



Welcome To:
**ADA AMENDMENTS ACT OF
2008**

“Interactive Process”

The Webinar will begin shortly.
Thank You!



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ADA AMENDMENTS ACT OF 2008

“Interactive Process”



THE AMERICANS WITH DISABILITIES ACT

- The Americans with Disabilities Act (ADA) was originally signed into law by President George H.W. Bush on July 26, 1990.
- The President described the Act as a “historic new civil rights Act, ... the world’s first comprehensive declaration of equality for people with disabilities.”



THE AMERICANS WITH DISABILITIES ACT

ADA guarantees equal opportunity for individuals with disabilities in:

- public accommodations,
- employment,
- transportation,
- state and local government services, and
- telecommunications.



THE AMERICANS WITH DISABILITIES ACT

This presentation will focus on how the ADA guarantees equal opportunity for individuals with disabilities in Employment and more specifically the “interactive process” which will now be central to an employer’s defense of alleged ADA violations.



ADA BASICS

To whom does the ADA apply?

- The ADA applies to all employers, including state and local government employers, who have fifteen (15) or more employees.

What does the ADA Prohibit?

- Employers are prohibited from discriminating against a qualified individual on the basis of disability.



ADA BASICS

What does the ADA Require?

Employers must provide reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship.

- 4 main points
 - Disability
 - Otherwise Qualified
 - Reasonable Accommodation
 - Undue Hardship



“Disability”

There are three categories of individuals that fall under the ADA’s definition of “disability.”

Individuals:

1. with a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
2. with a record of such an impairment; or
3. that are regarded as having such an impairment.



“Disability”

Prior to passage of the ADAAA, whether an employee was “disabled” was central to an employer’s defense and enabled many employers to win on summary judgment:

With passage of the ADAAA, employer’s would do well not to focus primarily on these arguments.



THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008

On September 25, 2008, President George W. Bush signed the Americans with Disabilities Amendments Act of 2008, or the ADAAA.

The ADAAA went into effect January 1, 2009.



BROAD INTERPRETATION OF DISABILITY

Why is the issue of “disabled” no longer central to an employer’s defense?

The ADAAA specifically rejected the Supreme Court standard which required courts to interpret terms in the definition of disability “strictly to create a demanding standard for qualifying as disabled.”



EXPANDED DEFINITION OF “MAJOR LIFE ACTIVITIES”

Prior to the ADAAA, “major life activities” was not defined in the statute.

Now, the definition is in the statute and is expanded to include the following activities:

- Eating
- Sleeping
- Standing
- Lifting
- Bending
- Reading
- Concentrating
- Thinking
- Communicating
- Operation of Major Bodily Functions*



Substantially Limited – Mitigating Measures

Prior to the ADAAA, the Supreme Court found persons were not disabled if mitigating measures were of such benefit that the individual was no longer “substantially limited” in a major life activity.

Now, determination of whether an individual meets the definition of disabled shall be made **without** regards to the beneficial effects of mitigating measures.



IMPAIRMENT

In addition, the ADAAA also added language to the statute which states:

- an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.



How Will the ADAAA Effect You?

The ADAAA will increase the number of employees who fall within the ADA's definition of disabled.

Employers will receive more requests for accommodations, and invariably more claims.

Now, central to employer's defense is the "interactive process" and how the employer handles the request for an accommodation.



What triggers the interactive process?

The EEOC interpretive guidelines shed some light regarding when the interactive process is triggered:

“Once a *qualified individual* with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation.”



“Otherwise Qualified”

While an employee may fall within one of the three categories of disability, they are not entitled to protection under the ADA unless they are “otherwise qualified.”

An individual is “otherwise qualified” under the ADA if they can meet the essential functions of the job with reasonable accommodations.



“Otherwise Qualified”

Essential functions of the job include prerequisites such as:

- particular skills or training,
- education,
- experience,
- etc.

In determining what functions of a job are essential, courts consider:

- employer’s judgment and
- written job descriptions provided to applicants.



What triggers the interactive process?

Several courts have held that the notice of a disability and need for accommodation may not only come from the employee, but also third parties.

Examples of third parties include a union representative, psychiatrist, or an employee's family member.



What triggers the interactive process?

The interactive process is triggered when the employer learns of the employee's possible disability and receives a request for accommodation

Case example: *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996) (previous leaves for mental illness-related disability plus doctor's request for "less stressful" assignment)



What happens during the interactive process?

According to the ADA's regulations:

This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

The employer is not required to provide whatever accommodation the employee requests



“Reasonable Accommodations”

If an individual

- is within one of the three categories of “disability,”
- is “otherwise qualified” for the job, and
- the employer is on notice the employee may need a reasonable accommodation

The employer must

- provide “reasonable accommodations” so the individual can apply for the job, perform the job, or enjoy benefits equal to those offered to other employees.



