

AT ISSUE

A PUBLICATION BY AND FOR THE YOUNG LAWYERS DIVISION
OF THE PENNSYLVANIA BAR ASSOCIATION

THE REASONABLE ACCOMMODATIONS STANDARD UNDER THE AMERICANS WITH DISABILITIES ACT

By Renee C. Mattei Myers

The Americans with Disabilities Act (ADA) not only prohibits discrimination on the basis of disability, it also places an affirmative obligation on employers to provide "reasonable accommodations" for disabled persons who are otherwise qualified to work.

What Accommodations are Reasonable?

It is a violation of the ADA for an employer to fail to make a reasonable accommodation for a disability of a qualified applicant or employee, unless to do so would impose an undue hardship on the operation of the business. Regs. § 1630.9(a). *

It is important to remember that the ADA requires that an individual be provided with a reasonable accommodation, not the best possible accommodation.

In *Barnett v. U.S. Airways*, the U.S. Supreme Court held that when an employer has a seniority system that the employee's requested accommodation would violate, the accommodation is presumed unreasonable. An employee may rebut this presumption by demonstrating that the seniority system is routinely changed. As a result, employers with collective bargaining agreements or seniority systems may refuse an accommodation that would violate the system. However, if the system is infrequently enforced or policies are subject to change, then the employee can overcome this presumption.

In *Weiler v. Household Finance Corp.*, the 7th U.S. Circuit Court of Appeals held that the ADA's reasonable accommodation requirement did not require an employer to transfer an employee so that he could work for a different supervisor, and did not require the employer to transfer the supervisor because of an

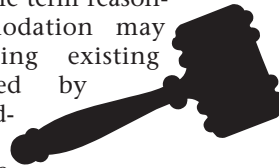
employee's "stress."

The ADA and the regulations provide that the term reasonable accommodation may include making existing facilities used by employees readily accessible to and usable

by individuals with disabilities (including areas that must be accessible to perform essential job functions and non-work areas used by employees for other purposes); job restructuring (redistributing nonessential job functions); part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modification of examinations, training materials or policies; providing qualified readers or interpreters; and other similar accommodations for individuals with disabilities. ADA Regs. § 1630.2(o)(2).

The interpretive guidance states that other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment; making employer-provided transportation accessible; providing reserved parking spaces; and providing personal assistants or travel attendants.

An employer should consider reassignment to a vacant position only when accommodation within the employee's current position would impose an undue hardship. Reassignment is not available to all applicants. App. § 1630.2(o). Reassignment should be permitted when there is a vacancy, or there will be a vacancy within a "reasonable amount of time." App. § 1630.2(o). An employee may be reassigned to a lower graded



vacant position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified, with or without reasonable accommodation. The salary of the employee need not be maintained, unless it is the employer's policy to do so for nondisabled employees who are reassigned to lower graded positions. App. § 1630.2(o). To be entitled to a transfer to a vacant position, the disabled employee bears the burden of proving that s/he can perform the essential functions of that position.

The ADA does not require an employer to create a light duty position, but if the employer has a light duty position that is vacant, the employee is qualified for the job and no reasonable accommodation is available that would enable the employee to perform his or her regular job, then it might be reasonable to assign the employee to that light duty position. Tech. Asst. Man. § 9.4.

Case Example:

A part-time position for an employee unable to give advance notice of absences due to unpredictable illness would not be a reasonable accommodation, because even a part-time employee would have a fixed schedule. *Dutton v. Johnson County Board of County Commissioners*, 3 AD Cases 808 (D. Kan. 1994); *Wimbly v. Bolger*, 642 F. Supp. 481 (W.D. Tenn. 1986), aff'd, 831 F.2d 298 (6th Cir. 1987).

The question of whether an accommodation is reasonable and required under the ADA is fact-specific, and

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WHAT'S AT ISSUE

One of the privileges of editing any publication is the opportunity to write about a topic that is pertinent — at least to the editor. An editorial is a place in which to share an opinion, offer un-



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olicited advice, stir up controversy or just think out loud. In this section of *At Issue*, you will not see string citations, will not read long block quotations and will not be burdened with legislative histories. Read this and think. Think about your own practice; think about the practices of your friends and loved ones. Think about how the practice of law affects those around us and how we, in turn, are affected by others who practice in various other professions.

Do any of you practice exclusively as plaintiffs' lawyers? Do any of you do medical malpractice? What about workers' compensation? Have you encountered hostility from the doctors? Why is this? Why are doctors so hostile to attorneys? Ah, yes. The "medical malpractice crisis." Real or imagined, this has been the rallying cry of the medical profession for some time. It was not too long ago that all one had to do was drive down the highway or listen to the radio to read a billboard or hear a commercial sponsored by the American Medical Association or Pennsylvania Medical Society vilifying the legal profession. PBA Immediate Past President Tom Golden took up the challenge and motivated the PBA to respond to this attack.

