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Workplace News *Employment Law Litigation and Proactive Conflict Resolution Services for the Workplace* **Fall 2014**

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My Employer Rejected My Request for Reasonable Accommodation

When an employer rejects an employee's suggested reasonable accommodation, it must come up with alternatives.

An employer's participation in the interactive process means more than simply meeting with an employee and rejecting her requested accommodation. To participate in "good faith" during the interactive process, an employer must suggest reasonable accommodations when it rejects an employee's requested accommodation. See, *Stockton v. N.W. Airlines*, 804 F.Supp.2d 938 (D. Minn. 2011) (Summary judgment denied: "There is a genuine issue of material fact regarding whether [employee] could have been reasonably accommodated, but for [employer's] lack of good faith." The evidence included the employer rejecting employee's accommodation suggestions out of hand and not offering other suggestions.).

In *Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3d. Cir. 2010), the Court stated that a jury could find that the employer failed to negotiate in good faith about a reasonable accommodation, because at every opportunity the supervisor flatly turned down the requested accommodation and failed to offer any alternatives.

Similarly, in *Miller v. Illinois Dep't of Transportation,* 643 F.3d. 190 (7th Cir. 2011), a bridge worker who had acrophobia requested an accommodation of not working at heights above 20-25 feet. The Court rejected the employer's argument that the plaintiff could not be provided such an accommodation, allowing the claims to proceed to a jury. Notably, the Court emphasized:

> *The ADA does not give employers unfettered discretion to decide what is reasonable. The law requires an employer to rethink its preferred practices or established methods of operation.*

The ADA does not give employers unfettered discretion to decide what is reasonable. 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 in the workplace.**

Miller, 643 F.3d at 199 (emphasis added).

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Bertelson Law Offices, P.A. handles disability discrimination, retaliation, and accommodation issues. We have handled many cases involving disability discrimination and reasonable accommodation issues. We enjoy helping clients obtain reasonable accommodations and have litigated cases on behalf of clients with disabilities. Contact us at 612-278-9832 if you need assistance with getting a reasonable accommodation or have been discriminated or retaliated against because of a disability. ■

Teleworking As A Reasonable Accommodation

In 2008 Congress passed the Americans With Disabilities Amendments Act (ADAAA) to strengthen the Americans with Disabilities Act (ADA). Congress intended to make it easier for individuals with disabilities seeking protection. By meeting the legal definition, employees and applicants are entitled to reasonable accommodation if necessary unless it causes an undue hardship or burden on the employer.

A reasonable accommodation is simply assistance or changes to a position or workplace that will enable an employee to do their job despite having a disability. Yet, it is not always easy for a disabled employee to get an employer to provide them with accommodation.

The ADAAA includes a non-exhaustive list of examples of reasonable accommodations: "making existing facilities used by employees readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9).

The EEOC has stated that teleworking–allowing an employee to work from home–may be a reasonable accommodation and that it may fall under the ADA's reasonable accommodation requirement of modifying workplace policies. See, the EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disability Act; and the EEOC's factsheet, "Work At Home/Telework as a Reasonable Accommodation."

Employers have sometimes been reluctant to allow teleworking as a reasonable accommodation, arguing that working from home is not reasonable because employees need to be at work to do their jobs.

In February 2014, the EEOC issued an opinion letter that discussed teleworking. The EEOC opined its position that an employer cannot have a blanket policy disallowing employees with disabilities from working from home.

Employees with disabilities for whom working from home would provide them with a reasonable accommodation got a boost this year from both the EEOC and more recently, the 6th Circuit Court of Appeals.

In February 2014, the EEOC issued an opinion letter that discussed teleworking. The EEOC opined its position that an employer cannot have a blanket policy disallowing employees with disabilities from working from home. The EEOC emphasized that it recognizes telework as a form of reasonable accommodation and has provided guidance about teleworking. According to the EEOC, an employer's suggestion that teleworking is not required except in extraordinary circumstances may lead the employer to violate the ADA. The employer and employee must work together to determine whether working from home would enable the employee to perform the job's essential functions.

On April 22, 2014, the 6th Circuit issued a decision in *EEOC v. Ford Motor Company*, No. 12-2484 6th Cir. 2014). The employee suffered from irritable bowel syndrome (IBS), a condition that caused incontinence during flare-ups, often caused by stress. The employee worked as a resale steel buyer for Ford and was responsible for mediating supply issues between Ford's steel suppliers and parts manufactures. The employee requested an accommodation of working from home on an as-needed-basis (depending on her IBS flare-ups) for up to four days a week. She claimed that most of her work could be accomplished by telephone and email and that she could reschedule any in-person meetings if required by her IBS. Ford maintained that her job duties required face-to-face meetings and that email or teleconference communication were insufficient substitutes. Ford also argued that part of her job was group problem-solving which required her to be available in the office to interact with her team members. Ford denied her request to telework and instead offered to move her desk closer to the restroom or to consider her for another job that may be

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more appropriate for telecommuting. The employee filed an EEOC charge alleging disability discrimination. After Ford later terminated her employment, the EEOC filed a lawsuit against Ford for failure to accommodate and retaliation under the ADA.