“Reasonable Accommodations”

Reasonable accommodations may include:

- Making existing employee facilities readily accessible and usable by persons with disabilities;
- Job restructuring;
- Modifying work schedules;
- Reassignment to a vacant position;
- Acquiring/modifying equipment/devices; and
- Adjusting/modifying examinations, training materials or policies, and providing qualified readers/interpreters.



“Reasonable Accommodations” – “Undue Hardship”

While employers are required to provide reasonable accommodations, they are not required to provide accommodations that cause an “undue hardship.”

An accommodation imposes an “undue hardship” if it requires significant difficulty or expense*.

*Before an employer can argue the accommodation causes an undue hardship due to cost, the employer must determine if outside funding is available to help cover the cost.



“Reasonable Accommodations” – “Undue Hardship”

To determine if an accommodation causes an “undue hardship,” consider the following aspects:

- nature and cost of the accommodation;
- overall financial resources of the business and that business’s particular location;
- number of persons employed by the business and at that business’s particular location; and
- how the accommodation will otherwise affect the operation of that business’ particular location.



“Reasonable Accommodations” – “Undue Hardship”

Case Example: *Fjellestad v. Pizza Hut of America*, 188 F.3d 944 (8th Cir. 1999) (employer not required to create a new co-manager position when it did not previously exist).

U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (altering seniority system to accommodate injured employee is not reasonable).



“Reasonable Accommodations” – “Undue Hardship”

If the employee

- rejects a reasonable accommodation proposed by an employer acting in good faith and
- consequently cannot perform the essential functions of the position,

the individual is not considered a qualified individual with a disability and the employer may fire the employee without fear of violating the ADA.



What if an employer fails to engage in the interactive process?

Some circuits hold that employers have a duty to act in good faith and assist in the search for appropriate reasonable accommodations; breach of this duty results in liability when a reasonable accommodation could have been made.

Circuits finding that a refusal to participate in the interactive process may itself constitute evidence of a violation of the ADA include the 1st, 3rd, and 5th.

Calero-Cerezo v. U.S. Dept. of Justice, 355 F.3d 6 (1st Cir. 2004)

Taylor v. Phoenixville Sch. Dist., 174 F.3d 142 (3d Cir. 1999)

Taylor v. Principal Fin. Group, Inc., 93 F.3d 155 (5th Cir. 1996)



Sample fact patterns from specific cases to illustrate how decisions can turn on the interactive process.

This includes the 8th, 9th, 10th and 11th Circuits, which have found that failure to participate is not a *per se* violation of the ADA, although it can be evidence of bad faith. *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir. 1999); *Barnett v. U.S. Air, Inc.*, 157 F.3d 744 (9th Cir. 1998); *Willis v. Conopco, Inc.*, 108 F.3d 282 (11th Cir. 1997); *White v. York Int'l Corp.*, 45 F.3d 357 (10th Cir. 1995).



What if an employer fails to engage in the interactive process?

Other circuits hold that there is no *per se* violation of the ADA for an employer's failure to interact in light of the ADA regulation's discretionary language

HOWEVER, these courts have further held that this same failure to interact can be evidence of bad faith.

The 8th, 10th and 11th Circuits have found that failure to participate is not a *per se* violation of the ADA, although it can be evidence of bad faith.

Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944 (8th Cir. 1999)

Willis v. Conopco, Inc., 108 F.3d 282 (11th Cir. 1997)

White v. York Int'l Corp., 45 F.3d 357 (10th Cir. 1995).



Other circuits have reached a compromise, finding that liability will not attach for failure to engage in the interactive process in good faith, where the employee fails to establish that a reasonable accommodation would have been possible.

Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208 (2d Cir. 2001)

Brown v. Chase Brass & Copper Co., Inc., 14 Fed.Appx. 482 (6th Cir. 2001)

EEOC v. Sears, Roebuck & Co., 417 F.3d 789 (7th Cir. 2005)

Barnett v. U.S. Air, Inc., 157 F.3d 744 (9th Cir. 1998)

While the 4th Circuit does not appear to address this issue directly, the case law suggests that the 4th Circuit would rule similar to the 2nd, 6th, 7th and 9th.

Walter v. United Airlines, Inc., 232 F.3d 892 (4th Cir. 2000)



What must an employer do to prove sufficient engagement in the interactive process?

“Employers may demonstrate a good faith attempt to find a reasonable accommodation for a disabled employee in many ways, such as meeting with the employee, requesting limitations, asking the employee what he wants for a specific accommodation, showing some sign of considering the employee’s request and offering and discussing available alternatives when the employee’s request is too burdensome.”



To demonstrate good faith engagement in the interactive process, the Employer must:

- Engage in Meaningful Dialogue Directly with the Employee.

