 'undermine the employees' expectations of consistent, uniform treatment,'" an employer may be required to reassign an employee despite the seniority system. Such circumstances include cases "where an employer retains the right to alter the seniority system unilaterally, and has exercised that right fairly frequently, thereby lowering employee expectations in the seniority system" (in which case, one more exception "may not make a difference"), cases where a system contains exceptions "such that one more exception is unlikely to matter," or cases where the seniority system "might contain procedures for making exceptions, thus suggesting to employees that seniority does not automatically guarantee access to a specific job." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at Question 31.

Courts have held that informal seniority systems might not be entitled to the same level of deference as formal, rigid systems. For example, in Jacobs v. N.C. Administrative Office of the Courts, 780 F.3d 562 (4th Cir. 2014), the court held that restructuring the job so that the employee worked less time at the front counter may have been a possible accommodation despite the fact that it "would have necessitated a departure from the office's informal seniority system." The court noted that, "[i]n the absence of evidence of a formal seniority policy, that [the employee's] proposed accommodation would require shifting a co-worker with more seniority to a less desirable task does not render it inherently unreasonable."

How Widely Must Employer Look for Position for Reassignment

The next question is how widely the employer must search for a vacant position and whether the employer can limit its search to those jobs for which an employee has expressed interest.

The statute does not, however, expressly provide support for such limitations. In fact, the EEOC has specifically stated that an employer's reassignment obligation is not limited to vacancies within a particular office, branch, agency, department, facility, personnel system, or geographical area. Rather, the only limitation on how widely the employer must look is whether such a search causes an undue hardship.[18] EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 27. Along these lines, in Felton v. Wolf (DHS), 2020 EEOPUB LEXIS 1195 (EEOC 2020), the EEOC rejected the employer's contention that it only needed to search "within a 50-mile radius of Complainant's duty station." Rather, the Commission noted that an employer's obligation is "not limited to vacancies within a particular department, facility, or geographical area." Rather, the "extent of the agency's search for a vacant position is an issue of undue hardship." Similarly, in Bill v. Brennan (USPS), 2020 EEOPUB LEXIS 956 (EEOC 2020), the EEOC held that a federal agency's reassignment obligation "is not limited to vacancies within a particular department, facility, or geographical area." Therefore, an agency "must conduct an agency-wide search for vacant, funded positions that the employee can perform with or without reasonable accommodation." In Julius v. Disbrow (Air Force), 2017 EEOPUB LEXIS 1878 (EEOC 2017), the EEOC stated that "the extent of the agency's search for a vacant position is an issue of undue hardship," and that "absent undue hardship, the agency must conduct an agency-wide search for vacant, funded positions that the employee can perform with or without reasonable accommodation."

In addition, some courts have specifically held that reassignment is not limited to an employee's particular department or to jobs the employee happens to know about. In Gile v. United Airlines, Inc., 213 F.3d 365 (7th Cir. 2000), the court rejected United's argument that it must only consider reassigning the plaintiff inside her department or to positions to which she had previously requested transfer.

An employer can certainly argue that if an employee has indicated that s/he is unwilling to relocate, the employer need not search outside of the particular area. In Complainant v. Holder, 2015 EEOPUB LEXIS 883 (EEOC 2015), the EEOC held that where the employee indicated that she was not interested in being reassigned outside of her facility, the employer did not have a reassignment obligation outside of the facility. Likewise, in Swank v. Caresource Management Group Corp., 2016 U.S. App. LEXIS 15291 (6th Cir. 2016)(unpublished), the court held that reassignment of a nurse to an available job in a different location (Dayton) was not required where the employee told her employer that she was not willing to relocate.

A related issued is whether the employer can limit its search to jobs for which the employee meets pre-established qualification standards. Courts have stated that employers can indeed limit the search to these jobs. For example, in Dalton v. Subaru-

Isuzu, 141 F.3d 667 (7th Cir. 1998), the court stated that "[n]othing in the ADA requires an employer to abandon its legitimate, nondiscriminatory company policies defining job qualifications, prerequisites, and entitlements to intra-company transfers." For example, the court noted that an employer may have a policy of preferring full-time employees over part-time employees for internal transfers, may have an "up-or-out" policy (where employees who do not advance in their jobs are terminated), may have a "non-demotion" policy (where employees are not entitled to demotion), or may have a policy that light-duty jobs are reserved for individuals recuperating from recent injuries. In Dalton, the court also stated the in order to avoid "an infinite regression on the accommodation issue," reassignment does not include "transfer to yet a third job" for an employee who has been reassigned to a second job as a reasonable accommodation.

