Reasonable Accommodation: What Does the Law Really Require?

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Introduction

Historically, individuals with disabilities suffered from stereotyping and were largely discriminated against in the workplace, in educational settings, and in public. The Rehabilitation Act of 1973 was the first act to address these injustices, prohibiting discrimination against individuals with any handicap by any entity receiving federal funding. Section 501 applies to the federal government, Section 503 to companies that do business with the federal government, and Section 504 to recipients of federal financial assistance. In 1990, the Americans with Disabilities Act (ADA) was enacted to further level the playing field for all people with disabilities, and it incorporated most of the standards established by the courts under the Rehabilitation Act. The ADA has become almost a household phrase for people with disabilities since it became law.

In the legal world, both the Rehabilitation Act and the ADA have been the subjects of scores of cases in attempts to narrow their application and clarify their vague terms. While everyone agrees on the intent of the laws-to eliminate discrimination against individuals with disabilities-the actual standards and terminology are not so clear, and different people interpret them differently. The courts have progressively chiseled away at the laws, leaving those of us with disabilities struggling to make sense of what has been done to these mandates that were to have provided equal access for all of us.

Under both the Rehabilitation Act and the ADA, employers are required to provide reasonable accommodation to qualified individuals with disabilities. Thus, even those employers who are not covered under the ADA are still required to meet this standard under the Rehabilitation Act. The federal government is one of those employers, and Executive Order 13164 directs all federal agencies to establish procedures to facilitate the provision of reasonable accommodations to employees and job applicants with disabilities (U.S. Department of Justice, 2002).

Who Are Qualified Individuals with Disabilities?

The Rehabilitation Act and Title I of the ADA were enacted to protect “qualified individuals with disabilities” in the workplace (ADA, 1990; 45 Code of Federal Regulations, 2002; U.S. Equal Employment Opportunity Commission, 1992). What is a “qualified individual with a disability?” Simply stated, a qualified individual with a disability “meets the skill, experience, education, and other job-related requirements of a position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of a job” (ADA, 1990).

The ADA (1990) definition of a disability with respect to an individual is very specific:

(A) having a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) having a record of such an impairment; or (C) being regarded as having such an impairment.

Since 1992, when the Equal Employment Opportunity Commission (EEOC) published its ADA Technical Assistance Manual, the Supreme Court has considered a number of cases involving disabled employees,

and its rulings have changed the definition of "disability," limiting the population protected by the ADA (Sutton v. United Airlines, Inc., 1999; Murphy v. United Parcel Service, Inc., 1999). As a result of Supreme Court decisions, the Technical Assistance Manual's Addendum advises that "[w]hether a person has an ADA 'disability' is determined by taking into account the positive and negative effects of mitigating measures used by the individual" (U.S. Equal Employment Opportunity Commission, October 2002). In practical terms, this means that if one has little or no difficulty performing any major life activity as a result of using a "mitigating measure" such as hearing aids, one may not meet the ADA's first definition of an individual with a disability.

What Constitutes Reasonable Accommodation?

Assuming an employee is a "qualified individual with a disability," the ADA mandates that the employer provide "reasonable accommodation" to enable the disabled employee to perform the essential functions of the job unless doing so would cause the employer undue hardship. The ADA (1990) defines "reasonable accommodation" in Title I stating that it may include:

(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.

The reasonableness of an accommodation depends upon a common sense balancing of the costs and benefits to both employer and employee (Lyons v. Legal Aid Society, 1995). An accommodation may not be considered unreasonable merely because it requires the employer to assume more than a de minimis cost or because it will cost more to obtain the same overall performance from a disabled employee. The statute does, however, provide that reasonable accommodation is not required if it would result in undue hardship, defined as "an action requiring significant difficulty or expense" (ADA, 1990).

