

# When is Enough Enough? Reasonable Accommodations

Melanie Osborne  
May 2017  
ASHRM Conference

1

---

---

---

---

---

---

---

---

## What are the rules?

<p><b>Federal Law</b></p> <ul style="list-style-type: none"> <li>▶ Americans with Disabilities Act, 42 U.S.C. §1201, as amended</li> <li>▶ Applies to employers who have 15 or more employees</li> <li>▶ EEOC Guidance (May 9, 2016)</li> </ul>	<p><b>State Law</b></p> <ul style="list-style-type: none"> <li>▶ Alaska Human Rights Law, AS 18.80.200</li> <li>▶ Applies to a person who has one or more employees in the state, but not a non-profit</li> </ul>
---	---

**THE BASIC PRINCIPLE** - An employer must not discriminate against and must provide a reasonable accommodation to a qualified individual with a disability who can perform the essential functions of the job (with or without accommodation).

2

---

---

---

---

---

---

---

---

## Who and what does the ADA protect?

- ▶ **Qualified individual with a disability** - an individual (employee or applicant) who
  - ▶ meets the skill, experience, education or other requirements of the position that s/he hold or seeks, and
  - ▶ who can perform the essential functions of a position with or without reasonable accommodation
  
- ▶ Under the ADA, an individual is **disabled** if he or she has:
  - ▶ A physical or mental impairment that substantially limits one or more major life activity
  - ▶ Has a "record of" a substantially limiting impairment
  - ▶ Is "regarded as" having a substantially limiting impairment

---

---

---

---

---

---

---

---

### 2008 Amendments & 2012 EEOC Regulations

- ▶ “Substantially limits” --
  - ▶ Lower degree of functional limitation
  - ▶ “To be construed broadly in favor of expansive coverage”
  - ▶ Requires individualized assessment
- ▶ Prohibits considering mitigating measures to determine disability (except eyeglasses / contacts)
  - ▶ Question is whether employee in untreated/unmedicated state, is disabled
- ▶ “Regarded as” based on belief of “impairment”
- ▶ Adds “major bodily functions” to “major life activity”

---

---

---

---

---

---

---

---

### What do we learn from all this?

- ▶ Reasonable accommodation involves the removal of workplace barriers
- ▶ Accommodations can involve “preferences” for an employee with a disability, so that s/he can “obtain the same workplace opportunities that those without disabilities automatically enjoy.”
- ▶ “by definition, any special ‘accommodation’ requires the employer to treat an employee with a disability differently, i.e., preferentially.”

---

---

---

---

---

---

---

---

### How does the process usually start?

- ▶ Employee goes into front line supervisor - “I’ve changed my meds and I’m having a hard time getting to work on time.”
- ▶ Employee goes into HR - “I have depression and stress, and I’m struggling.”
- ▶ Employee says supervisor “I have used up all my paid leave and FMLA leave and I need more time off.”
- ▶ Employee says to manager that “my hands ache after I use this machine all day.”

---

---

---

---

---

---

---

---

### Initial response

What's the right thing to do once an employee says any of those things?

- “What can I do for you?”
- “What do you need?”
- “How can I help you?”

▶ First look for the quick easy fix if there is one.

---

---

---

---

---

---

---

---

### What do you document?

- ▶ Employee said my hands ache at the end of the day.
- ▶ I asked what he needed.
- ▶ He said he should be fine if he could take a few additional 5-minute breaks during the day to massage his hands.
- ▶ I approved it.
- ▶ I didn't ask anything medical.
- ▶ I went back and followed up to make sure it was working.

---

---

---

---

---

---

---

---

### Does it trigger the process?

- ▶ Usually the individual must indicate that an accommodation is needed
  - ▶ Employer doesn't have a “duty to guess”
  - ▶ “it is not the employer's responsibility to anticipate the employee's needs and affirmatively offer accommodation”
- ▶ Exception is if it is obvious

Employee says:

- ▶ “Migraines from staring at the monitor all day.”
- ▶ Doctor note that says he can be returned to light duty.
- ▶ “By the end of the week, my wrists are really are aching from using the computer.”

No quick fix, then you go through the interactive process.

