

THE AMERICANS WITH DISABILITIES ACT
AWAKE IN PHILLY COMMUNITY EDUCATION GROUP – APRIL 11, 2001

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Understanding and Interpreting the ADA
So You Can Use It To Your Advantage

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Chapter 1

Overview of Key Points

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Topics

Jurisdiction: Who Is Protected?

Coverage extends to **qualified individuals with a disability**. Under the ADA (a Federal law), an individual is disabled if he/she has a "physical or mental impairment that substantially limits one or more of the major life activities of the individual," or a "record of such impairment," or is "regarded as having such an impairment." [Public Law 101-336, Sec. 3(2)] It is not the name given a condition that qualifies a person as disabled but the limitations extending from that condition at a particular time.

Coverage also extends to all terms and conditions of employment, including application and recruitment. [Sec. 102 (a)(b)] With respect to a particular employment situation, the term "qualified individual with a disability" means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." [Sec. 101(8)]

Pre-Employment Inquiries: Pre-Offer And Post-Offer

- Establishing a comfortable context for the interview;
- Providing an equal opportunity for the disabled applicant to participate in the job application process and be considered for a job;
- Avoiding questions about a person's disability such as its cause, extent, and likely prognosis;
- Focusing on questions that go to the person's ability to perform the functions of a job, including a description or demonstration of one or more functions of the job and an inquiry as to whether the person can carry out these functions. [See the EEOC's regulations at 29 CFR 1630.14, pages B-52/53.]

The general rule is: **IN A PRE-OFFER CONTEXT**, the ADA does not prohibit inquiries that are not likely to elicit information about a disability but that may reveal the existence, nature or severity of a disability. Where a legal inquiry inadvertently reveals such information or the applicant volunteers such information, the employer is prohibited from following up such disclosures and asking further questions about the applicant's disability. Where the applicant is asked a question directed to his/her ability to perform a job function "with or without a reasonable accommodation," and the applicant affirms such an ability but also makes clear that a reasonable accommodation would be needed, the employer may ask what type of accommodation would be needed. In fact, whenever an employer reasonably believes that an applicant may need accommodation (be-

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cause of an obvious disability that reasonably relates to some essential function of a job or because of a hidden disability which the applicant reveals to the employer and which it reasonably believes relates to an essential function of a job), it may ask whether an applicant will need an accommodation and what type of accommodation may be needed. The employer is not permitted to reject an applicant based upon the need to provide an accommodation or what it speculates will be the cost or difficulty of the accommodation.

IN A POST-OFFER CONTEXT, an employer may condition its bona fide job offer upon successful completion of a medical examination, provided all entering employees in the same job category are subjected to the examination. Similarly, where the examination or the earlier interview or a specific request from the person hired brings out the need to explore a reasonable accommodation, an employer may at that time explore the nature and severity of the person's disability in order to determine the most feasible type of accommodation. [EEOC Regulations at 29 CFR 1630.14, pages B-54/56]

The information collected as part of the post-offer medical examination or any other subsequent medical record created for an employee (whether disabled or not) must be kept confidential and in a place apart from the non-medical portions of the employee's personnel file. However, as necessary, appropriate medical information can be shared with the employee's supervisors, managers, first-aid and safety personnel, government officials investigating ADA compliance and state worker's compensation offices, second injury funds or worker's compensation insurance carriers in accordance with state worker's compensation laws. Finally, medical information about employees can be used to help the employer's insurance carrier carry out its normal risk assessment practices. [See EEOC Guidance on Pre-employment Inquiries Under the ADA.]

IN THE EMPLOYMENT CONTEXT, an employer cannot require a medical examination of an employee or inquire of an employee whether (s)he has a disability or inquire about the nature or severity of the employee's disability unless such an examination or inquiry is job-related and consistent with business necessity. In general, an examination or inquiry would be permitted where it was part of a reasonable accommodation attempt or a direct threat assessment (see below) or was caused by actual problems with an employee's performance or a need to assess the condition of an employee returning from a period of extended medical absence or leave. [Sec. 102(d)(4)(A)]

Reasonable Accommodation: When Does It Arise? What Does It Involve?

