

**ARE WE BEING UNREASONABLE?**  
**Practical Guidance for ADA**  
**Reasonable Accommodation Issues**

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**TOPICS FOR DISCUSSION**

- Overview of employer's ADA reasonable accommodation obligations
- Reasonable accommodation case studies
- Best Practices
- Your Questions

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**DISABILITY DISCRIMINATION**  
**UNDER THE ADA**

- The ADA prohibits discrimination because of disability against "a qualified individual with a disability."
- The statute defines "discrimination" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."
- Both applicants and employees are protected under the ADA.

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### DEFINITION OF QUALIFIED INDIVIDUAL

To be a qualified individual under the ADA, the applicant or employee must:

- Have the skills, experience, education, and other job-related requirements necessary for the position.
- Be able to perform the essential functions of the job with or without reasonable accommodation.

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### REASONABLE ACCOMMODATION

The ADA defines "reasonable accommodation" to include:

- Making existing facilities used by employees readily accessible to an usable by individuals with disabilities
- Job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position

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### REASONABLE ACCOMMODATION

- Acquisition or modification of equipment or devices
- Appropriate adjustment or modifications of examinations, training materials, or policies
- Provision of qualified readers or interpreters
- Other similar accommodations for individuals with disabilities
  - Covered employers must provide qualified individuals with a reasonable accommodation unless doing so would create an undue hardship.

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### ESSENTIAL JOB FUNCTIONS

- Defined in ADA regulations as “fundamental job duties of the employment position the individual with a disability holds or desires.”
- Employer determines whether a job function is essential, but that may be challenged in litigation.
- Make sure that you have detailed written job descriptions that are up to date and accurate.

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### REQUESTING A REASONABLE ACCOMMODATION

- Generally, it is the responsibility of the employee to request a reasonable accommodation.
- Request can come from a third party.
- No specific forms or special words must be used to request a reasonable accommodation.

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### REQUESTING A REASONABLE ACCOMMODATION

- An employer should provide an accommodation without a request when the employer:
  - knows that the employee has a disability
  - knows or should know that the employee is experiencing problems because of a disability
  - knows or should know that the disability prevents the employee from requesting a reasonable accommodation

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### ENGAGING IN THE INTERACTIVE PROCESS

- Schedule meeting promptly
- Informal
- Face-to-face meeting if at all possible
- Document the request for a reasonable accommodation and the meeting(s) with the individual.

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### GOALS OF THE MEETING

- Analyze the job's purpose and essential functions.
- Identify precise limitations caused by the disability.
- Explore potential reasonable accommodations that could overcome those limitations.
- Select the most appropriate accommodation for the employee and employer.

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### TIMING

- Individual can request a reasonable accommodation at any time during the application process or employment.
- But, the request must be timely.
- Generally, a post-termination request for an accommodation is ineffective.

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### EMPLOYEE MUST PROVIDE SUFFICIENT INFORMATION

- In cases where the disability and the need for a reasonable accommodation are not obvious, the employee must provide enough information to make it clear to the employer that
  - The employee needs an adjustment, change, or other assistance at work; and
  - The need is related to a medical condition.

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### REQUIRED DOCUMENTATION

- Cannot ask the employee for documentation unrelated to determining the existence of a disability and the necessity for an accommodation.
- May require that documentation come from an appropriate health care provider or rehabilitation professional.

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### MEDICAL EXAMINATIONS

- May require medical examination (at employer's expense) if medical information provided is insufficient.
- Better to attempt to resolve any missing or ambiguous information with employee directly.
- Be mindful of potential retaliation.

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### NEGOTIATE IN GOOD FAITH

- Employer must provide information to the employee about vacant positions.
- Employer should offer an alternative accommodation (if one is available) if the one the employee suggests is unduly burdensome.
- Employer has the right to choose between effective accommodations.

