

Reasonable Accommodation: The New ADA Focus

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Overview

- ADAAA of 2008 –changed the litigation landscape.
- Most pre-Act cases focused on definition of disability.
- Post-Act focus will shift to other issues, such as reasonable accommodation.
- Fewer summary judgments will be granted.

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Impact of ADAAA

- More plaintiffs will be deemed “disabled.”
 - Easier to prove “Substantially Limits”
 - “Major life activities” now include “major bodily functions.”
 - “Episodic” or “in Remission” Conditions.
 - Mitigating measures not determinative.
 - “Regarded as” coverage broader.

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Impact of ADAAA (continued)

- More disability claims.
- Pre-taliation.
- Fewer summary judgments.

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**“Reasonable Accommodation”
Requirements**

- Definition.
- Policies to address RA requests.
- Identifying RA requests.
- Employer response.
- Interactive process.
- Essential job requirements.

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**Reasonable Accommodations:
Employer Options**

- Making existing facilities readily accessible;
- Acquiring new equipment or modifying existing equipment;
- Job restructuring;
- Changing the work schedule;
- Reassigning a disabled employee to a vacant position because he or she can no longer perform the essential functions of their current position.

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**Reasonable Accommodations:
Employer Options (continued)**

- Changing tests and training materials;
- Changing company policies or creating an exception to company policies;
- Permitting use of accrued paid leave or providing additional unpaid leave;
- Providing reserve parking spaces.

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**Limitations on Reasonable
Accommodations**

- Employer may choose effective option.
- RA must not be “unreasonable” – cannot alter “essential functions.”
- RA must not impose “undue hardship.”
 - Financial difficulty
 - Prejudice, morale

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New Developments

- At the EEOC:
 - ADAAA regulations did not change prior RA regulations, but:
 - Commission is considering new regulations re: leave.
 - June 2011 Conference – EEOC disfavors “no fault” strict leave policies.

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New Developments (continued)

- No fixed date vs. no possibility of return
- Leave administration & ADA decisions – whether to separate?
- EEOC argues that each case should get “individualized assessment” – termination available only due to undue hardship –FMLA limit ignored.

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New Developments (continued)

- EEOC’s view has teeth with big settlements –
 - Verizon - \$ 20 million.
 - Sears - \$ 6.2 million.
 - SuperValu - \$ 3.2 million.
- Automatic termination at expiration of approved leave

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New Developments (continued)

- At the OFCCP:
 - Proposed new 7% disability goal.
 - Required voluntary self-identification.
 - Required outreach listing of vacancies.
 - RA procedures in AAPs.
 - Utilization analyses for disabled applicants and employees.

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Recent Case Law

- Leave.
 - *Ousley v. New Beginnings C-Star Inc.*, 2011 WL 4899950 (E.D. Mo. 2011).

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Recent Case Law (continued)

- Interactive Process
 - *Stockton v. Northwest Airlines Inc.*, 804 F.Supp.2d 938 (D. Minn. 2011).
 - *Wills v. Superior Court of Orange Cnty.*, 194 Cal.App.4th 312 (Cal. Ct. App. 2011).
 - *Reilly v. Upper Darby Twp.*, 809 F.Supp.2d 368 (E.D. Pa. 2011).

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Recent Case Law (continued)

- Job Restructuring.
 - *Muzyka v. Regions Bank*, 2012 WL 243575 (M.D. Fla. 2012).
 - *Johnson v. Board of Trs. of Boundary Cnty. Sch. Dist. No. 101*, 666 F.3d 561 (9th Cir. 2011).
 - *EEOC v. The Picture People*, 684 F.3d 981 (10th Cir. 2012).

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Recent Case Law (continued)

- Job Re-Assignment.
 - *Haynes v. AT&T Mobility LLC*, 2011 WL 532218 (M.D. Pa. 2011).
 - *Day v. Morgan*, 2011 WL 3418521 (D.S.C. 2011).
 - *Nixon-Tinkelman v. New York City Dep't of Health & Mental Hygiene*, 434 Fed.Appx. 17 (2d Cir. 2011).
 - *Jakubowski v. Christ Hosp.*, 131 S.Ct. 3071 (U.S. 2011)
 - *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190 (7th Cir. 2011).
 - *EEOC v. AutoZone Inc.*, C.D. Ill., No. 07 C 1154, jury verdict 6/3/11.

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Recent Case Law (continued)

- Commute.
 - *Regan v. Faurecia Automotive Seating, Inc.*, 2012 U.S. Dist. LEXIS 9470 (6th Cir., May 10, 2012)

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Recent Case Law (continued)

- Acquiring new or modifying existing equipment.
 - *Soliday v. 7-Eleven Inc.*, M.D. Fla., No. 2:09-cv-00807, jury verdict 6/23/11.

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Recent Case Law (continued)

- Re-Scheduling
 - *Valle-Arce v. Puerto Rico Ports Auth.*, 651 F.3d 190 (1st Cir. 2011).
 - *Griffin v. United Parcel Serv. Inc.*, 661 F.3d 216 (5th Cir. 2011).
 - *EEOC v. AT&T Mobility Servs. LLC*, 2011 WL 6309449 (E.D. Mich. 2011).
 - *Boitnott v. Corning Incorporated*, 2012 WL 414662 (4th Cir. 2012).

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Tips

- Consider adopting policies for addressing reasonable accommodation requests.
- Document all requests for reasonable accommodations and the response.
- Ask for medical documentation documenting the need for the accommodation.

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Tips (continued)

- Once an accommodation is made, be very leery of removing or modifying it.
- Train and notify new supervisors regarding pre-existing reasonable accommodations.
- Keep all matters regarding the accommodation confidential except for those with a need to know.

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Tips (continued)

- Consider revising “one size fits all” leave policies - a “red flag” for the EEOC. If you maintain such a policy, be sure to provide notice to employees that their leave is expiring, with information about options. This should include:
 - Case-by-case analysis.
 - Train those who administer your leave policies to be aware of your ADA obligations.
 - Keep communication open with employees out on leave.
 - Before termination, review alternatives.

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Tips (continued)

- Create and then periodically review job descriptions setting forth essential functions of your jobs.
- Always ask for, receive and document suggestions from the disabled employee regarding the appropriate accommodation.
- Review all disciplinary decisions carefully for those who have requested reasonable accommodation.

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Questions?

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