Mediating the Interactive Process

by Kathryn E. Miller

This article considers mediation as an optimal interactive process for resolving reasonable accommodations disputes between employers and employees.

A number of state and federal laws require that employers engage in an "interactive process" with employees who need or request a reasonable accommodation for work.[1] Although much litigation has ensued over the exact parameters of this obligation, it remains a challenging aspect of employee relations for all parties.

This article explores the statutory requirements of the interactive process and discusses how mediation can enhance the opportunities to find a reasonable accommodation and ensure that employers comply with their legal obligations.

Statutory Requirements

A number of federal and state statutes together prohibit employment discrimination and require reasonable accommodation for disabilities.

The Americans with Disabilities Act

The Americans with Disabilities Act[2] (ADA) prohibits employment discrimination based on a disability and prohibits retaliation against any person who has opposed discriminatory practices made unlawful by the ADA. The ADA was significantly amended in 2008 to broaden its coverage and reject the limitations on its scope resulting from U.S. Supreme Court decisions.[3] To establish that an individual has a disability within the meaning of the ADA, the individual must show that he or she (1) has an impairment that substantially limits a major life activity; (2) has a record of an impairment that substantially limits a major life activity; or (3) is regarded as having an impairment that substantially limits a major life activity.[4]

To be protected by the ADA, an individual with a covered disability must also be "qualified," which means that he or she can perform the essential functions of the job (defined as the fundamental, not marginal, duties of the position) with or without reasonable accommodation.[5] Thus an employer must determine if the employee can perform the essential functions of the job, and if not, whether there is a reasonable accommodation that would enable the employee to perform those functions.

To facilitate the determination of whether a reasonable accommodation can be made, "federal regulations implementing the ADA envision an interactive process that requires participation by both parties."[6] The extent of this interactive dialogue will necessarily vary from situation to situation. Essentially, the law requires good-faith communications between the employer and employee to "identify the precise limitations resulting from the disability" and potential accommodations that will allow the employee to overcome those limitations.[7]

Title VII Protections

The Civil Rights Act of 1964, as amended,[8] protects against discrimination based on race, color, religion, sex, or national origin. The accommodation for religious beliefs requires employers to go beyond neutral policies to find ways to accommodate the religious practices of employees. An employer that fails to hire an employee with the motive of avoiding accommodation may violate the law.[9]

Accommodation was also an issue in a recent Supreme Court decision regarding pregnant employees, who are not considered disabled.[10] In *Young v. United Parcel Service, Inc.*, the employer's light duty policy covered individuals who are injured on the job, disabled, or who lost their Department of Transportation certification to drive commercial vehicles. The issue was whether the employer's practice of providing accommodation to non-pregnant employees must similarly accommodate pregnant employees under Title VII as amended by the Pregnancy Discrimination Act. Finding that cost and incon-

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venience are not defenses, the Supreme Court held that the Pregnancy Discrimination Act may be violated where the employer accommodates non-pregnant, but not pregnant, employees.[11]

Patient Protection and Affordable Care Act

The federal Patient Protection and Affordable Care Act requires employers to provide "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth," and provide a place to do so other than a bathroom.[12]

Colorado Statutes

The Colorado Anti-Discrimination Act (CADA) prohibits employer discrimination based on disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry.[13] On June 1, 2016, the Colorado legislature amended CADA in response to *Young*. The law requires employers to provide a reasonable accommodation to pregnant employees by

- providing reasonable accommodation to an employee for health conditions related to pregnancy or physical recovery from childbirth, if requested, unless doing so would impose an undue hardship;
- engaging in a timely, good-faith, and interactive process to determine an effective, reasonable accommodation, if requested;
- not requiring an employee to accept an accommodation that has not been requested or that is unnecessary to perform the essential functions of the job.[14]

The provision of similar accommodation to other classes of employees creates a rebuttable presumption that the accommodation does not impose an undue hardship on the employer.[15]

Workplace Accommodations for Nursing Mothers

Colorado's Workplace Accommodations for Nursing Mothers Act[16] requires employers to make reasonable efforts to accommodate an employee who chooses to express breast milk in the workplace for up to two years after the birth of the child. The parties must engage in mediation prior to filing in court for any alleged violation of the Act.

Engaging the Interactive Process

Employers generally understand that they are required to provide reasonable accommodation in certain circumstances. But how can an employer determine what type of accommodation is reasonable and whether the accommodation will effectively assist an employee with performing essential job functions? The interactive process is a legally required tool for answering these questions.

During the interactive process, the parties engage in good-faith communication. The process encourages the exchange of information about why and to what extent the employee needs accommodation, and helps the parties explore options for providing a reasonable accommodation. The dialogue includes an assessment of the specific job requirements, the unique physical or mental limitations of the employee, and options for an accommodation that will allow the employee to perform the essential functions without imposing undue hardship on the employer.

