



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

DISABILITY EMPLOYMENT LAW CONFERENCE

25TH Anniversary of the Americans with Disabilities Act

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.

[What are "Reasonable Job Accommodations"?)

Victor F. Albert/Conner & Winters

Victor F. Albert

Vic Albert's practice focuses on all aspects of trial law with particular experience in the areas of labor and employment trials, insurance defense bad faith trials and trucking defense trials. He has tried to a jury verdict over 60 cases in state and federal courts in Oklahoma.

In the past fifteen years he has developed an employer-based practice advising employers in policy development, training, hiring and firing, and investigation of employee complaints. He represents employers in all aspects of federal and state litigation, as well as administrative investigations including OSHA, Department of Labor and EEOC matters. Mr. Albert is the national defense counsel for an emergency medical service company, and assists it with matters in the five states in which it has operations.

In the insurance bad faith litigation work that he does, Mr. Albert had had success at the summary judgment, offer of judgment and trial phases of matters for insurance clients. He also provides seminars and training for insurance companies on claims handling and bad faith issues.

Mr. Albert also has extensive background and experience with interstate trucking cases, and trucking regulatory matters. He regularly advises interstate trucking companies on issues regarding company and driver compliance with safety and operation regulations.

He is a regular feature columnist to the *Daily Oklahoman* on emerging employment law issues. He speaks at employment and insurance bad faith seminars for clients and civic groups such as the OKC Metro Employers' Council and Oklahoma Bar Association.

Special thanks to our co-sponsors!



2015 DISABILITY EMPLOYMENT LAW CONFERENCE

WHAT ARE “REASONABLE JOB ACCOMMODATIONS”?

Victor F. Albert, Conner & Winters, LLP
Oklahoma City, Oklahoma

Determining “reasonable job accommodations” under the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) is often like trying to nail Jell-O to a wall. It is a slippery and messy process at times. That’s because what is “reasonable” to an employee with a limitation or impairment collides with what is “unduly burdensome” to an employer, and the two do not often work well together. And then you add to the process the factors of what is “reasonable” or “unduly burdensome” in the opinion of the decision-makers; first the EEOC investigator, and then ultimately a judge and/or jury.

This presentation focuses on two sources of information as to what are considered “reasonable accommodations”. First, we will look at the guidelines of the primary source of authority on the subject -- the EEOC. Then, we will explore what the next layer of decision-makers -- the federal judges -- have determined to be “reasonable accommodations” in the 2015 case opinions from the Tenth Circuit Court of Appeals, and district courts within the Tenth Circuit.

I. STRAIGHT FROM THE HORSE’S MOUTH -- GUIDELINES FROM THE EEOC AS TO THE PROCESS TO DETERMINE A “REASONABLE ACCOMODATION”

The ADAAA did not change the definition of “reasonable accommodations”, but did clarify that only individuals who meet the first (actual disability) and second (record of a

disability) parts of the definition are entitled to accommodations. Individuals who only meet the third part (regarded as) are not entitled to accommodations. Even though the definition did not change, it is clear that with a broader definition of disability, more focus will be placed on providing reasonable accommodations.

One thing employers should keep in mind regarding a request for reasonable accommodation is that the accommodation does not have to be tied to the substantially limited major life activity that established that the employee has a disability. For example, a person with cancer may establish that he has a disability because he is substantially limited in normal cell growth, which is listed as a major life activity under the “bodily functions” category in the ADA. However, his accommodation request may be related to nausea resulting from his medical treatment. Once the employee establishes that he has a disability, then the employer must consider providing accommodations for any limitations he has as a result of his impairment, not just the limitation that established his disability.

Remember that the reasonable accommodation obligation under the ADA is flexible. Employers can choose among effective accommodation options and do not always have to provide the requested accommodation. Employers do not have to provide accommodations that pose an undue hardship, nor do they have to provide as reasonable accommodations personal use items needed in accomplishing daily activities both on and off the job. Employers do not have to make an accommodation for an individual who is not otherwise qualified for a position, nor remove essential functions, create new jobs, or lower production standards as an accommodation.