Interestingly, in Shepard v. UPS, 2012 U.S. App. LEXIS 5339 (11th Cir. 2012)(unpublished), the court held that the employer was not required to grant the employee's request to be moved to an administrative position where this "would have required UPS to violate its internal policy against assigning tasks to union employees that were not covered by the collective bargaining agreement." It is highly likely that the EEOC would disagree with this approach.

Whether Training is Required for Reassigned Employee

An employee must be qualified to perform the job to which s/he is reassigned. Therefore, it does not appear that an employer would have to train an employee for the new job. In fact, the EEOC has specifically stated that "there is no obligation for the employer to assist the individual to become qualified. Thus, the employer does not have to provide training so that the employee acquires necessary skills to take a job." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at "Reassignment." Courts seem to agree with this position. For example, in Ford v. Marion County Sheriff's Office, 942 F.3d 839 (7th Cir. 2019), the court suggested that the employer did not need to offer the employee, a sheriff's deputy, a job for which she was needed to be "trained" (a dispatcher position) because reassignment does not include jobs which the employee cannot perform. Similarly, in Martinez v. American Airlines, 2018 U.S. App. LEXIS 7336 (7th Cir. 2018)(unpublished), the court held that the employer was not required to reassign the employee to a staff support position requiring software knowledge which the employee did not have. The court noted that the ADA does not mandate an employer "to offer special training" to an employee. Of course, it could be disparate treatment to deny an individual with a disability the right to additional training that is available to others. For example, in Hoffman v. Caterpillar, Inc., 256 F.3d 568 (7th Cir. 2001), the court held that it would be illegal to deny training to an individual *because of* his/her disability if that individual is eligible for the training, unless the employee would ultimately be unable to perform the task.

Oddly, in litigation, the EEOC has taken the position that an employer may be required to provide training for an individual who needs reassignment "unless the required training was unusually difficult or expensive" so that it constituted an undue hardship. EEOC's Amicus Curiae Brief in Gelabert-Ladenheim v. American Airlines, Inc., No. 00-2324 (Brief filed in First Circuit, 1/30/01), at 19. Of course, if the employer trains employees

without disabilities for reassignments, it should do the same for employees with disabilities.

On a related point, in Johnson v. Board of Trustees of the Boundary School District No. 101, 666 F.3d 561 (9th Cir. 2011), the court held that an employer is not required to provide a reasonable accommodation so that an individual can meet the prerequisites for the job (for example, the licenses required for the job). In this case, the plaintiff argued that the employer was required to help her obtain a provisional teaching certification (which she allegedly could not get because of her disability) so that she could lawfully teach.

Requiring Employee to Compete for New Position

Another common question is whether, in carrying out its reassignment obligation, an employer can simply allow the employee to *compete* for a vacant position. The EEOC takes the position that reassignment means that the employee *gets* the vacant position if s/he is qualified for the position. See Appendix to 29 C.F.R. § 1630.2(o) ("[e]mployers should reassign the individual to an equivalent position . . . if the individual is qualified, and if the position is vacant within a reasonable amount of time.") In a nationwide training conducted throughout 1996, EEOC headquarters trained EEOC investigators that, in providing reassignment, "[t]he employee with the disability need not be the most qualified individual for the vacant position. The ADA only requires that the employee be qualified. Furthermore, if the employee is qualified for the position s/he is entitled to get the position without competing for it." EEOC ADA Case Study Training (1996) C.S.1 at p. 4. See also EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 29 ("reassignment would be of little value" if it just meant that an employee could "compete" for a vacant position). Similarly, courts that have held that reassignment is a required reasonable accommodation have expressly held -- or suggested -- that reassignment does not mean simply allowing the employee to compete for an open position. For example, in Sanchez v. Vilsack, 695 F.3d 1174 (10th Cir. 2012), the court stated that requiring an employee "to be the best qualified employee for the vacant position" is "unwarranted" by the statute. In Duvall v. Georgia-Pacific Consumer Products, L.P., 2010 U.S. App. LEXIS 11791 (10th Cir. 2010), the court noted that "that the statutory duty upon employers to reassign disabled employees to vacant positions is mandatory. If a disabled employee can be accommodated by reassignment to a vacant position, the employer must do more than consider the disabled employee alongside other applicants; the employer must offer the employee the vacant position." In Aka v. Washington Hospital Center, 156 F.3d 1284 (D.C. Cir. 1998), the court specifically noted that:

> the word "reassign" must mean more than allowing the employee to apply for a job on the same basis as anyone else. An employee who on his own initiative applies for and obtains a job elsewhere in the enterprise would not be described as having been "reassigned"; the core word "assign" implies some active effort on the part of the employer. Indeed, the ADA's reference to reassignment would be redundant if permission to apply were all it meant; the ADA already prohibits

> discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures.