The district court ruled in favor of Ford – granting Ford summary judgment – finding that regular attendance in the office was an essential job requirement that need not be eliminated as an ADA accommodation. The 6th Circuit reversed.

While the 6th Circuit recognized case precedent in several circuits which hold that regular attendance at the workplace is an essential job function, the Court held that technological advances have expanded the scope of reasonable "workplaces" and employers need to consider telecommuting as a reasonable accommodation for employees whose disabilities prevent them from being physically on site each day:

> "When we first developed the principle that attendance is an essential requirement of most jobs, technology was such that the workplace and an employer's brick-and-mortar location were synonymous. However, as technology has advanced in the intervening decades, and an ever-greater number of employers and employees utilize remote work arrangements, attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location. **Instead, the law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the "workplace" is anywhere that an employee can perform her job duties.** Thus, the vital question in this case is not whether "attendance" was an essential job function for a resale buyer, but whether physical presence at the Ford facilities was truly essential. Determining whether physical presence is essential to a particular job is a "highly fact specific" question. [Citations omitted]."

The Court distinguished between positions where teamwork or other considerations may make an employee's physical presence desirable from positions where physical presence indisputably is an essential job function, such as work done by a nurse or custodian.

The Court also held that the employer's offer to let the employee apply for another unspecified position, with an uncertain outcome, did not absolve the employer from its obligation to consider telecommuting as accommodation to allow the employee to remain in her current position.

The takeaway: Employers should recognize that "attendance" should not be assumed to mean attendance at the employer's physical location. The "workplace" is anywhere that an employee can perform their job duties. ■

What is the Interactive Process?

This summer marks the 14th anniversary of the Americans with Disabilities Act (ADA), the nation's first comprehensive civil rights law prohibiting discrimination on the basis of disability. While the ADA has been around for many years, the issues surrounding disability discrimination and reasonable accommodation, including the interactive process, continue.

The ADA and the Minnesota Human Right Act, require employers to accommodate the disabilities of their employees. To help determine effective accommodations, the EEOC recommends an "interactive process" between the employer and the employee. This simply means that the parties work together to find an accommodation that works.

1. Request Accommodation

While there is no set formula for the interactive process, it typically starts when the employee or someone on their behalf requests an accommodation. Requests for accommodation do not need to be in writing.

Employers should be aware that some courts have suggested that if the employer knows that an employee needs an accommodation, it may have an obligation to provide it. The EEOC's guidance suggests that an employer should provide an accommodation when it: knows of the disability; knows or should know that the employee is experiencing workplace problems because of the disability; or knows or should know that the disability prevents the employee from requesting a reasonable accommodation.

2. Communicate

Once the request for accommodation has been made or the need for accommodation is obvious, the employer should initiate the interactive process. Generally, courts have held that the interactive process requires employers to: analyze job functions to establish the essential and non-essential job duties; talk with the employee to learn their limitations; and explore possible accommodations.

The interactive process imposes mutual obligations on both the employer and the employee. An employee is required to provide the employer with necessary information about their disability and needs for accommodation. Courts have held that an

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employer cannot be liable for failing to accommodate if a breakdown in the communication process is attributable to the employee.

Similarly, if the breakdown in the interactive process is attributable to the employer, courts have generally found this to be an adverse employment action.

3. Work Together To Identify Possible Accommodations

The employee and the employer should work together to come up with different potential accommodations that allow the employee to perform the essential functions of their job.

Employers should remember that they *must* provide a reasonable accommodation unless doing so would pose an "undue hardship." The employer bears the burden of proving that it cannot provide the employee with a reasonable accommodation because it would cause an undue hardship. Under the law, undue hardship means "significant difficulty or expense." *See*, 42 U.S.C. § 12111(10). The EEOC's Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act states: "Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense." *See*, 29 C.F.R. pt. 1630 app. §1630.15(d) (1996). The Enforcement Guidance also states that undue hardship cannot "be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees."

If you have questions about the interactive process or are seeking help obtaining a reasonable accommodation, feel free to contact us at 612-278-9832. ■

Bertelson Law Office Offers Mediation Services

For many, early intervention in a legal conflict protects both a client's dignity and pocketbook. As a mediator, Beth Bertelson can help parties resolve disputes, providing control and closure on a difficult situation by avoiding the time and expense of a trial. As a legal advocate practicing exclusively in employment law, Beth understands that employment conflicts can impact people physically, emotionally and financially. She also understands that for companies, unresolved disputes generally fester into costly litigation, affecting employee morale and profits.

In addition to representing individual clients in employment law matters and providing mediation services, Beth has trained businesses on employment law issues and investigated internal reports.

For over 20 years, Beth Bertelson has practiced in the area of employment law. She is a certified Labor and Employment Law Specialist by the Minnesota State Bar Association. She has been recognized in *Law & Politics* and *Minneapolis St. Paul Magazine* as a "Super Lawyer." She is a qualified neutral under Minnesota Rule 114. She has served as a section council member of the Labor and Employment Law Section of the Minnesota State Bar Association and a board member for the Minnesota Chapter of the National Employment Lawyers Association and several other non-profit organizations.

Contact Beth Bertelson at 612-278-9832 if you are interested in having her serve as a mediator. ■

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