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The Americans with Disabilities Act
Developments in Reasonable Accommodation[1]

The American with Disabilities Act (hereinafter ADA) states that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

The ADA also states:

> As used in subsection (a) of this section, the term "discriminate" includes-
> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);
> (3) utilizing standards, criteria, or methods of administration -
> (A) that have the effect of discrimination on the basis of disability; or
> (B) that perpetuate the discrimination of others who are subject to common administrative control;
> (4) excluding or otherwise denying equal jobs or benefits to a qualified

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> individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
>
> (5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant; (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
>
> (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C. § 12112(b). In addition, the ADA incorporates the powers, remedies and procedures of the Civil Rights Act of 1964. The ADA states:

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title *[sections 705, 706, 707, 709 and 710 of the Civil Rights Act of 1964]* shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title *[section 106]*, concerning employment.

42 U.S.C. § 12117. Finally, the ADA states that:

> Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued

by Federal agencies pursuant to such title.

42 U.S.C. § 12201(a). 29 C.F.R. § 1630 indicates that except as provided otherwise, the rules do not apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973, or the regulations issued by federal agencies pursuant to that Title. 29 C.F.R. § 1630.1(c)(1).

1. *What Does Reasonable Accommodation Mean?*

42 U.S.C. § 12111(9) defines a "reasonable accommodation" to include, but not limited to:

> (A) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities ; and
> (B) 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 for individuals with disabilities.

If the employee cannot demonstrate a "reasonable accommodation," the employer's lack of investigation into reasonable accommodation is unimportant. **Willis v. Conopco, Inc.**, 108 F.3d 282 (11th Cir. 1997). However, in **Barnett v. U.S. Air, Inc.**, 228 F.3d 1105, 1112 (9th Cir. 2000), the Ninth Circuit reached the opposite conclusion. The Supreme Court will decide this issue within the next year.

An employer does not have to pick the employee's preferred accommodation. Rather, it may choose among available accommodations. **Keever v. City of Middletown**, 145 F.3d 809 (6th Cir.), *cert. denied,* 119 S.Ct. 407 (1998). In addition, an employer is not required to delegate essential functions to other individuals in order to accommodate a disabled employee. **Moritz v. Frontier Airlines, Inc.**, 147 F.3d 784 (8th Cir. 1998).

2. *When Is an Employer Not Required to Provide an Accommodation?*

There are cases when an employer does not have to provide an accommodation to a qualified individual with a disability. Those cases center on whether the reasonable accommodation constitutes an undue hardship or whether the individual represents a direct threat to the health and safety of that individual or others. Each of these situations shall be considered in sequence.

/ / / /

A. Undue Hardship:

The ADA defines "undue hardship" as:

> an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

42 U.S.C. § 12111(10)(A). The ADA then sets forth the following factors which a court should use to determine whether an accommodation would impose an undue hardship:

> (i) The nature and costs of the accommodation needed under this chapter;
> (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
> (iii) The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
> (iv) The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12111(10)(B).

B. Direct Threat to the Health and Safety of That Individual or Others:

The ADA also contains an affirmative defense concerning whether the employee constitutes a "direct threat" and states:

> (a) In general. It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.
>
> (b) Qualification standards. The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. § 12113. The EEOC regulations set forth four factors to determine whether an employee constitutes a direct threat to others. Those factors are:

1) the duration of the risk;
2) the nature and severity of the potential harm;
3) the likelihood that the potential harm will occur; and
(4) the imminence of the potential harm.

29 C.F.R. § 1630.2(r).

In **Bragdon v. Abbott**, 118 S.Ct. 2196 (1998), the United States Supreme Court held that a direct threat is present only where there is a significant risk of harm, which must be determined from the standpoint of the person who refuses the accommodation or treatment, based on medical or other objective evidence, measured by "statistical likelihood" of harm. A good faith belief that a significant risk is present is not enough.

In **Doe v. Dekalb County School District**, 145 F.3d 1441 (11th Cir. 1998), the court held that a HIV positive physical education teacher did not pose a direct threat to health and safety because the district court determined that he posed only a "remote and theoretical" risk to the students."

