TACKLING TOUGH HR ISSUES – ADDRESSING ACCOMMODATION REQUESTS IN THE 21ST CENTURY WORKPLACE

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Carolyn Gorwitz Dinberg, Esq.
Vice President and Managing Attorney, HMG Operations and Litigation
Intercontinental Hotels Group
(770) 604-2713
carolyn.dinberg@ichotelsgroup.com

Stanley E. Graham, Esq.
Chair, Hospitality Industry Team
Waller Lansden Dortch and Davis, LLP*
(615) 850-8935
stan.graham@wallerlaw.com

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Stan Graham is a partner in the law firm of Waller Lansden Dortch & Davis, LLP. He also serves as Chair of the firm's Hospitality Industry Team and as Chair of the Tennessee Bar Association's Labor and Employment Law Section. A veteran of the hospitality industry before entering law school, Mr. Graham has for over ten years exclusively represented employers across the country as a trusted advisor in all aspects of labor and employment law, class action defense, and alternative dispute resolution.

Mr. Graham earned a Bachelor of Science in Business Administration degree from the University of Florida in 1991, and graduated, *cum laude*, from Cumberland School of Law at Samford University in 1996, where he served as Executive Editor of the Cumberland Law Review. He is peer-review rated 'AV' by Martindale Hubbell, and has been recognized as a 2006 Mid-South Super Lawyer by Law and Politics magazine.

It is difficult to conceive of any segment of the economy more dependent on its human resources than the hospitality industry. The term "hospitality" itself connotes welcome and smiling faces, and the shared goal of ensuring guests' comfort and satisfaction. Perhaps that is why 11.4 million employees – over 8% of the U.S. workforce – made their living in 2006 working for hotels and restaurants.

Keeping all of those faces smiling can be a Herculean task. Making it all the more difficult are the myriad federal and state laws that impose confusing and sometimes conflicting duties to accommodate individuals' disabilities, religious beliefs, military obligations, and any number of other life situations. The material that follows is intended as a guide not only to keep everyone "hospitable" when dealing with employees' accommodation requests, but also to protect your organization's bottom line by reducing costs, retaining needed personnel, and avoiding the costly business of defending employment litigation lawsuits.

I. OVERVIEW OF THE MAJOR FEDERAL EMPLOYMENT LAWS

There is an extensive body of civil rights laws at the federal, state and municipal levels designed to ensure that all qualified individuals are afforded equal job opportunities. Chief among them:

A. Title VII of the Civil Rights Act of 1964 – Prohibits Discrimination Based on Race, Color, Religion, Sex, and National Origin

The first major comprehensive federal employment discrimination law was Title VII of the Civil Rights Act of 1964. Title VII makes it unlawful for an employer:

> To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e, et seq.

Title VII applies to employers with 15 or more employees. Title VII prohibits both intentional and certain types of unintentional discrimination.

Intentional discrimination under Title VII is generally proven under a theory of "disparate treatment." Disparate treatment occurs when an employer treats an employee or applicant differently than another similar applicant or employee because he or she is a member of any class protected by the law. For example, a female employee may allege that she was given a lower performance evaluation or

pay raise than another similarly situated male employee who had similar performance. The female thus alleges that she was subjected to disparate treatment by the employer on the basis of her gender. Disparate treatment is only unlawful if it is done intentionally on the basis of protected characteristics. Accidental or unintended disparate treatment is not unlawful.

In contrast, claims for "disparate impact" involve employment practices that appear neutral, but adversely impact one protected group of employees more than others. In these cases, proof of a discriminatory intent on the part of the employer is not required. Statistical evidence is usually involved in cases alleging disparate impact.

In addition to prohibiting outright discrimination on the basis of an individual's race, color, religion, sex or national origin, Title VII also prohibits harassment based on the same protected factors and likewise prohibits an employer from taking an adverse employment action against an individual in retaliation for opposing or protesting a discriminatory employment practice. Such retaliation cases typically arise when an employee files a charge of discrimination with the Equal Employment Opportunity Commission alleging that the employer has engaged in some discriminatory practice and then later claims that he or she was thereafter treated adversely because of engaging in the protected conduct of reporting to the EEOC. According to a recent Supreme Court decision, Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405 (June 22, 2006), the scope of adverse actions that will trigger a Title VII retaliation claim is broad, and includes any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Until the passage of the Civil Rights Act of 1991, plaintiffs suing under Title VII could only recover "equitable" relief including back pay, reinstatement or front pay in lieu of reinstatement, injunctive relief and attorneys' fees. Prior to passage of the Civil Rights Act of 1991, there was no right to a jury trial on a Title VII claim. The Civil Rights Act of 1991 amended Title VII to give parties the right to try Title VII claims to a jury instead of a judge and to broaden the damages that may be awarded when Title VII is violated. Now, plaintiffs can recover not only the equitable relief they previously had been able to recover but also compensatory damages, which include emotional damages, pain and suffering, inconvenience and mental anguish, and punitive damages, which are designed to punish the employer for engaging in an unlawful act. The Civil Rights Act of 1991 places limits on the amount of these types of damages that a plaintiff can recover. The limits depend on the size of the employer and caps out at $300,000 in compensatory and punitive damages for the largest of employers.

Before an individual can sue an employer for discrimination under Title VII, he or she must file a charge of discrimination with the EEOC or similar state agency that investigates charges of discrimination. Generally, the individual must

file the charge of discrimination with the EEOC within 180 days after the discriminatory act. If the state has an agency similar to the EEOC that investigates charges of discrimination, the state is known as a "deferral state" and the individual has 300 days from the date of the alleged discriminatory act within which to file the charge of discrimination.

Depending on the priorities and resources of the regional EEO office or similar state agency, the agency may investigate the charge, attempt to mediate or conciliate the charge or decline to investigate the charge altogether. The investigation process can last months or even years and frequently will require that the employer submit a position statement and additional information explaining its actions in the case. The EEOC has authority to conduct on-site investigations and occasionally will do that to take written statements from key witnesses.

After the EEOC investigates the charge of discrimination, it may issue a "cause" or "no cause" determination, thus finding whether there is or is not sufficient evidence of a violation of Title VII. The EEOC also may decline to make any determination on the merits of the case. In any event, the EEOC must issue a "right to sue" letter following its processing of the charge. The issuance of the right to sue letter triggers the time within which the plaintiff must file his or her complaint or lose the right to do so. An individual has 90 days from the receipt of the right to sue letter within which to file a complaint in court. If the EEOC believes that the employer has engaged in flagrant discrimination or if there is evidence of a pattern or widespread discrimination, the EEOC can, and occasionally does, initiate litigation on behalf of the charging party.

B. The ADEA – Prohibits Age Discrimination

The Age Discrimination in Employment Act (ADEA) was passed in 1967 and prohibits employers from discriminating against older employees or applicants (those age 40 or above) on the basis of age. Unlike Title VII, the ADEA only applies to employers with 20 or more employees for each working day in 20 consecutive calendar weeks of the current or preceding year.