Reasonable accommodation arises in the context of "making existing facilities used by employees readily accessible to and usable by individuals with disabilities...." and in the context of making changes in the way persons apply for a job or carry out work such as "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations...." [Sec. 101(9)]

The obligation to attempt a reasonable accommodation arises when you become aware of a need for accommodation that is grounded in the applicant or employee's disability. In most instances, the employee/applicant must request an accommodation ("notice" and "need").

The reasonable accommodation process is unique to each case but its general structure is outlined in the attached excerpt from EEOC's regulations. (29 CFR 1630.9) (Pages B-43 to 46). The

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process anticipates that the employer will consult with the employee in a mutual effort to establish a suitable accommodation. The employer must understand the “essential functions” of the position. The employee must be able to perform such functions with or without an accommodation. The essential function is often different from the means of accomplishing that function. Non-essential functions can be removed from the job requirements. The expectation is that the accommodation will be directed towards the job currently held by the employee. If it is impossible to arrange a suitable accommodation within that job, the employer must then transfer the employee to another position, without competition, if there is a current or projected vacancy for which the employee is qualified. Placing an employee in a “light duty” assignment is not a requirement under the ADA and may actually violate the ADA. An employer is not required to modify productivity-related requirements or leave policies.

The obligation to provide a reasonable accommodation is contingent upon the feasibility of doing so and the absence of a conflict between the requirements of the ADA and another Federal law. If provision of the reasonable accommodation would require “**undue hardship**” (**significant difficulty or expense**), it does not have to be provided. [Sec. 101(10)]

Direct Threat: What Is It? How Is This Affirmative Defense Established?

A person can be disqualified from holding a position where the individual poses a “direct threat to the health or safety of other individuals in the workplace.” [Sec. 103(b)] A direct threat is a “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” [Sec. 101(3)]

To establish that a direct threat exists, the covered entity proves by current, competent, and reliable evidence that, with respect to the individual person and the particular job at a particular time, there is a high probability of substantial harm to the individual or others. The covered entity considers four factors to measure the harm:

- The duration of the risk
- The nature and severity of the potential harm
- The likelihood that the potential harm will occur
- The imminence of the potential harm.

And, finally, once the magnitude of the risk has been established, the covered entity considers whether reasonable accommodation would reduce the level of risk to the point where it is no longer “significant” or would eliminate the risk entirely. [See the EEOC’s regulations, 29 CFR 1630.2(r), pages B-28/29.]

Employer Benefits Such As Health And Life Insurance

If an employer provides insurance or other benefit plans to its employees (including jointly administered employer-union welfare plans), it must provide the same coverage to its employees with disabilities. Disabled employees must be given equal access to the benefit plans. An employer may not deny insurance to an individual with a disability or subject the individual to different terms of insurance based on disability alone. An employer may not fire or refuse to hire an individual with a disability because the employer’s current health insurance plan does not cover his/her disability or because he/she may increase the employer’s future health costs. Nor can the employer legally fire or refuse to hire any individual because one or more of his/her family members or dependents have a disability not covered by the employer’s health insurance plan or that may increase the employer’s future health care costs.

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On the other hand, an employer (whether self-insured or providing health insurance through an insurance carrier) may provide coverage in a manner that is consistent with basic, accepted principles of risk classification, even if this results in limitations in coverage to persons with disabilities. In other words, assuming that such restrictions are not being used as a subterfuge to evade the purposes of the ADA, an employer's health insurance plan may contain a "pre-existing condition" clause, may limit coverage for certain procedures or treatments to a specified number per year or limit reimbursements for certain types of drugs or procedures. [See section 7.9 from EEOC's Technical Assistance Manual.]