In **Echazabal v. Chevron USA**, 226 F.3d 1063 (9th Cir. 2000), the court considered whether the "direct threat" defense is available to employers under the ADA applies to employees , or prospective employees, who pose a direct threat to their own health or safety, but not to the health or safety of other persons in the workplace. The court looked at the language of the provision itself and stated:

> The direct threat defense permits employers to impose a "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." On its face, the provision does not include direct threats to the health or safety of the disabled individual himself. Moreover, by specifying only threats to "other individuals in the workplace," the statute makes it clear that threats to other persons - including the disabled individual himself - are not included within the scope of the defense.

3. *Recent Cases on What "Reasonable" Means*.

A. Recent Supreme Court Decisions:

In **Bragdon v. Abbott**, 118 S.Ct. 2196 (1998), the United States Supreme Court first determined whether HIV infections constituted a disability under the ADA. The Court set forth a three part test to determine whether HIV was a disability and stated:

> First, we consider whether respondent's HIV infection was a physical impairment. Second, we identify the life activity upon which respondent relies and determine whether it constitutes a major life activity under the ADA. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity.

118 S.Ct. at 2202. The Court then quoted the First Circuit Court of Appeals and stated

> [t]he plain meaning of the work 'major' denotes comparative importance" and "suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance."

118 S.Ct. at 2205. The Court then discussed the issue of what constitutes a direct threat under the ADA and stated:

> The existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence.

118 S.Ct. at 2211.

In **Cleveland v. Policy Management Systems Corporation**, 119 S.Ct. 1597 (1999), the United States Supreme Court held that:

> An ADA plaintiff's sworn assertion in an application for disability benefits that she is unable to work appears to negate the essential element of her ADA claim that she can perform the essential functions of her job, and a court should require an explanation of this apparent inconsistency. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless perform the essential functions of her job, with or without reasonable accommodations.

119 S.Ct. at 1598.

Finally the United States Supreme Court has recently accepted certiorari in two new ADA cases. On April 17, 2001 the Las Vegas Review Journal reported that the Court accepted certiorari in the case of *Toyota v. Ella Williams*. Ms. Williams was an assembly line worker at a Toyota plant in Kentucky who developed crippling carpal tunnel syndrome. She argues that her inability to do manual tasks is an impairment of a "major life activity" covered by the ADA. The Las Vegas Review Journal also reported that the Court accepted certiorari in the case of *Barnett v. U.S. Airways.* The Ninth

Circuit Court of Appeals setting en banc ruled that disabled workers seeking accommodations should have priority for jobs over more senior nondisabled workers. The Supreme Court is expected to hand down a decision concerning these cases by next year. See Las Vegas Review Journal, *Court to hear ADA appeals; Cases may draw line on accommodating disabled employees,* April 17, 2001, p. A 1.

B. Recent Court of Appeals Cases:

In **Nunes v. Wal-Mart Stores**, 164 F.3d 1243, 12 46 - 1247 (9th Cir. 1999), the court stated that:

> The district court erred in determining that Nunes was totally disabled on the date of her termination. It is undisputed that, during the period of Nunes's medical leave leading up to her termination, her doctors continued to state that she was incapacitated and unable to return to work. Relying on these certifications during this period, the district court concluded that Nunes was totally disabled and therefore unqualified under the ADA.

The court concluded that:

> by focusing on Nunes's disability during the period of her medical leave, however, the district court misapplied the ADA's "qualified individual" requirement. The ADA requires that Nunes be able to perform the essential functions of her job "with or without reasonable accommodation." Unpaid medical leave may be a reasonable accommodation under the ADA. Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer. If Nunes's medical leave was a reasonable accommodation, then her inability to work during the leave period would not automatically render her unqualified.

