

CHAPTER 7

REASONABLE ACCOMMODATION

Reasonable accommodation is one of the foundations of both the Rehabilitation Act and the ADA. It is the principal means by which Congress sought to level the playing field for individuals with disabilities so that they could compete in the employment arena on an equal basis with nondisabled individuals. This is not to suggest that the other provisions of the Rehabilitation Act and the ADA are not significant; they are. But without the concept of reasonable accommodation, the statutes would be largely symbolic. As the EEOC notes in its *Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation*, (Oct. 20, 2000), reasonable accommodation is an “important part of the government’s national policy to create additional employment opportunities for people with disabilities.” The guidance further explains:

An accommodation is a change involving the workplace that enables a person with a disability to enjoy equal employment opportunities. Many individuals with disabilities can apply for and perform jobs without the need for an accommodation. However, where workplace barriers exist, such as physical obstacles or rules about how a job is to be performed, reasonable accommodation serves two fundamental purposes. First, reasonable accommodations remove barriers that prevent people with disabilities from applying for, or performing, jobs for which they are qualified. Second, reasonable accommodations enable agencies to expand the pool of qualified workers, thus allowing the agencies to benefit from the talents of people who might otherwise be arbitrarily barred from employment.

Id. [[Research Supp. M](#)].

Reasonable accommodation is significant in two ways under the ADA and, by incorporation of ADA standards, under the Rehabilitation Act. First, to the extent that certain protections of the ADA and the Rehabilitation Act extend only to qualified individuals with disabilities, reasonable accommodation is significant in defining those individuals. A qualified individual—i.e., an individual with a disability who can perform the essential functions of a given position with or without reasonable accommodation—is protected from discrimination in job application procedures, as well as in hiring, advancement, discharge, compensation, and all other terms, conditions, and privileges of employment. See 42 USC 12112(a) [[Research Supp. B](#)]. Second, agencies are required to make reasonable accommodation of any known physical or mental disabilities of a qualified individual unless to do so would impose an undue hardship. See 42 USC 12112(b)(5)(A) [[Research Supp. B](#)]. In many cases, the prohibition against discrimination and the obligation to provide reasonable accommodation work together. If a complainant maintains that he or she was not hired due to disability discrimination, the determination of whether the complainant is protected by the ADA and the Rehabilitation Act usually requires consideration of whether the complainant could perform the essential functions of the position with reasonable accommodation. If so, the complainant is protected from discrimination. A finding of discrimination would not only require the offending agency to hire the complainant, it would require the agency to provide reasonable accommodation. In essence, 42 USC 12112(b)(5)(B) ties the prohibition against discrimination and the obligation to provide reasonable accommodation together by defining discrimination as:

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;...

As a result, the focus of this chapter is on the agency's obligation to provide reasonable accommodation because that obligation cannot be separated in any meaningful way from the prohibition against discrimination. For the reader, though, it is worth remembering that, in a given case alleging prohibited discrimination, reasonable accommodation can be raised by implication even though it is not explicitly raised on the face of the complaint.

An agency's duty to provide a reasonable accommodation to a qualified employee or applicant arises when:

- (1) the agency knows, or should know, that the employee or applicant is a qualified individual with a disability; and
- (2) the employee or applicant has requested a reasonable accommodation or the need for accommodation is otherwise apparent.

When these two criteria are met, the agency must either provide a reasonable accommodation, if one exists, or establish that doing so would be an undue hardship on the operations of the agency. *See* 42 USC 12112(b)(5)(A) [\[Research Supp. B\]](#).