The governing body to administer and enforce the ADA is the EEOC. Shortly after the ADA went into effect in 1993, the EEOC issued an interpretive guideline on the issues

presented in a “reasonable accommodation” analysis and process.¹ So, straight from the horse’s mouth, here are the questions and answers provided by the EEOC to guide you in the process of examining whether an accommodation is “reasonable” or “unduly burdensome”:

Q. What is "reasonable accommodation?"

A. Reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities.

Q. What are some of the accommodations applicants and employees may need?

A. Examples of reasonable accommodation include making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs. Reasonable accommodation also may include reassigning a current employee to a vacant position for which the individual is qualified, if the person is unable to do the original job because of a disability even with an accommodation. However, there is no obligation to find a position for an applicant who is not qualified for the position sought. Employers are not required to lower quality or quantity standards as an accommodation; nor are they obligated to provide personal use items such as glasses or hearing aids.

The decision as to the appropriate accommodation must be based on the particular facts of each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that of effectiveness, i.e., whether the accommodation will provide an opportunity for a person with a disability to achieve the same level of performance and to enjoy benefits equal to those of an average, similarly situated person without a disability. However, the accommodation does not have to ensure equal results or provide exactly the same benefits.

¹ This discussion does not deal with the parts of the guideline as to what constitutes a disability or as to the roles in the interactive process, as other speakers at this seminar will address those topics.

Q. When is an employer required to make a reasonable accommodation?

A. An employer is only required to accommodate a "known" disability of a qualified applicant or employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently will be able to suggest an appropriate accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of a job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one except where an individual's known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer. If a person with a disability requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one. There are also many public and private resources that can provide assistance without cost.

Q. What are the limitations on the obligation to make a reasonable accommodation?

A. The individual with a disability requiring the accommodation must be otherwise qualified, and the disability must be known to the employer. In addition, an employer is not required to make an accommodation if it would impose an "undue hardship" on the operation of the employer's business. "Undue hardship" is defined as an "action requiring significant difficulty or expense" when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation. Undue hardship is determined on a case-by-case basis. Where the facility making the accommodation is part of a larger entity, the structure and overall resources of the larger organization would be considered, as well as the financial and administrative relationship of the facility to the larger organization. In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.

If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. Also, if the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of paying that portion of the cost which would constitute an undue hardship or providing the accommodation.

Q. Does the ADA require employers to develop written job descriptions?

A. No. The ADA does not require employers to develop or maintain job descriptions. However, a written job description that is prepared before advertising or interviewing applicants for a job will be considered as evidence along with other relevant factors. If an employer uses job descriptions, they should be reviewed to make sure they accurately reflect the actual functions of a job. A job description will be most helpful if it focuses on the results or outcome of a job function, not solely on the way it customarily is performed. A reasonable accommodation may enable a person with a disability to accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function.

Q. Must an employer modify existing facilities to make them accessible?

A. The employer's obligation under Title I is to provide access for an *individual* applicant to participate in the job application process, and for an *individual* employee with a disability to perform the essential functions of his/her job, including access to a building, to the work site, to needed equipment, and to all facilities used by employees. For example, if an employee lounge is located in a place inaccessible to an employee using a wheelchair, the lounge might be modified or relocated, or comparable facilities might be provided in a location that would enable the individual to take a break with co-workers. The employer must provide such access unless it would cause an undue hardship.

Under Title I, an employer is not required to make its existing facilities accessible until a particular applicant or employee with a particular disability needs an accommodation, and then the modifications should meet that individual's work needs. However, employers should consider initiating changes that will provide general accessibility, particularly for job applicants, since it is likely that people with disabilities will be applying for jobs. The employer does not have to make changes to provide access in places or facilities that will not be used by that individual for employment-related activities or benefits.

Q. Can an employer be required to reallocate an essential function of a job to another employee as a reasonable accommodation?

A. No. An employer is not required to reallocate essential functions of a job as a reasonable accommodation.

Q. Can an employer be required to modify, adjust, or make other reasonable accommodations in the way a test is given to a qualified applicant or employee with a disability?

A. Yes. Accommodations may be needed to assure that tests or examinations measure the actual ability of an individual to perform job functions rather than reflect limitations caused by the disability. Tests should be given to people who have sensory, speaking, or manual impairments in a format that does not require the use of the impaired skill, unless it is a job-related skill that the test is designed to measure.

Q. Can an employer maintain existing production/performance standards for an employee with a disability?

A. An employer can hold employees with disabilities to the same standards of production/performance as other similarly situated employees without disabilities for performing essential job functions, with or without reasonable accommodation. An employer also can hold employees with disabilities to the same standards of production/performance as other employees regarding marginal functions unless the disability affects the person's ability to perform those marginal functions. If the ability to perform marginal functions is affected by the disability, the employer must provide some type of reasonable accommodation such as job restructuring but may not exclude an individual with a disability who is satisfactorily performing a job's essential functions.