Like Title VII, the ADEA prohibits both intentional discrimination ("disparate treatment") and discrimination that results unintentionally when a particular policy or practice that is neutral on its face adversely affects one protected group more than others ("disparate impact"). The availability of a disparate impact claim under the ADEA is a recent development arising out of the Supreme Court's decision in Smith v. City of Jackson, 544 U.S. 228 (2005).

Unlike Title VII, proving intentional discrimination on the basis of age does not necessarily require a showing that an employee was replaced by, or treated differently than, someone outside his/her protected class. Under the United States Supreme Court's opinion in O'Connor v. Consolidated Coin Caterers Corp., a

plaintiff claiming age discrimination under the ADEA can alternatively prove age discrimination by showing that the replacement employee was significantly younger than the terminated employee.

In addition to its anti-discrimination prohibitions, the ADEA contains an anti-retaliation provision that mirrors the anti-retaliation protections within Title VII. While ADEA claims are triable as of right before a jury, the ADEA only provides equitable relief in the form of back pay, reinstatement or front pay in lieu of reinstatement, and attorneys' fees. Although a plaintiff cannot recover compensatory or punitive damages under the ADEA, if the violation of the ADEA is found to be "willful," the plaintiff may recover "liquidated damages" in the form of a doubling of the back pay award.

C. The ADA – Prohibits Disability Discrimination.

The Americans with Disabilities Act (ADA) was passed in 1991 and makes it unlawful for an employer to discriminate against a qualified individual with a disability. Like Title VII, the ADA applies to employers with 15 or more employees and the claims are triable as of right to a jury.

The ADA defines a disability to be any physical or mental impairment that "substantially limits" one or more "major life activities." However, the ADA protects not only those who are actually and currently disabled, but also those individuals who have a record of disability and those who are regarded as being disabled.

A qualified individual with a disability is defined by the ADA to be an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. The essential functions of a job are the primary, as opposed to secondary or marginal, duties of the job position in question. Employers may prepare detailed position descriptions stating the essential functions of each job and including any physical requirements associated with the position. Several courts have held that regular attendance at work is considered to be an essential function of any job. Thus, an employee who is unable to come to work likely will not be considered a qualified individual under the ADA unless the employee could perform the essential functions of the job with a reasonable accommodation (such as working offsite) or could regularly attend work with a reasonable accommodation (such as a special parking space or workplace modification).

In addition to prohibiting discrimination on the basis of a disability, the ADA requires an employer to take affirmative steps to allow the individual to perform the job in question. This is known as making a "reasonable accommodation." An employer can violate the ADA if it does not make a reasonable accommodation for an otherwise qualified individual to allow that person to perform the essential functions of the job. Typical examples of reasonable accommodations include

altered work schedules, physical alterations of the work area such as installing ramps, rearranging furniture for providing access to workstations, or providing an employee with special instruments to perform his job such as a magnification device for a computer screen. Other types of accommodations may include a part-time or reduced work schedule or reassignment to another position the employee is capable of performing.

Employers are required to reasonably accommodate an otherwise qualified individual unless doing so would cause the employer "an undue hardship." Undue hardship is defined under the ADA as an action requiring "significant difficulty or expense." Factors to be taken into consideration in determining undue hardship include the cost of the accommodation, the overall financial resource of the employer and the impact of the accommodation on those resources, the nature of the employer's operations and the impact of the accommodation on those operations, and the length of the assignment. Factors that should not be considered include the relative cost of the accommodation as compared with the employee's salary, and the effect of the accommodation on overall employee morale.

An employer does not have to hire an applicant or continue to employ an employee who poses a direct threat to one's health or safety or that of others. This determination should not be lightly made and must be based on an individualized assessment of the individual's present ability to safely perform essential job functions. The direct threat standard must apply to all employees or applicants and not just to individuals with disabilities. If an employer determines that an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level.

In order to establish that a direct threat exists such that an employer may refuse to hire or continue to employ a disabled individual, the employer must show that (1) there is a significant risk of substantial harm; (2) the risk is specifically identified; (3) the risk is current rather than speculative or remote; (4) the assessment of the risk is based upon objective medical or other factual evidence regarding a particular individual; and (5) the risk cannot be eliminated or reduced to an acceptable level by reasonable accommodation.

Like Title VII and the ADEA, the ADA contains an anti-retaliation provision. Plaintiffs are required to exhaust ADA claims through the EEOC or similar state agency prior to filing a lawsuit in court, and the same types of relief that are available under Title VII are available under the ADA.

D. The PDA – Prohibits Pregnancy Discrimination

In 1978, Congress amended Title VII by enacting the Pregnancy Discrimination Act (PDA). The PDA provides that discrimination on the basis of

"pregnancy, child birth, or related medical conditions" is equivalent to discrimination on the basis of sex. Under the PDA, it is unlawful for an employer to distinguish between pregnancy-related and other temporary physical disabilities in making employment decisions or in granting fringe benefits, including leave policies.

E. Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) – Prohibits Discrimination Based on Military Service

USERRA prohibits employment discrimination on the basis of military service, and applies to all employers. The Act also imposes certain return-to-work obligations on employers who have employees take a leave of absence to serve in the military, including reinstatement to the same or similar position and reinstatement of benefits (including seniority) to the same level that the employee would be entitled to had he or she not taken the military leave and instead continued to work with the employer.

II. ACCOMMODATING RELIGIOUS BELIEFS.

In its latest statistics, the United States Equal Employment Opportunity Commission found "reasonable cause" to believe that discrimination occurred at a higher rate in charges of religious discrimination than in any other protected class under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, or the Age Discrimination in Employment Act. The 8.5% "reasonable cause" determination rate for 2005 was the highest among the protected classes, edging out the second place, sexual harassment charges, by two-tenths of a percentage point, and eclipsing the "reasonable cause" rate for all statutes (5.7%) by nearly three percentage points. Not surprisingly, the percentage of religion charges that the EEOC dismissed with a "no reasonable cause" finding was down more than a percentage point – from 62.5% in 2004 to 61.3% in 2005.

The enforcement statistics on religion charges were robust as well. The EEOC engaged in "merit resolutions" – negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations – in 526 religion-based charges, representing 22.4% of such charges, an all-time high for religion charges. So continues a trend that began before, and was fueled by, the attacks of September 11, 2001.

The enforcement statistics on religious discrimination charges reflect the ever-more-diverse and multicultural workforce, and perhaps the regrettable reality that sensitivity and understanding of these new dynamics is not keeping pace. The numbers show that it is time for a great awakening among employers to the religious beliefs and needs of their workforce, and to equipping the supervisors and others on the front line to vigilantly guard against religious discrimination and

harassment, and to appropriately address the need for accommodations of religious belief.