The theory of reasonable accommodation has some marked differences from other theories of discrimination [covered in [Chapter 9](#)], such as intentional discrimination, adverse or disparate impact, and hostile environment harassment. Most notably, the theory of reasonable accommodation, when it applies to a given situation, places an affirmative obligation on the agency to act. The other theories of discrimination require only that an agency abstain from acting in a discriminatory manner. One effect of this difference is that reasonable accommodation cases require an agency to be proactive from the moment accommodation is requested, or the need for accommodation otherwise becomes apparent. The agency must become an active participant in determining whether the individual is entitled to reasonable accommodation; what accommodations, if any, are appropriate; and whether those accommodations would impose an undue hardship on the agency. Another effect of the difference in the reasonable accommodation theory of discrimination as opposed to most of the other theories of discrimination is that once a complainant demonstrates that he or she has a disability that requires accommodation, the burdens of production and persuasion actually shift to the agency to show either that there is no way to reasonably accommodate a disability, or that any accommodation would constitute an undue hardship on the agency's operations. *See, e.g., Gilbert v. Frank*, 949 F.2d 637, 642 (2nd Cir. 1991). [Undue hardship is discussed thoroughly in [Chapter 8](#).]

An agency's affirmative obligation to provide reasonable accommodation is sometimes confused with affirmative action. Not only is this a legally incorrect view, it is a view that can lead to the mistaken impression that the ADA and the Rehabilitation Act require an agency to employ individuals with disabilities who are not qualified to perform their assigned work and to give preference to individuals with disabilities in employment decisions. Neither act imposes any such obligation on an agency. From the legal perspective, "affirmative action" is a term of art that describes a remedy for past discrimination that requires an employer to take protected status into account in employment decisions in order to cure the lingering effects of past discrimination. Both the Rehabilitation Act and the ADA have affirmative action aspects. However, the affirmative action aspects of the ADA do not apply to the federal government, *see* 29 USC 791(g) [\[Research Supp. A\]](#), and, in any event, reasonable accommodation is not part of the affirmative action requirements of either act. To be sure, an agency's obligation to provide reasonable accommodation requires it to act affirmatively. But, properly viewed, the obligation is to act in a manner that eliminates existing barriers to

the employment and advancement of disabled persons rather than compensating for past discrimination.

Equally important to an understanding of the concept of reasonable accommodation is that it encompasses both a process and an end result. Obviously, the desired end result is to provide those accommodations to an individual with a disability that make it possible for him or her to perform the essential functions of the position in question without imposing an undue hardship on the agency. But just as significant as the end result is the process. If there is any doubt about the significance of the process, one need look only as far as the 1991 Civil Rights Act amendment, codified at 42 USC 1981a(a)(3), that exempts an agency from liability for compensatory damages in those cases where it has engaged in a "good faith" effort to provide reasonable accommodation, even if those efforts fall short of what is legally required.

The reasonable accommodation process entails three distinct stages:

- (1) *The first stage involves the agency's knowledge of the employee's disability and need for accommodation.* The agency's knowledge may come from an employee's request for accommodation, a request from someone else on behalf of the employee, or through observation of an employee in the workplace.
- (2) *The second stage is an individualized inquiry by the agency into the nature of the employee's disability to determine whether the disability can be accommodated, and, if so, what accommodations may be appropriate.* The extent of this inquiry and the quality and quantity of medical evidence the agency may require the employee to provide will depend on the nature of the employee's disability and the position at issue. The employee must cooperate with the agency by providing the agency with information relevant to reasonable accommodation.
- (3) *The third and final stage is identification and, if necessary, implementation of a reasonable accommodation.* This is done through an interactive process between the agency and the employee.

These stages are not rigid, and it may be difficult to determine where one stage ends and the next one begins. The goal throughout the process, however, is for the agency and the employee to cooperate and interact in the mutual interest of finding a reasonable accommodation.

