Accommodations for Disabled Workers

Special Report

Seven steps to a smooth-running job accommodation process
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Accommodations for Disabled Workers

By Barbara Magill

Human resources professionals know that accommodating workers with disabilities, which is at the center of the employment provisions of the Americans With Disabilities Act, is not as simple as it sounds. And it is not getting any easier.

Two issues will continue to dominate, and confuse, the subject for some time – accommodating employees who are “regarded as” having a disability, and when and whether leave is a reasonable accommodation. The somewhat related topic of medical examinations, which was thought to be relatively settled, has become muddled again due to a recent court case that found that the Minnesota Multiphasic Personality Inventory was actually a medical exam.

Try Quick Fix, But Document

In general, when an employee requests an accommodation, the quick fix is usually the best, even if the adjustment is not actually required by the ADA. Assuming the employee has been performing competently, when he or she asks a supervisor for some sort of accommodation due to a health condition, the normal response is “How can I help you? What do you need?”

There is nothing wrong with that, either. The supervisor does not need to determine whether the employee has a disability as defined by the ADA, and in fact is probably better off not knowing, so there can be no claim that the worker was regarded as being disabled. The supervisor should document any assistance given and ask the employee whether it works. If the quick fix is successful, the problem was easily solved to everyone’s satisfaction.

Only if the simple solution does not work for the employee or if the requested accommodation is an expensive one, does the supervisor need to know that HR should be involved. HR may very appropriately want to take the more formal approach of asking for certification of the employee’s condition to determine if a disability exists, and then committing to the interactive process to find a reasonable accommodation.

After HR has decided the worker has a disability that needs to be accommodated, the best approach is to make a real effort to find the right accommodation. The employee’s ideas should be considered first. If they are too expensive or unworkable for some reason, HR should contact organizations and other employers for help. The greater the effort, the less likely the employee is to be unsatisfied and sue.

And again, every effort that is made should be documented. The employer should take credit for trying. If no reasonable accommodation can be found to

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assist the employee in doing the essential functions of the job, HR should talk to
the worker again to see if anything has come to mind.

What if the employee is not one of the best or it is obvious the groundwork is be-
ing set for a lawsuit? As David Fram, director of ADA and EEO Services for the Na-
tional Employment Law Institute, advises, the more an employer thinks an employee
might sue, the more effort the company should make to accommodate the disability.
Employers can lay the groundwork for a lawsuit, too.

‘Regarded as’ Headaches

HR professionals know that employees who are regarded as having a disability
are protected by the ADA. Employees are protected against discrimination under the
law if they have an impairment that does not rise to the level of a covered disability,
but the employer acts as if they do; if they have a condition that is limiting only because of the atti-
ditudes of others; or if they have no impairment at all, but the employer thinks they do and treats them as
if they do.

In so-called “regarded as” cases, courts focus on
the employer’s perception, not an actual disability.
That is why it is better for a supervisor not to ask
about the health condition of an employee who re-
quests an accommodation. If something goes wrong
with the accommodation process, the employee has
less chance of making a “regarded as” claim if the
employer had no knowledge of the worker’s medical
condition.

The Equal Employment Opportunity Commis-
sion also considers an employer’s knowledge of
the employee’s medical condition to be a critical
piece of the “regarded as” issue. In this case, lack
of knowledge is a good thing. The less an employer,
through its supervisors, knows about its employees’
health, the better.

Providing an accommodation does not, by itself,
impute knowledge to the employer or show that it
regards the employee as having a disability, accord-
ing to informal guidance provided by the EEOC.
The courts appear to agree with that conclusion. A
statement by the 7th U.S. Circuit Court of Appeals is
illustrative: “decent managers try to help employees
cope with declining health without knowing or car-
ing whether they fit the definition in some federal
statute” (Cigan v. Chippewa Falls School District,
388 F.3d 331 (7th Cir. 2004)).
Another court called providing minor accommodations a sensible way to avoid litigation, liability and confrontation (Colwell v. Suffolk County Police Dept., 158 F.3d 635 (2d Cir. 1998)). Helping an individual to perform better without delving into why the person needs help does not prove that an employer regards the worker as disabled.

Similarly, providing information on or referring a worker to an employee assistance program, with nothing more, does not show the employer regards the employee as having a disability. Even sending an employee for a medical exam, by itself, generally is not sufficient to show the employer regarded the worker as disabled.