A. Title VII's Protection against Religious Discrimination

Title VII of the Civil Rights Act of 1964 renders illegal an employer's "fail[ure] or refus[al] to hire or discharge" or "otherwise to discriminate against [an employee] with respect to his compensation, terms, conditions or privileges of employment because of such individuals. . . . . religion." Also prohibited is any act to "limit, segregate or classify an employee or applicants for employment in any way which would deprive or tend to deprive [the employee or applicant] of employment opportunities or otherwise adversely affect" the employee, because of religion. 42 U.S.C. § 2000e-2(a).

Title VII includes within its definition of "religion" the affirmative duty of an employer to "reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). The duty to accommodate presents unique challenges and opportunities for employers.

1. Disparate Treatment

Except for claims of failure to reasonably accommodate, disparate treatment claims are the most common religious discrimination claims. Disparate treatment simply refers to being treated differently because of an employee's religious beliefs or practices. Examples would include an employer's refusal to hire a Sikh applicant because of his wearing a turban or beard, or an employer's refusal to promote a Catholic employee into a customer service role, because the employee wears a cross.

Disparate treatment religious discrimination cases are analyzed with the familiar framework of McDonnell-Douglas v. Green, 411 U.S. 792 (1972), and can be proven with either direct or circumstantial evidence. Direct evidence of religious discrimination includes statements that, if believed by the jury, establish that the employers motivation was the employees religion, similar to the employer's statement in Weiss v. Parker Hannofan Corp., 747 F. Supp. 1118, 1122 (D.N.J. 1990) that: "as long as I'm the warehouse manager, no Jew will run the warehouse for me."

Without direct evidence, the employee must establish a prima facie case, by showing: (1) he holds a bona fide religious belief or practice; and (2) the employer is aware of it; (3) the employee was qualified; (4) the employee was subjected to an adverse employment action or treated less favorably than someone outside the protected class. Roh v. Lakeshore Estates, Inc., 241 F.3d 491, 497-98 (6th Cir. 2001) (jury verdict for employee in religious discrimination case under Title VII reversed where employee was not qualified for the position she was denied). Derusha v. Detroit Jewish News & Style Mag., 132 Fed. Appx. 629, 631 (6th Cir. 2005) (former

editor, a Jehovah's Witness, claimed that he was fired because he was not Jewish; court affirmed dismissal for magazine because, inter alia, there were no similarly situated Jewish employees that that the magazine treated better and former editor did not contend that he was not replaced by someone outside the protected class); Byrd v. Johnson, 31 Fair Empl. Prac. Cas. (BNA) 1651, 1668 (D.D.C. 1983) (Christian attorney rejected for a job based on employer's alleged preference for Jewish applicants failed to establish a prima facie case because there was no evidence that employer knew of his faith).

If the employee makes out a prima facie case of religious discrimination – with either direct or circumstantial evidence – the burden shifts to the employer to show that the adverse action was motivated by a legitimate non-discriminatory reason. For example, the employer could explain the adverse action based on the employee's poor job performance or misconduct rather then religion. See e.g., Lawrence v. Mars, Inc., 955 F.2d 902, 906 (4th Cir. 1992) (poor performance, and not observance of Jewish Holidays, reason for discharge); Douglas v. Eastman Kodak, 2005 WL 1412155 (W.D.N.Y. 2005) (Seventh Day Adventist employee terminated, in part, for tardiness unrelated to observing the Sabbath).

Once the employer has articulated a legitimate non-discriminatory reason, the burden shifts back to the employee to show that the reason is simply a pretext for religious discrimination. Derusha, 132 Fed. Appx. at 631 (Jewish magazine's reason for firing Jehovah's Witness editor – poor management and failure to adhere to budget – were not pretextual where there were no indicators of discrimination and editor was hired and fired by the same person over a short period of time). Employees have been most successful in showing pretext where there have been anti-religious comments directed at the employee, or where the employer's reasons for terminating the employee are inconsistent or implausible. See Weiss, 747 F. Supp. 1122; Rosen v. Thornburg, 928 F. 2d 528 (2d Cir. 1991) (pretext shown by anti-Jewish animus); Firestine v. Parkview Health Sys. Inc., 388 F.3d 229, 236 (7th Cir. 2004) (Catholic employee showed pretext because the employer's reasons for the discharge were inconsistent and possibly pretext for discrimination based on employee's religiously-motivated comments about gays to her boss, an ex-Catholic lesbian.

2. Disparate Impact

Title VII outlaws employment practices that might appear neutral on their face, but that have an adverse or more burdensome impact on employees based on their religion. 42 U.S.C. § 2000e-2 (a)(2). The "Guidelines on Discrimination Because of Religion" promulgated by the Equal Employment Opportunity Commission ("EEOC") describe selection practices that are illegal because they would have a more burdensome effect on employees of certain religions, and not on other employees. These include scheduling a test or selection procedure at a time when an employee or a prospective employee cannot attend because of her religious

practices, such as Sabbath or Holy Day, or requiring an applicant to disclose her availability in such a way as to determine her religious beliefs or commitments. 29 C.F.R. § 1605.3 (a)-(b). The EEOC has stated that these practices are illegal because of the disparate impact they have, unless an employer can show that the practice does not in fact have an exclusionary effect, or is otherwise justified by business necessity. Id at (b)ii.

3. Harassment

Just as with other protected classes of employees, Title VII protects employees from harassment based upon religion. Both statutes safeguard an employee from a hostile work environment characterized by severe or pervasive harassment in the form of threats, ridicule, slurs, jokes, comments, persistent unwelcome proselytizing by co-workers or supervisors, or mandatory religious activity in the workplace. See Weiss v. United States, 595 F. Supp. 1050, 1056-57 (E.D. Va. 1984) (Jewish employee subjected to consistent stream of offensive religious slurs by supervisor and co-worker, causing his work performance to decline, showed religious harassment); Venters v. City of Delfi, 123 F.3d 956, 972-74 (7th Cir. 1997) (concluding that the question of harassment was for the jury, where plaintiff's supervisor "repeatedly subjected her to lectures (at work, during working hours) about her prospects for salvation, made highly personal inquiries into her private life (whether there was truth to purported rumors that she entertained guests in her home with pornography, for example), and ultimately went so far as to tell her that she led a sinful life, that he was certain she had had sex with family members and possibly animals, that she had sacrificed animals in Satan's name, and that committing suicide would be preferable to the life he believed Venters was living.").

To establish a prima facie case of hostile work environment based on religion, the employee must show: (1) that he was a member of a protected class; (2) that he was subjected to unwelcome religious harassment; (3) that the harassment was based on religion; (4) that the harassment had the effect of unreasonably interfering with the plaintiff's work performance by creating an intimidating, hostile, or offensive work environment; and (5) that the employer was liable for the harassment. Hafford v. Seidner, 183 F.3d 506, 512 (6th Cir. 1999).

To establish the fourth prong, the complained-of conduct must be severe or pervasive enough to create an environment that a reasonable person objectively, and the victim subjectively, would find hostile or abusive. Bowman v. Shawnee State Univ., 220 F.3d 456, 463 (6th Cir. 2000). Courts look to several factors in determining whether conduct is "severe or pervasive," including: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Id.

