The ADA – 25 Years Later

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**Agenda**

I. **Disability**
   - Short term conditions

II. **Qualified**
   - Attendance

III. **Reasonable Accommodation**
   - Duty to ask for accommodation
   - Interactive process
   - Leave as a reasonable accommodation

IV. **Take-Aways and Best Practices**
ADA Update

• In a nutshell...
  – ADA imposes the duty to provide **reasonable accommodations** to **qualified** individuals with **disabilities**

• Review post-ADAAA law on these three important ADA concepts...but in reverse order

I. Disability

• ADAAA expanded the definition of “disability” for cases arising after January 1, 2009

• **Felkins v. City of Lakewood** (10th Cir. 2014):
  – Although the standard for showing disability is lower than it was, an individual still must show that he/she has an impairment substantially limiting a major life activity
Short Term Conditions

- In Toyota Motor Manufacturing v. Williams (U.S. Supreme Court 2002), Court held that an impairment’s impact must be “permanent or long-term”
- Toyota has essentially been legislatively overruled by the ADAAA

Short Term Conditions

- ADAAA does not specify the length of time a condition must last to be substantially limiting
- In its ADAAA regulations, the EEOC stated that the “effects of an impairment lasting or expected to last fewer than six months” can be substantially limiting
Short Term Conditions

- **Hosea v. Donley** (9th Cir. 2014)
  - Court found plaintiff did **not** have a disability because he had “acute work related stress” for just over two months with no “long term or permanent impairment”
  - A “temporary psychological impairment without evidence of residual effects is not a disability in this context”

- **Summers v. Altarum Inst. Corp.,** (4th Cir. 2014)
  - Plaintiff suffered fractured leg and ankle, torn and ruptured knee tendons
  - After two surgeries, his doctors restricted him from putting any weight on his left leg for six weeks and said he would not walk normally for several months
  - He asked to work from home but, instead, was terminated
Short Term Conditions

• **Summers v. Altarum Inst. Corp.,** (cont’d)
  – Trial court found no ADA claim because the condition was too temporary to be a disability
  – 4th Circuit reversed, citing EEOC regulations, and also stating: “the [trial] court’s holding that a ‘temporary injury’ cannot be a disability erroneously relied on pre-ADAAA case law”

II. Whether An Individual is “Qualified”

• The ADA only protects an individual who has a disability and who is “qualified”
• To be qualified under the ADA, an individual must:
  – Have the requisite skills, experience, education, licenses, etc.
  – Be able to perform the essential functions of the job, either with or without reasonable accommodation
Attendance as an Essential Function

- Whether “attendance” is itself a function has been subject to debate
- The EEOC, in its Enforcement Guidance on Reasonable Accommodation, has taken the position that “attendance” is not an essential function of a job
- However...

Attendance as an Essential Function

- Majority of courts that have considered the issue have concluded that attendance is essential for most jobs
Attendance as an Essential Function

• Taylor-Novotny v. Health Alliance Med. Plans, (7th Cir. 2014)
  – Court held that “regular attendance” was essential for a contract specialist, and as a result, the employer “need not accommodate erratic or unreliable attendance” caused by her MS

Attendance as an Essential Function

• Taylor-Novotny v. Health Alliance Med. Plans, (cont’d)
  – Plaintiff tried to argue that attendance was not essential because some employees were allowed to work from home
  • Court noted that even employees working at home were “required to adhere to an agreed-upon work schedule,” and to attend meetings “as needed by the organization”
Attendance as an Essential Function

- Samper v. Providence St. Vincent Med. Ctr., (9th Cir. 2012)
  - Court held that reliable attendance for a neonatal intensive care nurse was essential
  - Court noted that most circuits have “endorsed the proposition that in those jobs where performance requires attendance at the job, irregular attendance compromises essential job functions”

Attendance as an Essential Function

- Samper v. Providence St. Vincent Med. Ctr., (cont’d)
  - Court stated that factors -- including: working as part of a team, needing face-to-face interaction with customers/employees, or needing to work with on-site equipment -- militate in favor of attendance as essential
Attendance as an Essential Function