164 F.3d at 1247. The court then considered the affirmative defense of whether Nunes constituted a direct threat to the health and safety of other individuals in the work place. The court set out specific factors to be considered when attempting to determine whether an individual would constitute a direct threat to others: 1) the duration of the risk; 2) the nature and severity of the potential harm, 3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. 164 F.3d at 1248 (citing *Arline,* 480 U.S. at 287; 29 C.F.R. § 1630.2(r).

In **Phelps v. Optima Health**, 251 F.3d 21 (1st Cir. 2001), the Court was attempting to resolve the issue when co-workers do part of an employees job, does the essential functions of the job, i.e., the functions which must be accommodated, then

change. The Court stated:

> we agree with the Seventh Circuit that evidence that accommodations were made so that an employee could avoid a particular task "merely shows the job could be restructured, not that [the function] was non-essential." Basith, 241 F.3d at 930. To find otherwise would unacceptably punish employers from doing more than the ADA requires, and might discourage such an undertaking on the part of employers. See Laurin v. Providence Hosp., 150 F.3d 52, 60-61 (1st Cir. 1998); Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019, 1023 (7th Cir. 1997); Holbrook v. City of Alpharetta, 112 F.3d 1522, 1528 (11th Cir. 1997); Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 545 (7th Cir. 1995). In short, even though her co-workers had allowed Phelps to avoid having to lift more than fifty pounds, the ability to do so remained an essential function of her position.

Id. at 26. In reaching its decision, the Court relied on decisions from several other appellate courts which indicate that:

> even when an employer and employee have made arrangements to account for the employee's disability - a court must evaluate the essential functions of the job without considering the effect of the special arrangements. See, e.g., Basith v. Cook County, 241 F.3d 919, 930 (7th Cir. 2001) (delivery of medicine remained essential function of job despite special assignment allowing employee not to deliver medicine for period of time); Pickering Page 26 v. City of Atlanta, 75 F. Supp.2d 1374, 1378-79 (N.D.Ga. 1999) (temporary assignment of prison guard to "light duty" because of her disability does not change essential functions of prison guard position). The fact that an employee might only be assigned to certain aspects of a multi-task job does not necessarily mean that those tasks to which she was not assigned are not essential. Anderson v. Coors Brewing Co., 181 F.3d 1171, 1175-76 (10th Cir. 1999) (relevant functions are those of "TPO" position for which employee was hired, as opposed to can-sorter position to which she was assigned); Miller v. Ill. Dep't of Corr., 107 F.3d 483, 485 (7th Cir. 1997) (essential functions of prison guard position included all functions required of prison guards, even when plaintiff had been allowed to rotate only between certain assignments).

4. *Recent Cases on EEOC's 1999 Enforcement Guidance.*

In 1999 the Equal Employment Opportunity Commission issued its ***Enforcement Guidance: Reasonable Accommodation and Undue hardship Under the Americans with Disabilities Act.*** Any employer or employee dealing with accommodation issues should download and review the guidance from the EEOC's website www.eeoc.gov. While not the definitive guide, it will answer many questions which they may have. However, the guidance is not law. In other words, Courts may

differ with the guidance and issue different rulings based on similar facts.

The United States Court of Appeals for the Ninth Circuit cited to the Guidance and held that a triable issues of fact existed as to whether the Plaintiff would have been able to perform the essential duties of her job with the accommodation of a work-at-home position. **Humphrey v. Memorial Hospitals Assn.**, 239 F.3d 1128, 1136 (9th Cir. 2001). The Court cited the Guidance and stated: "Working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer." **Id.**

Similarly, the United States Court of Appeals for the Tenth Circuit has also cited to the Guidance when considering how long an employer must keep an employee on an unpaid leave of absence before offering the employee a vacant position and stated that the EEOC's "Enforcement Guidance Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," suggests that six months is beyond a "reasonable amount of time." See **Boykin v. ATC**, 247 F.3d 1061 (10th Cir. 2001). As a result, the Court held that the employer did not violate the ADA by not offering the Plaintiff the newly created dispatcher position when it became available six months after his termination.