With “regarded as” cases, it does not matter to the EEOC whether the condition the employer thinks the worker has would actually qualify as a disability, but the courts seem to want the supposed impairment to be one that if it existed, would qualify as a disability under the ADA (see Sutton v. Lader, 185 F.3d 1203 (11th Cir. 1999)). Courts generally find that the employer must consider the condition it thinks the employee has to be substantially limiting and long term.

Logical or not …

It seems logical that if an employer regards a worker as having a disability, but that worker really does not have one, there would be no need for an accommodation. Logic, however, does not always provide guidance for HR pros. There is a split in the circuits on the issue, but at least two federal appeals courts have said that employees who are regarded as disabled by their employers are entitled to reasonable accommodations that would enable them to perform the essential functions of their jobs, even if their conditions would not rise to the level of an actual disability under the ADA.

How the courts arrived at that seeming incongruous pronouncement is perhaps best explained by examining the most recent decision, D’Angelo v. ConAgra Foods, Inc. (422 F.3d 1220 (11th Cir. 2005)).

Cris D’Angelo suffered from vertigo. She worked as a product transporter for ConAgra, which required her to move products from one end of the line to another in and out of freezers, stack pallets and work around moving equipment, according to the company’s vice president of human resources. In a previous position with ConAgra, D’Angelo worked on a conveyor belt and found that doing so exacerbated her vertigo to the point that she got dizzy and could no longer work.

The job of product transporter did not require conveyor belt work, but a year and a half after she began that job, a new supervisor assigned her to work on a conveyor belt during her shift. She suffered an attack of vertigo and subsequently brought in a note from her doctor, explaining that she could not work on the conveyor belt. The plant manager took the note to the HR vice president and fired D’Angelo the next day, telling her she posed “a safety hazard to yourself and your co-workers.”

D’Angelo sued, claiming both that she was disabled and that ConAgra regarded her as disabled. Both the trial court and the federal appeals court agreed that her condition prevented her from holding only a narrow category of jobs and did not substantially impair her ability to work or to perform any other major life activity. She did not have a disability under the ADA.
They also agreed, however, that ConAgra treated her as if she were disabled. The district court said that someone regarded as, but not actually, disabled was not entitled to a reasonable accommodation and dismissed the case. The appeals court disagreed on that point.

The text of the law provides “no basis for differentiating among the three types of disabilities [actual, regarded as, and association with those who are disabled] in determining which are entitled to a reasonable accommodation and which are not,” the appeals court found. It also said that the 1973 Rehabilitation Act, on which the ADA is based, requires employers to accommodate employees who are disabled in the regarded-as sense.

On the basis of what it called the plain language of the statute, the 11th Circuit joined the Third in requiring accommodations for workers an employer regards as disabled, regardless of whether an actual disability exists. The First Circuit indirectly agreed in a decision in which it assumed that the ADA requires accommodations for regarded-as-employees, but it did not expressly so hold (Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996)).

The Fifth, Sixth, Eighth and Ninth Circuits have ruled the other way. They reason that requiring accommodations for workers who are regarded as disabled would “create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers’ misperceptions, a right to reasonable accommodation no more limited than those afforded actually disabled employees” (Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 1999)).

What should HR do? If an employee asks for an accommodation to enable him or her to do the essential tasks of the job, unless that assistance would be an undue hardship on the employer’s business, find a way to provide it. That is the simple answer. If providing the accommodation is too difficult, document your reasoning. And communicate with the employee, honestly and directly.

**Leave as an Accommodation**

Most courts agree that regular attendance is an essential function of most jobs. However, leave may be a reasonable accommodation in some instances as long as the leave has at least an approximate end date.

The EEOC is especially hard on employers that have no-fault leave policies that provide workers with a pool of leave for any reason but an automatic termination when that leave is exceeded. Moreover, the agency insists that employers may have to grant or extend leave to accommodate employees who can give only an approximate, rather than a definite, return date.

Leave caps, if applied too rigidly, violate the ADA as far as the EEOC is concerned, even if the caps are for long periods such as six months. Sending out a form letter at the end of the period to terminate someone does not comply with the law’s reasonable accommodation mandate if a leave extension would not result in any undue hardship.
Totally indefinite leave with no end in sight is not a reasonable accommodation, which by definition is assistance that enables an employee to presently or in the immediate future do the job (see Myers v. Hose, 50 F.3d 278 (4th Cir. 1995)). But courts realize that physicians often have difficulty defining exactly how much time an individual will need to be healthy enough to return to work, so some leeway usually is permitted. “Some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment” (Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000)).

The approximation may be as vague as “in six to eight weeks” or “in about three months,” the EEOC said in its guidance. Because Family and Medical Leave Act (FMLA) leave is 12 weeks, a time period of about that length probably will be considered reasonable by most courts, at least for larger employers.