In the introduction to Chapter 6, the complex interrelationship between the definition of a qualified individual with a disability, the agency's obligation to provide reasonable accommodation, and whether that obligation imposes an undue hardship on the agency was discussed. Specifically, a somewhat rhetorical question was posed: how can an accommodation be reasonable if it imposes an undue hardship on the agency? The question is only somewhat rhetorical because facially it would appear to expose a basic contradiction in the Rehabilitation Act and the ADA. But the question is susceptible to an answer and it is to that answer we shall now turn, prior to discussing both the process and end result of reasonable accommodation. The answer lies in the fact that just as disabled individuals are not a homogenous group, neither are employers. In determining whether a specific accommodation is reasonable, the individual characteristics of the employee, but not the employer, are taken into account. The only real question is whether there is a plausible reason to believe the specific accommodation would permit the individual to perform the essential functions of the position in question. This requires an individualized examination of the specific nature and effects of the employee's disability along with the specific requirements of the job he or she holds or desires. If there is a plausible reason to believe an accommodation would allow an employee to perform the essential functions of a particular position, that accommodation is reasonable. The accommodation is within the range of reason

because it is something the employer could do and, at least arguably, it would allow the individual affected to perform his or her duties. It is not until an accommodation has been deemed reasonable that the individual characteristics of the specific employer come into play in the form of considering whether the accommodation would impose an undue hardship. Specifically, at that point in time, the ADA, at 42 USC 12111(10)(B) [Research Supp. B], permits consideration of:

- The nature and cost of the accommodation;
- The overall financial resources of the agency's facility or facilities involved in providing accommodation;
- The number of employees at the agency's facility or facilities;
- The effect of the expenses and resources required to provide accommodation;
- The impact that providing the accommodation would otherwise have on the agency's facility or facilities;
- The overall financial resources of the agency; and
- The type of operation or operations engaged in by the agency, including the composition, structure and functions of the agency's workforce.

See also 29 CFR 1630.2(p)(2) [Research Supp. D].

As a result, an accommodation can indeed be reasonable and, at the same time, impose an undue hardship on a particular employer. An example illustrates this result. Assume that an individual who is blind and satisfies the criteria of having a physical impairment that substantially limits the major life activity of seeing applies for a job as a data entry clerk. To perform the essential function of data entry, the individual must be able to read the employer's procedural manuals. Providing a set of those manuals in braille would be a reasonable accommodation—i.e., it is something the employer could do and there is a plausible reason to believe it would allow the individual to perform the function of data entry. For a large entity that employs 200 or so data entry clerks, providing a set of braille manuals would not be considered an undue hardship. However, for the smaller entity that employs only one or two data entry clerks, the price of those manuals may make the accommodation financially prohibitive and impose an undue hardship. In either case, the accommodation remains a reasonable one. It is the impact on the particular employer that changes.

We turn to our discussion of reasonable accommodation, where the focus is on the plausibility of the required accommodation in terms of allowing the individual to perform the essential functions of the position and not on the impact that accommodation has on the employer.

I. OBLIGATION TO ACCOMMODATE

The ADA expressly states that failure to provide a reasonable accommodation is a form of prohibited discrimination. Section 102 of the ADA, at 42 USC 12112, states:

(b) *Construction.*—As used in subsection (a) of this section, the term “discriminate” includes—

...

(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...

A brief definition of the term “reasonable accommodation” is provided at 42 USC 12111(9):

Reasonable accommodation.—The term “reasonable accommodation” 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.

These provisions are applicable to the federal government through the 1992 amendments to the Rehabilitation Act that adopt the nonaffirmative action requirements of Title I of the ADA. See 29 USC 791(g) [Research Supp. A].

The EEOC initially issued regulations regarding reasonable accommodation under the Rehabilitation Act at 29 CFR 1613.704, *et seq.* and subsequently at 29 CFR 1614.203. These regulations were issued prior to the 1992 amendments to the Rehabilitation Act that incorporated Title I of the ADA, and therefore did not take into account the amendments. On May 21, 2002, the Commission published a notice of rulemaking at 67 FR 35735 that amended 29 CFR 1614.203 to provide:

- (a) Model employer. The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities.
- (b) ADA standards. The standards used to determine whether section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791), has been violated in a complaint alleging nonaffirmative action employment discrimination under this part shall be the standards applied under Titles I and V (sections 501 through 504 and 510) of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101, 12111, 12201), as such sections relate to employment. These standards are set forth in the Commission’s ADA regulations at 29 CFR part 1630.

