

## *A Practical Approach to Reasonable Accommodation*

by Margaret Hart Edwards

Under the Americans with Disabilities Act (ADA) and many similar state statutes, employers are required to provide disabled employees and applicants with reasonable accommodations as part of the duty to avoid discrimination on the basis of disability. The theory behind this duty is to “level the playing field” for individuals with disabilities, so that they have an equal chance to succeed in employment and enjoy the same privileges and benefits of employment as the non-disabled.

Most lawsuits against employers for disability discrimination arise from some misunderstanding about reasonable accommodation. As a result, the term has become associated with unnecessary complexity and anxiety. There is no one-size-fits-all process, nor could there be, as flexibility is intended by the law. In fact, the reasonable accommodation process is simply a negotiation with the applicant or employee, which need not be complex or contentious. This negotiation is required by law, which refers to it by the polysyllabic term “interactive process.” This article gives a simple, practical approach to a successful negotiation.

### **When Does the Duty to Negotiate Start?**

Generally speaking, the applicant or employee usually starts the negotiation by expressing a need for accommodation. The use of magic words, like “reasonable accommodation” is not required. An employee may simply say, “I need some time off because I have to attend therapy sessions.” Or the employee may forward a note from a doctor saying, “Joe needs to work part time and avoid lifting more than 20 pounds because of his back condition.” This kind of statement triggers the negotiation. In some cases the employee never asks for help, but the employer has reason to believe help might be needed. In that case, the employer should start the negotiation.

The negotiation starts with an exchange of ideas about what accommodations appear to be necessary, and why. The employee or applicant is usually in the best position to identify what is needed. If the need for accommodation is obvious to the employer, it should not request medical proof of need. If the need is not obvious, the employer may request medical proof of need, initially from the medical provider

for the applicant or employee, and should ask specific questions only related to the ability to perform the job in question.

### **How Does the Negotiation Work?**

Employers should immediately examine what the job requires. Job functions may be essential or marginal. Essential job functions are those that go to the reason the job exists, the removal of which would change the job fundamentally. Marginal functions are all the rest. An accommodation is reasonable if it can be performed without substantial difficulty, expense or disruption to operations, and if it permits the employee or applicant to perform the essential functions of the job. As a practical matter, the employer should look at the job description, if there is one (detailed job descriptions are highly recommended), and examine the mechanics of actual performance of the job with the supervisor. For example, the job description may say that the employee supervises sales representatives in a four-state region, but may not mention the need to travel to do so. The employer should figure out whether traveling to visit subordinates is just one way to per-

form the essential function of supervision, or whether the visits themselves are part of the essential function of supervision, because there is no way to effectively supervise the sales representatives without spending time in their presence.

If the accommodation appears reasonable on its face, or appears as if it would work most of the time, then it is reasonable, and should be granted. While the employer has the choice between alternative accommodations that will each allow effective performance of the job, the law expects the employer to give strong consideration to the accommodation requested by the employee.

If the accommodation looks like it may be very costly, or disruptive to the workplace, then it may not be reasonable. Here, the employer must delve into the way the job really works day-to-day, and should encourage flexibility by the manager. If, after this careful analysis of the facts, the accommodation still appears very costly or disruptive, then the employer should explain that to the applicant or employee and suggest alternatives or ask for new ideas. The employee and employer can use external resources for ideas, and should do so. A set of links to some resources is provided at the end of this article.

Employers do not have to provide accommodations that waive essential functions of the job or waive consistently applied production standards. Nor do they need to create a job for someone, or bump an employee from a job. In addition, promotion to another position is not a reasonable accommodation. With those few exceptions, other accommodations may or may not be reasonable, depending on the circumstances. When there is a disagreement in the negotiation over what is reasonable, the employer has the burden of proving that a particular accommodation is an undue hardship.

Accommodations may take a variety of forms, and may include such things as:

- Changing start or ending times for work;
- Extending a leave of absence beyond the period provided by FMLA;
- Making ergonomic improvements or purchasing assistive devices or software to allow performance of the job;
- Modifying workplace policies, such as

“no fault” attendance policies;

- Telecommuting;
- Assigning a parking space closer to the entrance;
- Placing the employee in another available position after exhausting the possibility of returning the employee to work in his former position.

Reasonable accommodation is a process, not a one-time event. Sometimes the accommodation agreed upon does not work, or ceases to work. Then the negotiation starts again. Sometimes, the employee needs different accommodations as an illness progresses. The employer should be ready to discuss changes to accommodations.

### Common Sources of Misunderstanding

Certain mistakes by employers and employees show up as patterns in the lawsuits involving reasonable accommodation. Common mistakes by employers are:

- Assuming there is no duty to accommodate a need for more leave at the end of a FMLA leave of absence;
- Waiting too long to negotiate reasonable accommodations;
- Waiting too long to implement reasonable accommodations;
- Assuming an accommodation is an undue hardship without really analyzing its difficulty or cost;
- Failing to document the discussions with an employee or applicant about reasonable accommodation (confirming emails are often the easiest ways to avoid this problem);
- Using the need to accommodate as a factor in a decision about employment status, such as a promotion or layoff.

### Common mistakes by employees are:

- Failing to provide medical documentation for the need for an accommodation;
- Assuming that the employer must provide any accommodation requested;
- Not promptly engaging in a negotiation with the employer;
- Trying to use the accommodation discussion to get something outside the appropriate scope of the discussion, such as relief from performance deficiencies, a change of supervisor, a better office, a lighter workload, etc.

### Resources for Employers

There are many resources for employers. Some of them are listed here. In addition, employers may find helpful ideas for reasonable accommodations by performing web searches on specific illnesses or conditions.

1. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act at <http://www.eeoc.gov>.

*The EEOC's website provides the Americans with Disabilities Act, the regulations under the Act, and a variety of documents providing guidance on the enforcement of the Act in certain situations, such as with mental illnesses.*

2. Job Accommodation Network: <http://janweb.icdi.wvu.edu>

*The Job Accommodation Network provides resources on possible accommodations, organized by illness or condition.*

3. Registry of Interpreters for the Deaf: <http://rid.org>

*This website provides a directory of interpreters and information about interpreting for individuals with hearing impairments.*

4. American Foundation for the Blind: <http://afb.org>

*This website is a gateway to a large range of resources for people with visual impairments. The section entitled CareerConnect™ provides extensive information about accommodations and assistive devices. The section entitled AccessWorld™ provides technology reviews of the accessibility of equipment, such as PDAs, cell phones, etc. to those with visual impairments.*

5. Boston University Center for Psychiatric Rehabilitation: <http://www.bu.edu/cpr/reasacom/index.html>

*This website is a resource on different forms of mental illness and accommodations for mental illness.*

6. RESNA Technical Assistance Project: <http://www.resna.org>

*This website of the Rehabilitation Engineering & Assistive Technology Society of North America is a gateway to sources of information about assistive technology.*