



How Reasonable is That Accommodation? Case Studies Evaluating the Reasonableness of Workplace Accommodations Under the Americans With Disabilities Act

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One of the stated purposes of the Americans With Disabilities Act (ADA)¹ was “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”² To carry out that purpose, the law prohibited discrimination based on physical or mental disabilities in private workplaces with 15 or more employees.³ The ADA antidiscrimination mandate covers “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁴

The ADA also placed an affirmative duty on employers to provide reasonable accommodations to applicants or employees with known disabilities so that they could perform the essential functions of the job, unless such an accommodation would be an undue hardship to the employer’s business operations.⁵ The ADA does not define a “reasonable accommodation.”⁶ However, the ADA set out specific examples of “reasonable accommodations,” such as:

- making existing facilities 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; and
- adjustment of examinations, training materials, or policies, among others.⁷

Implementing these accommodations could result in an undue hardship, meaning “significant difficulty or expense,” for the employer.⁸ The ADA outlined four factors to evaluate whether the hardship to the employer is undue: (1) the nature and cost of the requested accommodation; (2) the financial resources and size of the employer’s facility that would implement the accommodation; (3) the employer’s financial resources and size generally; and (4) the employer’s type of operations and workforce.⁹ Regardless of hardship, the ADA further prohibited retaliation against applicants and employees who request accommodations.¹⁰

To understand the propriety of an accommodation, the person with the disability requesting the accommodation and the employer must discuss the issues and options at hand. This informal dialogue is known as the “interactive process.” The purpose of the interactive process is to “identify the precise limitations resulting from the disability and potential accommodations that could overcome those limitations.”¹¹ As part of the interactive process, applicants or employ-

ees may share sensitive medical information with their employers. It is critical that employers protect such information by storing it in a confidential medical file separate from the personnel file.¹² During the interactive process, how should attorneys and human resources practitioners analyze whether an accommodation is reasonable or an undue hardship? What kinds of questions should participants ask during the interactive process? In recent months, courts across the country have provided guidance as to the reasonableness of certain requested accommodations under the ADA, as demonstrated in the three case studies below.

Case Study No. 1: Is Additional Time Off a Reasonable Accommodation?

Because of the physical nature of the employee's work, the employee suffered back pain for which he took a 12-week leave of absence under the Family Medical Leave Act (FMLA).¹³ On the last day of his leave of absence, the employee had back surgery and required an additional two or three months away from work to recover from surgery. The employee requested that his employer continue his medical leave of absence. The employer declined this request because the employee had already depleted his FMLA entitlement. Subsequently, the employer terminated the employee's employment. The employee sued the employer for violating the ADA by failing to provide a reasonable accommodation of a three-month leave of absence. This case presented the court with the question of whether a three-month medical leave was a reasonable accommodation.

In a groundbreaking opinion, the U.S. Court of Appeals for the Seventh Circuit answered "no" and found that a "multi-month" leave of absence is not a reasonable accommodation.¹⁴ The Court of Appeals differentiated between the purpose of the FMLA as a "medical-leave entitlement" statute and the ADA as an antidiscrimination statute. According to the Seventh Circuit, recognizing a multi-month leave as a reasonable accommodation impermissibly conflates the statutes' purposes. As defined by the ADA, a reasonable accommodation allows an employee to perform the essential functions of the job, or, in other words, to work. Because an employee on a multi-month leave is not working, such a leave is not a reasonable accommodation.

The Equal Employment Opportunity Commission's (EEOC) involvement as *amicus curiae* before the Seventh Circuit shows that this case could impact workplaces outside the Seventh Circuit's jurisdiction of Illinois, Indiana, and Wisconsin. Consistent with its prior guidance, the EEOC took the position that a multi-month leave may be a reasonable accommodation.¹⁵ In its *amicus* brief to the Seventh Circuit, the EEOC argued that a multi-month medical leave should qualify as a reasonable accommodation when the leave is "of definite, time-limited duration, requested in advance, and likely to enable the employee to perform the essential functions of the job when he or she returns."¹⁶ The EEOC has long maintained that a reasonable accommodation "could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment."¹⁷ Ultimately, this position did not persuade the Seventh Circuit.

The impact of the Seventh Circuit's decision on short-term leave requests is also unclear. The Seventh Circuit left open the possibility that a medical leave shorter than two or three months could be a reasonable accommodation if an employee is not ready to return to work after FMLA leave or if the employee does not qualify for FMLA leave. For example, intermittent leave or "a couple of days or even a couple of weeks" of time off may qualify as a reasonable accommoda-

tion.¹⁸ Most courts have reached similar conclusions.¹⁹ Because the U.S. Supreme Court declined to review the case in April 2018, these issues are open for future litigation.

Case Study No. 2: Is Use of Medical Marijuana a Reasonable Accommodation?

Pursuant to Massachusetts state law, an employee had a lawful prescription for medical marijuana to treat her Crohn's disease. As a condition of her employment, she took a mandatory drug test, which unsurprisingly resulted in a positive screen for marijuana. Even though the employee informed the employer of the medical reason for her positive screen, the employer terminated her employment for failing the drug test. The employee sued the employer under state law for disability discrimination and claimed that her employer failed to accommodate her medical marijuana prescription. Given that use of medical marijuana is a crime under federal law, the issue was whether an employee's requested accommodation to continue using medical marijuana was per se unreasonable.

In a first-of-its-kind decision, the Massachusetts Supreme Court answered "no" and found that the fact that an accommodation violates federal law does not automatically make it unreasonable.²⁰ The court stated:

To declare an accommodation for medical marijuana to be per se unreasonable out of respect for federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of states, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions.²¹

The court went on to reason that the employer should have engaged the employee in an interactive dialogue to determine whether there was an equally effective alternative to medical marijuana. The court noted, however, that employers may still raise undue hardship as a defense, particularly for safety-sensitive positions.