With respect to health insurance alone, certain disability-based distinctions are permitted. First, not all coverage distinctions are disability-based. For example, a given plan may provide lesser care for all "nervous/mental" conditions. Because the category "nervous/mental conditions" applies to the treatment of a multitude of dissimilar conditions affecting persons both with and without disabilities, it is not normally a disability-based distinction. By contrast, a distinction that singles out a particular disability (deafness, AIDS, schizophrenia), discrete groups of disabilities (cancers, muscular dystrophies, kidney diseases), or disability in general (i.e., all substantial impairments to one or more major life activities) are disability-based distinctions.

Where the plan contains one or more disability-based distinctions, the employer (or joint plan administrators) must prove that the plan is a bona fide insurance plan that is not inconsistent with state law (or, if self-insured, is not inconsistent with basic, accepted principles of risk classification) and must prove that the plan is not being used as a subterfuge to evade the purposes of the ADA. "Subterfuge" in this context refers to distinctions in coverage not justified by the risks or costs associated with the disability. Proof concerning the risks or costs associated with the disputed coverage will normally include proof that the distinctions incorporated into the plan are necessary in the sense that no non-disability-based changes in coverage exist which would maintain the plan's fiscal soundness without a drastic increase in premium payments, co-payment charges, deductibles or the scope of coverage or level of benefits generally.

General Information:

Questions about the ADA can be directed to the EEOC at any time. Within the Philadelphia District (Pennsylvania, West Virginia, New Jersey or Delaware), you may direct such calls to Edward McCaffrey at 215/451-5732 [215/451-5814 (TDD)]. You should also consider sources of information such as State Vocational Rehabilitation Agencies as well as the Job Accommodation Network [800/526-7234 (voice or TDD)] and the President's Committee on Employment of People with Disabilities [202/663-6200 (voice) 202/376-6205 (TDD)]. Also, many disability groups have specific information related to a particular disability as well as regarding possible accommodations related to that disability.

The EEOC will provide you with one free copy of its Technical Assistance Manual and each of its policy statements on the ADA. To obtain any of this material, call 800-669-3362 and identify the publication you want. [800-800-3302 (TDD)]

Questions concerning public services or public accommodations (Titles II and III of the ADA) may be addressed to the U.S. Department of Justice by calling its Hotline number, which is 800-514-0301 [800-514-0383 (TDD)].

Chapter 2

DIRECT THREAT ASSESSMENT

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Assessing the threat

- Each assessment is unique. That is, one cannot establish general rules but must rely on good technique to reach a valid outcome.
- Good technique first demands that the assessment be individualized. Individualizing an assessment means looking at the individual applicant/employee. Do not treat the individual as an example of a type of person but find out about and consider the ways in which his or her impairment impacts on him/her individually.
- Two key indications that the person is being assessed as an individual are that the assessor inquires from the person and/or his/her caregiver about the impact of the impairment on the person and, secondly, that the assessor inquires about the person's work history. In general, the more the assessor assumes about the person, the more the assessment seems to be based upon stereotypes and speculation. A threat assessment based on or significantly affected by stereotype and speculation is not likely to be considered a valid assessment.

While EEOC encourages the assessor to learn as much as is needed about the applicant or employee's limitations, remember that the assessor has a right only to a reasonable amount of information about the person. In the context of a direct threat assessment, this means that the assessor can legitimately seek information about the person's impairment that relates to the demands of the job the person holds or seeks. Thus, for example, a person with a psychiatric disability will have unique aspects to his condition (such as his reliability with respect to medication, frequency of depressive episodes, past reaction to job stress, and so forth) which the assessor can legitimately inquire about because they can help the assessor relate the person to the demands of the job. But it would be inappropriate to request a copy of all the person's treatment records or to inquire about the cause of the person's condition or other information not reasonably related to the task of matching the person to the job in order to gauge the threat to his safety or that of others.

The second hallmark of good technique is reliance upon current, competent, and reliable medical evidence or its best equivalent. Not only will the person's impairment impact in a unique way upon the person which the person and caregiver can explain but the caregiver or other expert can explain things like the latest scientific thinking with respect to the person's impairment, prognosis for improvement/regression and factors tending to make the limitations associated with the impairment better or worse.