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### UNDUE HARDSHIP

- Means a significant difficulty or expense.
- Factors to be considered in whether a proposed accommodation creates an undue hardship include:
  - The nature and cost of the accommodation
  - The overall financial resources of the employer
  - The type of operation of the employer

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### OTHER DEFENSES TO ACCOMMODATION CLAIMS

- Direct Threat
- “Regarded As” disabled claims
- Food Handlers (if there are no reasonable accommodations available that can eliminate the danger of spreading infectious disease)

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## CASE STUDY #1

- Employer terminates employee on July 31 after 26 weeks on LTD per CBA.
- Employee takes leave of absence for closed head injury, receives STD benefits. After 26 weeks of leave, employee placed on LTD pursuant to Collective Bargaining Agreement (CBA).
- Pursuant to CBA, employee must return to work without restrictions within 26 weeks of receiving LTD benefits, or he is subject to termination.
- At 26 weeks, one of employee's two physicians deemed him unable to work in any capacity. Employer receives copy of report on July 30. Employee never requests a reasonable accommodation.
- Employer receives letter from employee's second doctor in mid-August, disagreeing with assessment of first doctor, recommending that employee be allowed to return to work with supervision.

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## CASE STUDY #1

**Holding:** Employee's termination upheld.

**Issues:**

1. Employee is not a "qualified individual" within the meaning of the ADA. No physician had released him to return to work in any capacity at the time of his termination.
2. Employee never requested an accommodation prior to receiving termination letter.
3. No evidence that CBA was not uniformly applied, one-year leave period standard. See *Walsh v. United Parcel Serv.*, 201 F.3d 718 (6<sup>th</sup> Cir. 2000).

*Melange v. City of Center Line*, 482 Fed. Appx. 81 (6<sup>th</sup> Cir. 2012)

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## CASE STUDY #2

- Applicant is a deaf graduate of the Johns Hopkins School of Nursing, uses bilateral hearing aids.
- Right after graduation, nurse applied for one of two open Nurse Clinical positions at Johns Hopkins Hospital.
- Job description for position includes "highly effective verbal communication and interpersonal skills to establish working relationships" as an essential job function.
- After receiving an offer, applicant made request for full time ASL interpretation as an accommodation.
- Employer determined annual cost of providing interpreters proficient in medical terminology was \$40,000 to \$60,000. Employer concluded that applicant would require a team of two interpreters with her at all times at an annual cost of \$240,000.

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## CASE STUDY #2

- Annual Budgets
  - Nursing Unit - \$3.4 million
  - Department of Medicine - \$88 million
  - Hospital - \$1.7 billion
- Applicant offered to only take one interpreter, thereby decreasing annual cost of accommodation to \$120,000
- Nursing unit would have to lay off two nurses to pay for one interpreter.
- Hospital rescinded offer, claimed undue hardship based on expense of providing interpreter.

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## CASE STUDY #2

Holding: Hospital denied applicant a reasonable accommodation.

Issues:

1. Court looked at hospital's budget instead of nursing unit in analyzing undue hardship defense. Cost of interpreter was .007% of hospital's annual operating budget.
2. Employer cannot compare cost of accommodation to the salary of the individual with a disability.

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

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## CASE STUDY #3

- Employee bitten by a brown recluse spider on May 3.
- Employer approves FMLA leave on May 4.
- Employee requests to return from leave on June 19, July 7, and July 17 while he still had restrictions.
- Employer did not discuss with employee whether he could perform the essential functions of his job, denied requests to return to work under employer's "100% healed" policy.

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### CASE STUDY #3

**Holding:** Employer denied employee reasonable accommodation, failed to engage in interactive process.

**Issues:**

1. Multiple courts have held that a "100% healed" rule is a *per se* violation of the ADA.
2. Employer failed to engage in good faith interactive process to determine whether employee could have returned to work with accommodations while still under work restrictions.
3. Employer will violate ADA if it claims that employee with medical restrictions poses a safety risk but cannot show that the individual is a "direct threat."