Thus, where a Muslim employee complained that he had been subjected to religious harassment based on a sporadic chain of "eight alleged incidents . . . spread out over a period of five years," the Sixth Circuit Court of Appeals held that the alleged harassment was not sufficiently pervasive and did not arise to the "threatening" or "humiliating" level, to create an objectively hostile or abusive work environment. Bourini v. Bridgestone/Firestone N. Am. Tire, LLC, No. 04-5441, 2005 WL 712881, *4 (6th Cir. March 30, 2005). There, the complained of conduct included: a co-worker's stating to him, in 1998, "Steve, I don't want to go outside and see your camel tied to my wheels"; in 1999, another co-worker's calling him a "camel jockey"; in 2001, another co-worker's stating "If it were up to [me], they would put [Bourini] back--put [Bourini] in a box and send [him] back to [his] country," and "[I]f you'd get the sand out of your ears you'll hear me better"; in 2002, anonymously-written graffiti on a bathroom that the "I" in "Islam" stood for "idiots," the "s" for "shit bags," the "1" for "losers," the "a" for "assholes," and the "m" for "morons"; and later in 2002, a pamphlet left at the employee's work station entitled "For my Muslim Friend," which he assumed to be Christian proselytizing material. Id. at *1-2.

Similarly, where a Jewish former employee complained of harassment consisting of a supervisor's bringing a Nazi flag to work, a Christian co-worker's saying "your people killed my God," and another co-worker's handing out crosses, the Sixth Circuit Court of Appeals found that the conduct was not "severe or pervasive" because: the supervisor "was a collector of war memorabilia who brought the flag to work for purposes of obtaining help in getting it framed" and after the Jewish employee "complained about the flag, [the employer] took appropriate action by discussing the situation with [the supervisor], who took the flag home that day"; the "your people killed my God" "comment was made by a co-worker who had no supervisory power . . . and who played no part in the decision to terminate [the plaintiff's] employment"; and the co-worker's handing out of crosses to various employees was "clearly motivated by [the co-worker's] religious faith" and not by any ill-will towards the plaintiff. Ploscowe v. Kadant, 121 Fed. Appx. 67, 72-73 (6th Cir. 2005).

With regard to the last prong, the employer's liability, the defenses available to an employer will depend upon whether the employee claiming harassment has been subjected to a "tangible employment act" such as discharge or demotion. If the employee has been fired, demoted, or given an undesirable reassignment, for example, the employer likely will not be able to defend itself based upon its anti-harassment policy. If, however, the employee has not been subjected to a tangible employment action, the employer has a complete defense to a claim of religious harassment if the employer can show that it has a policy against religious harassment, and either the employee failed to report the harassment in accordance with the policy or the employer, when it learned of the alleged harassment, took prompt and effective remedial action. Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998).

Oftentimes, harassment cases involve an employee's resigning and claiming that she was "constructively discharged" because she had no reasonable choice but to resign. The Supreme Court, in the sexual harassment context, recently ruled that such a claim does not automatically strip the employer of the Faragher affirmative defense. Pennsylvania State Police v. Suders – U.S. – , 124 S. Ct. 2342 (2004). Instead, courts must first ask whether the employee's resignation was a "reasonable response" to the alleged harassment; if so, then the defense is not available to the employer. Id.

The EEOC, on its website, www.eeoc.gov, reports that since the attacks of September 11, there has been a significant increase in charges of religious harassment against Muslims, Arabs, South Asians, and Sikhs. The EEOC advises employers on how to reduce this regrettable trend by reaffirming anti-harassment policies, explaining to employees why such behavior is unacceptable, providing anti-harassment training to all employees in the workplace, facilitating a dialogue between the victim of the harassment and the accused harassers, and, when necessary, punishing the harassers appropriately. This trend also underscores every employer's need to review employee handbooks and harassment policies to ensure that they include statement banning religious-based harassment from the workplace.

4. Retaliation

Title VII also protects employees from retaliation for opposing religious discrimination or harassment, or participating in any way in a charge or lawsuit asserting the same. E.g., Abbott v. Crown Motor Co., 348 F.3d 537, 542 (6th Cir. 2003). Retaliation, like the other forms of discrimination, may be proved with direct or circumstantial evidence. Abbott, 348 F.3d at 542. To make out a prima facie case of retaliation, an employee must show that: 1) he engaged in a protected activity; 2) the employer knew that he engaged in this protected activity; 3) the employer subsequently took an employment action adverse to the plaintiff; and 4) a causal connection between the protected activity and the adverse employment action exists. Id. (citing Strouss v. Michigan Dep't of Corr., 250 F.3d 336, 342 (6th Cir. 2001); Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000).

Just as in a disparate impact case, once the employee proves the existence of a prima facie case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. Nguyen, 229 F.3d at 562. If the employer meets this burden, the employee must then prove by a preponderance of the evidence that the proffered reason was a mere pretext for discrimination. Id. The employee can do so by showing that the proffered reason: "has no basis in fact; did not actually motivate the adverse action; or was insufficient to motivate the adverse action." Abbott, 348 F.3d at 542 (internal numbering omitted; citing Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1084 (6th Cir. 1994)). If the employee shows pretext, then unlawful retaliation can

be inferred. Id. (citing Kline v. Tenn. Valley Auth., 128 F.3d 337, 344 (6th Cir. 1997)).

Recently, the Sixth Circuit Court of Appeals noted that to be considered protected activity, the employee's activity must most likely be on behalf of himself or another employee, and not on behalf of the employer. Derusha, 132 Fed. Appx. at 632. There, the employee signed an affidavit, at the request of his employer, denying that his employer, a Jewish-interest magazine, had discriminated against a Catholic co-worker. Id. The employer submitted this affidavit in response to the Catholic co-worker's charge of discrimination with the EEOC. Id. Because the employee's activity was on behalf of the employer, the court held that his claim that he was later fired for insisting on several edits to the affidavit before he signed it was "dubious." Id. The court went on to rest its holding, however, on the fact that the decision maker in plaintiff's termination had no knowledge of plaintiff's insisted edits to the affidavit; thus there was no causal nexus. Id.

B. Employees Entitled to Protection Against Religious Discrimination and Harassment

Permanent, as well as temporary, employees of all religions are protected against religious discrimination and harassment, so long as the discrimination or harassment is based on religion. Defining "religion," however, is not always easy or intuitive, as the law on the subject demonstrates.