---

---

---

---

---

---

---

---

### Once the process is triggered...

- ▶ Obligation moves to employer → *effective* accommodation
- ▶ Employers must, at a minimum, consider possible modifications of jobs, processes, or tasks so as to allow an employee to work
- ▶ ADA, EEOC regulations and court decisions identify many types of accommodations:
  - ▶ job restructuring
  - ▶ part-time or modified work schedules
  - ▶ reassignment to a vacant position
  - ▶ acquiring or modifying equipment
  - ▶ changing exams, training materials or policies
  - ▶ providing qualified readers or interpreters

---

---

---

---

---

---

---

---

### What is reasonable?

- ▶ "seems reasonable on its face" - US Airways v. Barnett (S. Ct. 2002)
- ▶ "practical approach" - must in some way consider the difficulty or expense
- ▶ "feasible for the employer under the circumstances"
- ▶ Some courts suggest a costs-benefits analysis
- ▶ Likelihood of success / futility
- ▶ Consistent with medical documentation
  
- ▶ Does accommodation have to tie to the substantial limitation or the disability?

---

---

---

---

---

---

---

---

### Job restructuring, part time or modified schedules

- ▶ Job restructuring
  - ▶ Don't need to restructure essential functions
  - ▶ Don't need to lower quality or productivity standards
- ▶ Light duty
  - ▶ Don't have to reallocate essential functions
  - ▶ Don't have to create a new job - such as a transitional or light duty job
  - ▶ If existing light duty jobs exist, may have to consider reassignment

---

---

---

---

---

---

---

---

### Job restructuring, part time or modified schedules (cont'd)

- ▶ Side note - Most courts will not punish employers for going beyond the ADA's requirements - *e.g.*, move an essential function for a time
  - ▶ Document: "we all understand these are essential functions, this is a request of the employee, temporarily approved but is up to the employer"
  - ▶ In performance evaluation - document that the person isn't doing their position

---

---

---

---

---

---

---

---

### Other potential requests for accommodation

- ▶ Is a new supervisor a reasonable accommodation?
  - ▶ No
- ▶ Providing an assistant or job coach?
  - ▶ Possibly
- ▶ Modified work schedule?
  - ▶ Yes
- ▶ Work at home?
  - ▶ Could be
- ▶ Comfort animals?
  - ▶ No cases on this yet

---

---

---

---

---

---

---

---

### Other potential requests for accommodation

- ▶ Irritant free environment?
  - ▶ Probably not
- ▶ Request to relocate the operations to a warmer climate
  - ▶ No
- ▶ Rescinding discipline?
  - ▶ No - but accommodation so that employee does not break rules in the future

---

---

---

---

---

---

---

---

### Other potential requests for accommodation

- ▶ Reassignment?
  - ▶ Yes, if no other reasonable accommodation
  - ▶ For current employees, but not applicants
  - ▶ To a 'vacant' and 'equivalent' position
  - ▶ 'Vacant' means it will soon be available
  - ▶ Don't have to bump any employee from a job to create a vacancy
  - ▶ Don't have to promote an employee as a reassignment
  - ▶ Ordinarily don't have to modify seniority system (if followed)
  - ▶ If no vacant and equivalent position, look for lower level
  - ▶ Must only be reassigned to a job for which s/he is qualified (with an accommodation if necessary)

---

---

---

---

---

---

---

---

### Employer's right to choose

- ▶ While employer should give consideration to the individual's preferred accommodation, employer is free to choose any *effective* accommodation that is less expensive or easier to provide
- ▶ Flexible schedule offered; telecommuting rejected
- ▶ Set lunch break vs. ability to check blood sugar as necessary
- ▶ Requiring employee to use accrued leave rather than leave without pay
- ▶ Leave and schedule change vs. being excused from shift work
- ▶ Putting instructions in writing vs. allowing employee to tape record
- ▶ Reallocation of marginal functions vs. leave

---

---

---

---

---

---

---

---

### Documenting the "disability"

- ▶ An employee's request need not necessarily be in writing
- ▶ Engage in good faith attempts to document
- ▶ Employer has the right to get information about the covered disability
- ▶ Track if employee fails to cooperate in providing medical documentation → negates entitlement to reasonable accommodation

---

---

---

---

---

---

---

---

### Exceptions to a Reasonable Accommodation:

- ▶ If an employer can prove that the accommodation would create an undue hardship (e.g., cost, impact on operations, impact on others, etc.), then the employer may not need to make the accommodation
- ▶ If employer can prove a disabled person creates a direct threat to the health and safety of other employees or themselves then the employer may not need to make the accommodation