Q. Can an employer establish specific attendance and leave policies?

A. An employer can establish attendance and leave policies that are uniformly applied to all employees, regardless of disability, but may not refuse leave needed by an employee with a disability if other employees get such leave. An employer also may be required to make adjustments in leave policy as a reasonable accommodation. The employer is not obligated to provide additional paid leave, but accommodations may include leave flexibility and unpaid leave.

A uniformly applied leave policy does not violate the ADA because it has a more severe effect on an individual because of his/her disability. However, if an individual with a disability requests a modification of such a policy as a reasonable accommodation, an employer may be required to provide it, unless it would impose an undue hardship.

Q. Can an employer consider health and safety when deciding whether to hire an applicant or retain an employee with a disability?

A. Yes. The ADA permits employers to establish qualification standards that will exclude individuals who pose a direct threat -- i.e., a significant risk of substantial harm -- to the health or safety of the individual or of others, if that risk cannot be eliminated or reduced below the level of a direct threat by reasonable accommodation. However, an employer may not simply assume that a threat exists; the employer must establish through objective, medically supportable methods that there is significant risk that substantial harm could occur in the workplace. By requiring employers to make individualized judgments based on reliable medical or other objective evidence rather than on generalizations, ignorance, fear, patronizing attitudes, or stereotypes, the ADA recognizes the need to balance the interests of people with disabilities against the legitimate interests of employers in maintaining a safe workplace.

II. 2015 LAWSUIT OR APPELLATE OPINIONS ON WHAT CONSTITUTES “REASONABLE ACCOMODATIONS”

The Americans With Disabilities Act was enacted in 1990. The Americans With Disabilities Act Amendments Act became the law in 2008. From the following reported case opinions for 2015, we glean the judicial construction of what constitutes a “reasonable accommodation”.

Applicant/Employee Offers Options of Reasonable Accommodations and Risks are De Minimis

***Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260 (10th Cir. 2015)**

Facts: Deaf applicant for plasma center technician position commenced action alleging that employer’s revocation of her job offer violated ADA. The United States District Court for the District of Wyoming granted summary judgment for employer. The Tenth Circuit reversed and remanded.

Holdings: The Tenth Circuit held that:

1. *McDonnell Douglas* burden-shifting framework did not apply;

2. applicant could not safely perform essential function of donor monitoring through job restructuring;
3. factual issue existed as to whether specific modifications would be costly or difficult;
4. applicant was not required to show that accommodation would be feasible for employer;
5. applicant carried her initial burden on qualification element;
6. factual issue existed as to whether call buttons, used in conjunction with visual or vibrating alerts, would allow deaf person to perform essential function of donor monitoring;
7. applicant did not have to show under direct threat standard that accommodation would eliminate every de minimis health or safety risk that employer could hypothesize; and
8. factual issue existed as to whether donors were capable of using call button system and whether call buttons would materially affect their ability to alert deaf PCT in event of adverse reaction.

Key Quote From the Court:

Osborne, 798 F.3d at 1269-70.

The following summarizes our discussion of the legal landscape applicable to this case. To make out a prima facie case for discrimination under the ADA, Ms. Osborne must show (1) she is disabled; (2) she is qualified, with or without reasonable accommodations, to perform the essential functions of the job; and (3) she was discriminated against based on her disability. Because the parties agree elements (1) and (3) are met and Ms. Osborne is not qualified for the PCT position in the absence of reasonable accommodations, the issue is whether she is qualified with reasonable accommodations.

To determine this issue at summary judgment, courts employ a burden-shifting framework: (1) the plaintiff has the initial burden to show an accommodation is reasonable on its face, then (2) the defendant must show it cannot provide the accommodation without undue hardship, and finally (3) the plaintiff must rebut the employer's evidence based on her individual capabilities.

When the reasonableness of an accommodation turns on whether it alleviates health and safety concerns related to the essential functions of a position, the ADA's direct threat standard—whether a significant risk can be eliminated by reasonable accommodations—applies to whether the plaintiff has met her initial burden to show an accommodation is reasonable on its face. In other words, we ask whether the plaintiff has shown that her proposed reasonable accommodation would eliminate significant risk.

