The Legal Intelligencer

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Undue Hardship:

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2011-06-14 12:00:00 AM

Recently, the Equal Employment Opportunity Commission unveiled its long-awaited regulations to the Americans with Disabilities Act Amendments Act (ADAAA). These regulations confirmed the expansion of what impairments will qualify as "disabilities" under the Americans with Disabilities Act. Pursuant to these regulations, it is now easier for millions of Americans to establish a disability within the meaning of the ADA, and employers will be less able to challenge whether an employee has a "disability."

In light of the amendments and corresponding regulations, the major focus will now fall on the interactive process and whether an employer can satisfy its mounting burden of demonstrating that an employee's requested accommodation is "unreasonable" or would create an "undue hardship."

The ADA affords a statutory defense to an employer's obligation to provide a reasonable accommodation if the change or modification requested creates an "undue hardship" to the employer. By its nature, if a requested accommodation is not reasonable, then it falls within the parameters of "undue hardship."

"Undue hardship" is defined as "significant difficulty or expense in, or resulting from, the provision of the accommodation" and "refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."

Specifically, in determining whether an accommodation would impose an "undue hardship" on an employer, courts will consider, among other things, the nature and net cost of the accommodation needed, the overall financial resources of the facility and size of the business and "the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business."

The ADAAA did not change the definitions of "undue hardship" or "reasonable accommodation." However, as noted above, litigation will now focus on these definitions as never before. An employer must be mindful that it bears the burden of establishing whether an accommodation is "unreasonable" such that it places a "undue hardship" on the employer's organization and business operations. Courts have made clear that these considerations must be evaluated on a case-by-case basis. If an employer is able to demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business, then the employer is better able to defend its decision not to afford a particular accommodation to an employee.

Although the ADAAA became effective in January 2009, there has been little case law to date which specifically addresses what constitutes an "undue hardship" under the amendments. However, recent cases addressing requests for reasonable accommodation illustrate what the courts consider to be "unreasonable" and are helpful in predicting what the courts will take into account in determining what constitutes an "undue hardship" under the ADAAA.

In *Graham v. Watertown City School District*, the court granted an employer's motion for judgment on the pleadings with respect to a teacher's allegations that a school failed to accommodate her disability when it did not transfer her to another school during the school year. In rejecting her claims, the court held that the teacher failed to identify a vacant position to which she could have been transferred, and, instead, she sought to "swap positions with teachers who had preferable assignments."

Another case is *Smith v. Clark County*, which determined that there was a question of fact as to whether the employee's proposed accommodation — staying in her current non-teaching position — was reasonable when the employer attempted to place her in a teaching position. But see *Davis v. Heraeus Electro-Nite Co.*, which stated that an employer is not required to create a permanent light duty position where that position did not exist previously; and *Walker v. Putnam County*, holding that

the plaintiff's request to be reinstated to a position that had been eliminated was an unreasonable accommodation.

This line of cases suggests that while the creation of a new job position or bumping other employees from their positions may be "unreasonable" as an accommodation, an employer may be required to look to vacant positions within its organization in order to accommodate employees covered by the ADAAA.

The courts have continued to deem an employee's request to have "no contact" with co-workers as an "unreasonable" accommodation under the ADA. For instance, in Theilig v. United Tech Corp., the 2nd U.S. Circuit Court of Appeals held that an employee's requested accommodation of "no direct person to person contact and definitely none with his previous co-workers" was "unreasonable as a matter of law." There, the court reasoned that while there is "no per se rule against a change in supervisor [under the ADA], there is a presumption … that a request to change supervisors is unreasonable."

In doing so, the court cited *Borkowski v. Valley Cent. School District*, holding that the plaintiff's request for no contact with a supervisor was unreasonable as a matter of law; and *Gaul v. Lucent Techs. Inc.*, holding that the plaintiff's requested accommodation to be transferred away from co-workers would impose a wholly impractical obligation on any employer.

The courts have recently noted, however, that a modified work schedule — even when the request is due to an employee's inability to get to work — can be a reasonable accommodation under the ADA. In Colwell v. Rite Aid Corp., the 3rd Circuit found that "if reasonable," the "ADA can obligate an employer to accommodate an employee's disability-related difficulties in getting to work" and a "change in shifts could be that kind of accommodation." Specifically, the 3rd Circuit determined that it was a question for a jury as to whether the employee's request to be scheduled during the day because she was unable to drive at night due to her disability was reasonable.

Similarly, in *Pinegar v. Shinski*, the court determined that there was a question of fact as to whether the employee's request to work from home was reasonable when she alleged that she could perform all of the essential functions of her job from home.

See also *Hoffman v. Carefirst of Fort Wayne Inc.,* which determined that there were questions of fact as to whether the employee's requested accommodation under the ADAAA (working in a home office) created an undue hardship where the employer failed to provide evidence regarding how much the accommodation would cost or whether there were sufficient customers in the area to justify a continuous home office. Requests for modified work schedules or alternative work locations are subject to the same proofs and considerations provided in Section 1630.2(p) of the regulations for "undue hardship" as other requested accommodations.

Finally, where the proposed accommodations would effectively eliminate one or more essential functions of the employee's job, it is likely that courts will support an employer's rejection of those accommodations. In *Griffin v. Prince William Health System*, the court analyzed a plaintiff's lifting restriction when evaluating whether the proposed accommodation of having other employees assist her when she needed to lift more than 40 pounds was reasonable.

In holding that the accommodation was not reasonable, the court noted that plaintiff's testimony and her job description both established that lifting 40 pounds was an essential function of the nursing position and that she was responsible for responding to emergent situations, which included assisting patients who were falling. The court further noted that there was no accommodation that would have allowed the plaintiff to perform this essential function and the plaintiff's proposed request of having other nurses assist was not reasonable, as it would have required the employer to "ensure that other employees perform the essential function of not only their job, but also plaintiff's [job]."

Other cases following the same reasoning include *Cronin v. Visiting Nurses Assoc. of St. Luke's Hospital*, which held that the plaintiff's claim failed where her doctor documented that she was unable to fulfill the "essential physical requirements" of her hospice nursing position and failed to suggest any accommodation that would allow her to fulfill those essential requirements of her position); *Jakubowski v. Christ Hospital Inc.,* determining that the plaintiff failed to provide evidence that he could perform the essential functions of a medical resident when he failed to demonstrate how his accommodation would allow him to communicate with professional colleagues and patients in ways that ensured patient safety.

Accordingly, employers must take the time to carefully evaluate their job descriptions to confirm that the essential functions of the positions are clearly identified. Job descriptions will be an important piece of evidence in establishing that an employee's proposed accommodation, which would eliminate an essential function of the position, would create an "undue hardship" by altering and disrupting the nature and operations of an employer's business.

As can be seen from the foregoing, courts will look at a number of factors to determine whether the provision of a particular requested accommodation constitutes an "undue hardship" for the employer. For instance, courts will evaluate the nature of the employer's business and its size to determine whether an expense is "significant or difficult."

For large, multi-national companies, the bar will be set much higher than for small, local businesses. Large companies with greater resources will undoubtedly be expected to make accommodations requiring greater effort or expense than smaller employers with fewer resources.

Further, financial difficulty is not the only factor considered. Proposed accommodations that are unduly extensive, substantial or disruptive to the point where they alter the nature or operation of the business will likely satisfy the employer's burden to prove "undue hardship." Employers should take note of what courts have found to be "unreasonable" as an accommodation under the Act and guide their decisions accordingly. Failure to take notice of these issues now may have a significant impact on the exposure thatan employer might incur should that employer fail to accommodate an employee's request for an accommodation under the ADAAA.

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