• Anderson v. JP Morgan Chase & Co., (11th Cir. 2011)
  – Court held that being “physically present” was an essential function of the plaintiff’s job as a first responder in the call center
  – Since the plaintiff had a large number of absences, because of her allergy to carpet cleaner, she was not “qualified” for her job under the ADA

Attendance as an Essential Function

• Perhaps the best practice would ask not whether “attendance” is essential, but whether “physical presence” at a worksite is essential
• Garrison v. City of Tallahassee, (11th Cir. 2016)
  – Court held that “physical presence” was essential for a purchasing agent who worked directly with colleagues and vendors who “would arrive unannounced at the office...”
Attendance as an Essential Function

• **EEOC v. Ford Motor Co., (6th Cir. 2014)**
  – Court held that attendance at employer’s facility might not be an essential function of a resale steel buyer’s job since many of the duties, including responding to steel supply issues and updating spreadsheets, could be performed at home

  "As technology has advanced” attendance at the workplace “can no longer be assumed to mean attendance at the employer’s physical location.”

  “The vital question is not whether ‘attendance’ was an essential job function for a resale buyer, but whether physical presence at the Ford facilities was truly essential.”
III. Update on Reasonable Accommodation

• Perhaps the most important statutory requirement of the ADA is the duty to provide “reasonable accommodations” to qualified individuals with disabilities.

• This requirement has likely resulted in the most litigation under the ADA.

Duty to Ask for Accommodation

• Most legal authority, including the EEOC (Enforcement Guidance on Reasonable Accommodation), supports the notion that, in general, it is the requirement of the individual with a disability to inform the employer that an accommodation is needed.
Duty to Ask for Accommodation

- **Chancey v. Fairfield Southern Co., (11th Cir. 2014)**
  - A train operator was not entitled to a reasonable accommodation where he never requested an accommodation for his tremors, insomnia, anxiety and concentration problems.

- **Kobus v. The College of Scholastica, Inc., (8th Cir. 2010)**
  - Court held that to be entitled to a reasonable accommodation, the employee must “inform the employer that an accommodation is needed.”
  - Court found in this case there was no evidence that the employee’s limitations “were apparent at work” and he had “repeatedly declined to reveal his diagnosis to his employer.”
Duty to Ask for Accommodation

• BEWARE
  — Some courts have suggested that if the employer knows about the disability and need for accommodation, it may have a duty to provide accommodation — even without an express request from the employee.

Duty to Ask for Accommodation

• Jones v. Nationwide Life Insurance Co., (1st Cir. 2012)
  — Individual “must explicitly request an accommodation, unless the employer otherwise knew one was needed”
Duty to Ask for Accommodation

- **Brady v. Wal-Mart Stores, Inc., (2nd Cir. 2008)**
  - Employer “has a duty to accommodate an employee’s disability if the disability is obvious, which is to say, if the employer knew or reasonably should have known that the employee was disabled” even without an express request.

The Interactive Process

- Courts appear to differ on whether this is a duty under the ADA to engage in the interactive process, which if breached, gives rise to liability.
The Interactive Process

- **Spurling v. C & M Fine Pak, Inc., (7th Cir. 2014)**
  - Although the ADA requires an employer to engage with the employee in an interactive process, there is no independent liability for failure to engage in the process.

- **Bunn v. Khoury Enterprises, Inc., (7th Cir. 2014)**
  - Court held that “there is no separate cause of action for a failure” to engage in the interactive process because the ADA is “primarily concerned with the ends, not the means.”
The Interactive Process: Potential Liability for Failure to Engage

• Snapp v. United Transportation Union, (9th Cir. 2013)
  – There is a mandatory obligation to engage in an informal interactive process to clarify what the individual needs and identify the appropriate accommodation.”
  – “Failure to do so would constitute discrimination under the ADA.”