Make no mistake: The medical profession is waging war against legal practitioners. But the billboards and the sound bites are not the worst. This past year, a physician presented to the American Medical Association a resolution to withhold medical treatment from plaintiffs' lawyers and their spouses. The specific language of the resolution provided, "except in emergencies and except as otherwise required by law or other professional regulation, it is not unethical to

Brett Woodburn is editor of At Issue and practices in Harrisburg.

refuse care to plaintiffs' attorneys and their spouses." The language does not matter, because this resolution was so thoroughly opposed and drew such strenuous objection that it was withdrawn before a vote could be taken.

Cooler heads prevailed.

For now.

The AMA continues driving its propaganda machine, and the PBA is preparing its response. The lobbying is in full force and the next wave of advertising is right around the corner. Hundreds of thousands of dollars are going to be poured into garnering both public and political support. It doesn't stop there. The August 2004 issue of the *ABA Journal* contained an article titled "M.D. with a Mission." The subject of the article is a physician by the name of Dr. Bernard Ackerman and his Coalition and Center for Ethical Medical Testimony (CCEMT). Initially, I was encouraged by what I was reading. Dr. Ackerman was advocating for "peer review in the courtroom — a

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way for an expert witness's testimony to be scrutinized by other experts. ..." Quickly, my interest transformed into disgust. I learned that Dr. Ackerman's CCEMT began sharing information with the organization Medical Justice, which offers an augmentation to medical malpractice insurance that will "aggressively go after plaintiffs' lawyers and expert witnesses who might have stepped over the line."

What about defense lawyers or defense expert witnesses who may have stepped over the line?

The impact from this conflict between medicine and law is truly experienced closer to home as well. You and I have clients who are affected by the growing rift between attorneys and physicians. You and I have husbands and wives and children and grandchildren who are affected by the animosity between these two noble professions. Patients need to be treated for their ills. Patients sometimes need their doctors to testify for them so that they can receive much needed benefits because they were hurt at work. Sometimes, people are hurt and a doctor is to blame. These people need a doctor to stand up for them and to hold those within their profession accountable.

AT ISSUE

Editor
Brett Woodburn

At Issue is published quarterly by the PBA Young Lawyers Division. Editorial items, news material and correspondence should be sent to the PBA Communications Department, P.O. Box 186, Harrisburg, Pa. 17108-0186.

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Who is to blame for the division between doctor and lawyer? Is it bad lawyers? Bad doctors? Is it the insurance companies trying to protect themselves further using more subtle means? What role do the licensing laws to which physicians must answer play in this complex debate? There is the understatement of the day: complex. So what can you and I do to affect the way this plays out? Of course, we can always add our fuel to the fire, raise our righteous indignation

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REASONABLE ACCOMMODATIONS

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employers should proceed with caution, not relying on general principles in all situations.

When the need for an accommodation is not obvious, an employer may require that the individual with a disability provide medical documentation of the need for accommodation before providing a reasonable accommodation. App. § 1630.9(a). While it is generally an employee's duty to request an accommodation, an employer may initiate a discussion concerning the need for an accommodation when an employee with a known disability is having problems with job performance. Without a request for an accommodation, it is improper for the employer to provide one. App. § 1630.9(a).

After it is determined that an employee requires an accommodation, an employer may not unilaterally impose an accommodation. Instead, the employer has a duty to engage in a good faith, informal "interactive process" with the individual who needs an accommo-

Renee C. Mattei Myers is a partner in the Harrisburg office of Wolf Block Schorr and Solis-Cohen and is a member of the firm's Employment Services Group.

dation. *Taylor v. Phoenixville School District*, 184 F.3d 296 (3d Cir. 1999). "This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." Regs. § 1602.2(o)[3]. Determining which accommodation is appropriate in a particular situation involves a process by which the employer begins with analyzing the job to determine its purposes and essential functions. Then, in consultation with the employee, the precise limitations imposed by the disability and how those limitations may be overcome can be identified. The employer and employee then identify potential accommodations and their effectiveness in overcoming those limitations. Finally, after considering the preference of the individual to be accommodated, the employer selects and implements the accommodation that is most appropriate for both the employee and the employer. App. § 1630.9(a).

Although the interpretive guidance states that the individual's preference should be given primary consideration, it also points out that "the employer has the discretion to choose between effective accommodations and may choose the less expensive accommodation or the accommodation that is easier to provide." App. § 1630.9(a).

If a disabled employee refuses the accommodation offered by the employer (and the accommodation is reasonable), the employee is no longer a "qualified individual with a disability" and loses the protection of the ADA.

* The act is cited herein as "ADA § ___." The Equal Employment Opportunity Commission [EEOC] has issued regulations interpreting Title I. The regulations are found at 29 C.F.R. Part 1630 [cited as "Regs. § ___"]. The regulations include an appendix containing interpretive guidance. The appendix is found at 29 C.F.R. Part 1630, App. [cited as "App. § ___"]. The EEOC has also issued a Compliance Manual to assist its investigators and a Technical Assistance Manual to assist individuals with disabilities and employers in understanding their rights and obligations [the latter cited as "Tech. Asst. Man. § ___"].

