



*Oklahoma Attorney General Scott Pruitt's  
Office of Civil Rights Enforcement Presents*

## **DISABILITY EMPLOYMENT LAW CONFERENCE**

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*25<sup>TH</sup> Anniversary of the Americans with Disabilities Act*

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*10.20.2015*

*A charitable event benefiting Oklahomans with disabilities and Oklahoma employers by offering practical strategies for successfully employing people with disabilities in compliance with disability employment laws.*

**[How to Navigate the Interactive Accommodation Process for an Individual with a Physical Disability]**

**Charlie Plumb & Courtney Bru/ McAfee Taft**

## Charlie Plumb

Charlie Plumb represents management in all phases of employment law and labor relations. Much of his practice is dedicated to counseling employers on compliance with a broad range of state and federal employment laws and regulations and educating management on best practices for avoiding disputes arising from the employer/employee relationship. He also has extensive litigation experience before federal and state courts, regulatory and administrative agencies, and in arbitration matters involving claims of discrimination, wrongful discharge, retaliatory discharge, breach of contract, and constitutional law violations.

As part of his labor practice, Charlie represents unionized employers in collective bargaining negotiations with labor unions, arbitrates grievances, and defends management against a variety of claims before the National Labor Relations Board and Department of Justice and in state and federal courts. He also represents employers who seek to maintain a non-unionized workforce by counseling management on union avoidance strategies and by providing training and advice to management and supervisors. His clients include numerous municipalities throughout Oklahoma and companies engaged in the manufacturing and distribution, construction, energy, public utility, technology and business services industries. Charlie has previously served as leader of the firm's Labor and Employment Group, one of the largest of its kind in the region. He is a member of the American Bar Association's Labor and Employment Law Section and the Oklahoma Bar Association's Labor Council. He is also the designated representative of McAfee & Taft as the exclusive member firm representing Oklahoma in the Employers Counsel Network, a nationwide affiliation of leading law firms providing legal assistance and representation to employers.

Charlie is a frequent speaker on labor and employment issues before state, regional and national audiences, has been interviewed by local and national media on a variety of state and federal employment law matters, and has been a guest legal columnist and contributing author to numerous business and professional publications, including *The Oklahoman*, *The Journal Record*, *HRLaws.com*, and *EmployerLINC.com*, a legal blog dedicated to employers and workplace issues. He is also co-editor of the *Oklahoma Employment Law Letter*, a monthly review of new court decisions, regulations and laws that affect state employers, as well as co-editor for the Oklahoma section of the annual guidebook for employers and human resources professionals, *50 Employment Laws in 50 States*.

Charlie's achievements have earned him inclusion in *The Best Lawyers in America* (employment law – management; labor law – management; labor and employment litigation), *Oklahoma Super Lawyers* ("Top 50 Oklahoma Lawyers"), *Benchmark Litigation* and *Chambers USA Guide to America's Leading Lawyers for Business*, where he has been lauded as "an impressive public speaker who utilizes his vast experience to effectively defend clients." Researchers at Chambers & Partners also quoted market observers as admiring him for his "practicality of advice and specialized knowledge of complex legal issues," with sources commenting that he "immediately commands respect, is always up to date and knows how to handle a problem." He was named by *Best Lawyers* as the "Tulsa Labor and Employment Litigation Lawyer of the Year" in 2012 and "Tulsa Labor Lawyer of the Year (Management)" in 2014, honors only given to a single lawyer in each legal specialty in each community.

## Courtney Bru

Courtney Bru's practice is focused on the representation of employers in state and federal labor and employment matters and other issues affecting the workplace. In addition to having extensive experience representing management in all phases of litigation before state and federal courts and regulatory and administrative agencies, a significant portion of her practice is devoted to counseling and training management and human resources professionals on the best practices for reducing risk, avoiding litigation, and maintaining a productive workforce.

Courtney has extensive experience representing local, regional and national clients with respect to claims and potential claims arising from the Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA), National Labor Relations Act (NLRA), Title VII of the Civil Rights Act of 1964, wage and hour issues arising under various state laws, and discrimination and retaliation issues arising under various state and federal laws. In addition, she frequently assists employers with day-to-day issues, including interviewing and hiring, discipline and termination, employment and nonsolicitation agreements, workplace policies and handbooks, drug and alcohol testing, employee classification, internal investigations, audits by state and federal agencies, anti-harassment and anti-discrimination training, reductions in force, and severance programs.

In addition to her employment practice, a portion of Courtney's practice is devoted to commercial and civil litigation in state and federal trial and appellate courts. She has represented numerous clients in cases involving negligence, breach of contract, fraud and bad faith.