In many instances, it will be necessary to re-examine the job the person seeks or holds in order to compare his/her limitations to the demands of the job. The assessor will be better able to

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defend the threat assessment if the assessor takes the time to determine how the job held or sought is actually performed. Relying on a job description (which often is significantly incomplete or inaccurate) may undermine the assessment. The assessor might want to check on which tasks are really performed unassisted, on environmental factors such as smoke, poor lighting, extreme temperatures and on “tricks of the trade” used by incumbents on the job to reduce/alter the demands of the job.

It will also normally be necessary to determine the true demands of the job sought or held because good technique also requires that the assessor consider the effect of reasonable accommodation on the threat posed by placing the person in the job. Can the threat be reduced to acceptable levels by means of one or more reasonable accommodations?

To consider the possibility of reasonable accommodation properly, it is necessary to determine which functions of the job are marginal and which are essential. Marginal functions might be removed from a given job. Essential functions need not be removed but might be done in a different manner by the person with a disability. Actually revisiting the way the job is done may enable the assessor to visualize certain accommodations or to describe the true job conditions to a third party like the Job Accommodation Network from whom advice on accommodations might be sought or simply to particularize the assessor’s dialogue with the person she is assessing so that the possibility of accommodation is explored in specific terms.

THE GOAL OF A DIRECT THREAT ASSESSMENT

The goal of a direct threat assessment is to determine whether placing or keeping an individual in a particular job creates a high probability of substantial harm that cannot be reduced to an acceptable level via reasonable accommodation.

To make such a determination, the assessor must determine

THE NATURE OF THE RISK – What is it that will happen?

THE DURATION OF THE RISK – When and for how long is the risk present, and under what circumstances? If emergency conditions are a concern, when and how often and in what ways are emergencies likely to occur?

THE LIKELIHOOD OF THE RISK OCCURRING – How likely is it that the risk will ever occur?

THE IMMINENCE OF THE RISK – How likely is the risk going to occur soon or within the reasonably foreseeable future?

Once the risk has been properly determined, the assessor must explore the effect of reasonable accommodation on the nature or probability of the risk’s occurrence.

The most frequent error in risk assessment is to turn the assessment on its head. Instead of ascertaining that there is a high probability of substantial harm, the assessor determines that there is a one-in-a-million chance of the risk occurring and that, if it occurs, it will create significant harm. For example, the assessor may be considering the threat posed by placing an applicant with a history of coronary problems in a security guard job. The assessor knows that the guard might have to chase and restrain an intruder but instead of determining how often and un-

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der what circumstances this kind of activity occurs, the assessor reasons, "Once is too often, the applicant might kill himself chasing the intruder." The applicant is viewed as a direct threat to his safety and that of others and is rejected. The failure to gather detailed information about the applicant's physical capacity, the effect of intervening surgery or therapy and similar information combined with the failure to determine whether there are postings within the facility where such stressful crises have never occurred or are unlikely to occur or whether such crises have, in fact, ever occurred will undermine the validity of the disqualification of this applicant.

Another common scenario involves a person who, in fact, has no impairment that substantially limits any major life activity but the assessor regards the person as substantially impaired and makes an inappropriate employment decision. For example, suppose a person with a hernia applies for a job. The assessor makes a job offer to the person, requires the person to undergo the normal medical examination for persons entering that job, learns that the person has a hernia, believes that all such persons are likely to injure themselves, is worried this will drive up the company's insurance costs and rejects the person. In this scenario, the assessor may well have violated the ADA because he has decided that the hernia is a serious condition affecting the person's ability to lift or do some other part of the job and may regard the person as unfit for an entire class of jobs such as laboring jobs. The assessor has not inquired about the person's condition, has not re-examined the job the person seeks and has not considered the effect(s) of accommodation, assuming the hernia is in fact a substantially serious condition.