Even before the notice of rulemaking, the Commission routinely looked to its guidance in Part 1630 in federal sector disability discrimination cases.

Reasonable accommodation is defined at 29 CFR 1630.2(o):

- (1) The term reasonable accommodation means:
 - (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
 - (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
 - (iii) Modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.
- (2) Reasonable accommodation may include but is not limited to:
 - (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications 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.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity 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.

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the “actual disability” prong (paragraph (g)(1)(i) of this section), or “record of” prong (paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong (paragraph (g)(1)(iii) of this section.).

The ADA regulations, at 29 CFR 1630.9, also set forth in a more thorough fashion what constitutes unlawful discrimination with regard to failure to provide reasonable accommodation:

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual’s physical or mental impairments.

(c) A covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance authorized by section 507 of the ADA, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

(d) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

(e) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition under the “actual disability” prong (§ 1630.2(g)(1)(i)), or “record of” prong (§ 1630.2(g)(1)(ii)), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong (§ 1630.2(g)(1)(iii)).

Subsection (c) of section 1630.9 refers to Section 507 of the ADA, which requires the Attorney General, in consultation with other individuals, to develop a plan to assist entities covered by the Act in understanding their legal responsibilities. The subsection provides that agencies are not absolved of their legal responsibilities under the ADA because they have not received this technical assistance.

A. PERSONS ELIGIBLE FOR ACCOMMODATION

Just who is eligible to receive consideration for reasonable accommodation? It seems like a simple, straightforward question that is susceptible to a simple, straightforward answer even if the concepts involved in that answer are reasonably complex: an otherwise qualified individual with a disability is entitled to reasonable accommodation unless he or she can perform the essential functions of a position without such accommodation or the required accommodation would impose an undue hardship on the agency.

The answer seemed simple and straightforward enough until one considered the definition of an individual with a disability. An individual with a disability is one who has a current physical or mental impairment that substantially limits one or more major life activities, has a record of that impairment, or is regarded as having that impairment. See 42 USC 12102(1) [Research Supp. B]; 29 CFR 1630.2(g) [Research Supp. D]. The plain language of the ADA, by using the term individual with a disability, seems to require that reasonable accommodation be provided to a qualified individual who presently has a physical or mental impairment that substantially limits one or more major life activities, no longer has that impairment but has record of such an impairment, or never had such an impairment but is regarded as having such an impairment. See 42 USC 12112(b)(5)(A) [Research Supp. B]. Does this mean that an agency must provide reasonable accommodation to an individual who has a record of a disability, or has no disability but is perceived as having one? Once again, the answer seemed to be simple and straightforward: to be entitled to a reasonable accommodation, the individual must actually be disabled. The reason for this answer was obvious; if there was no actual disability, there was nothing to accommodate. Yet, there was a trend toward a less obvious answer prior to the passage of the ADAAA.

The First Circuit Court of Appeals suggested that employers may have an obligation to provide reasonable accommodation to an employee whom it regards as disabled. See *Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996). However, a divided panel of the Third Circuit rejected the *Katz* analysis in *Deane v. Pocono Medical Center*, 142 F.3d 138 (3d Cir. 1997) (*en banc*). The court, sitting *en banc*, reversed the panel on other grounds, but did not reach “the more difficult question of . . . whether ‘regarded as’ disabled plaintiffs must be accommodated by their employers if they cannot perform the essential functions of their jobs.” *Id.* at 148–49 n.12.

The Eighth Circuit determined that an employee must have an actual disability in order to be entitled to reasonable accommodation under the ADA. See *Weber v. Strippit*, 186 F.3d 907, 916 (8th Cir. 1999), *cert. denied* 120 S. Ct. 794 (2000).