Determining what is a reasonable accommodation is intensely fact-dependent. In most cases, the employee and employee's physician will articulate the precise limitations or restrictions resulting from the disability. The employer has no obligation to eliminate or alter the nature of the job, or to create a new job. An employer cannot speculate or assume that an accommodation is not available.[17]

The burden to initiate the interactive process is typically on the employee.[18] However, if the disability or need for an accommodation is apparent, the obligation to commence the interactive process may fall on the employer.[19] Neither party can prematurely disengage from the process to avoid or inflict liability.[20]

Once an employee requests an accommodation or a supervisor observes a need for one, the employer should take the following steps:

1. Identify the essential job functions by using a job description and information from the supervisor. The employer's judgment on this should be based on the written job description, the amount of time the employee spends performing these job functions, the consequences of not requiring the employee to perform the functions, and the current work experience of incumbents in similar jobs.[21]
2. Review relevant records, including medical records that support the need for accommodation. If physician notes are unclear, request clarification. Appropriate medical information includes diagnosis, prognosis, treatment regimen or therapy appointments, medical side effects, and restrictions related to the impairment.
3. Engage the employee in a discussion to identify potential barriers to performing essential job functions that could be addressed with reasonable accommodations. Fully document all conversations for the record, including the date, attendees, any decisions reached, or agreed upon follow-up actions. Include as topics for discussion all activities, physical demands, environmental conditions, frequency of activities, and hours per day required for each activity.
4. Obtain the employee's list of possible reasonable accommodations.
5. Investigate and evaluate all potentially feasible job modifications or accommodations.
6. Analyze and document the analysis whether the modifications are a reasonable accommodation or whether a legally permissible defense exists.

7. Evaluate whether undue hardship exists. Undue hardship is defined as a "significant difficulty or expense" in light of the nature and cost of the accommodations, the resources of the covered entity, and the type of operation of the covered entity.[22] The burden is on the employer to show undue hardship.[23]
8. Make a decision. An employer may legally decide not to hire or to terminate a qualified individual with a disability if, after an interactive evaluation, it is determined that the employee poses a direct threat to his or her own health or safety or to the health or safety of others, which threat cannot be eliminated or reduced by reasonable accommodation.[24]
9. Implement the decision and document the entire process.

Mediation as the Interactive Process

These situations can be incredibly difficult for employers to manage because they often lack a full understanding of their rights and obligations to accommodate employees' conditions. Human resources managers are often not adequately trained to handle these situations. They may take too long to respond to requests for accommodation, or think a response has been given when the employee believes there has been no response. Inaction can lead to adverse action that can lead to legal action. Supervisors and coworkers often jump to conclusions that the issues are performance-based as opposed to health-based, and fear, stereotypes, and stigma take over the emotions of the situation. Concern over "putting their nose where it doesn't belong" leads managers to ignore clear signs of a disability or other problem with the expectation that the employee make the request for accommodation.

Employees often lack understanding and awareness of their rights. Fear of retaliation or stigma deters requests for accommodation. Although medical conditions are entitled to confidentiality, breach of confidentiality is common, and anxiety can exist over perceived or actual hostility from supervisors and coworkers. Although delay in treatment and accommodation can lead to a decline in condition, job performance, and work relationships, this is often exactly what happens. Employee advocates wait too long to get involved.

Physicians contribute to the problems as well. They may fail to pay enough attention to the issues, or write unintelligible restrictions or notes that are too vague to be helpful. Physicians often do not ask for the written job description, and thus the restrictions might not relate specifically to the essential functions of the job. Prescribing an indefinite leave of absence might make sense to a doctor, but this alone cannot support an accommodation request. Doctors are often unavailable to answer the employer's questions, and frequently do not respond timely to the employee/patient.

All of these circumstances can erode trust and lead to deterioration in the supervisor-employee relationship. As the situation spirals downward, the options for finding a reasonable accommodation dissipate. Positions harden and personal resentment grows on both sides. The employee may end up blaming the company or the supervisor, while the company ends up wanting to get rid of the "problem employee." As stress increases, the employee's medical condition can worsen, further complicating the situation.

Mediation is a uniquely suited interactive process that offers the parties optimal solutions. Mediation as the interactive process can alleviate the above-described difficulties to the benefit of all parties. A trained third-party neutral facilitates the conversation, which emphasizes sharing and clarifying information. It is a flexible process where the parties can safely explore options to maximize outcomes. Mediation is a confidential process regulated by the Colorado Dispute Resolution Act.[25]

Who Should Attend the Mediation?