Enica v. Principi, 544 F.3d 328 (1st Cir. 2008).; *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000)

- Identify the Barriers to Job Performance.

Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000); *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103 (9th Cir. 2010)

- Explore Accommodation Options With the Employee in Good-Faith.

Enica v. Principi, 544 F.3d 328 (1st Cir. 2008); *Calero-Cerezo v. U.S. Dept. of Justice*, 355 F.3d 6 (1st Cir. 2004); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000); *Toronka v. Continental Airlines*, 2011 WL 493101 (C.A.5 (Tex.), February 14, 2011)(slip opinion – not selected for publication)

- Demonstrate Good Faith through Cooperative Behavior.

Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000);); *Calero-Cerezo v. U.S. Dept. of Justice*, 355 F.3d 6 (1st Cir. 2004).



To demonstrate good faith engagement in the interactive process, the Employer must:

Engage in Meaningful Dialogue Directly with the Employee.

- Meet with the employee directly, when possible
- Request information regarding the employee's condition and limitations
- If necessary, request the employee provide information from his physician regarding his condition and limitations, or request to speak directly with the physician
- If needed, request the employee undergo a medical examination with an employer-selected physician to determine scope and extent of employee's condition and limitations



To demonstrate good faith engagement in the interactive process, the Employer must:

Identify the Barriers to Job Performance.

- Examine essential job functions, and determine how limitations affect employee's ability to perform same
- If needed, seek assistance of employee's physician to identify barriers, or, if not already done, request employee undergo an additional examination to determine any barriers regarding essential job functions
- If needed, meet with an occupational specialist to identify barriers



To demonstrate good faith engagement in the interactive process, the Employer must:

Explore Accommodation Options With the Employee in Good-Faith.

- If employee has requested a specific accommodation which is not reasonably feasible, discuss this with employee, explaining why that option is not available
- Discuss with employee any employer-recommended accommodations to determine whether employee would consider same
- Discuss how accommodation would be implemented



To demonstrate good faith engagement in the interactive process, the Employer must:

Demonstrate Good Faith through Cooperative Behavior.

- Work with the employee in a cooperative exchange to develop and implement an accommodation that is reasonable to both the employer and employee, and work with the employee to implement same
- If the initial accommodation does not work as intended, meet with the employee again, to discuss and implement other possible accommodations



Examples of good-faith and lack of good-faith behavior include:

Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944 (8th Cir. 1999)

Meeting with the employee, gathering information about the employee's condition and limitations, asking the employee what he specifically wants, showing that the employee's request has been considered, and discussing available alternatives are examples of good faith on the part of the employer to engage in the interactive process.

Barnett v. U.S. Air, Inc., 157 F.3d 744 (9th Cir. 1998)

The employer did not engage in the interactive process in good faith where the employer rejected the employee's proposed accommodation, but, at the same time, failed to offer any practical alternatives

Louiseged v. Akzo Nobel Inc., 178 F.3d 731 (C.A.5 (Tex.),1999)

The employer may move at whatever pace he chooses as long as the ultimate problem-the employee's performance of his/her duties-is not truly imminent, and is addressed prior to the performance of those duties is required.

EEOC v. UPS Supply Chain Solutions, 620 F.3d 1103 (9th Cir. 2010)

A failure to provide the specific accommodation requested by the employee does not constitute bad faith on the part of the employer, where other accommodations are available which would achieve a similar outcome.

Toronka v. Continental Airlines, 2011 WL 493101 (C.A.5 (Tex.), February 14, 2011)(slip opinion – not selected for publication)

Where no reasonable accommodation is available to allow employee to remain in his present position, meeting with the employee to discuss other available positions for which the employee is qualified does show good-faith effort to engage in the interactive process.



Is all the responsibility on the employer?

No, the ADA regulations and case law establish that the responsibility to engage in the interactive process is a shared one between employee and employer

Employees who fail to participate in the interactive process do so at their peril

An employee cannot cry foul if the employer either did not know of the employee's disability or the employee refused to participate in the interactive process.



Employer Did Not Know of the Employee's Disability

Conneen v. MBNA America Bank, N.A., 334 F.3d 318, 14 A.D. Cas. (BNA) 874 (3d Cir. 2003).

- Employee must renew request if additional accommodation needed.
- Although the employer was initially aware of the employee's disability and changed her schedule to accommodate her, the disability was believed by the employer to be temporary, and after the employee's schedule was changed back to its initial setup, the employee failed to either renew her request for an accommodation after problems resurfaced, or to inform the employer that the disability was the reason for her tardiness.



Employer Did Not Know of the Employee's Disability

Hunt-Golliday v. Metropolitan Water Reclamation District of Greater Chicago, 104 F.3d 1004, 19 A.D.D. 712, 6 A.D. Cas. (BNA) 725, 73 Fair Empl. Prac. Cas. (BNA) 1007, 69 Empl. Prac. Dec. (CCH) 44516 (7th Cir. 1997).