Thirty states and the District of Columbia have legalized medical marijuana in some form.²² Although the Department of Justice under the Trump administration is unlikely to decertify medical marijuana as a Schedule I drug, other state courts may follow Massachusetts to protect employees with disabilities on the basis of state law.²³

Case Study No. 3: Is Hiring an Interpreter a Reasonable Accommodation?

A deaf nurse relied upon an American Sign Language (ASL) interpreter to communicate with hearing individuals in the workplace. The nurse applied for a job and received a job offer, conditioned upon a health screening and clearance by the employer's occupational health office. The annual salary for her position was approximately \$60,000. The nurse notified the employer that she required a full time ASL interpreter as an accommodation, at an annual cost of \$120,000. The employer decided the cost of the ASL interpreter was not reasonable and withdrew its job offer. The issue before the court was whether paying a full-time ASL interpreter double the salary of the hearing-impaired employee is a reasonable accommodation.

In this case, the District Court of Maryland answered "yes" and found that the full-time ASL interpreter was a reasonable accommodation because the nurse could perform the essential job functions with the accommodation.²⁴ Additionally, the court noted that the

\$120,000 expense paled in comparison to the overall hospital's operational budget of \$1.7 billion. The outcome makes sense given that one of the examples of an accommodation listed in the ADA is "the provision of qualified readers or interpreters."²⁵

Conclusion

In the words of Judge Sandra L. Lynch of the U.S. Court of Appeals for the First Circuit, cases evaluating the reasonableness of a requested accommodation are "difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes."²⁶ Although the cases explained above provide guideposts to analyzing the reasonableness of requested accommodations, attorneys and human resources practitioners should remember that reasonableness is determined on a case-by-case basis according to the particular facts of the parties' circumstances. ☺



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Endnotes

¹Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*

²*Id.* § 12101(b)(1) (2018).

³Title I outlines private employers' obligations under the ADA. *Id.* §§ 12111-12117.

⁴*Id.* § 12112(a) (2018).

⁵*Id.* § 12112(5)(A) (2018).

⁶*Id.*

⁷42 U.S.C. § 12111(9) (2018).

⁸*Id.* § 12111(10)(a) (2018).

⁹*Id.* § 12111(10)(b) (2018).

¹⁰42 U.S.C. §§ 12203(a)-12203(c) (2018).

¹¹29 C.F.R. § 1630.2(o)(3) (2018).

¹²*See, e.g.*, 29 C.F.R. § 1630.14(b)(1) (2018).

¹³Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*

¹⁴*Severson v. Heartland Woodcraft Inc.*, 872 F.3d 476 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1441 (2018); *see also Delgado Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119 (1st Cir. 2017) (affirming summary judgment to dismiss the plaintiff's claim for disability discrimination because the plaintiff's request for an additional 12 months of medical leave after she exhausted her FMLA entitlement was not a reasonable accommodation under the ADA); *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014) (affirming motion to dismiss the plaintiff's claim for disability discrimination under the Rehabilitation Act because the plaintiff's request for an additional six months of leave was not a reasonable accommodation).

¹⁵Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellant and Reversal, *Severson v. Heartland Woodcraft Inc.*, 872 F.3d 476 (7th Cir. 2017) (No. 15-3754), <https://www.eeoc.gov/eeoc/litigation/briefs/severson.html>.

¹⁶*Id.*

¹⁷EEOC TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE ADA (1992), at III-6.

¹⁸*Severson*, 872 F.3d at 781.

¹⁹*Garcia-Ayala v. Lederle Parenterals Inc.*, 212 F.3d 638, 647 (1st Cir. 2000) ("This court and others have held that a medical leave of absence—Garcia's proposed accommodation—is a reasonable accommodation under the act in some circumstances."); *Walton v. Mental Health Ass'n of Se. Pa.*, 168 F.3d 661, 671 (3d Cir. 1999) (stating that "unpaid leave supplementing regular sick and personal days might, under other facts, represent a reasonable accommodation"); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 783 (6th Cir. 1998) ("[A] medical leave of absence can constitute a reasonable accommodation under appropriate circumstances."); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1135 (9th Cir. 2001) ("A leave of absence for medical treatment may be a reasonable accommodation under the ADA."), *cert. denied*, 122 S. Ct. 1592 (2002); *Rascon v. U.S. W. Commc'ns Inc.*, 143 F.3d 1324, 1333-34 (10th Cir. 1998) ("An allowance of time for medical care or treatment may constitute a reasonable accommodation.").

²⁰*Barbuto v. Advantage Sales & Mktg., LLC*, 477 Mass. 456, 78 N.E.3d 37 (2017).

²¹*Id.* at 456-66, 78 N.E. 2d at 46.

²²*State Marijuana Laws in 2018 Map*, GOVERNING (current as of Mar. 30, 2018), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>.

²³*But see Coats v. Dish Network*, 350 P.3d 849 (Colo. 2015) (affirming dismissal of the plaintiff's wrongful discharge claim for testing positive for medical marijuana because the plaintiff's use of medical marijuana violated federal law and therefore was not protected as a "lawful activity" under state antidiscrimination laws) (not analyzing use of medical marijuana as a reasonable accommodation).

²⁴*Searls v. Johns Hopkins Hosp.*, 158 F. Supp. 3d 427, 437 (D. Md. 2016).

²⁵42 U.S.C. § 12111(9) (2018).

²⁶*Garcia-Ayala*, 212 F.3d at, 650.