Courtney's achievements have earned her inclusion in *The Best Lawyers in America* (employment law – management; labor and employment litigation), *Oklahoma Super Lawyers* and *Chambers USA Guide to America's Leading Lawyers for Business*, where she was praised for her understanding of the business environment and for her "good response time and knowledge of the field." Researchers also noted her extensive litigation experience, as well as her specific expertise in the handling of wage and hour issues.

Courtney is a contributing author and co-editor of the *Oklahoma Employment Law Letter*, a monthly review of new court decisions, regulations and laws affecting Oklahoma employers. She is also a frequent speaker on labor and employment topics before employer groups, industry professionals, and state and local bar associations.

Courtney began her career as an associate with the Atlanta office of Littler Mendelson and, more recently, was a partner of a Tulsa-based law firm, where she also served as leader of its Employment Law Practice Group.

# Special thanks to our co-sponsors!



A photograph of two women in a professional office environment. The woman on the left is standing and smiling, wearing a light blue short-sleeved button-down shirt and a light-colored skirt. The woman on the right is seated in a wheelchair, wearing a light grey long-sleeved button-down shirt and grey trousers. They are shaking hands across a desk. In the background, there are large windows with blinds, showing a cityscape. The overall scene is bright and positive.

**Navigating the interactive  
accommodation process  
for physical disabilities**

# 2015 Disability Employment Law Conference

October 20, 2015



**Courtney Bru**  
courtney.bru@mcafeetaft.com



**Charlie Plumb**  
charlie.plumb@mcafeetaft.com



# What is an employer's obligation to accommodate?

- Reasonably accommodate an employee's **"disability"**
  - ✓ Expanded definition of physical "disability"
    - C.F.R. § 1630.2
  - ✓ Obligation applies to applicants and employees
- EEOC Strategic Enforcement Plan (FY 2013-16): focusing on employer's reasonable accommodation obligations



# What is an employer's obligation to accommodate?

- Not required to provide an accommodation, if it imposes an **undue hardship**
  - The employer bears the burden of proving undue hardship
    - Nature and extent of costs
    - Size of the employer and the facilities
    - Operational impact

42 USC § 12112(b)(5)(A)

42 USC § 12111 (10)

29 CFR § 1630.2(p)(2)



# What is an employer's obligation to accommodate?

## ■ Direct threat

- A significant risk of substantial harm to employees' health or safety that cannot be eliminated or reduced by reasonable accommodation
- Employer must prove – stiff burden
  - Risk to an individual or others in the workplace
  - Individual and objective assessment – not assumption, perception, stereotype or fear

42 USC § 12111(3)



# What triggers the interactive process?

- When the employer has notice or becomes aware of an employee's disability
  - Does not need to use a special or technical language
  - Does not need to be in writing
  - ✓ - With notice of a potential disability, it becomes the employer's responsibility

29 CFR § 1630.2 (o)(3)



# What triggers the interactive process?

- Employee requests accommodation or need for an adaptation to work
- Employer receives medical information
  - *Gilreath v. Cumberland Cnty Bd. Of Educ.*, (E.D.N.C. 7/31/14) School Band Director with ADHD requests accommodations and offered a letter from his physician. The medical information was insufficient to support the Band Director's request for accommodations; however, under ADA, the Principal and School Board were obligated to explain the inadequacies and allow the Band Director a chance to supplement.



# What triggers the interactive process?

- Employee confides in co-worker or supervisor
  - *Cole v Cobb Cnty School Dist.*, (N.D. Ga 9/12/14)  
School teacher on leave for paranoid delusions sent email to School District Benefits Manager: “I need paperwork and what I need to do to move schools.” Insufficient to be treated as an accommodation request. No discussion what limitations, duration, a need for accommodation (e.g. reassignment).



# What triggers the interactive process?

- Workplace observation of employee's difficulty performing job
  - *Barfield v Donahoe*, (N.D. Ill. 9/17/14) Mail processor suffering from depression and anxiety had extended absences from work (cumulatively 4 months) and submitted notes from her doctor – “she is totally disabled.” Employer on notice of accommodation and leave issues. Employer required to initiate discussions with employee.



# “Interactive process” basics

- General rule – it is mandatory
  - “The obligation to engage in an interactive process is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee.” *Valdez v. McGill*, 462 Fed. Appx. 814 (10th Cir. 2012).
  - “Typically indispensable.” *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999)



# “Interactive process” basics

- It is “interactive”
- Flexible and informal
  - Interactive discussion of potential accommodation is handled on case-by-case basis depending upon the disability, job and work environment. Mandatory, standard forms are discouraged by the EEOC. *EEOC Discussion Letter* (4/22/14).
  - “The exact shape of this dialogue will necessarily vary from situation to situation and no rules of universal application can be articulated.” *Bartee v. Michelin N. Am., Inc.*, 374 F.3d 906 (10th Cir. 2004).