- Employee must provide employer with enough basis to inquire further.
- The employer did not fail to engage in the interactive accommodation process when an employee initiated her return to work after being hospitalized for depression because her doctor's letter gave no indication that she was mentally incapable of returning to her job or that she needed any accommodation, and the employee never stated that she was not capable of doing what her job duties entailed.



Employee Refused to Participate in the Interactive Process

When an employer tries to find a reasonable accommodation and requests additional medical or other information from the employee, the employee must provide the information so the employer understands exactly what is needed.

Beck v. University of Wisconsin Bd. Of Regents, 75 F.3d 1130, 14 A.D.D. 904, 5 A.D. Cas. (BNA) 304, 106 Ed. Law Rep. 1052, 5 (7th Cir. 1996) (Employer initially provided accommodations, but requested more medical information to assist in determining future accommodations and employee never provided the information.)

McAplin v. National Semiconductor Corp., 921 F. Supp. 1518, 15 A.D.D. 719, 5 A.D. Cas. (BNA) 1047 (N.D. Tex. 1996). (Employer requested additional medical information about which chemicals the employee could not be around, but employee never provided information.)

Hennenfent v. Mid Dakota Clinic, P.C., 164 F.3d 419, 8 A.D. Cas. (BNA) 1537 (8th Cir. 1998) (Employer provided accommodations for a number of years, but then requested employee undergo additional medical testing to determine future accommodations and employee refused.)

Parker v. Sony Pictures Entertainment, Inc., 260 F.3d 100, 12 A.D. Cas. (BNA) 1 (2d Cir. 2001) (An employee who fails to clarify the nature and extent of his/her medical restrictions may be held responsible for the breakdown in the interactive process.)

Templeton v. Neodata Services, Inc., 162 F.3d 617, 8 A.D. Cas. (BNA) 1615 (10th Cir. 1998)



Employee Refused to Participate in the Interactive Process

Employee must request accommodation he/she wants or respond to accommodations proposed by the employer.

Burch v. City of Nacogdoches, 174 F.3d 615, 9 A.D. Cas. (BNA) 509, 9 A.D. Cas. (BNA) 637 (5th Cir. 1999). (Employer not required to accommodate a disabled employee by reassigning him to a light-duty position where the employee did not inform the employer that he wanted such a position and did not prove that he was qualified for such work.)

Sieberns v. Wal-Mart Stores, Inc., 946 F. Supp. 664, 19 A.D.D. 960, 6 A.D. Cas. (BNA) 403 (N.D. Ind. 1996), *aff'd*, 125 F.3d 1019, 25 A.D.D. 76, 7 A.D. Cas. (BNA) 433 (7th Cir. 1997) (Employee did not make any suggestions to the employer regarding a reasonable accommodation and did nothing to investigate the propriety of modifying the employer's phone system until after the suit was filed.)

Lousegged v. Akzo Nobel, Inc., 178 F.3d 731, 9 A.D. Cas. (BNA) 783 (5th Cir. 1999) (Employer was found not responsible for the breakdown in the interactive process where its suggestions as to possible accommodations were met by silence on the part of the employee.)



What Should You Do?

Provide Training

Employers should provide education on how to handle requests for an accommodation

In the 1991 Interpretive Guidance on the ADA, the EEOC listed the steps an employer should follow to dialogue appropriately (see next slide)



What Should You Do?

Steps to Dialogue Appropriately

- 1) Analyze the particular job involved and determine its purpose and essential functions;
- 2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
- 3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- 4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.



What Should You Do?

Document, Document, Document

Anytime an employee requests an accommodation, the employer and employee should document each step of the interactive process.



What Should You Do?

Documented information should include:

- Precise limitations suffered and supporting documentation
- Accommodation(s) requested and offered
- Pros and Cons to every accommodation requested and offered, including why the accommodation may or may not,
 - (1) address the employee's limitation; or
 - (2) cause a hardship on the employer.
 - Employers will need to be able to address the reasonableness of the accommodations offered.
 - If the employee's preferred accommodation is denied, the employer must document specifically why it was denied.
- Accommodation chosen, including why it was chosen



What Should You Do?

If a current employee was

- previously denied an accommodation request
- because the employer determined the employee was *not* disabled under the ADA's definition of disability,

The employer should review the decision to determine whether the individual is disabled under the ADAAA

The employee should go back to the employer to request accommodations



Additional Notes About the ADAAA

The ADAAA

- eliminates reverse disability discrimination claims (i.e. an individual can not claim they were discriminated against because they do not have a disability)
- does not require employers provide reasonable accommodations for individuals “regarded as” having disabilities.
- retains employers’ ability to define the essential functions of a job,
- still requires an individual be “otherwise qualified” for the position



Questions?



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