In **Reed v. Lepage Bakeries**, 244 F.3d 254, 262 (1st Cir. 2001), the United States Court of Appeals for the First Circuit stated:

> Because an employee's disability and concomitant need for accommodation are often not known to the employer until the employee requests an accommodation, the ADA's reasonable accommodation requirement usually does not apply unless "triggered by a request" from the employee. Henry Perrett, Jr., 1 Americans With Disabilities Act Handbook, §§ 4.17, at 121 (3d ed. 1997) (collecting cases).[fn7] The employee's request must be "sufficiently direct and specific," giving notice that she needs a "special accommodation." Wynne v. Tufts Univ., 976 F.2d 791, 795 (1st Cir. 1992) (quoting Nathanson v. Medical Coll. of Pa., 926 F.2d 1368, 1381 (3d Cir. 1991)).

The Court then cited to the guidance and stated:

> At the least, the request must explain how the accommodation requested is linked to some disability. The employer has no duty to divine the need for a special accommodation where the employee merely makes a mundane request for a change at the workplace. See EEOC, Enforcement Guidance Reasonable

> Accommodation and Undue Hardship Under the Americans with Disabilities Act, FEP (BNA) 405:7601, at 7605-06 (March 1, 1999)

Id.

In **Kennedy V. Dresser Rand Co.**, 193 F.3d 120, 122 (2nd Cir. 1999), the United States Court of Appeals for the Second stated that:

> EEOC guidelines seemingly embrace the notion that a request for a change of supervisor is per se unreasonable. See EEOC Enforcement Guidance Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act, 8 Fair Employment Prac. Manual (BNA) 405:7625

However, the Court then ruled that:

> in this Circuit, the question of whether a requested accommodation is a reasonable one must be evaluated on a case-by-case basis. *See* 91 F.3d at 385. A per se rule stating that the replacement of a supervisor can never be a reasonable accommodation is therefore inconsistent with our ADA case law. There is a presumption, however, that a request to change supervisors is unreasonable, and the burden of overcoming that presumption (i.e., of demonstrating that, within the particular context of the plaintiff's workplace, the request was reasonable) therefore lies with the plaintiff. *Cf. Borkowski*, 63 F.3d at 139 (stating, even in the absence of a formal presumption, that "the plaintiff must show, as part of her burden of persuasion, that an effective accommodation exists that would render her otherwise qualified").

Id. at 122 - 123.

Therefore, while the EEOC guidance is helpful, be careful, not all Courts will agree with its conclusions.

5. *The Interactive Process-What Triggers It?*

The ADA authorizes the EEOC to issue regulations implementing the ADA. *See* 42 U.S.C. §§ 12116. The EEOC regulations outline the nature of the interactive process: To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. §§ 1630.2(o)(3).

Almost all of the circuits to rule on the issue of whether an employer must engage in the inter active process have held that an employer has a mandatory obligation to engage in the interactive process and that this obligation is triggered either by the employee's request for accommodation or by the employer's recognition of the need for accommodation. *See* **Fjellestad v. Pizza Hut of America, Inc.**, 188 F.3d 944, 952 (8th Cir. 1999) ("when the disabled individual requests accommodation, it becomes necessary to initiate the interactive process"); **Smith v. Midland Brake, Inc.**, 180 F.3d 1154, 1161-62 (10th Cir. 1999) (holding that the duty to engage in the interactive process is triggered once the employee "convey[s] to the employer a desire to remain with the company despite his or her disability and limitations" and that "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"); **Taylor v. Phoenixville Sch. Dist.**,184 F.3d 296, 315 (3d Cir. 1999) (holding that the employer's duty to engage in the interactive process is triggered "[o]nce the employer knows of the disability and the employee's desire for accommodations" and that the employer must "`meet the employee half-way'" by requesting additional information); **Bultemeyer v. Fort Wayne Community Schools**, 100 F.3d 1281, 1285 (7th Cir. 1996) ("The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help"); **Taylor v. Principal Fin. Group Inc.**, 93 F.3d 155, 165 (5th Cir. 1996) ("Thus, it is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one"). But see **Willis v. Conopco**, 108 F.3d 282, 285 (11th Cir. 1997) (holding that the plaintiff must produce evidence that a reasonable accommodation is available before an employer is obligated to engage in the interactive process)