---

---

---

---

---

---

---

---

### How long should the process take?

- ▶ Depends
- ▶ Relevant factors for delay:
  - ▶ Reason for delay
  - ▶ Length of delay
  - ▶ How much the individual with a disability and the employer each contributed to the delay
  - ▶ What the employer was doing during the delay
  - ▶ Whether the required accommodation was simple or complex to provide

---

---

---

---

---

---

---

---

### Summary of steps

- ▶ Talk to the person - if it's easy, do it (and document)
- ▶ Analyze the job functions to establish essential and non-essential functions
- ▶ Figure out the functional limitations
  - ▶ Talk to the employee
  - ▶ Talk to the doctor
  - ▶ Other research
- ▶ Offer a reasonable accommodation - i.e., *effective*
- ▶ Consider suggestions of employee
- ▶ Document the process
- ▶ Check back in as to whether the accommodation works

---

---

---

---

---

---

---

---

### What can the supervisor say to the other employees?

- ▶ We are "acting for legitimate business reasons or in compliance with federal law."
- ▶ We "have a policy of assisting any employee who encounters difficulties in the workplace" and "many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy."

22

---

---

---

---

---

---

---

---

### Leave requests

- ▶ Unpaid leave is a form of reasonable accommodation in particular circumstances
- ▶ How much leave is a fact specific issue
- ▶ No bright-line rule defining a maximum duration
- ▶ Consider undue hardship - *e.g.*, ability to get a temp.
- ▶ How much leave?
  - ▶ The larger the employer and the lower the skill level, the more leave -- Walmart - might have to give a year; Federal Express - 6 months reasonable
  - ▶ The smaller the employer and higher the skill level, the less leave - less than six months probably okay

23

---

---

---

---

---

---

---

---

### When does an employee's leave becomes an undue hardship?

- ▶ Indefinite leave - most courts have held that employer does *not* have to provide indefinite leave as reasonable accommodation
- ▶ Leave is "unreasonable" if it will not lead to job performance "in the present or in the immediate future"
- ▶ Consider whether regular attendance is an "essential function"
- ▶ Doctor's view -
  - ▶ Need "at least another 14 weeks of leave" or "at least another six months" or specific return was "purely a guess"
  - ▶ Why did your previous prediction on return turn out to be wrong?

24

---

---

---

---

---

---

---

---



### The most common problems both employers and managers face

- ▶ Supervisors
  - ▶ Don't recognize the process being triggered
  - ▶ Say they can't afford an accommodation
  - ▶ Believe we treat everyone equally - and say it
  - ▶ Don't want to follow up on accommodation
- ▶ Don't forget "retaliation"

---

---

---

---

---

---

---

---

### Scenarios

---

---

---

---

---

---

---

---

### Now The Fun Begins!

You work for Jessica in HR. She is a perfectionist who comes to you with lots of questions - and checks and double checks everything.



---

---

---

---

---

---

---

---

### Kevin

This is Kevin.  
He was recently hired in IT.  
He never disclosed that he has  
ADD, ADHD, Asperger's and  
depression.  
He gets regular treatment.



---

---

---

---

---

---

---

---

### Kevin (cont'd)

- ▶ Kevin gets disciplined for lack of attention to detail and failure to follow-through.
- ▶ He discloses his conditions, says his meds are not working, and that he will consult his doctor.



---

---

---

---

---

---

---

---

### Kevin (cont'd)

- ▶ Six months later Kevin's supervisor, Dina criticizes Kevin for low productivity.
- ▶ Kevin proposes a plan he says will get him back on track.
- ▶ Dina accepts the plan.



---

---

---

---

---

---

---

---

Kevin fails to follow through, and Jessica wants to fire him.

- ▶ Disabled?
- ▶ Enough interactive dialogue?
- ▶ Have to offer your own if employee's proposal fails
- ▶ What's the accommodation of last resort?



---

---

---

---

---

---

---

---

Kevin (cont'd)

- ▶ Suppose instead of being fired, Jessica offers to put Kevin back in former position, where he performed well.
- ▶ Kevin rejects because it is lower paying and boring.



---

---

---

---

---

---

---

---

Kevin - Discussion points

- ▶ Employer is free to choose reassignment so long as it is appropriate position
- ▶ If disabled worker rejects appropriate reassignment, employer under no obligation to offer other positions
- ▶ But does the lower pay make it an unreasonable accommodation?
- ▶ Yes, if there was another reassignment possible at the same pay and he could perform it.