The Third Circuit then revisited the question in *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751 (3rd Cir. 2004). Acknowledging the split in the courts of appeals as to whether an individual who is perceived as having an impairment that substantially limits a major life activity is entitled to reasonable accommodation, the court in *Williams* found that the plaintiff, whom the employer regarded as having a mental disability, was entitled to reasonable accommodation. The Commission had issued at least one decision finding that a failure to make reasonable accommodation of a perceived disability constitutes a violation of the Rehabilitation Act. In *Brown v. Postmaster General*, 01966738 (1998), the complainant contended the agency failed to reasonably accommodate his disability when it issued him a notice of proposed removal. Although the factual recitation in the case is sparse, the complainant had some injuries to his feet and knees that made it difficult to walk. Acknowledging the agency’s argument that the complainant’s impairments were not a substantial limitation on walking, the Commission concluded the complainant was a qualified individual with a disability because the agency perceived him as being substantially limited in walking. The Commission said, “we agree and herein adopt the AJ’s findings that the agency failed to provide the appellant with reasonable accommodation.” *Id.* The decision left unclear precisely what accommodation of the complainant could be made other than rescinding the proposed removal. The decision also leaves unclear why the case should

be viewed as one of failure to make reasonable accommodation instead of intentional discrimination. However, the Commission had also held in two cases that an agency does not have an obligation to provide reasonable accommodation to an individual with a perceived disability. See *Baldassarre v. Postmaster General*, 01A05157 (2003); *Robertson v. Postmaster General*, 01990267 (2002).

Fortunately, Congress in passing the ADAAA and the Commission in adopting its amended regulations have resolved the issue in a simple straightforward way. Individuals who meet the definition of having a disability solely under the third prong or regarded as prong of the definition are not entitled to reasonable accommodation. Individuals who meet the definition of having an actual disability under the first prong or a record of a disability under the second prong are entitled to reasonable accommodation if it does not impose an undue hardship. See 42 USC 12201(h); 29 CFR 1630.2(o)(4).

II. REASONABLE ACCOMMODATION PROCESS

As noted at the outset of the chapter, reasonable accommodation is both a process and an end result. The end result is the particular accommodation or accommodations that permit an individual with a disability to perform the essential functions of the position he or she holds or desires. But before discussing particular kinds of accommodations, it is necessary to understand the process that both the complainant and the agency must go through to reach that end result. The ADA requires an “interactive” process for consideration of reasonable accommodation requests. This means that each party to the process has obligations and the parties are expected to cooperate.

The accommodation process can be broken down into three general phases or stages:

- (1) The agency’s knowledge of the disability and need for accommodation;
- (2) An individualized inquiry into the nature of the disability and possible accommodations for the position in question;
- (3) Identification and, if necessary, implementation of a reasonable accommodation.

These phases or stages of the process do not necessarily have distinct contours, and during the entire process the employer and employee should be flexible and interact with one another toward the mutual goal of finding a reasonable, effective accommodation.

A. WRITTEN PROCEDURES REQUIREMENT

Initially, the process of determining whether an individual was entitled to reasonable accommodation was ill defined, in part, because there was no specific process. The process envisioned by the EEOC could only be gleaned by piecing together its regulations, appendix guidance and enforcement notice guidance on reasonable accommodation and several related subjects. At least in the federal sector that began to change on July 26, 2000, when President Clinton signed Executive Order 13164, 65 Fed. Reg. 46565, requiring each federal agency to develop written procedures for processing requests for accommodation.

To assist agencies in developing written procedures, the Commission issued EEOC Directive No. 915.003, *Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation* (Oct. 20, 2000) [Research Supp. M]. In the introduction to the policy guidance, the Commission explains that written procedures:

will enable agencies to handle requests in a prompt, fair, and efficient manner;

they will assure that individuals with disabilities understand how to approach the system and know what to expect; and they will be a resource both for individuals with disabilities and for agency employees, so that all parties can understand the legal requirements of the Rehabilitation Act.