Likewise, in Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000), vacated on other grounds, 535 U.S. 391, 122 S. Ct. 1516 (2002), the court expressly stated that "if there is no undue hardship, a disabled employee who seeks reassignment as a reasonable accommodation, if otherwise qualified for a position, should receive the position rather than merely have an opportunity to compete with non-disabled employees." In Timmons v. UPS, Inc., 2009 U.S. App. LEXIS 2081 (9th Cir. 2009)(unpublished), the court noted that reasonable accommodation includes reassigning the employee to a "vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation." Similarly, other courts have suggested that "reassignment" means that the individual is "transferred" to the vacant position for which s/he is qualified. For example, in Liner v. Hospital Service District, 2007 U.S. App. LEXIS 8261 (5th Cir. 2007)(unpublished), the court suggested that reassignment is noncompetitive, by holding that the employer did not make a good faith effort to accommodate the employee where it told him to look on the internet for other positions with the employer and that he would be treated like any other applicant.

Interestingly, in EEOC v. Dillon Companies, Inc., 310 F.3d 1271 (10th Cir. 2002), the court noted that the EEOC, in its litigation brief, conceded that in analyzing the obligation to reassign, an employer need not alter its policy preferring incumbents of a particular facility over others (including the individual with a disability) for vacancies at that facility. See EEOC's Brief in EEOC v. Dillon Companies, Inc., No. 01-1478 (Brief filed in 10th Cir., 12/18/01).

In EEOC v. United Airlines, 2012 U.S. App. LEXIS 18804 (7th Cir. 2012), the court reversed its earlier decisions on this issue, and held that "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer." The court further noted that showing that reassignment "would be ordinarily reasonable" should not be difficult to prove. Along these lines, in Brown v. Milwaukee Board of School Directors, 855 F.3d 818 (7th Cir. 2017), the court noted that, in analyzing possible reassignment, a "disabled employee need not be the most qualified applicant for a vacant position, but she must be qualified for it."

On the other hand, in EEOC v. St. Joseph's Hospital, Inc., 842 F.3d 1333 (11th Cir. 2016), the court held, "the ADA does not require reassignment without competition for, or preferential treatment of, the disabled." In this case, the court found that the employer was not required to reassign a nurse to another position in violation of its "best-qualified hiring or transfer policy." The court denied that other circuits have held to the contrary, and stated that its holding was consistent with cases permitting employers to comply with seniority and civil service systems in reassigning employees. In Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007), the court held that the ADA "does not require

an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate." Similarly, in Hedrick v. Western Reserve Care System and Forum Health, 355 F.3d 444 (6th Cir. 2004), the court held that the plaintiff, a nurse who could no longer perform her job's physically-demanding tasks, was not entitled to "preferential treatment" in reassignment.

Perhaps the most thoughtful solution to this issue was provided in Lincoln v. BNSF Railway Co., 900 F.3d 1166 (10th Cir. 2018), where the court stated that reassignment requires an employer "to do more than merely 'consider without discrimination'" an employee for a vacant position. The court noted that, "instead, in most situations, an employer must award the position to the disabled, but qualified, employee," which might involve providing a "preference" to the employee with a disability. Importantly, however, the court stated that an employer may rely on its "policy in favor of hiring the most qualified applicant for a position" in arguing that an "employee's qualifications for the position fell significantly below the qualifications of other applicants such that reassignment is not reasonable or would place an undue hardship on the employer."

Salary/Benefits of Reassigned Employee

There appears to be general agreement that the employer does not have to pay an employee's original salary or maintain the original benefits if the new position pays a lower salary. Of course, if the employer pays employees without disabilities their higher salary or benefits when they are reassigned to lower-level positions (for example, in connection with a plant closing), it should do the same for employees with disabilities (or risk a disparate treatment lawsuit). Indeed, even the EEOC has said that in cases of reassignment to lower-level positions, an employer is not required to maintain the reassigned individual at the salary of the higher graded position if it does not so maintain reassigned employees who do not have disabilities. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 30. Courts have reached this same result. For example, as noted earlier, in Jenkins v. Cleco Power LLC, 487 F.3d 309 (5th Cir. 2007), the court held that a reassigned disabled employee has no right "to receive the same compensation as he received previously." Similarly, in Voytek v. University of California, 1996 U.S. App. LEXIS 3531 (9th Cir. 1996)(unpublished), the court held that when an employee was reassigned (because of his mental disability) to a job with fewer responsibilities and less stress, he could receive the reduced salary of the new position.