---

---

---

---

---

---

---

---

Kevin (cont'd)

- ▶ Suppose instead of being fired, Kevin asks to be transferred to a different position.
- ▶ Jessica agrees but says he has to take a test for the new position. Kevin refuses tests because he is afraid he will fail.
- ▶ Kevin asks for different position but is it told he as to compete for it.




---

---

---

---

---

---

---

---

Kevin - Discussion points

- ▶ Employer must look for vacant, equivalent or lower level position. No duty to maintain pay.
- ▶ What's vacant? Case-by-case. If you know something might be coming open, you will need to tell disabled employee and wait.
- ▶ EEOC - "several weeks"
- ▶ Reassignment does not mean promotion
- ▶ Kevin must be qualified, not best qualified
- ▶ If test was part of regular job requirement, then okay to make Kevin take and pass test.

---

---

---

---

---

---

---

---

Kevin, cont'd

- ▶ What if, instead Kevin tells you his relationship with Dina has deteriorated to the point they can't work together anymore?
- ▶ Dina "picks on" Kevin and "is not nice" as Kevin's prior boss.
- ▶ Kevin demands that: a) Dina be removed, or b) that he, Kevin, be transferred to a new manager.




---

---

---

---

---

---

---

---

### Kevin - Discussion Points

- ▶ Courts have routinely rejected "boss-ectomies!"
- ▶ To be disabled in the major life activity of "working," Kevin must be substantially limited in a broad range of jobs
- ▶ Focus on improving the relationship between Dina and Kevin and helping Kevin meet performance standards.



---

---

---

---

---

---

---

---

### Connie

- ▶ This is Connie.
- ▶ She also works for Jessica in HR.



---

---

---

---

---

---

---

---

### Connie, cont'd

- ▶ Connie heard that coworker Ron threatened to "go postal."
- ▶ This triggers her PTSD.
- ▶ Ron works for IT, the neighboring department.
- ▶ This is Ron....



---

---

---

---

---

---

---

---

### Connie, cont'd

- ▶ Ron comes back to work, but Connie says she can't work near Ron and goes on STD.
- ▶ Connie demands: move Ron across town, move her across town to a new position where she would do some of her tasks and some other new tasks, or let her work form home.
- ▶ You can't move Ron, and Connie has to be physically present.
- ▶ You can't find Connie another position, and she never returns. LTD is denied.




---

---

---

---

---

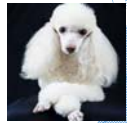
---

---

---

### Connie - Discussion Points

- ▶ Does denial of LTD mean she is not disabled?
- ▶ Is her physical presence an essential function?
- ▶ Was there a reasonable accommodation that would have permitted her to perform essential functions of her job?
- ▶ Was suggesting she look for another position enough?




---

---

---

---

---

---

---

---

### Connie - Discussion Points

- ▶ Disabled? From working near Ron, yes, but not from a broad class of jobs.
- ▶ STD, LTD - Irrelevant
- ▶ Request to move Ron not reasonable - do not have to adversely affect other employees (except marginal tasks)
- ▶ Do not have to create a new position
- ▶ Physical attendance is workplace is *usually* essential function.




---

---

---

---

---

---

---

---

### Chris

- ▶ This is Chris.
- ▶ Chris is an on-the-road salesman who covers five states. He has major job stress from the criticism he receives.
- ▶ The symptoms are extreme.




---

---

---

---

---

---

---

---

### Chris, cont'd

- ▶ Chris is diagnosed with Major Depressive Disorder brought on by performance problems at work, and goes on leave.
- ▶ His doctor's note says the condition may be temporary or lifelong, and that Chris needs "substantial" time off.
- ▶ 12 weeks: Doctor says Chris needs 2 more months
- ▶ 14 weeks: Doctor says he needs another 2 months
- ▶ Business is limping along. Other employees are filling in where they can, but customers are angry and perfume sales have plummeted. You have advertised for a temp but have received no applications.