1. A Recognized Religion Not Required

For an employee to be protected from religious discrimination, the employee need not be a member of a traditionally recognized church or religion, as long as the alleged discrimination is based upon a belief, observance, or practice that the employee holds "with the strength of traditional religious views." 29 C.F.R. § 1605.1 (citing United States v. Seeger, 380 U.S. 163 (1965) and Welsch v. United States, 398 U.S. 333 (1970)). Thus, an employer violated Title VII when it demoted a white supremacist employee, based upon the employer's belief that the employee could not treat minority employees under his supervision in an objective way. Peterson v. Wilmur Comm., Inc., 205 F. Supp. 2d 1014, 1015-16 (E.D. Wis. 2002). The demoted employee showed that he was a minister in a religion known as "Creativity," which espouses that whites are superior to other races, survival of the white race is the highest law of nature, and rejects concepts of God and an afterlife as "silly spook craft." Id. Based on the employee's belief, the court ruled for the employee, reasoning that an employer cannot demote an employee based on his pure religious beliefs, unaccompanied by acts. Id. at 1025-26. Moreover, even if an employee's beliefs are a "religion of one," in that no religious group espouses such beliefs, the employee's belief, observance, or practice is still protected against discrimination if held with the strength of traditional religious views. 29 C.F.R. § 1605.1. See E.E.O.C. v. Arlington Transit Mix Inc., 734 F. Supp. 804, 807 (E.D. Mich. 1990)

(employee's sincere belief that the Bible mandated his attendance at a Wednesday night Bible study was held to be a protected belief, regardless of the fact that his church did not hold the same belief; reversed on other grounds by E.E.O.C. v. Arlington Transit Mix, Inc., 957 F.2d 219 (6th Cir. 1991)).

2. A Sincerely Held or "Bona Fide" Religious Belief Required

While the employee's belief or practice need not be attributable to a recognized religion, the law does require the employee herself to hold the belief sincerely, that is, for the belief to be a subjectively bona fide belief. Thus, an employee's refusal to complete a form required by her employer was not a protected religious act, where the employee refused simply because she had "sworn to God" that she would not complete another such form. Williams v. Potter, 2004 WL 965892 (D. Kan. 2004). The employee had completed many other such forms in the past, and failed to show any evidence that her refusal to do so was the result of her own sincerely held religious beliefs.

Courts are reluctant, however, to probe too far into the sincerity of an employee's religious belief, typically taking an employee's word that such belief is sincerely-held or bona fide. For example, in Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004), cert. denied 125 S. Ct. 2940 (U.S. 2005), while the court expressed some doubts about whether the employee's insistence that she be allowed to wear her facial jewelry, in violation of the employer's dress code, was mandated by her beliefs as a member of the Church of Body Modification. The court declined to hold that the employee's belief was insincere, even though she had made inconsistent representations to her employer about what her belief was and what it required. Id., 390 F.3d at 131. See also Arlington Transit Mix Inc., 734 F. Supp. at 807 (not questioning employee's assertion that the Bible required him to attend Wednesday night Bible study).

C. The Duty to Accommodate.

As described in the EEOC's Guidelines interpreting Title VII, the reasonable accommodation process is a two-step process, with the burden first being on the employee to make a request for and offer a specific reasonable accommodation. 29 C.F.R. § 1605.2(c). The employer then must make a bona fide consideration of whether the requested accommodation is reasonable and it is an "undue hardship." Id. If it is not reasonable or is an "undue hardship," the employer is not obligated to accommodate the employee's request. Id.

1. Reasonable Accommodation

Title VII imposes the duty of reasonable accommodation upon employers, and the concomitant duty to engage in a good faith, interactive process with employees to determine what accommodations might be available and which are reasonable.

See 29 C.F.R. § 1605.2(c)(1); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69, 107 S. Ct. 367, 372, 93 L. Ed. 2d 305 (1986) ("'bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business."); California Fair Empl. and Housing Comm'n v. Gemini Alum. Corp., 122 Cal. App. 4th 1004 (Cal. Ct. App. 2004) (employer violated duty to accommodate by not making good faith efforts to consider accommodation requests). The reasonableness of an accommodation is determined on a case-by-case basis, upon factors such as the accommodations that an employer or union actually considers, those offered to an employee, the cost to the employer, and effect on the employee. 29 C.F.R. § 1605.2(c)(2). When more than one reasonable accommodation is available, the employer is free to choose which accommodation to offer the employee. Ansonia, 479 U.S. at 68, 107 S. Ct. at 372. Cf. 29 C.F.R. § 1605.2(c)(2) (advising that in such a situation, the employer should offer the employee the accommodation that least disadvantages the employee's job opportunities, without unduly burdening the employer).

The guarantee of a reasonable accommodation is not, however, a guarantee of the accommodation of the employee's choice, or the creation of a special privilege for the employee. Ansonia, 479 U.S. at 69, 107 S. Ct. at 372. For example, an employer did not violate the duty to reasonably accommodate when it denied an employee's request to allow him to work voluntary weekend overtime on Sunday, but not on Saturday, which was the employee's Sabbath. Fox v. Lear Corp., 327 F. Supp. 2d 946, 953 (S.D. Ind. 2004). The court reasoned that because the overtime that the employee was asking for was voluntary, and not required, the employer did not have to give him the privilege of specifying the days on which he worked voluntary overtime. Id. Likewise, where an employee requested to be allowed to end her written and verbal business communications with the phrase "have a blessed day," but admitted that she was not required by her religion to do so, the employer did not violate Title VII by forbidding it in written, but allowing it in verbal, communications Anderson v. V.S.F. Logistics, Inc., 274 F.3d 470, 476 (7th Cir. 2001).

2. Undue Hardship

An employer is not required to grant an accommodation that would pose an undue hardship. Under the Supreme Court's decision in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977), and 29 C.F.R. § 1605.2(e), a requested accommodation poses an "undue hardship" when it would impose anything more than a de minimis cost upon the employer. For example, increased operating costs or the necessity of paying premium wages to a replacement worker would pose an undue hardship for the employer because they impose more than a minimal cost. Id.

Likewise, an accommodation that would require a variance from a collective bargaining agreement or bona fide seniority system poses an undue hardship on the employer. Id.; Virts, 285 F.3d at 508 (seniority system trumped male truck driver's

request to not have to travel with women on "sleeper runs," and thereby avoid the "appearance of evil"). Cook v. Chrysler Corp., 981 F.3d 336, 339 (8th Cir. 1992) (employer's refusal to grant Seventh Day Adventist employee's requests to be excused from work every Friday night or to change shifts did not violate Title VII because granting such accommodations would have impinged on the seniority system). Even in workplaces that do not feature seniority systems, increased workloads on co-workers will justify denial of a request for accommodation. Thus, when an employee assistance counselor requested that she be exempted from providing relationship counseling to gay clients, based on her religious beliefs on homosexuality, the employer was justified in denying the request because it would have caused an uneven workload on her co-workers. Bruff v. North Miss. Health Servs., 244 F.3d 495, 500 (5th Cir. 2001).

While the increased costs posed by an accommodation need not be quantifiable, they must be more than the administrative costs of considering and implementing a reasonable accommodation. Cook, 981 F.3d at 339. Moreover, an employer's fear that if it grants the requested reasonable accommodation to one worker, that it will have to grant it to all other employees with the same religious practices, does not constitute an undue hardship. 29 C.F.R. § 1605.2(c).