Whether Reassignment is a Required Reasonable Accommodation in Case of Reduction-in-Force (RIF)

One important question -- given the common practice of corporate downsizing -- is whether an employer must provide reassignment as a reasonable accommodation when an employee's position is eliminated as part of a workforce restructuring. Certainly, an employer *can* restructure its workforce for reasons unrelated to disability. There is a strong argument that if, in the restructuring, the job of an individual with a disability is

eliminated, the employer simply needs to treat the individual the same way it treats other individuals whose jobs are lost. In Saladino v. Envirovac, Inc., 2006 U.S. App. LEXIS 2100 (7th Cir. 2006)(unpublished), the court held that the employer could follow its seniority based reduction-in-force policy, even if this led to the termination of an employee without adequate seniority who had requested a reasonable accommodation.

If displaced employees must compete for new positions, the individual with a disability can be required to compete for a new position. In Sharpe v. AT&T, 66 F.3d 1045 (9th Cir. 1995), the court specifically noted that when the plaintiff lost his job as part of a corporate restructuring, he could be forced to compete for available positions in the same manner as other employees. The rationale for this argument is that reassignment is available as a reasonable accommodation when an individual can no longer perform his/her job because of disability; an employee who is displaced as a result of downsizing is unable to perform his job because of the restructuring, *not* his/her disability.

The EEOC has taken the position that if someone is being RIF'd as a result of his/her disability, the employer must show that the reason for the termination is job-related and consistent with business necessity. For example, in an amicus curiae brief, the EEOC noted that a particular employee received a lower performance rating because of heart attack-related absences. As a result, he was among the low-rated employees who were laid off in the RIF. The EEOC stated that, in cases where discharge "was directly tied to the consequences of his disability or his need for reasonable accommodation," the employer has acted "because of disability." EEOC Amicus Curiae Brief in Matthews v. Commonwealth Edison, Co., No. 96-3665 (Brief filed in Seventh Circuit, 1/21/97) at pp. 10-13.

Undue Hardship Issues

General

The ADA and the EEOC's regulations provide a number of factors that are to be considered in determining whether an accommodation imposes an undue hardship on the employer. Relatively few cases have turned on whether a reasonable accommodation posed an undue hardship. Importantly, in Roetter v. Michigan Dept. of Corrections, 2012 U.S. App. LEXIS 1343 (6th Cir. 2012)(unpublished), the court held that it is the employer's burden to prove that a proposed accommodation causes an "undue hardship." By way of background, the statute and regulations provide that the following factors are relevant to the undue hardship determination:

- the nature and net cost of the accommodation;
- the financial resources of the facility/facilities, the number of employees at the facility/facilities, the effect on expenses and resources, or other impact on the operation of the facility/facilities;
- the overall financial resources of the entity, the size of the business with respect to the number of employees; the number, type, and location of its facilities; and

- the type of operations of the entity, including the composition, structure, and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility/facilities in question to the covered entity.

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

Courts hold employers to a strict standard when arguing undue hardship. For example, in Osborne v. Baxter Healthcare Corp., 798 F.3d 1260 (10th Cir. 2015), the court held that an employer could not argue undue hardship simply by stating that it did not own the machines that would have to be modified (blood machines for which an auditory alarm would need to be installed for a phlebotomist with a hearing impairment). The court stated the "merely noting that modifications would require [an employer] to contact its vendor does not show undue hardship." The EEOC would agree with this. For example, in Complainant v. Bay (FERC), 2016 EEOPUB LEXIS 711 (EEOC 2016), the EEOC found that the employer could not claim an inability to provide automatic doors to an employee with a mobility impairment simply because it did not own the building. The EEOC stated that an employer "has its own duty to ensure that its employees are provided with reasonable accommodations, and its leases and relationships with third parties should incorporate this duty."