Employer’s Job Description Requiring DOT Certification Upheld

***Hawkins v. Schwan’s Home Service, Inc.*, 778 F.3d 877 (Tenth Cir. 2015)**

Facts: Former employee, who had heart problems and failed his DOT certification test was fired from his job as a warehouse supervisor. The employer’s written job description required the warehouse supervisor to have current DOT certification. Former employee challenged whether that requirement was an essential function of the job, and whether an accommodation should be made to allow him to continue in the job without the certification.

Holding: The Tenth Circuit affirmed the summary judgment in favor of the employer.

Key Quote From the Court:

Hawkins, 778 F. 3d at 884.

An employer is not required by the Americans with Disabilities Act Amendments Act (ADAAA) to create a position out of wholecloth to accommodate a disabled individual.

The ADAAA defines a “qualified individual” as a person “who, with or without reasonable accommodation, can perform the essential functions of the employment position that [he] holds or desires.” 42 U.S.C. § 12111(8). Under the statute, “consideration *shall* be given to the employer’s judgment as to what functions of a job are essential,” and an employer’s written job description “*shall* be considered evidence of the essential functions of the job.” *Id.* (emphases added).

Employer’s Increased Job Production Standards Did Not Allow Employee to Accommodation of Not Performing Up to Them

***Marsh v. Terra Intern., (N.D. Oklahoma), Inc.*, --- F.Supp.3d ---, 2015 WL 4139421 (N.D. Okla. 2015)**

Facts: Employee who was able to perform his job as shipping technician for over one year but who, because of his knee injury, could no longer do so when production standards were

increased and he was required to run two pumps instead of one was not a “qualified individual” as required to establish prima facie case of disability discrimination under the ADA; increased performance expectation to run two pumps was an “essential function” of the position which employee could not perform without some accommodation, and requested accommodations of employee’s team running only one pump and/or using two pumps but shutting one down when employee could not keep up were not reasonable.

Holding: Summary judgment granted to employer on that basis that increased production standard was an essential function of the job position, and proposed accommodation of altering that production standard was not a reasonable accommodation.

Key Quote From the Court:

Marsh’s requested accommodation is an altered production standard that is more accommodation than is reasonable. This situation arose because [the supervisor] ... was concerned about unequal performance among the shifts. Terra could not accommodate Marsh without lowering its standards or requiring other employees—either Marsh’s fellow shift members or members of other shifts—to work harder. Therefore, Marsh is not an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the shipping technician position.

Employee’s Request for Leave of Absence Must be of Definite Length or Return Date

Lancaster v. Sprint/United Management Co., --- F.Supp.3d ----, 2015 WL 5305944 (10th Cir. 2015)

Facts: Plaintiff was employed as a call center worker by Sprint. She started missing work due to stress-related conditions. She ultimately requested “a leave of absence until such time I can receive the necessary treatments to repair and correct the abnormalities in my body.” The employer asked her for the duration or expected end date of the leave of absence. She did not provide it. She was fired and sued her former employer. The court granted summary judgment to the former employer.

Holding: The evidence is undisputed that Sprint had no estimation of the date Plaintiff would be able to resume her position. Because Sprint did not have a reasonable estimate of when Plaintiff would be able to resume the essential functions of her employment, she is not a qualified individual under the ADA and her claim of discrimination must fail.

Key Quote From the Court:

There are two limits on the bounds of reasonableness for a leave of absence. The first limit is clear: The employee must provide the employer an estimated date when she can resume her essential duties. *See e.g., Cisneros*, 226 F.3d at 1130; *Rascon*, 143 F.3d at 1334. Without an expected end date, an employer is unable to determine whether the temporary exemption is a reasonable one.

The second is durational. A leave request must assure an employer that an employee can perform the essential functions of her position in the “near future.” *Cisneros*, 226 F.3d at 1129 (quotation omitted). Although this court has not specified how near that future must be, the Eighth Circuit ruled in an analogous case that a six-month leave request was too long to be a reasonable accommodation.

Medical Marijuana Use by a Disabled Employee Did Not Excuse Failed Drug Test

Steele v. Stallion Rockies Ltd, --- F.Supp.3d ----, 2015 WL 3396417 (D. Colo. 2015)

Facts: Stallion maintains a Drug and Alcohol Policy in its Handbook prohibiting the off-the-job use of controlled substances interfering with job performance and testing positive for such substances at work. Plaintiff was an employee who suffered from lumbar degenerative disc disease, and who was a medical marijuana participant listed in the Colorado medical marijuana registry for treatment of the disease. In response to an instruction to take a drug test, Plaintiff advised that he was a registered medical marijuana user. He was fired. He sued the employer for various employment law claims, including failure to accommodate his disability by allowing him to test positive for marijuana in violation of the employer’s Drug and Alcohol Policy.