Chapter 3

REASONABLE ACCOMMODATION: DISABILITY-BASED

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Who Is Covered Under The ADA?

By way of general background to any reasonable accommodation question, I note that, under Federal law, if an employer has 15 or more employees, the Americans with Disabilities Act presently covers that employer. (ADA) Where a Qualified Individual with a Disability (QID) requests a reasonable accommodation, the employer must attempt to accommodate the employee/applicant. To be “qualified,” a person must possess whatever the formal qualifications for a job are (specific education, experience, proven ability of some sort and so forth). To be an “individual with a disability”, a person must presently have a substantial impairment to one or more major life activities, a history of same, or be regarded as having same. Neither the term “substantial” nor the term “major” is defined by the ADA. In order to determine whether a person presently has a substantial impairment, we look to the limitations extending from the condition a person has rather than the condition itself. For example, in a group of ten persons with Parkinsonism, only those whose limitations are substantial are disabled under the ADA. Furthermore, temporary disabilities are not covered. Generally speaking, most state laws are not interpreted in the same fashion. Thus, where a person has limitations that are transitory or possibly insubstantial, that person should contact the relevant state agency to file a claim.¹

Supposing we have a QID, the next step calls for the QID to put his or her employer on

¹ Normally, a person needs help because of a present and substantially limiting impairment but the person may need help because of the consequences of an earlier condition that does not now substantially limit him. An example would be a person who earlier had leukemia which is in remission but who needs to avoid certain fumes lest they compromise his immune system. Normally, a person who is disabled only because the employer’s representative perceives her as disabled does not need any accommodation except a change in the perceptions of the employer’s representative. For example, the person has a cosmetic disfigurement or has essential hypertension but the employer has stereotypical fears about customer preference or inflated health-care costs such that its representative regards the person as substantially impaired.

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notice that there is a need for an accommodation.² At this point, if the employer ignores or effectively ignores the request, it has violated the ADA. The employer has a responsibility to meet or communicate with the person and begin a dialogue designed to explore the possibility of an accommodation. On the other hand, the employer (as appropriate to the situation) has a right to gather reasonable information about the person making the request. Reasonable information is defined as job-related information needed to determine whether the person is an individual with a disability. Information is job-related if it goes to establishing whether the person has or had a disability and what limitations the person may experience as a consequence of the disability which may conflict with the requirements of the job as it is normally done.³ When seeking such information, the employer's representative(s) will normally speak with the person and may lawfully require the person to be examined or lawfully require the person's caregiver to provide such information. In this way, an employer might eventually determine that a person is not disabled and deny the request. As in all the scenarios I present here, the person may disagree with his/her employer's decision and contest the decision via a charge with the EEOC.

Alternatively, a request for accommodation that is not grounded in the person's disability is not protected. Therefore, the employer may examine the person's request and conclude that, while the person is a QID, the requested accommodation is a matter of personal preference rather than a need driven by the person's disability-based limitations. For example, a QID might request the creation of a "handicapped" parking space near the door of the plant or a reserved space for him near the door. If the QID is mobility-impaired the request is grounded in his disability-based limitations. If the QID merely seeks to park closer to the door for reasons that cannot be tied to his disability, his request can lawfully be denied.

After exploring the person's limitations and the behavioral demands of the job (i.e., the physical and emotional abilities required to carry out the essential functions of a job), the

² There are certain exceptions to this statement. Where the employer's representative believes that placing or continuing the person in a particular job would create a direct threat to the person's safety and/or that of others, the employer must consider (without a request from the person) the extent to which the threat can be reduced to an acceptable level by reasonable accommodation as part of its threat assessment. Secondly, where any qualification an employer uses to reject a person for a particular job causes the person's rejection because of his/her known disability, then the employer must be able to show that the qualification is job related and consistent with business necessity and (again without a request from the person) must consider whether a reasonable accommodation exists which would enable the person to meet the qualification. Thirdly, the request for accommodation can come from a representative of the individual with a disability (such as a family member or health professional). Finally, where the person's specific disability (e.g., mild retardation) acts by its nature to prevent the person from being able to articulate his/her needs under the ADA, the employer is expected to explore reasonable accommodation (without a request) where its representative observes performance difficulties that might be linked to the person's disability. The employer should proceed cautiously in such an instance, however, in order to avoid the appearance of paternalism. That is, where it is reasonable to expect the person to be able to articulate his/her need for an accommodation, the employer should wait for a request rather than "pressure" the person to discuss an accommodation.