The EEOC and some courts have stated that accommodations might pose an undue hardship specifically because of the adverse effect on other employees. In its "EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02), the EEOC stated that undue hardship may result where an accommodation "would be unduly disruptive to other employees' ability to work." For example, the EEOC stated that if modifying one employee's schedule as an accommodation would so overburden another employee that he would not be able to handle his duties, the employer could show undue hardship. Guidance at "Undue Hardship Issues." The EEOC also has stated that an attorney would not be entitled to a modified schedule if, as a result, she was unavailable "when other attorneys and employees need her assistance, thus resulting in missed deadlines and incomplete work." The EEOC noted that such a schedule modification would be deemed to cause an undue hardship "because it adversely affects the ability of other employees to perform their essential functions in a timely manner." EEOC's Fact Sheet "Reasonable Accommodations for Attorneys with Disabilities," (7/27/06). The EEOC also has stated that "relevant considerations" in showing undue hardship caused by modifying an employee's schedule could include "the proportion of overtime that is voluntary versus involuntary, and how much additional involuntary overtime each co-worker would be assigned." EEOC Amicus Curiae Brief in Davis v. Florida Power & Light Co., No. 99-4076 and 99-10524 (Brief filed in Eleventh Circuit, 6/11/99) at p. 14.

In Ball v. George Washington University, 98 Fed. Appx. 654, 2020 U.S. App. LEXIS 3241 (D.C. Cir. 2020), the court implicitly endorsed the employer's position that it could pose an undue hardship to provide the employee, a plumber, with leave where "a substantial number" of plumbers were already out on leave and the "absence of several employees put a significant burden on the remaining employees." In Pegues v. Mississippi State Veterans Home, 2018 U.S. App. LEXIS 16373 (5th Cir.

2018)(unpublished), the court held that requiring others employees to always lift heavy patients created "an undue hardship" because an "accommodation that would result in other employees having to work harder or longer is not required under the ADA. Similarly, as noted earlier, in Winnie v. Infectious Disease Associates, P.A., 2018 U.S. App. LEXIS 31609 (11th Cir. 2018)(unpublished), the court held that providing a 4-month leave of absence for an IV nurse caused an undue hardship because of the specialized nature of the medical practice, the high skill-level of the nurses (who used "special needles" to inject "extremely potent drugs"), patient demand was "at an all-time high," and the center was understaffed with only four nurses. In Anderson v. Harrison County, 2016 U.S. App. LEXIS 2490 (5th Cir. 2016)(unpublished), the employee, a corrections officer, claimed that she was entitled to work an 8-hour shift rather than a 12-hour shift because of her depression and anxiety disorder. The court held that this would cause an undue hardship because it would require other officers "to work longer hours and extended shifts." In Mason v. Avaya Communications, Inc., 357 F.3d 1114 (10th Cir. 2004), the court noted that "an accommodation that would require other employees to work harder is unreasonable." In Johnson v. Midwest City, 1999 U.S. App. LEXIS 473 (10th Cir. 1999)(unpublished), the court found that the City did not have to reallocate overhead lifting duties to other employees. Among other things, the court stated that an accommodation "that would result in other employees having to work harder or longer hours is not required." Similarly, in EEOC v. United Airlines, 1999 U.S. App. LEXIS 13347 (10th Cir. 1999)(unpublished), the court found that the airline was not required to assign a co-worker to assist a Customer Service Representative with a back impairment to lift odd-sized baggage. The court noted that the employer was not required to provide an accommodation that would "increase the difficulty of [the plaintiff's] coworkers' jobs." See also Turco v. Hoechst Celanese Chemical Corp., 101 F.3d 1090 (5th Cir. 1996), the court noted that "an accommodation that would result in other employees having to work harder or longer is not required under the ADA."

On the other hand, where an employer has done certain things for other employees, it is difficult to successfully claim that it would cause an undue hardship to do those same things for an individual with an ADA-covered disability. For example, in Petitioner v. Johnson (Homeland Security), 2014 EEOPUB LEXIS 1810 (EEOC 2014), the EEOC held it would not cause an undue hardship for the Agency to give the border patrol officer a modified schedule where it had allowed this flexibility to the employee and others without evidence that it "significantly disrupt[ed] the facility's operations or the ability of the hundreds of other officers to perform their jobs. In Taylor v. Rice, 451 F.3d 898 (D.C. Cir. 2006), the employer claimed that it would cause an undue hardship for it to waive its "world-wide availability" requirement for a Foreign Service Officer applicant with HIV. The court disagreed with the employer because, among other things, the employer had waived the requirement for twelve employees with asthma (during a four year period), it waives the requirement for incumbents, and it routinely takes into account "personal and professional considerations" when placing individuals in overseas assignments.