Holding: The court granted summary judgment in favor of the former employer. The court held that the employee did not achieve protected status under either federal or state anti-discrimination laws protecting disabled individuals simply by virtue of his use of medical marijuana, and thus, his termination as a result of the use of the drug did not constitute discrimination, in that anti-discrimination laws did not extend so far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct.

Key Quote From the Court:

Magistrate Judge Wang also correctly concluded that there was no basis for finding that Defendants terminated Plaintiff's employment because of his disability; the Complaint fails to allege a single fact to support the notion that Plaintiff's medical condition, or any accommodation for a medical condition, led to his termination. Even if Plaintiff is attempting to argue that his termination was related to his disability by virtue of the fact that marijuana was what he used to treat his disability, Magistrate Judge Wang's citation to *Curry v. MillerCoors, Inc.*, No. 12-cv-02471-JLK, 2013 WL 4494307, at *3 (D.Colo. Aug. 21, 2013), is well-taken. In that case, Judge Kane held that "antidiscrimination law does not extend so far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct." *Id.* As such, Plaintiff's termination as a result of his use of medical marijuana does not constitute discrimination.

Employee Must Specifically Set Out Accommodations Sought

***Schlecht v. Lockheed Martin Corp.*, --- Fed.Appx. ---- , 2015 WL 5672695 (10th Cir. 2015)**

Facts: Schlecht was employed with LMC as an optical engineer. In 2007, she was assigned to work on LMC's Orion space shuttle project. Her wages were garnished in July 2008 and again in June 2009. In July 2009, she asked LMC to notify her immediately if it was served with another wage garnishment because she suffered from attention deficit disorder. In September 2009, she asked LMC to notify her within two days of receiving a garnishment order and to give her an accounting and explanation of the order before adjusting her paycheck.

Schlecht's wages were not garnished again, however. LMC laid off Schlecht in June 2010 due to funding and budget cuts. She sued LMC alleging that it fired her for her ADA accommodation requests, which she only identified as the garnishment notice requests.

Holding: Summary judgment in favor of the employer was affirmed by the Tenth Circuit because Plaintiff could not articulate any requested accommodations that she asked for which lead to her termination from employment.

Key Quote From the Court:

Schlecht offered no evidence that LMC denied her any reasonable accommodations to which she was entitled, precluding her failure-to-accommodate claim under the ADA. *See Kotwica v. Rose Packing Co.*, 637 F.3d 744, 747–48 (7th Cir.2011) (explaining that a plaintiff alleging a failure-to-accommodate claim must establish, among other elements, that the defendant failed to make reasonable modifications to accommodate the plaintiff's disabilities). Schlecht makes conclusory assertions that she tried to communicate with LMC but she produced no supporting evidence that she communicated to LMC any adequate request to accommodate a disability other than her garnishment request. *See C.R. England*, 644 F.3d at 1049 (“The request for accommodation must be sufficiently direct and specific, giving notice that [the employee] needs a special accommodation.” (internal quotation marks omitted)).

III. TAKEAWAYS – TIPS FOR APPLICANTS/EMPLOYEES AND TIPS FOR EMPLOYERS

Here are the learning points that we can derive from the 2015 case opinions regarding what constitutes a “reasonable accommodation”:

For Applicants/Employees:

1. Applicants/Employees need to be as specific as possible in the request for job accommodations, and should offer the employer as many options as possible.
2. Applicants/Employees should use their medical providers to support the ability to do the job if accommodations were to be made.

3. Applicants/Employees should obtain a copy of the written job description for the essential functions of the job, and should provide that to their medical providers to assist with the analysis of ability to do the job and any potential accommodations that would allow that.

4. Applicants/Employees need to be specific on the return date and duration of any request for additional leave as a form of requested accommodation.

For Employers:

1. Employers need to have accurate and updated written job descriptions, and should analyze potential job accommodations in context with them.

2. Employers may exercise business judgment as to layoffs, disciplinary action and responses to legal proceedings without fear of being pulled into a finding of ADAAA disability liability. But, documentation to support such is crucial to dispelling any inference about disability being the factor for the adverse action.

3. Employers need to be open-minded about requested accommodations and provide such where available and warranted so as to establish a record of accommodating disabled employees.