If the situation requires reassignment to accommodate the disability, the employer is required to comply; however, the employer is not obligated to reassign the employee to a better position than he or she normally would be entitled to because of his or her disability, nor is the employer obligated to provide an employee the accommodation he or she requests or prefers if an alternative reasonable accommodation is offered (Henricks-Robinson v. Excel, 1997; Schmidt v. Methodist Hospital, 1996).

The employee has a duty to inform the employer of a need for accommodation. If an employee does not request an accommodation, the employer cannot be held liable for failing to provide one. An employee cannot remain silent and expect the employer to bear the initial burden of identifying the need for and suggesting an appropriate accommodation (Taylor v. Principal Financial Group, Inc., 1996; Miller v. National Casualty Co., 1995; Hedberg v. Indiana Bell Telephone Co., 1995).

Under the ADA, reasonable accommodation is required in three aspects of employment: to ensure equal opportunity in the application process, to enable a qualified individual with a disability to perform the essential functions of a job, and to enable a disabled employee to enjoy equal benefits and privileges of employment (U.S. Equal Employment Opportunity Commission, May 2002). Examples of some acceptable accommodations in each category follow.

The Application Process

Reasonable accommodations for job applicants may include providing an accessible location for job interviews, sign language or oral interpreters, provision of computer-assisted real-time transcription (CART), or provision of other assistive communication devices.

Performance of the Essential Functions of a Job

An employer is not required to decrease performance standards as an accommodation, nor is an employer required to provide personal use items such as hearing aids (U.S. Equal Employment Opportunity Commission, May 2002). It may be necessary to redefine the job duties as a reasonable accommodation. An employee must be able to perform the essential functions of the job, but where it is possible to remove certain non-essential tasks from an employee's work requirements, this should be done. Provision of auxiliary devices and services is included in the ADA mandate. Examples of such devices and services for people who are deaf, hard of hearing, or who have other communicationrelated disabilities include, but are not limited to the following: telecommunication devices for deaf individuals (TDDs, also referred to as TTYs), sign language and oral interpreters, computer-assisted realtime transcription (CART) services, note takers for training courses and meetings, captioned training tapes, assistive listening systems, and videotext displays.

Equal Benefits and Privileges of Employment

It may be necessary for an employer to make physical changes to the workplace to enable an employee with a disability to enjoy the benefit of an employee cafeteria or break room, such as installing a ramp or lowering the sink to enable a mobility-impaired person to enter the area and reach the sink. If the employer provides a television in the employee break room, the employer would be required to provide an infrared assistive listening device to enable a hard of hearing employee to enjoy the benefit of hearing the television that other employees enjoy.

What is Required of Private Providers of Public Accommodation?

Title III of the ADA addresses the obligations of privately operated facilities that are used by the public. These are listed in the Act by category (ADA, 1990):

Lodging (other than apartments), eating establishments, entertainment facilities, public gathering places, stores and sales establishments, service establishments (including law offices and health care provider facilities), transportation stations, public display facilities (such as museums), places of recreation (such as parks), places of education, social service centers, and exercise facilities (such as golf courses).

With the exception of some private health care programs, such as social service centers and educational programs that may receive federal funding, the Rehabilitation Act does not cover most of these services because they are not recipients of federal financial assistance. Remarkably, airline travel and housing are not included in the ADA; however, they are subject to the Air Carrier Access Act and the Fair Housing Act, respectively, which are not addressed in this article. Private clubs and religious organizations are specifically excluded from the ADA. State and local government entities are public entities covered by Title II of the ADA, not Title III.

Once a facility is determined to fall under the ADA, anyone who owns, leases, leases to another, or operates the facility is required to provide accommodation to individuals with disabilities whom it serves. Two areas of particular concern to professionals with disabilities are conferences and conventions.