In Spring 2020, the EEOC wrote that, "In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now." EEOC's

"What You Should Know About COVID-19," Q&A (D)(9). For example, the EEOC noted that because of the pandemic, "it may be significantly more difficult" to conduct a needs assessment," "to acquire certain items," to "provide employees with temporary assignments," "to remove marginal functions," "to readily hire temporary workers for specialized positions," and that delivery of accommodations "may be impacted, particularly for employees who may be teleworking." Id. at (D)(10).

Cost as an Undue Hardship

An employer could theoretically argue that an accommodation was simply too expensive. For example, in Ward v. Massachusetts Health Research Institute, 209 F.3d 29 (1st Cir. 2000), the court pointed out that an employer could argue that a modified schedule for a laboratory assistant might be an undue hardship because of the "significant cost" of keeping the laboratory open (e.g., extra hours for security personnel, janitors).

However, as a practical matter, courts do not seem receptive to this argument. In Reyazuddin v. Montgomery County, 789 F.3d 407 (4th Cir. 2015), the court suggested that a $129,000 workplace modification to allow a blind employee to work in a call center might not have posed an undue hardship. Likewise, in this case, the court held that the employer's budget for reasonable accommodations is irrelevant in determining whether the cost created an undue hardship. The court noted that, "taken to its logical extreme, the employer could budget $0 for reasonable accommodations and thereby always avoid liability."

In addition, if an employer plans to argue that the cost of an accommodation imposes an undue hardship, it might be required to open up its financial books during the course of discovery. Moreover, in arguing such a defense, employers have found themselves in the uncomfortable position of being forced to justify to a jury why they pay certain expenses (for example, country club memberships) while claiming they cannot afford the reasonable accommodation. In any case, courts do not seem receptive to this defense. For example, in Taylor v. Rice, 451 F.3d 898 (D.C. Cir. 2006), the court held that it would not necessarily pose an undue for the State Department to pay for a Foreign Service Officer's travel expenses in connection with medical appointments related to his HIV monitoring.

When asserting *cost* as the reason for undue hardship, some employers have argued that the cost is too high relative to the employee's low salary. The EEOC has routinely said that the cost that must be spent on an accommodation depends on the employer's resources, not on the employee's salary, position, or status within the company. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 45. In addition, Congress considered and rejected an amendment that would have limited the cost of reasonable accommodation to ten percent of the particular employee's salary.[19] However, as noted earlier in this paper, a number of Courts of Appeals have potentially opened up the door to such arguments, by tying "reasonableness" to a cost/benefit determination.

It is important to remember that "cost" really means "net cost." The EEOC takes the position that the cost to be analyzed is the employer's *real* cost of providing the accommodation, after taking into account other offsetting resources, such as tax credits or deductions. See Appendix to 29 C.F.R. § 1630.2(p). The EEOC has further stated that if an employer believes that the accommodation's cost causes an undue hardship, it "should ask the individual with a disability if s/he will pay the difference." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at "Undue Hardship Issues."

It will be even more difficult to argue cost as an undue hardship if the employer has made the modification for other employees. For example, in Smith v. Henderson, 376 F.3d 529 (6th Cir. 2004), the court held that the employer had not shown undue hardship simply by asserting that it would cause "lower production and increased costs" to allow a Customer Service Supervisor to delegate accounting duties, especially when the employer had permitted other Supervisors to delegate this task.

Importantly, in Spring 2020, the EEOC wrote that, although prior to COVID-19, "most accommodations did not pose a significant expense when considered against an employer's overall budget and resources," the "sudden loss of some or all of an employer's income stream" and "the amount of discretionary funds available at this time" are relevant considerations. EEOC's "What You Should Know About COVID-19," Q&A (D)(11).

Collective Bargaining Agreement as an Undue Hardship

Courts have held that a conflicting collective bargaining agreement can be used to show undue hardship. For example, in Kempter v. Michigan Bell Telephone Co., 2013 U.S. App. LEXIS 17930 (6th Cir. 2013)(unpublished), the court held that the ADA did not require that the plaintiff be given a particular job as a reassignment where this would violate another employee's collective bargaining rights. As noted earlier, in Henschel v. Clare County Road Commission, 737 F.3d 1017 (6th Cir. 2013), the court stated that where reassignment of an Excavator Operator to a Truck Driver job would violate the collective bargaining agreement, that would not be a required accommodation. In Winfrey v. City of Chicago, 259 F.3d 610 (7th Cir. 2001), the court held that "the duty to reassign does not require an employer to "abandon its legitimate, nondiscriminatory company policies," including the terms of a collective bargaining agreement. In this case, a City Ward Clerk wanted reassignment to a Dispatcher job. However, the court held that the employer was not required to reassign the clerk to this position because it would violate the collective bargaining agreement, which required that only employees represented by the union were entitled to bid for the dispatcher job.