³ The Supreme Court has instructed us that we are to consider the whole person when deciding whether (s)he is presently substantially impaired. This means that we take into consideration the positive and negative effects of any medications or assistive devices the person uses as well as bodily adjustments the person has made to her impairment which improve function.

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employer then is able to isolate the areas where there is friction between what the person can do and what the job demands. It may conclude that there are no areas of friction and, thus, that there is no need for an accommodation.

Assuming there are areas of friction, the employer's burden is to seek out information about assistive devices, workplace modifications, scheduling changes, and the like in order to arrive at an accommodation. Generally, the employer is required to offer an accommodation that creates an equally effective opportunity for the person to attain or retain his/her particular job. For example, an accommodation that would not allow the person to meet the employer's quantitative or qualitative performance expectations is not an effective accommodation. The "higher" the employer's performance expectations the more carefully it must craft its accommodation in order to provide an effective accommodation. Where there would exist two or more effective accommodations, the employer is free to offer the accommodation it prefers rather than agree to the person's preference (assuming there is any conflict in this respect).⁴

If, based upon the information it gathers as part of the accommodation process, the employer concludes that it would be significantly expensive or significantly difficult to provide an effective accommodation, it is not required to provide any accommodation. If challenged, the employer must prove significant difficulty or expense to an agency like the EEOC or to a court. There are a number of factors entering into any "expense" defense. The overall economic resources of the employer will either raise or lower the significant cost threshold. There is no generally agreed upon method of measuring an employer's economic resources. For example, one might choose gross volume of business, gross asset value, net profits, magnitude of discretionary spending for items unrelated to accommodation and the like. Secondly, the cost of an accommodation might be lowered by taking advantage of one or more tax credits or by having a State vocational rehabilitation agency or similar organization provide all or some of the cost. Architectural changes can be considered to add to the value of a facility and their cost amortized over time. A given accommodation (such as strobe fire alarms) might benefit more than one employee (the EEOC will divide the cost by the expected number of beneficiaries over some reasonable time). And so on. In fact, it is lawful for the employer (assuming the cost of an accommodation has been accurately calculated in light of the tax credits and other considerations mentioned above and assuming the cost is "significant" in light of its economic resources), to approach the person and give him/her the opportunity to defray enough of the cost of accommodation to bring the cost down to a feasible level.

⁴ The situation is somewhat different in an application setting. Where an applicant would need an accommodation to gain access to an employer's facility or to be interviewed or to take an employer's entrance examinations (including a physical agility test) or to demonstrate certain job-related abilities, the applicant is expected to give the potential employer notice of the need for accommodation. The employer is not expected to provide an immediate accommodation (unless this is feasible) but rather is given a reasonable amount of time to arrange for the accommodation.

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For these reasons, the EEOC anticipates that defenses based on cost will frequently be unsuccessful.

There is no statutory definition of significant difficulty but the law references the “nature” of the accommodation, the number of persons employed at the facility where the accommodation is being considered, the impact of the accommodation on the operation of the facility, the potential for accommodation at other facilities of the employer, the composition, structure and functions of the workforce at the facility, and the geographic separateness of the facility. To build on this, consider that the employer does not have to alter its quantitative or qualitative performance standards in order to accommodate the person. Thus, it appears that an accommodation that would negatively impact upon the ability of one or more coworkers to accomplish the employer’s performance standards might well constitute significant disruption to the employer’s operation. Put differently, an employer might successfully argue that the only effective accommodation, which would enable the person to hold the job, would also diminish the ability of coworkers to perform their jobs at the expected level of performance. Other successful defenses might center on the fluid nature of the jobsite (e.g., a movie set or a construction site) or the effect of a given accommodation on the systems used by the employer to track production, distribute equipment, or carry out its operations in the most profitable manner.