3. Specific Requests for Accommodation

In the commentary to its Guidelines on religious accommodations, the EEOC lists the following, among others, as common religious practices in the workplace, for which employees seek accommodation:

a. Observance of a Sabbath or Religious Holidays

Many religions have, as tenets of their faith, the observance of a Sabbath or other religious holiday. The Sixth Circuit Court of Appeals recently decided a case involving this issue. Two Orthodox Jewish insurance agents made a request for exemption from their employer's requirement that its agents staff their insurance office on Friday nights and Saturday mornings. Goldmeier v. Allstate Ins. Co., 337 F.3d 629, 638 (6th Cir. 2003). The employer denied their request, and they resigned in response. Id. The court concluded that they could not recover for religious discrimination, because they had not been terminated. Id. At the heart of this case is the issue of the appropriate accommodation to be given to employees whose religious beliefs require observance of a Sabbath. Id. at 634 ("the Goldmeiers were faced with a choice of violating the Sabbath or hiring outside staff using either their own funds or their limited office expense allowance, otherwise available for other business-enhancing purposes to other agents.").

The EEOC, in its Guidelines, suggests several ways for employers to deal with such a situation. These include allowing the employee requesting the

accommodation to seek out co-workers with similar qualifications to swap shifts or days off with them, with the approval of the employer. 29 U.S.C. § 1605.2(d)(1)(i). To facilitate this procedure, the EEOC recommends employers make efforts: "to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; [or] to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed." Id. Another way of accommodating an employee's observance of a Sabbath is to create a flexible work schedule for individuals requesting accommodation, with features such as:

> flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.

Id. at (ii).

Of course, the feasibility of these accommodations will depend on the realities of the employers' workplace. If the employer has a collective bargaining agreement or a seniority system in place, the employer frequently will not have the freedom to manipulate the requesting employee's schedule to accommodate the Sabbath observance. Courts have routinely upheld these as reasons for denying such a request for accommodation, reasoning that granting such would disadvantage other workers. See Hardison, 432 U.S. at 74; Cook, 981 F.3d at 339. Likewise, the EEOC's Guidelines recognize these as validly creating an undue hardship on the employer, supporting denial of the request for accommodation. 29 U.S.C. § 1605.2(e)(2).

b. Need for Prayer Break During Working Hours

This requested accommodation presents the same challenges, although typically on a different scale and frequency, as the request for accommodating a Sabbath observance. Frequently, the request for a Sabbath observance entails the employee being away from work in a large block of time, recurring weekly or yearly, while the request for prayer time is typically for shorter increments of time recurring daily or even several times a day. Two Tennessee-based manufacturing employers, Dell and Whirlpool, have faced this issue recently. Dell successfully and proactively accommodated the requests of Muslim workers seeking time to pray, by providing them flexible break schedules to accommodate their prayer time, as well as training to its managers on accommodating religious requests. Johnson, Rob, "Settlement over prayers at Dell seen as fair for all," The Tennessean, March 19, 2005.

Whirlpool's situation illustrates the possibility that an employer may not be able to accommodate requests for prayer time, and may be justified in denying it.

At the Whirlpool plant, 40 Muslim employees in the same manufacturing line requested to take a sunset prayer break at the same time. Whirlpool denied the request, reasoning that providing this substantial number of its manufacturing line employees with simultaneous daily time off would be an undue burden, based on the realities of its manufacturing operation. The employees brought suit, and the jury agreed with Whirlpool, finding that granting such an accommodation would be an undue burden. Johnson, Rob, "30 Muslim workers fired for praying on job at Dell," The Tennessean, March 10, 2005.

Of course, requests for daily prayer breaks are subject to the same collective bargaining agreement and seniority system constraints as other requests for accommodations. Thus, an employer was justified in offering a Muslim driver, a union member, the opportunity to bid on a schedule that would accommodate his request for prayer time. This solution both accommodated the employee and preserved the collective bargaining agreement. Elmenayer v. ABF Freight Sys., 87 Fair Empl. Prac. Cas. (BNA) 253 (E.D.N.Y. 2001).

c. Prohibition against Membership in, or Payment of Dues to, Labor and Other Organizations

The EEOC has given the guidance that employees who seek the religious accommodation of exemption from joining or paying dues to a labor union either should be excepted from these requirements, or allowed to donate an equal sum to the charity of their choice. 29 C.F.R. § 1605.2(d)(iii). However, one court, addressing an issue of first impression, held that a union could require an employee to produce independent corroboration that his religious beliefs are sincerely held, to support his requested accommodation of donating an amount equal to his union dues to charity. Bushouse v. Local Union 2209, United Auto., Aerospace & Agric. Implement Workers of Am., 164 F. Supp. 2d 1066, 1074-75 (N.D. Ind. 2001).

d. Practices Concerning Dress and Other Personal Grooming Habits.

Another common request for religious accommodation is a request for a variance from an employer's dress or grooming code. These range from employee requests for exemptions from policies forbidding facial hair to an employee's request to wear a turban or head scarf, as discussed on the EEOC's website, http://www.eeoc.gov/facts/backlash-employer.html, in a document entitled "Questions and Answers about Employer Responsibilities Concerning the Employment of Muslims, Arabs, South Asians, and Sikhs."

Dress and grooming accommodation requests are subject to the same legal standards as all other requests for accommodation. If the employer has a valid business reason for its dress or grooming code, and a variance from that code would

pose an undue hardship, then the accommodation need not be granted. If there is no undue hardship, then the employer must grant the accommodation. Thus, when a machinist, a devout Sikh, requested a variance from his employer's no facial hair policy, the court held that the employer was justified in denying the request, because the policy was in place to ensure every employee's ability to safely wear a respirator. Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383-84 (9th Cir. 1984).

In contrast, the EEOC's guidance on the subject provides that "[n]otions about customer preference real or perceived do not establish undue hardship" that would relieve the employer of the duty to make a reasonable accommodation relating to dress or grooming codes. See "Questions and Answers about Employer Responsibilities Concerning the Employment of Muslims, Arabs, South Asians, and Sikhs," http://www.eeoc.gov/facts/backlash-employer.html. The more out-of-the-mainstream an employee's violation of a dress or grooming policy may be, however, the more likely a court's willingness to allow an employer to deny a requested accommodation. In Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004), cert. denied 125 S. Ct. 2940 (U.S. 2005), the employer denied an employee's request for a variance from the policy against any kind of facial jewelry other than earrings. The employee maintained that she was required to display her facial piercings as a member of the Church of Body Modification. Id. at 131. The employer denied her request, based on the justification for its policy, that it wanted its employees to project a "neat, clean and professional image." Id. The employer offered two alternative accommodations, covering the piercings with band-aids or wearing transparent retainers in the piercings while at work, which she refused. Id. The court concluded that the employer had not violated her rights under Title VII, because allowing her demanded accommodation – a complete exemption from the dress code – would have been an undue hardship on the business. Cf. Swartzentruber v. Gunite Corp., 99 F. Supp. 2d 976, 979 (N.D. Ind. 2000) (employer reasonably accommodated employee's beliefs as a member of the Church of the American Knights of the Ku Klux Klan by requiring him to cover his tattoo of a burning cross and hooded figures, while at work, as the tattoo uncovered would have caused disruption in the workplace, an undue hardship).