Accommodation in the Context of Conferences and Conventions

Conferences and conventions are most commonly staged by educational institutions, professional organizations, and service establishments, but might be offered by any entity covered by the ADA. Furthermore, public gathering places such as convention centers and auditoriums are included under Title III; thus, any gathering in such facilities is required to provide specific accommodation to attendees with disabilities. Unlike Title I, Title III of the ADA does not mandate "reasonable accommodation." Instead, the Act states that covered entities must provide individuals with disabilities "opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others" (ADA, 1990).

Covered entities are prohibited from discrimination against people with disabilities. The broad principles underlying the specific prohibitions include equal opportunity to participate, equal opportunity to benefit, and receipt of benefits in the most integrated setting appropriate (ADA Title III Technical Assistance Manual, 1993). Under these principles, the following are specifically prohibited: failure to make reasonable modifications in policies, practices, or procedures that would accommodate individuals with disabilities; failure to take necessary steps to ensure that auxiliary aids and services are provided to ensure access to individuals with disabilities to goods or services being offered to others; and failure to remove architectural and communication barriers where such removal is readily achievable (ADA, 1990). Examples of acceptable accommodation under each of the prohibitions are provided below.

Reasonable Modifications in Policies, Practices, or Procedures. If a conference planner has a policy that specific seats cannot be reserved ahead of time, and if seating is provided on a first come, first served basis, the ADA requires the planner to make a reasonable modification in its seating policy to ensure a front row seat for a hard of hearing conference attendee. This could be accomplished by including a section on a registration form requesting special disability seating.

Provision of Auxiliary Aids and Services. The ADA requires a public accommodation to provide auxiliary aids to individuals with disabilities who have physical or mental impairments that substantially limit the ability to communicate (ADA Title III Technical Assistance Manual, 1993). The type of auxiliary aid or service required to ensure effective communication will depend upon the length and complexity of the communication involved. For example, it is acceptable and reasonable for a sales clerk to communicate with a Deaf individual by exchanging written notes when the individual is shopping for a suit in a department store. Alternatively, the clerk might utilize a computer terminal and take turns typing to communicate. However, if a Deaf individual attends a conference lasting several hours, the conference organizers would be required to provide a sign language interpreter or real-time captioning to ensure adequate communication. Similarly, if a hard of hearing person attends a conference, to ensure effective communication, the conference organizers would be required to provide real time captioning or an assistive listening system. Ideally, a public accommodation should consult with individuals with disabilities to determine the appropriate auxiliary aid or service; however, the ultimate decision is in the hands of the public accommodation, provided that the outcome is effective communication.

Removal of Architectural and Communication Barriers. Public accommodations must remove barriers only when it is “readily achievable” to do so. That is, if the changes are “easily accomplishable and able to be carried out without much difficulty or expense,” they should be done (ADA, 1990). Furthermore, the ADA provides factors to be considered in determining whether an action meets this standard. For example, a convention center meets its obligation to remove architectural barriers by providing ramps to permit wheelchair users to enter the seminar rooms and lowering towel dispensers in restrooms. By adding strobe alarms to the traditional audible alarm system, the center removes a communication barrier.

Conclusions

As is the case with most legal issues, the laws that have been enacted to protect the rights of individuals with disabilities are fraught with terminology and standards that are difficult to interpret. The interpretations by the courts are fluid and may change on a case-by-case basis. It is important for people with disabilities to be informed about the laws that affect them and to continuously be alert to case law that alters the interpretations of those laws. Obviously, this article does not cover every mandate in the ADA. The point to remember is that the legislature intended to eliminate discrimination against people with disabilities in all areas of life, including the workplace, educational institutions, and public facilities of all types. Individuals with hearing loss that results in substantial limitation of their ability to hear are entitled to request and receive reasonable accommodation to enable them to perform the essential functions of a job as identified by the employer in the job description. Furthermore, they have the right to equal enjoyment of goods, services, and facilities offered to the public by privately operated facilities through the removal of barriers, modification of policies and procedures, and provision of appropriate auxiliary aids and services. By knowing the law, people with disabilities can take action to ensure that they are afforded opportunities equal to the general population.

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