As noted earlier, after U.S. Airways v. Barnett, if a collective bargaining agreement's (CBA's) consistently enforced seniority provisions conflict with a desired reasonable accommodation, an employer has an excellent argument that the accommodation is simply not "reasonable."

However, if the conflicting CBA provisions do not involve seniority, a hotly-contested issue is whether an employer can demonstrate undue hardship simply because the accommodation would cause the employer to violate the CBA. The EEOC's position -- at odds with most courts -- is that the CBA's provisions dealing with non-seniority issues are relevant, but not determinative. Therefore, the EEOC would likely say that an employer cannot demonstrate undue hardship *just* by showing that the reasonable accommodation violates the CBA. Specifically, the EEOC has written that the ADA requires unions and employers to negotiate a change to a collective bargaining agreement if no other accommodation exists and the proposed accommodation does not unduly burden the expectations of other workers.[20] At least one Court of Appeals seems to have agreed with EEOC. For example, in Cripe v. City of San Jose, 261 F.3d 877 (9th Cir. 2001), the court stated that modifying a collective bargaining agreement might be required where the modification does not implicate a seniority system. The court rejected the employer's argument that modifying the agreement would generate "resentment" by employees, noting that employee "morale" is "not a factor that may be considered in an undue hardship analysis." On the other hand, in Adams v. Potter, 2006 U.S. App. LEXIS 21503 (6th Cir. 2006)(unpublished), the court held that the Postal Service was not required to provide the requested reasonable accommodations (a light-duty assignment or transfer to a particular position) that would violate a Collective Bargaining Agreement because this would "usurp the legitimate rights of other employees in a collective bargaining agreement (citation omitted)."

Importantly, if an employer makes this "conflicts" argument, courts closely analyze whether there truly is a conflict. For example, in Jones v. Service Electric Cable TV, Inc., 2020 U.S. App. LEXIS 12061 (3d Cir. 2020)(unpublished), the court suggested that a valid argument that an accommodation poses an undue hardship requires, at a minimum, a demonstrable inconsistency between the requested accommodation and the collective bargaining agreement. In this case, the court found that the collective bargaining agreement might not have been inconsistent with the employee's leave request. In Morton v. United Parcel Service, Inc., 2001 U.S. App. LEXIS 25903 (9th Cir. 2001), the court concluded that allowing the employee to drive smaller vehicles (not requiring DOT certification) would not have conflicted with the agreement in place at the time the plaintiff requested a job driving such vehicles. Likewise, as noted earlier, in Dilley v. Supervalu, Inc., 296 F.3d 958 (10th Cir. 2002), the court held that although an employer is not required "to provide an accommodation that would violate a bona fide seniority system under the terms of a collective bargaining agreement," there must be a "direct violation of a seniority system," not just a "a potential violation."

END NOTES

[1]Importantly, in a litigation brief, the EEOC has stated that "a workplace modification that does not enable an individual to meet average productivity or performance standards is not an effective or reasonable accommodation within the meaning of the ADA." See EEOC's Brief in EEOC v. Humiston-Keeling, Inc., No. 99-3281 at p. 21 (Brief filed in Seventh Circuit, 11/8/99). Therefore, the EEOC argued, assigning an employee with an injured arm to a job that she could not effectively perform was not a reasonable accommodation.