In other words, accommodations that demand wide scope or systemic alteration to an employer’s way of doing business might be more successfully defended as too “difficult.”

With respect to employees (and not applicants), there is an additional consideration. If the employer concludes that (absent the burden of an undue hardship) there is no feasible, effective accommodation that would enable a QID who is already employed to retain his/her particular job, then, as a final step in the accommodation process, the employer must consider reassignment of the employee to a position that is vacant or about to become vacant, provided the QID is otherwise qualified to perform the essential functions of the vacant job(s) with or without a reasonable accommodation.⁵ The EEOC believes the employer has the obligation to search its database to uncover such expected or actual vacancies and it is not appropriate to require the person to find a vacancy for him or herself. Finally, the EEOC

⁵ The ADA distinguishes between functions of a job that are essential to the job and those that are marginal to the job. The same function can be essential in one context and marginal in another, depending on the ability of coworkers to take over the function or the other resources of the facility doing the accommodating. If the areas of friction between what the job requires and what the person is able to do center on functions that are marginal to the job, reasonable accommodation might well include transfer of these marginal functions to other workers and the allocation of other functions to the person that the person is able to do. This is called job restructuring. Finally, even with regard to an essential function, the EEOC distinguishes between the object of the function and the manner and timing with which the object is attained. Frequently, the objective of the function is essential but the way the objective is accomplished can be accommodated. Reasonable accommodation never requires transfer of an essential function but it can involve alteration of the way the function is accomplished.

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believes the person should be placed into the vacancy without regard to other “rules” that may govern the filling of vacancies. In our opinion, the vacancy disappears, as a “vacancy,” once reassignment is in the picture. Whatever rules govern the way a “vacancy” is filled is irrelevant. This can be important in a civil service environment. Reassignment may bring the employer into conflict with its collective bargaining agreement (CBA) because the person being reassigned does not have enough seniority to compete successfully for the position that is “vacant.” In such a situation, the employer and union frequently work out an understanding that avoids a direct conflict and facilitates accommodation. If there would be a conflict, however, probably a Federal court would have to decide which rights were paramount, those created by the ADA or those created by the CBA. The Third Circuit (covering the states of Pennsylvania, New Jersey and Delaware) has ruled in *Kralik v. Durbin* that “an accommodation to one employee which violates the seniority rights of other employees in a collective bargaining agreement simply is not reasonable.” (130 F.3d 76,83)

There are many other aspects to the reasonable accommodation process that are too numerous to treat here.⁶

⁶ For example, the cost of accommodation cannot be gauged by reference to the wage or salary of the person being accommodated.

Secondly, while the process of attempting a reasonable accommodation is generally triggered by a request from the applicant or employee, “the employer must notify applicants and employees of its obligation under this legislation to make reasonable accommodations.” (Report of the Committee on Education and Labor) Thus, failure to request a reasonable accommodation might not be material in a situation where such notice was not provided.

Another frequent problem can arise with respect to the interplay between “light duty” and the accommodation duty. While both the person and the employer may agree to deal with the need for accommodation through a “light duty” assignment, technically a “light duty” assignment does not constitute an attempt to enable a person to attain or retain a particular job and thus is not an accommodation. It is a way of deferring the accommodation burden for a period of time in an attempt to eliminate the need for accommodation at a later date. Thus, the employer may put an employee in a light duty assignment while the employee engages in a program of therapy to regain the physical ability to return to the job without an accommodation. In such a situation, if the need for therapy would become indefinite in duration and the employer is unwilling to retain the person in a light duty assignment indefinitely, the next step would not properly be termination but a bona fide attempt to accommodate the person.