In **Humphrey v. Memorial Hospitals Assn**., 239 F.3d 1128, (9th Cir. 2001) the Court stated:

> Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. Barnett v. U.S. Air, 228 F.3d 1105, 1114 (9th Cir. 2000). "An appropriate reasonable accommodation must be effective, in enabling the employee to perform the duties of the position." Id. at 1115. The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process. Id. at 1114-15; Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996) ("A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith."). Employers, who fail to engage in the interactive process in good faith, face

> liability for the remedies Page 1138 imposed by the statute if a reasonable accommodation would have been possible. Barnett, 228 F.3d at 1116.
>
> Moreover, we have held that the duty to accommodate "is a `continuing' duty that is `not exhausted by one effort.'" McAlindin, 192 F.3d at 1237. The EEOC Enforcement Guidance notes that "an employer must consider each request for reasonable accommodation," and that "[i]f a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship." EEOC Enforcement Guidance on Reasonable Accommodation, at 7625. Thus, the employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. This rule fosters the framework of cooperative problem-solving contemplated by the ADA, by encouraging employers to seek to find accommodations that really work, and by avoiding the creation of a perverse incentive for employees to request the most drastic and burdensome accommodation possible out of fear that a lesser accommodation might be ineffective.

Similarly, in **Barnett v. U.S. Air, Inc.**, 196 F.3d 979, 990 (9th Cir. 1999), the Court stated that it was "persuaded by well reasoned opinions from other circuits that have concluded that the ADA does not require an employer to give disabled employees preference over nondisabled employees in hiring and reassignment decisions. As a result a company does not have to reassign an employee to a new position contrary to the terms of a collectively bargained seniority system, or a non collective bargained seniority system. The Court also held that:

> If the employer is incorrect in its assessment of the existence of reasonable accommodation that would not unduly burden the employer *given the employer's knowledge of the employee's abilities), the employer is liable under the ADA for failing to provide reasonable accommodation. Thus, an employer's decision not to engage in an interactive process may put it at peril, but it does not create liability independent from a resulting failure to accommodate the employee's disability.

196 F.3d at 993 - 994. The Ninth Circuit then reheard this case en banc and reversed its decision. In **Barnett v. U.S. Air, Inc.**, 228 F.3d 1105, 1112 (9th Cir. 2000), the court stated that the EEOC's interpretive guidance states that "the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process

that involves both the employer and the [employee] with a disability." The Court then stated that: "[a]ll most all of the circuits to rule on the question have held that an employer has a mandatory obligation to engage in the interactive process and that this obligation is triggered either by the employee's request for accommodation or by the employer's recognition of the need for accommodation." **Id.** The court then held:

> we join explicitly with the vast majority of our sister circuits in holding that the interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA and that this obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation. In circumstances in which an employee is unable to make such a request, if the company knows of the existence of the employee's disability, the employer must assist in initiating the interactive process.

Id. The Court stated that "[t]he interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees." The court then set out the interactive process and stated:

> Employers should "meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee's request, and offer and discuss available alternatives when the request is too burdensome.
>
> The interactive process requires that employers analyze job functions to establish the essential and nonessential job tasks. In order to identify the barriers to job performance, employers must consult and cooperate with disabled employees so that both parties discover the precise limitations and the types of accommodations which would be most effective. The evaluation of proposed accommodations requires further dialogue and an assessment of the effectiveness of each accommodation, in terms of enabling the employee to successfully perform the job. See 29 C.F.R. Pt. 1630, App. § 1630.9.
>
> Once the employer and employee have identified and assessed the range of possible reasonable accommodations, the legislative history directs that "the expressed choice of the applicant shall be given primary consideration unless other effective accommodation exists that would provide a meaningful equal employment opportunity."

228 F.3d at 1115. The Court then held that:

> employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation

> would have been possible. We further hold that an employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process.

The Supreme Court has accepted certiorari of this case. It will be interesting to see what happens.