2See also 7/29/98 Informal Guidance letter from Christopher J. Kuczynski, Assistant Legal Counsel ("In order to receive a reasonable accommodation, an employee with a disability must request one from the employer. The employee should explain why a particular accommodation is needed.").
32/1/95 Informal Guidance letter from Claire Gonzales, Director of Communications and Legislative Affairs.
4However, the Vinson and Humphrey courts went on to state that employers "who fail to engage in the interactive process in good faith face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible." This suggests that it is questionable whether there is independent liability for failure to engage in the interactive process if a reasonable accommodation was not possible.
51/31/00 Informal Guidance letter from Peggy R. Mastroianni, Associate Legal Counsel.
65/15/95 Informal Guidance letter from Elizabeth M. Thornton, Deputy Legal Counsel.
79/27/01 Informal Guidance Letter from Sharon Rennert (Senior Attorney Advisor)(although "leave and working at home are forms of reasonable accommodation," these "are not equally effective because only one – working at home – allows the employee to perform his job.").
83/10/94 Informal Guidance letter from Philip B. Calkins, Acting Director of Communications and Legislative Affairs ("[i]f an employee refuses an effective reasonable accommodation, but cannot perform a job's essential functions without it, s/he will no longer be considered qualified and will lose protection under the ADA").
91/28/00 Informal Guidance letter from Christopher J. Kuczynski, Assistant Legal Counsel.
108/13/99 Informal Guidance letter from Peggy R. Mastroianni, Associate Legal Counsel.
11However, if an employee is given a part-time schedule as a reasonable accommodation, the EEOC has stated that the employee "is entitled only to the benefits, including health insurance, that other part-time employees receive." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 23.
124/15/99 Informal Guidance Letter from Christopher J. Kuczynski, Assistant Legal Counsel.
134/17/95 Informal Guidance letter from Elizabeth M. Thornton, Deputy Legal Counsel. See also 6/15/93 Informal Guidance letter from Ms. Thornton ("it would not appear that an employer must provide an accommodation to assist the employee in getting to work. Unlike travel that is required during the workday as part of the job, commuting to or from an employee's home is not a function of the job."). Similarly, in a nationwide training program conducted throughout 1996, EEOC headquarters trained EEOC investigators that "[e]mployers generally are not required to provide transportation, as a reasonable accommodation, to enable a person to commute to work." EEOC ADA Case Study Training, 1996 at C.S.1, p. 2.
145/4/95 Informal Guidance letter from Elizabeth M. Thornton, Deputy Legal Counsel.
15See 4/17/95 Informal Guidance letter from Elizabeth M. Thornton, Deputy Legal Counsel.
16Whether "probationary" employees are entitled to reassignment has been hotly debated. The EEOC has taken the position that the "probationary" designation is irrelevant.

Rather, an employee -- including a probationary employee -- is entitled to reassignment if s/he "adequately performed the essential functions of the position, with or without reasonable accommodation, before the need for a reassignment arose." If the probationary employee "never adequately performed the essential functions . . . then s/he is not entitled to reassignment because s/he was never 'qualified' for the original position." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at Question 25. See also EEOC Fact Sheet "Applying Performance and Conduct Standards to Employees with Disabilities" (2008). **This Fact Sheet is available on the internet at www.eeoc.gov** (when an employee "never performed the essential functions of his job satisfactorily," the employer does "not have to consider reassigning him as a reasonable accommodation").

17Specifically, in the past, the EEOC stated that where a "seniority policy is not part of a collective bargaining agreement," an employer "is under no legal obligation to observe the terms of its seniority policy." Therefore, according to the EEOC's old position, an employer was required to make "an exception" to its seniority policy unless that would cause an undue hardship. EEOC Amicus Curiae Brief in Barnett v. U.S. Air, Inc., No. 96-16669 (Brief filed in Ninth Circuit, 12/11/98) at pp. 13-14. The EEOC also stated (in another unsuccessful litigation) that an employer may need to modify non-CBA seniority policies in order to allow an employee with epilepsy to remain in her day-shift job, rather than allowing another employee to bump her from that job because of seniority. EEOC Brief in EEOC v. Sara Lee Corp., No. 00-1534 (Brief filed in Fourth Circuit, 6/12/00).

18The EEOC has stated, however, that "if an employee is being reassigned to a different geographical area, the employee must pay for any relocation expenses unless the employer routinely pays such expenses when granting voluntary transfers to other employees." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at Question 27. See also Internal EEOC "Procedures for Providing Reasonable Accommodation for Individuals with Disabilities" (2/2001) at V ("Reassignment may be made to a vacant position outside the employee's commuting area if the employee is willing to relocate. As with other transfers not required by management, EEOC will not pay for the employee's relocation costs.").

19136 Cong. Rec. at H2475 (daily ed. May 17, 1990).

20 See EEOC Amicus Curiae Brief in Eckles v. Consolidated Rail Corp., No. 95-2856 (Brief filed in Seventh Circuit, 12/1/95) at p. 11; 11/1/96 Letter from Ellen J. Vargyas, Legal Counsel ("It is the Commission's position that, where no other reasonable accommodation exists, the employer and union are jointly obligated to negotiate with each other to provide a variance [to the collective bargaining agreement] if it will not impose undue hardship.").