---

---

---

---

---

---

---

---

### Chris - Discussion Points

- ▶ Is indeterminate leave ever a reasonable accommodation?
- ▶ How long do you have to hold the job open? When can you terminate or permanently refill?
- ▶ Leave is a reasonable accommodation. To reject an indefinite leave request, the employer must show:
  - ▶ Undue hardship (no one available to fill position and temp can't be hired) and
  - ▶ Extended leave will not plausibly enable an eventual return to work
  - ▶ Very fact-specific inquiry




---

---

---

---

---

---

---

---

### Chris - Discussion Points

- ▶ Assume you can show leave request causes undue hardship, can you terminate?
- ▶ No. Have to look for an open equivalent position and if none, then a lower level position.
- ▶ What if Chris was a file clerk?




---

---

---

---

---

---

---

---

### Leslie

This is Leslie, Director of Chew Toy Sales.



She travels about 50% of the time and works 70 hours a week.

Lately, Leslie has been kind of stressed out.

---

---

---

---

---

---

---

---

### Leslie, cont'd

- ▶ She is severely anemic, and sustained permanent liver damage which will require life-long treatment.
- ▶ She has clinical depression and chronic fatigue.
- ▶ You give her 4 weeks leave to control the anemia and to get treatment.
- ▶ At 4 weeks, she returns to work with a release saying she may only work 40 hours a week and her travel must be reduced to 5 days per month.
- ▶ If you do not accommodate her, she will become ill again very shortly.




---

---

---

---

---

---

---

---



Leslie, cont'd

- ▶ Is Leslie disabled?
- ▶ Is temporary leave a reasonable accommodation?
- ▶ What about this request?
  - ▶ Request for part-time work?
  - ▶ Reallocating work to another employee?
- ▶ What if you want to help anyway?
- ▶ What if there is no accommodation?

---

---

---

---

---

---

---

---

Leslie - Discussion Points

- ▶ Leslie is probably disabled.
- ▶ 4 weeks of leave can be a reasonable accommodation when the employee is able to return to work after treatment and perform all the essential functions.
- ▶ You should continue the interactive process.
  - ▶ What are the fundamental job duties of the position (essential functions)?
  - ▶ Can she fulfill them?
  - ▶ You never have to reallocate *essential* functions to another worker as an accommodation
  - ▶ Leslie's is essentially requesting part time employment. You need not create a part time position.

---

---

---

---

---

---

---

---

Leslie - Discussion Points

- ▶ If Leslie is not qualified, you must explore whether she can perform existing vacant position.
- ▶ You may be more generous than the ADA requires, but state in writing that the arrangement is only temporary and discretionary. It is not an "accommodation."




---

---

---

---

---

---

---

---

### Trent

This is Trent. He works in customer service.

He is on the telephone 75% of his day taking complaints.

To deal with increased call volume, Eric (the head of customer service) has imposed hourly call quotas.

Trent's performance has declined, and he is not meeting those standards.

Coworkers report hearing Trent ask customers to repeat their information several times.



---

---

---

---

---

---

---

---

### Trent, cont'd

▶ You meet with Trent. Before you can get a word out, he shows you his new hearing aids he go over the weekend and says he's still having trouble hearing customers on the phone.

▶ Trent knows his stats need to improve but to hear, he needs a sonically enhanced TTY phone, headset, and computer.

▶ Trent's boss, Peggy, has just done the department budget and knows there's no extra money to pay for expensive new equipment.



---

---

---

---

---

---

---

---

### Trent - Discussion Points

- ▶ Undue hardship factors:
  - ▶ Nature and net cost of accommodation
  - ▶ Financial resources of the facility and impact on same
  - ▶ Overall financial resources of the entity
  - ▶ Type of operations of the entity
- ▶ Employer must prove undue hardship

---

---

---

---

---

---

---

---

### Trent, cont'd

- ▶ Trent takes leave for ear complications and is gone for 3 months.
- ▶ While he is gone, the department reorganizes and Trent's position is eliminated.
- ▶ Trent had received poor rating on his last review and was not well-liked by his co-workers.
- ▶ Trent calls Angel and finds out his job has been eliminated. He is furious.
- ▶ You investigate and learn the reorg was legitimate, but that Trent was selected for termination because he was not liked.
- ▶ You tell Trent he's to be treated just like any other reorg'd worker.

---

---

---

---

---

---

---

---

### Trent - Discussion Points

- ▶ Did you do the right thing?
- ▶ Was this a *bona fide* reorg?
- ▶ If so, treat the employee the same way a non-disabled employee would have been treated.
- ▶ But, what if his job was eliminated because of his poor review - and he says that was because of his disability?

---

---

---

---

---

---

---

---

Questions?

---

---

---

---

---

---

---

---