6. *Issues in Undue Hardship Situations:*

In **Monette V. Electronic Data Systems Corporation**, 90 F.3d 1173 (6th Cir. 1996), the Court stated:

> In cases in which the plaintiff is seeking some accommodation on the part of the employer, and is claiming that he or she would be qualified to perform the essential functions of the job with such reasonable accommodation, the disputed issues will be whether such accommodation is reasonable, whether such accommodation would impose an undue hardship upon the employer, and/or whether the plaintiff is capable of performing the job even with the suggested accommodation, each of which may also be resolved through direct, objective evidence. The Americans with Disabilities Act provides a guide for determining the burden of proof in these cases. 42 U.S.C. 12112(b)(5)(A) states that an employer has "discriminated" against a disabled individual by: [32] not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. [33] The language of this provision makes it clear that the employer has the burden of persuasion on whether an accommodation would impose an undue hardship. However, the disabled individual bears the initial burden of proposing an accommodation and showing that that accommodation is objectively reasonable. The Seventh Circuit has described the employee's initial burden on this issue as showing "that the accommodation is reasonable in the sense both of efficacious and of proportional to costs." Vande Zande v. State of Wisconsin Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995).[fn10] Additionally, nothing in the statute alters the burden the disabled individual bears of establishing that he or she is capable of performing the essential functions of the job with the proposed accommodation. Put simply, if the employer claims that a proposed accommodation will impose an undue hardship, the employer must prove that fact. If the employer claims instead that the disabled individual would be unqualified to perform the essential functions of the job even with the

> proposed accommodation, the disabled individual must prove that he or she would in fact be qualified for the job if the employer were to adopt the proposed accommodation.
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> In **Reed V. Lepage Bakeries**, 244 F.3d 254, 259 (1st Cir. 2001), the Court held:
>
> In order to prove "reasonable accommodation," a plaintiff needs to show not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances.[fn5] If plaintiff succeeds in carrying this burden, the defendant then has the opportunity to show that the proposed accommodation is not as feasible as it appears but rather that there are further costs to be considered, certain devils in the details.
>
> Under this arrangement, the difficulty of providing plaintiff's proposed accommodation will often be relevant both to the reasonableness of the accommodation and to whether it imposes an undue hardship. Cf. Vande Zande, 44 F.3d at 542-43.

In **Reed**, the EEOC filed an amicus brief arguing:

> that the only burden a plaintiff has on proving reasonable accommodation is to show that the accommodation would effectively enable her to perform her job; whether the accommodation would be too costly or difficult, on the EEOC's view, is entirely for the defendant to prove.

Id. In rejecting the EEOC's position, the Court stated:

> We agree that proving an accommodation's effectiveness is part of the plaintiff's burden; but it is not the whole. Indeed, simply in explaining how her proposal constitutes an "accommodation," the plaintiff must show that it would effectively enable her to perform her job. That is precisely what an accommodation does. But what plaintiff must show further under the statute is that her requested accommodation is "reasonable." And consistent with its usage throughout the law, the concept of reasonableness here constrains the plaintiff in what she can demand from the defendant. A request that the defendant relocate its operations to a warmer climate, for example, is difficult to imagine as being "reasonable." A reasonable request for an accommodation must in some way consider the difficulty or expense imposed on the one doing the accommodating. See Vande Zande, 44 F.3d at 542-43.

Id.

In **Barnett v. U.S. Air, Inc.**, 228 F.3d 1105, 1119 (9th Cir. 2000), the Court considered the issue of whether an employer's unilaterally imposed seniority system trumps a disabled employee's right to reassignment. The Court held that:

> reassignment is a reasonable accommodation and that a seniority system is not a per se bar to reassignment. However, a seniority system is a factor in the undue hardship analysis. A case-by-case fact intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer. If there is no undue hardship, a disabled employee who seeks reassignment as a reasonable accommodation, if otherwise qualified for a position, should receive the position rather than merely have an opportunity to compete with non-disabled employees.

Id. at 1120.

Respectfully Submitted,

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