The general parameters for developing written procedures are set forth in *Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation* [Research Supp. M, p. 361]:

Reasonable accommodation procedures should be designed to expand employment opportunities for people with disabilities, not to create new bureaucratic requirements. The Rehabilitation Act requires that individuals be given substantial leeway in the ways in which they can make requests for reasonable accommodation. *Additionally, agency procedures must permit flexibility in the processing of requests and assure that agency officials act expeditiously in providing reasonable accommodations.*

Agency procedures must also inform individuals with disabilities and agency employees about their rights and responsibilities under the Rehabilitation Act. The procedures must be written in plain language so that they can be understood by those not familiar with the law. They must also explain relevant terms (e.g., essential functions, undue hardship, etc.).

An agency may permit different components of the agency to adopt their own procedures as necessary to expedite the processing of reasonable accommodation requests. However, all procedures must comply with the requirements of the Order and the standards set forth in this Guidance.

(Emphasis in original.)

Agencies are also required to notify their collective bargaining representatives, and to bargain over their reasonable accommodation procedures, to the extent required by law. See Executive Order, Section 3.

The policy guidance further requires that agencies must educate their employees about the procedures and disseminate the procedures. Specifically, the policy guidance requires:

Each agency's procedures must be accessible to individuals with disabilities. Where agencies post their procedures on their websites, those websites must be accessible. Agencies should also make their procedures available in alternative formats, such as large print or Braille, on request. Moreover, agencies should provide other reasonable accommodations where necessary to make the procedures accessible for particular individuals with disabilities.

EXAMPLE—Matthew, who is mentally retarded, cannot understand the agency's reasonable accommodation procedures as written. The agency must provide the information contained in the procedures in a manner accessible to him.

Id.

In addition, the Commission has published *Practical Advice for Drafting and Implementing Reasonable Accommodation Procedures Under Executive Order 13164* [Research Supp. O].

Although written procedures will no doubt eliminate some of the confusion around the reasonable accommodation process, there are bound to be instances, particularly with applicants for employment or employees in remote locations, where the complainant, and possibly even agency officials, are unaware of the written procedures. Much of the Commission's case law, developed in the absence of written procedures, will remain applicable.

B. KNOWLEDGE OF NEED FOR ACCOMMODATION

An agency's knowledge of an employee's disability and the limitations it places on the employee in the workplace is the catalyst for the reasonable accommodation process. This is because an agency only is required to provide reasonable accommodation to the known disabilities of its employees and applicants for employment. See 42 USC 12112(b)(5)(A) [Research Supp. B]. See also *Brown v. Secretary of Health and Human Services*, 05921024 (1993) (“[T]he agency's obligation arises only when the disability is known.”); *Pascale v. Secretary of Navy*, 03850092 (1986) (upholding finding of the Merit Systems Protection Board that there was no disability discrimination because the agency did not know of the complainant's condition until two months after the disputed demotion). There is no need for an agency to accommodate a psychiatric disability when the employee has only informed the agency of her physical disability. See, e.g., *Mayo v. Postmaster General*, 01A41584 (2005).

Knowledge that the employee has a disability, as defined by the ADA, need not always precede a request for accommodation, however. A request for reasonable accommodation, in fact, may require the agency to explore whether or not the employee has a disability covered by the ADA. Moreover, knowledge of an employee's disability can be constructive. In some instances, an employee's disability may be obvious, such as paralysis, blindness, or deafness. In other cases, an employee's behavior in the workplace, or prolonged absence from the workplace, may trigger an agency's duty to explore both the issues of disability and need for accommodation.

There are two distinct affirmative obligations that are placed on an agency, depending on the degree of knowledge it has regarding an individual's disability or possible disability:

- (1) *The agency has an affirmative obligation to explore whether an individual is disabled and requires accommodation.* This obligation does not require the agency to have definitive information that the individual has a disability. If the agency knows, or has reason to know, the individual has a disability, is experiencing problems in the workplace because of a disability, or that a disability may be preventing the individual from requesting accommodation, the agency's affirmative obligation to conduct further inquiry is triggered. *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* [Research Supp. G].
- (2) *The agency has an affirmative obligation to provide reasonable accommodation unless doing so would impose an undue hardship.* This obligation is not triggered until the agency has sufficient knowledge of the individual's impairment to determine that it substantially limits a major life activity and the individual cannot perform the essential functions of the position without reasonable accommodation. But this obligation is also subject to the above obligation to conduct an inquiry.