4. The Employer's Catch-22

For employers, a troubling aspect of religious discrimination and harassment law is the "Catch 22" situation that often arises between one employee's right to express herself religiously and another's right to be free from religious harassment. For example, in Chalmers v. Tulon Co. of Richmond, an employee wrote her supervisor a letter entreating him to "go to God and ask for forgiveness" for what she perceived to be unethical conduct, and wrote an unmarried co-worker who had just given birth to tell her that she "need[ed] the Lord Jesus in [her] life right now" and telling her "what [she] did is wrong." 101 F.3d 1012, 1016 (4th Cir. 1996). After a thorough investigation, the plaintiff was terminated for her "serious error in judgment." Id. at 1017. The Fourth Circuit Court of Appeals rejected her religious

accommodation challenge, noting that the employer was protecting itself from potential liability for religious harassment. Id. at 1021. Although the court was sympathetic to the employer's plight, the manner in which the case arose illustrates the problems that can arise from religious activity in the workplace and the importance of thoroughly investigating problems to reach the right conclusion.

A couple of recent cases illustrated the Catch-22, though the courts deciding them ultimately exonerated the employers. In Mawaldi v. St. Elizabeth Health Ctr., 381 F. Supp. 2d 675, 687-88 (N.D. Ohio 2005), the court found that the employer had not discriminated against a resident physician, through the religious actions of one of the residency directors. There, at an orientation session at the beginning of the residency program, the one of the directors invited the residents to a Bible study. Id. The plaintiff, a Muslim, was offended and contended that he was forced to choose between his religious beliefs or attending the Bible study to ostensibly succeed in the residency. Id. The court rejected his claim because there was no evidence that the Bible study was an employment requirement – it was held at the director's home and not at the hospital, it was not part of the curriculum, and not considered a rotation. Id. Moreover, the plaintiff admitted that he never informed the hospital of any feelings of discomfort, let alone any conflict he felt between an employment requirement and his existing beliefs. Id.

Similarly, in Powell v. Yellow Book USA, Inc., 445 F.3d 1074, 1077-78 (8th Cir. 2006), an employee sued her employer for religious harassment, based on a co-worker's "continued proselytizing" by voicing her religious beliefs and posting religious messages in her cubicle. After the plaintiff employee complained, Yellow Book moved her away from her zealous colleague. Id. at 1078. This alleviated the verbal proselytizing, but the plaintiff continued to complain about the posted messages. Id. The Eighth Circuit Court of Appeals, in affirming summary judgment for Yellow Book, held that it had responded appropriately by separating the two employees but not requiring the removal of the messages from the religious employee's cubicle. Id. The court reasoned that "an employer . . . has no obligation to suppress any and all religious expression merely because it annoys a single employee." Id. The court also found that the conduct complained of was not "severe or pervasive harassment that altered the terms of [plaintiff's] employment." Id.

III. ACCOMMODATING DISABILITIES.

In order to be entitled to reasonable accommodation or protection under the ADA, an employee must be a "qualified individual with a disability," which is defined as an individual with a disability who, either with or without reasonable accommodation, can perform the essential functions of the job position in question. See 42 U.S.C. §§ 12111(8) and 12112(a). Thus, prior to being protected from discrimination by the ADA, an individual must make a threshold showing that he or she has a "disability" as defined by the ADA.

The courts seem to have little problem recognizing that an "injury" is not necessarily a "disability" as defined by the ADA. See Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995) (welder who injured arm in a gun accident did not have a disability). The EEOC, in a September 1996 publication Equal Employment Opportunity Commission Enforcement Guidance: Workers' Compensation and the Americans with Disabilities Act (the "EEOC Guidance"), also recognized that an occupational injury may or may not "substantially limit" a major life activity. EEOC Guidance at Questions 1-3. Certain categories of impairments, such as temporary or short term impairments and impairments that affect only a limited range of jobs, normally will not be disabilities.

A. Temporary or short-term impairments

Many injuries compensable under a workers' compensation statute will be short-term injuries that do not have serious long-term effects. Similarly, many "serious health conditions" that entitle an employee to FMLA leave will not be "disabilities" under the ADA. "Temporary, non-chronic impairments of short duration, with little or no long-term or permanent impact are usually not disabilities" because they do not "substantially limit" an individual's major life activities. 29 C.F.R. § 1630.2(j), Appendix at 396 (1994). For example, in Roush v. Weastec, Inc., 96 F.3d 840, 844 (6th Cir. 1996), the plaintiff argued that her severe, life-long kidney condition was a disability. Prior to the alleged discrimination, her kidney condition had interfered with her ability to work, but not at the time of the alleged discrimination. The Court held that "[b]ecause plaintiff's kidney condition was temporary, it is not substantially limiting and therefore, not a disability under the ADA." Nor did the possibility that kidney blockage might recur in the future substantially limit her.

B. Impairments affecting a limited range of jobs

Many injuries compensable under workers' compensation legislation will be sufficiently permanent and severe so as to prevent an employee from working in the job position in which he or she worked prior to the injury. Before assuming that an employee is disabled under the ADA, however, the employer must determine the extent to which an impairment affects one or more of the employee's major life activities. With respect to the major life activity of "working," the EEOC has explained that the term "substantially limits" encompasses more than the inability to perform a single job. Instead, the employee must be

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The ability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i)(emphasis added). The United States Supreme Court has agreed. In Murphy v. United Parcel Service, 144 L.Ed.2d 484 (1999), the Court held that an employee or applicant is not subject to discrimination because he or she is excluded from working a particular job. That ruling was consistent with most lower court precedent. See e.g. McKay v. Toyota Motor Mfg., 110 F.3d 369, 672-73 (6th Cir. 1997) (plaintiff's carpal tunnel syndrome did not affect more than the narrow range of repetitive motion factory jobs).

One of the questions now being litigated frequently is what constitutes a "class of jobs" or a "broad range of jobs." The EEOC has taken the position that a "class of jobs" included categories like "heavy labor" or "clerical" jobs. The EEOC Compliance Manual § 902.4 opines that people precluded from working 1) in many high-rise office buildings due to allergies, 2) noisy jobs due to hearing problem, or 3) full-time jobs all have disabilities. The Department of Justice has contended, albeit without success, that "firefighting positions" constitutes a class of jobs. DOJ's Amicus Curiae Brief in Bridges v. City of Bossier City, No. 95-30756 (filed in the United State Court of Appeals for the Fifth Circuit). The litigated cases on this issue usually provide little guidance, typically making conclusory findings of whether or not an individual was restricted in a broad range or class of jobs.