What should an employer do? First of all, evaluate a request for leave the same as any other accommodation request. Discuss the matter with the employee and look for options such as a job transfer that might accommodate the employee and also suit the employer’s business needs better.

When scheduling intermittent leave, employees are required to cooperate with the employer to choose times that cause the least amount of disruption for the business. And remember, if the leave really is open-ended with no range in sight, “leave is off the table” as an ADA accommodation, according to Ann Reesman, general counsel with the Equal Employment Advisory Council.

The Trouble With Tests

The rules about testing under the ADA seem reasonably clear: Absolutely no testing likely to illicit medical information is permitted before a clear offer of employment is issued. The rule is aimed at preventing discrimination against job applicants with disabilities – if the employer does not know about a disability, obviously it cannot discriminate on the basis of one.

After an offer of employment is made, medical examinations are permitted for insurance and other purposes as long as the exam is for some good business reason and is required of all employees in the same job category. If a disability is uncovered as a result of the exam, the employer is required to provide a reasonable accommodation, so long as doing so does not cause an undue hardship.

Pre-offer tests designed to evaluate skills necessary for the particular job are permitted. For example, physical agility tests for firefighters or typing tests for secretaries are not considered medical examinations, but rather, skills tests, and may be given to job applicants.

Whether a paper and pencil psychological or personality test is considered a medical examination depends on the purpose for which it is given. Tests designed to measure honesty, tastes, habits and other personality traits were okayed by the EEOC in its guidance. Tests meant to discern whether an applicant has a mental disorder are prohibited as medical examinations. Questions about the use of mental health services, drugs or alcohol are prohibited even if the rest of the paper and pencil test is not.
That is all at the pre-offer stage. After an employee has been hired, even medical exams are permitted, as long as they are job related, there is a justifiable business reason for them and everyone is treated the same. But maybe things were not really as clear as we thought.

For one thing, the EEOC and some courts agree that promotions are the same as an initial job – the employee is more like an applicant than an existing employee, so the prohibition against medical examinations and questions exists again, regardless of the fact that such information more than likely is already available in the employee’s files.

For another, there is no universal agreement on which personality tests are meant to illicit more than just likes and dislikes, as one employer found out. Rent-a-Center gave employees who sought promotions to managerial positions a battery of tests, including the Minnesota Multiphasic Personality Inventory, in an effort to determine if the candidates were suited by personality to manage others.

Rent-a-Center used a vocational scoring protocol, not a clinical one, to assess the MMPI results and the test was administered by HR staff. But the court held that the test was a prohibited medical exam. Some questions were “designed, at least in part, to reveal mental illness” and hurt the employment prospects of those with mental disabilities, the court decided (Karraker v. Rent-a-Center, 411 F.3d 831 (7th Cir. 2005)).

Another appeals court approved the use of the same test as job related and consistent with business necessity when it was used to screen police officers at the post-job-offer stage. “We easily conclude that appropriate psychological screening is job related and consistent with business necessity where the selection of individuals to train for the position of police officer is concerned,” the court in that case said (Miller v. City of Springfield, 146 F.3d 612 (8th Cir. 1998)).

So where does this leave HR professionals? On a very narrow balance beam, it would seem. Personality tests must be chosen with care. The company that publishes the MMPI recommends use of its test in employment only in the identification of suitable candidates for high-risk public safety positions and only after a conditional job offer has been made.

Test No Match for Judgment

Reliance on a personality test rather than an HR professional’s judgment is a misuse of the test, according to Dan King, principal of Career Planning and Management Inc., Boston. If used as part of an exhaustive assessment to make sure there is not some factor that was overlooked, however, a personality test can be a useful tool. The key is selecting the appropriate test, King said.

The Myers-Briggs personality test is good for measuring leadership style, but is not intended as a screening device, he said. The MMPI is more clinical and may be perceived by some as crossing the line toward an actual medical exam.

The selection of a personality test also tells applicants something about the employer’s corporate culture, King noted. HR should give careful consideration to whether a test fits the personality of the employer.

He suggested that employers use tests to match profiles of their star performers. Too often tests are given in a vacuum without matching them to a company’s best workers, he said.

At the post-offer stage, personality tests are less likely to get in the way of HR’s own gut reactions and be used more as a tool for due diligence. “HR professionals need to have instincts about people to begin with,” King advised.
HR pros also need to remember that promotions for which employees must compete generally will be viewed the same as an initial job for ADA purposes, so the same medical examination prohibitions apply.

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