*Harris v. City of Lewisburg*, 2017 WL 3237780 (M.D. Tenn. July 31, 2017).

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### CASE STUDY #4

- Employee, who suffers from depression and anxiety attacks, works for call center as a customer service representative (CSR).
- CSRs work eight-hour shifts. They are expected to remain at work stations answering calls, with the exception of a lunch period, two prescheduled 15-minute breaks, and unscheduled restroom breaks as needed.
- CSRs typically handle 40-50 calls per shift.
- Any calls that CSR does not answer rolls to next available CSR, which increases customer wait time and diminishes quality of customer service.
- Regular attendance is an essential function of the CSR position.

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### CASE STUDY #4

- Employee struggled with attendance throughout her employment due to her medical conditions.
- After she had accumulated almost enough absences to warrant termination under point system, she asked for leave from work for treatment, a flexible start time, and additional breaks throughout the day.
- Employer denied requested accommodations, terminated her employment after several more prolonged absences.

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## CASE STUDY #4

Holding: Employee's termination upheld.

Issues:

1. Employee was not qualified for her job because she could not perform the essential function of attending work regularly and punctually. See *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6<sup>th</sup> Cir. 2015)
2. Employee failed to propose any reasonable accommodation that would have allowed her to perform the essential functions of her job.
3. Employee's request for additional leave was not reasonable.
  - Employee had a history of taking leaves of absence.
  - Her condition failed to improve during these leaves.
  - She repeatedly failed to return to work by dates treatment providers had estimated.

*Williams v. AT&T Mobility Services, LLC*, 847 F.3d 384 (6<sup>th</sup> Cir. 2017)

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## CASE STUDY #5

- Employee is a 61 year old forklift service technician
- Essential job function includes lifting 60-70 lbs. LP tanks and placing them on forklifts on a daily basis, frequent bending and reaching.
- Employee had back surgery on June 24, 2014. Employer approved leave until September 30, 2014.
- Employee has a second back surgery on August 26, 2014.
- On October 8, 2014, employee returns to the doctor. Nurse gives him a note excusing him from work until next appointment on November 19, 2014, work status will be determined at that time.
- Employee terminated on October 9, 2014 (<16 weeks after leave began).

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## CASE STUDY #5

Holding: Employee's termination upheld.

Leave as a form of reasonable accommodation.

1. An indefinite leave of absence is not a reasonable accommodation.
2. In situations in which the employer has provided an employee with a significant period of leave time, an extension to that leave can be a reasonable accommodation only when its duration is defined.
3. In these situations, unless the requested additional leave time has a "certain or credibly proven end" at which point the employee can return to work, it is unreasonable as a matter of law.
  - Doctor's note did not provide a definite time as to when employee's leave would end and he would be able to return to work.

*Hurst v. The Lilly Co.*, 2017 WL 3187218 (E.D. Tenn. July 26, 2017).

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## UNPAID LEAVE

- Whether you owe an employee unpaid leave as a form of reasonable accommodation is not determined by whether the employee's medical condition is work-related.
- You may owe leave as a reasonable accommodation even if you do not offer leave as an employee benefit, the employee is not yet eligible under your policy, or the employee has exhausted all employer-provided and FMLA leave.
- If you have a maximum leave policy, be prepared to make an exception for a qualified individual.
- No EEOC Guidance on maximum amount of leave employer must give employee.

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## BEST PRACTICES

- Have an effective reasonable accommodation policy.
- Train supervisors on their roles in the reasonable accommodation policy.
- Even if you question whether an applicant or employee has a covered disability, engage in the interactive process.
- Be creative, flexible, and sincere during the interactive process.
- Communicate with the employee on leave before making the termination decision.

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## AVAILABLE RESOURCES

- Job Accommodation Network (JAN)  
askjan.org
- Disability.gov
- EEOC's Publication Center

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## QUESTIONS?

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