# “Interactive process” basics

- Information-gathering process – can include requiring medical information or documentation
  - *Backhaus v. General Motors, LLC* (E.D. Mich. 9/22/14)  
Forklift driver who is blind in one eye passed a depth perception and acuity test. Rather than basing decision on conclusory assumptions, GM should have tested employee in actual work environment to see if he could operate a forklift safely in the actual work environment.



# “Interactive process” basics

- Requires good faith participation by both employer and employee
  - *Leukiewicz v Castro* (D.D.C. 7/31/15) Employee made a series of requests for accommodation, including a change of office location and/or telecommuting. Her employer requested additional medical documentation, which was not provided, and the employer denied the request.
  - A jury will decide whether the employer or the employee was responsible for the breakdown in the interactive process.
- Must occur “expeditiously”
- Information gathered during the interactive process is confidential



# “Interactive process” how-to’s

- Face-to-face, with two employer representatives participating
- Address only the medical condition at issue – known, observed, disclosed
- Address only the behavior, symptoms at issue – known observed, disclosed
- Discuss the nature, extent, severity and duration of any impairment, in sufficient detail
  - *Bartee v. Michelin N. Am., Inc.*, 374 F.3d 906 (10th Cir. 2004): failure to “identify precise limitations,” inquire as to restrictions or discuss accommodations may result in liability under the ADA



# “Interactive process” how-to’s

- Solicit multiple accommodation suggestions from the disabled individual
  - *Osborne v Baxter Healthcare Corp.* (10th Cir. 8/24/15): Deaf applicant for plasma center technician position could not hear audible alarms on plasma machine or verbal requests from donors. As an accommodation, applicant proposed installing visual or vibrating alerts and providing call buttons to donors. Burden on employer to establish the proposed accommodations would pose an undue hardship.
- Entitled to seek medical documentation about an employee’s disability and functional limitations (if not obvious)



# When seeking medical documentation

- Limited to the medical condition at issue
  - *Doby v Sisters of St. Mary and Ore. Ministries*, (D. Ore 8/11/14)  
Employer entitled to request a fitness-for-duty evaluation before preschool teacher with an obsessive compulsive disorder could resume teaching.
- Ask about the nature, severity, duration and limitations. Provide a description of the job's essential functions.
  - *Budhan v. Reading Hosp. and Med. Ctr.*, (3rd. Cir. 8/27/14)  
Assistant prevented from returning to work by employer, although doctor authorized her to resume her job while three fingers in her right hand were splinted. May amount to the employer "overruling" the treating physician's assessment of ability to return to work.



# When seeking medical documentation

- Release for employer to request and see medical information
- If information is insufficient, employer can choose its own health care professional to conduct assessment
  - EEOC Enforcement Guidelines (Question No. 11)
- Using medical evaluations from other sources to consider accommodation issues



# Rounding out the “Interactive Process”

- Don't decide the same day as your discussion
- Possibility: an accommodation on a trial or short-term basis
  - *Campbell v. Wal-Mart Stores, Inc.*, 272 F. Supp. 2d 1276 (N.D. Okla. 2003) – the interactive process requires an “ongoing, informal communicative process”



# Documenting the “Interactive Process”

- How triggered
- When, where, who
- What was discussed with the employee
- What medical information was provided



# Documenting the decision-making process

- Who was involved
- What medical information was relied upon
- Don't decide the same day as your discussion
- Possibility: an accommodation on a trial or short-term basis



# Best practices

- Many health conditions are subject to the reasonable accommodation obligation
- Low threshold for triggering an obligation to discuss accommodation



# Best practices

- Train manager and supervisors
  - What events or information start the accommodation process
  - Who to get involved, when it comes up – i.e., HR
  - What the interactive process involves
  - A review of job description to ensure the list of essential functions is accurate
  - Sensitive to confidentiality



# Best practices

- It's all about meaningful communication with employee about health issues – don't avoid or hesitate
- Ultimately, it will be the employer's obligation – not the employee's – to be proactive when investigating disability and accommodation circumstances



# Best practices – Uncooperative employee

- Employee fails to provide requested medical documentation
- Employee refuses accommodation offered
  - *Wells v. Shalala*, 228 F.3d 1137 (10th Cir. 2000): disabled employee could not recover under ADA



# Questions?



**Courtney Bru**

courtney.bru@mcafeetaft.com  
(918) 574-3052



**Charlie Plumb**

charlie.plumb@mcafeetaft.com  
(918) 574-3003