• EEOC v. Chevron, (5th Cir. 2009)
  – “When an employer does not engage in a good faith interactive process, that employer violates the ADA.”
Leave as a Reasonable Accommodation

- Courts have held that unpaid leave is a form of reasonable accommodation
- EEOC has consistently taken the position that leave can be a reasonable accommodation (EEOC Enforcement on Reasonable Accommodation)

Approved

Definite v. Indefinite

- Most courts have held that an employer does not have to provide indefinite leave as a reasonable accommodation
- Petrone v. Hampton Bays Union Fire School Dist., (2nd Cir. 2014)
  - School teacher’s requested leave of absence was not reasonable where he had no anticipated date of return to his job
Leave as a Reasonable Accommodation

Definite v. Indefinite

- **Silva v. Hidalgo Police Dept.**, (5th Cir. 2014)
  - Police department was not required to give “indefinite” leave because the police officer had used all of her FMLA leave and could not “provide an estimate of when she could resume her former job duties except to say that it would be longer than one month in the most optimistic scenario.”

- **Murphy v. Samson Resources Co.**, (10th Cir. 2013)
  - Employee “must provide an expected duration” for the leave she needs; otherwise, the employer “cannot determine whether an employee will be able to perform the essential functions of the job in the near future.”
Leave as a Reasonable Accommodation

Definite v. Indefinite

- **Roddy v. City of Villa Rica**, (11th Cir. 2013)
  - Employee only indicated there was a “possibility” of returning to work and the doctor’s note indicating a specific return date was “purely a guess.”

Leave as a Reasonable Accommodation

Multiple Leave Requests as Indefinite

- **Brannon v. Luco Mop Co.**, (8th Cir. 2008)
  - 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.”
Best Practices/Take-Aways

1) The ADAA era generally means, that in many situations, employers are best advised to assume “disability”
   • Do not automatically disqualify temporary conditions
     – Is a fact specific analysis

Best Practices/Take-Aways

2) May lose at EEOC level if your position is that the employee’s regular and reliable attendance was an essential job function;
   • But might succeed with EEOC if you connect the need for regular/reliable attendance to the job duties that aren’t accomplished because of the absenteeism
Best Practices/Take-Aways

3) Attendance as an essential job function may be better considered as “physical presence” at the worksite being essential;
   • And, if it’s “essential,” it should appear in the job description
   • Jobs change all the time – and, so should the job description

Best Practices/Take-Aways

4) While it’s true the employee has a duty to request accommodation, consider whether the employer may be charged with constructive knowledge of the disability and the need for accommodation
   • Confer with direct supervisors on what do they “know”
Best Practices/Take-Aways

5) Engage in the interactive process
   • Even if the ADA, legally speaking, is about the “end result,” the interactive process will increase the chances that the end result is ADA compliant
   • And, the “optics” will be better to EEOC, judge and/or jury

6) Leave as an accommodation
   • Be especially careful with “no fault” or “maximum leave” attendance policies
     – EEOC has brought several challenges of no-fault policies
     – Arguably, the employer must excuse all disability-related absences from penalty point assessment under such policies
Best Practices/Take-Aways

6) Leave as an accommodation (cont’d)
   - Such policies arguably run counter to the concept that unpaid leave can, in appropriate cases, be a reasonable accommodation
   - The ADA does not identify the amount of leave time that would automatically be deemed an undue hardship

Best Practices/Take-Aways

7) Recognize that most issues in this area can be handled without becoming mired in “ADA-land”
   - Hypothetical employee says “I’m having trouble with my migraines because of the glare from my monitor...” or “My supervisor triggers my stress, anxiety and depression...”
   - Recommended 5-word response: “How _____ _____ _____ _____?”
Best Practices/Take-Aways

7) Assuming there’s a quick/easy solution, you want to document with six elements, ideally:

1. What the employee said
2. The employer’s response (How can I help you?)
3. The employee stated what was needed (or it was mutually arrived at)
4. Employer agreed to do it
5. Employer did not ask any medical condition questions
6. Employer followed-up (to confirm it’s working)
Best Practices/Take-Aways

8) Supervisors need to come to grips with the fact that application of the ADA may involve preferential treatment
   - U.S. Airways v. Barnett (U.S. Sup. Ct. 2002) “...by definition any special accommodation requires the employer to treat an employee with a disability differently, i.e., preferentially”
   - But beware: cannot tell co-employees that the preferential treatment is due to a disability or medical condition

Thank you!

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