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PBA/YLD DAY ON THE HILL SLATED FOR NOV. 9

Join your colleagues on Tuesday, Nov. 9, in Harrisburg for the PBA's ninth annual Day on the Hill. Cosponsored by the PBA Young Lawyers Division and PBA Legislative Department, the annual Day on the Hill program is designed to provide a forum for discussion between lawyers and members of the Pennsylvania Legislature. This year's program will feature the popular "Luncheon with Pennsylvania Legislators," which all members are encouraged to attend (even if you can't make the CLE programs).

In addition to the luncheon, the day includes two CLE programs: "Diagnosis Pennsylvania: Tort Reform — Panacea or Placebo?" and "Focus on Finance: How a Sales Tax on Legal Fees Would Affect Your Practice." Day on the Hill will be held at the State Museum Building, 300 North Street, in Harrisburg.

and contribute to the new wave of propaganda and fight back!! We can proclaim our righteous role in this battle, condemn the physician for his arrogance, his belief that he cannot err.

Or we can do the right thing: We can begin to dowse the bridges that smolder with the fires of mistrust and discontent. Do you know a doctor? Is one of your brothers or sisters a physician? What about a classmate or former paramour? Once there was a great bond between doctors and lawyers. We worked together to help our patients/clients, and our concern for them was the common interest we shared.

So what can I do? I can do what I can to earn the trust and respect of the people with whom I interact, both professionally and otherwise. If some of those people happen to be physicians, then perhaps I can be the one to take the first step in repairing the relationship.

There is no easy answer. We must defend our profession. We must protect our clients. We must find a way.

COURTHOUSE CAFE

By Kelly Dilts

Featured: Adams County

If you find yourself in Adams County around lunchtime, try these Gettysburg restaurants, listed in order of quickest to more leisurely meal times:

Downtown Deli & Café – is located diagonally across the street from the courthouse. The soup, salad and sandwich menu is eclectic, and the food is fresh and homemade. The prices are moderate.

Hard Bean Café – located on the northwest quarter of the square. The main item on the menu is coffee in many styles, but quiche and dessert are also served. You can also find Mr. G's homemade ice cream there. The prices are low.

Ross's Coffeehouse & Eatery – is located one block west of the courthouse at 65 West Middle Street. Sandwiches and salads make up the menu, and Ross makes a great latte. The prices are moderate.

Subway – is located two blocks north of the courthouse (one block north of the square) at the corner of Railroad Street and Carlisle Street. You already know the menu and prices.

Ernie's Texas Lunch – is located one block west of the square at 58

Kelly Dilts is the chair of the Adams County Young Lawyer Division.

Chambersburg Street. Ernie's specialty is an old-fashioned hot dog served "with" in a 1930s style diner. The prices are low. Go a bit early; it can be hard to find a seat during the summer.

The Lincoln Diner – is located two blocks north of the courthouse (one block north of the square) at the corner of Railroad Street and Carlisle Street. Breakfast is served all day along with a wide variety of other choices, which include daily specials. Prices are low to moderate.

The Plaza Restaurant – is located on the southeast quarter of the square. This place has great Greek diner food, sandwiches, soups, daily specials and loads of other choices. The prices are moderate.

The Pub & Restaurant – is located on the northwest quarter of the square. The Pub offers an extensive menu and large portions. Homemade potato chips are one of the specialties of the house. The place gets crowded shortly after noon during the summer. Prices are moderate to high.

McClellan's Tavern at the Gettysburg Hotel – is located on the northeast quarter of the square. The menu is short but covers a range of sandwiches and salads. The tavern is decorated in the English pub style, very nicely done. The prices are moderate to high.

Blue Parrot Bistro – is located one-half block west of the square at 35 Chambersburg Street. The Parrot offers

something for every taste and the meal is always worth the wait. The crab bisque is a favorite. Prices are moderate to high. The Parrot is closed on Mondays during the fall, winter and spring.



The Spring House Tavern at the Dobbin House – is located approximately five blocks south of the courthouse at 89 Steinwehr Avenue. Once a stop on the Underground Railroad, the Dobbin House has kept the feel of the Civil War era. The menu offers a variety of sandwiches, salads and soups. The sweet bread with cream cheese is a favorite. The prices are moderate.

Farnsworth House – is located approximately three blocks south of the courthouse at 401 Baltimore Street. The menu is diverse. Peanut soup is a favorite. The Farnsworth has kept the feel of the Civil War era and the prices are moderate.

The usual fast food places can be found on Rt. 30 East, about one or two miles from the square. Mr. G's homemade ice cream is also on that stretch of road. Gettysburg offers lots of great food, so enjoy!

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