How the agency obtains knowledge of an individual's disability and the possible need for accommodation is not relevant to the agency's burden to conduct an inquiry into the necessity of an accommodation. In too many cases, agencies focus on whether the employee made a specific request for accommodation. As discussed below, however, it is the agency's knowledge of the disability and the possible need for accommodation, and not whether the employee took certain steps to request an accommodation, that triggers the agency's obligation to explore and, if necessary, provide accommodation.

When a request for a reasonable accommodation is made by a disabled employee or applicant, whether written or oral, the agency's duty to explore accommodation arises, plain and simple. The more difficult scenarios occur when no request for accommodation is made, but there is an indication that an employee may be disabled and in need of accommodation. When the agency is not specifically informed of the disability and need

for accommodation, whether the agency knows about or, at least should know about, an employee's disability status requires a fact-intensive inquiry. Determining when an agency is on notice of a potential disability and the possible need for accommodation is not a precise science. A competing concern for agencies is the fear that inquiries into an employee's disability status, absent the employee's disclosure of the disability and request for accommodation, will be met with hostility, and may even be prohibited by the ADA. See 42 USC 12112(d)(4)(A), prohibiting an agency from conducting medical examinations or making inquiry into an individual's disability unless the examination or inquiry is job related and consistent with business necessity.

Discussed below is the process of reasonable accommodation, both from the perspective of when the complainant, or someone acting in his or her behalf, requests accommodation and when no request for accommodation is made.

1. Requests for Accommodation

In many cases, a disabled employee seeking reasonable accommodation makes a specific request for accommodation. Given the savvy of many federal employees, the request may explicitly reference "reasonable accommodation" and may even reference the Rehabilitation Act or the ADA. In those instances when a specific request for accommodation is made, an agency should have no difficulty in identifying the exact point in time that the reasonable accommodation process begins. In other cases, though, a request for accommodation is less obvious and may be an implicit or constructive request.

a. Form of Request

A request for accommodation can take many forms and there is no particular form that is required. There are no magic words that an employee requesting accommodation must use, as long as the agency is put on notice that the employee is disabled and may need accommodation. There is no requirement that a request be in writing. See *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* [Research Supp. G]. An employee is not required to make repeated requests for accommodation. One request is sufficient. See *Zarate v. Postmaster General*, 01A00415 (2001).

Any communication that conveys to the agency an employee's disability and the resultant public need for a modification in the workplace, is a request for accommodation. See, e.g., *Gary v. Postmaster General*, 01A23962 (2003) (rejecting agency argument that it had no duty to consider accommodation where physician's restrictions were phrased as requests and not necessities). Similarly, in *Sullivan v. Secretary of Veterans Affairs*, 01973555 (1999), the Commission found that the complainant's presentation of a set of physical limitations and restrictions to the agency following her injury constituted a request for accommodation because the agency was "made aware of restrictions on her performance of her position." The Commission has also construed a request for approval to use leave for an absence that is caused by a disability as a request for accommodation. See, e.g., *Growitz v. Smithsonian Institution*, 01A15047 (2002) (employee's request to schedule change to attend weekly doctor appointment deemed accommodation request). See also *Spikes v. Secretary of Air Force*, 01976786 (2000); *McNeil v. Postmaster General*, 05960436 (1998); *Randel v. Secretary of Navy*, 03960070 (1996).

A key element in determining whether an action on the part of the employee will be construed as a request for reasonable accommodation is the linkage of a medical condition with some need for an adjustment in the complainant's working environment or conditions. That linkage usually is explicit, but need not be if the agency either has prior knowledge of the complainant's medical condition, or has reason to know of the complainant's medical condition.