The parties decide who should attend which parts of the mediation, and depending on the issues and number of attendees, the mediator will coordinate the process.

- Attorneys are welcome but may not be necessary.
- Experts in a variety of areas, including vocational rehabilitation, can participate in brainstorming ideas for modifying the job or the use of machinery or tools that may accommodate the employee.
- If the medical records are unclear or incomplete, the employee's treating physician can attend in person or by phone. The

physician can answer questions with all parties present so that the employee's restrictions and prognosis are clearly understood.
- The employee may ask to bring in others who have knowledge about the disability or to simply provide support. These individuals may include the physician, the employee's spouse, adult children, parents, a religious advisor, a counselor, or a therapist.
- Different members of the supervisory chain and management may attend to speak to certain issues. If the issue of undue hardship arises, the people who know the most about the job, the requirements, and how the accommodation might impact the work can discuss it in a safe environment without taking rigid positions.

How Long Does the Process Take?

The process is flexible. It should be approached in a collaborative manner. How long it takes depends on the issues presented. It can take a couple of hours, multiple sessions, or several months. It depends on availability of information and complexity of the issues. The mediator can assist the employer to track and obtain missing information and set deadlines for moving through the process.

Even after the accommodation is implemented, it is important that a process be established to monitor the effectiveness for both the employer and the employee and to make adjustments, if necessary. This requires ongoing communication that can also be facilitated with the mediator, or managed directly by the parties once they are comfortable communicating about the issues.

Mediation Compels Documentation

Through mediation, the interactive process will be well documented by the mediator. There will not be a question as to whether the interactive process occurred. The process is designed to maximize the opportunity to find a reasonable accommodation that both the employer and the employee find to be reasonable. The employer's concerns about hardship can be vetted without fear of allegations of discrimination, and the employee can raise his or her fears, including those of retaliation, knowing that the concerns will be addressed.

Conclusion

Mediation can be used as an interactive process regardless of whether the issue is one of pregnancy, disability, nursing mothers, or religion. It is a safe, flexible, confidential, and direct conversation between the parties that allows them to explore resolution to their mutual satisfaction.

Managing the request for a reasonable accommodation is time-consuming and can create stress and confusion for all involved. Using a mediator can assist the employer in organizing the process so that it takes place in a timely and cost-effective manner. A mediator will also document that the process occurred and further assist the employer in obtaining all necessary information, while documenting the efforts taken to analyze the situation and agreements reached. Once a reasonable accommodation is made, a mediator can assist with ongoing discussions to monitor the effectiveness of the accommodation and, if necessary, adjust the accommodation.

Notes

1. Job applicants are also protected, but this article is limited to discussion regarding employees.
2. 42 USC §§ 12101 et seq.
3. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *superseded by statute*, Pub. L. 110–325, 122 Stat. 3553 (2008); *Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), *superseded by statute*, Pub. L. 110–325, 122 Stat. 3553 (2008).
4. 42 USC § 12102(1).
5. 42 USC § 12111(8); 29 CFR § 1630.2(n)(1).
6. *Bartee v. Michelin N. Am., Inc.*, 374 F.3d 906, 916 (10th Cir. 2004) (quoting *Templeton v. Neodata Servs., Inc.*, 162 F.3d 617, 619 (10th Cir. 1998)).
7. 29 CFR § 1630.2(o)(3); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1171 (10th Cir. 1999).
8. 42 USC §§ 2000e, et seq.
9. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, 2034 (2015) ("Title VII requires otherwise-neutral policies to give way to the need for an accommodation.").
10. *See Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338, 1344 (2015).
11. *Id.* at 134–35.
12. 29 USC § 207(r)(1).
13. CRS §§ 24-34-401 et seq.
14. CRS § 24-34-402.3.
15. CRS § 24-34-402.3(4)(c)(II).
16. CRS §§ 8-13.5-101 et seq.
17. *Woodman v. Runyon*, 132 F.3d 1330, 1345 (10th Cir. 1997).
18. *Smith*, 180 F.3d 1154 at 1171.
19. *United States v. City & Cty. of Denver*, 49 F.Supp.2d 1233, 1241 (D.Colo. 1999).
20. *Davoll v. Webb*, 194 F.3d 1116, 1133 (10th Cir. 1999).
21. 29 CFR § 1630.2(n)(3).
22. 42 USC § 12111(10).
23. *See United States v. City & Cty. of Denver*, 943 F.Supp. 1304, 1311–13 (D.Colo. 1996), *aff'd*, 194 F.3d at 1148 (court found no undue hardship where there was no evidence that the employer conducted an analysis to determine whether such hardship actually existed).
24. 29 CFR § 1630.2(r).
25. CRS § 13-22-301 et seq. ■