One of the most common workers' compensation claims that manufacturing industry employers encounter is carpal tunnel syndrome. Although the decision whether carpal tunnel syndrome constitutes a disability must be made on a case by case basis, several courts, including the Sixth Circuit Court of Appeals, have held that carpal tunnel syndrome did not constitute a disability. See, e.g., McKay v. Toyota Mfg. USA, Inc., 110 F.3d 369 (6th Cir. 1997). In Williams v. Toyota Motor Mfg., 2002 LEXIS 400 (U.S. 2002), the United States Supreme Court affirmed the proposition that "performing manual tasks" is not a major life activity. Rather, a "major life activity" is a broader concept.

C. Mitigating Measures

In the trilogy of cases decided in 1999, the Supreme Court resolved a significant conflict among the Circuit Courts of Appeals by holding that mitigating measures must be taken into account in determining whether an individual is "disabled" under the ADA. See Sutton v. United Airlines, Inc., 119 S. Ct. 2139 (1999); Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133 (1999); Albertson's, Inc. v. Kirkingburg, 119 S. Ct. 2162.

In Sutton v. United Airlines, the Court addressed ADA claims brought by twin sisters with severe myopia who applied to a major airline for employment as commercial airline pilots. Sutton, 119 S. Ct. at 2143. Both were rejected for the position because they failed to meet the airline's uncorrected vision requirement of 20/100. Id. The Court reasoned that the plaintiffs were not substantially limited in

the major life activity of seeing, because with corrective lenses each had 20/20 visual acuity, and they were therefore not "disabled" under the ADA. Id. at 2149.

In Murphy v. United Parcel Service, the plaintiff was a mechanic whose job required him to drive commercial vehicles. Murphy, 119 S. Ct. at 2136. He was discharged, however, when his health condition violated Department of Transportation ("DOT") regulations applicable to commercial vehicle drivers. Id. Rejecting the plaintiff's claims of disability discrimination, the Court held that the plaintiff was not "disabled" under the ADA because his blood pressure medicine mitigated the effects of his high blood pressure. Id. at 2137.

Finally, Kirkingburg v. Albertson's, Inc. involved the claim of a truck driver against his supermarket employer. Because the plaintiff had monocular vision, which violated DOT vision regulations, his employment was terminated. Kirkingburg, 119 S. Ct. at 2165. On the issue of mitigating measures, the Court noted that even one's subconscious compensation for his impairment must be considered in determining whether he is substantially limited in a major life activity. Id. at 2168-69. In Kirkinburg's case, his brain had subconsciously adjusted to his monocular vision by altering the manner in which he perceived depth and saw peripherally. Id. at 2168. The Court concluded, therefore, that he would be required to demonstrate that he was substantially limited in a major life activity even with that internal compensation. Id. at 2169.

After the Sutton trilogy, it is clear that under the ADA the "[u]se of the predicted effects of [an] impairment in its untreated state for the purposes of considering whether a major life activity has been affected by a physical or mental impairment has . . . been foreclosed by . . . the Supreme Court." EEOC v. R.J. Gallagher Co., 181 F.3d 645, 653 (5th Cir. 1999). An employee does not have a "disability" if her impairment only "'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken." Sutton, 119 S. Ct. at 2146. Rather, the Supreme Court emphasized that "substantially limits," as used in the ADA, is "in the present indicative word form," which requires "that a person be presently -- not potentially or hypothetically -- substantially limited in order to demonstrate a disability." Id.

Despite the relative clarity of the Court's mandate, the Sutton trilogy nonetheless gives rise to several new questions. It does not completely close the door to plaintiffs who can use mitigating measures to alleviate their impairments. In fact, although several federal courts have cited Sutton and Murphy to reject claims of "disability" based on mitigating measures,[1] a few others have found

[1] See, e.g., Hill v. Kansas City Area Transp. Auth., 181 F.3d 891, 894 (8th Cir. 1999) (holding that plaintiff's hypertension was not a disability because it could be sufficiently controlled with medication); EEOC v. R.J. Gallagher Co., 181 F.3d 645, 653-54 (5th Cir. 1999) (holding that although plaintiff's blood cancer, "if left untreated, would affect the full panorama of life activities, and indeed

various ways to allow plaintiffs to proceed on their ADA claims despite having impairments that can be mitigated.

One basis on which federal courts have allowed plaintiffs to proceed despite the use of mitigating measures is grounded in language from Sutton itself. "The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability under [the ADA] if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity."[2] Sutton, 119 S. Ct. at 2149 (emphasis added). See also Murphy, 119 S. Ct. at 2137 (noting that the Court was not addressing issue of whether plaintiff was "'disabled' due to conditions that persist despite his medication").

The Eighth Circuit, for instance, has seized on this language to hold that a plaintiff with polio was "clearly 'disabled' as defined by the ADA" despite the use of a leg brace which admittedly allowed him to "coach Little League, hunt[ ], fish[ ], and buil[d] a garage and an addition to his home," because "[t]he full range of motion in his leg [was] limited by the brace" and he walked with a "pronounced limp." Belk v. Southwestern Bell Tel. Co., 194 F. 3d 946, 950 (8th Cir. 1999). The court reasoned that the plaintiff was therefore substantially limited in the major life activity of walking. Id. Distinguishing Sutton, the court concluded that unlike the Sutton plaintiffs, whose eyesight was fully correctable, Belk could not, even with his brace, "function the same as someone who never had polio." Id; see also Barnett v. Revere Smelting & Refining Corp., 67 F. Supp. 2d 378 (S.D.N.Y. 1999) (holding that plaintiff's affidavit that he continued, despite treating his heart condition with medication, to experience chest pains and breathing problems that might cause him to miss work in the future, was sufficient to create genuine issue of material fact as to substantial limitation).

An employer would be ill-advised to rely solely on a plaintiff's use of a mitigating measure to conclude that he is not "disabled." Instead, an employer should be prepared to contend that a plaintiff has not *demonstrated* that he is substantially limited in a major life activity with the mitigating measure(s) taken into consideration. A plaintiff must satisfy a high standard that her impairment is "a significant restriction when compared with the abilities of the average person," in order to prove the required substantial limitation under the ADA. 29 C.F.R. § 1630.2(j).

D. Leave-Related Accommodations.

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would likely result in an untimely death," Sutton "foreclosed" consideration of the "predicted effects" of an impairment if mitigating measures were not used); Todd v. Academy Corp., 57 F. Supp. 2d 448, 454 (S.D. Tex. 1999) (holding that plaintiff had not adduced sufficient evidence that his epilepsy substantially limited a major life activity despite medication).

[2] This argument is also supported by "the individualized inquiry mandated by the ADA," which led the Court to hold that mitigating measures must be considered. Sutton, 119 S. Ct. at 2147.

Generally speaking, the Family and Medical Leave Act of 1993 requires that covered employers provide eligible employees up to twelve weeks of unpaid leave each year for the birth or placement of a child for adoption, a serious health condition, or to care for a spouse, child or parent with a serious health condition. Although the ADA has no independent requirement to provide leave for an employee, employers should not overlook the fact that leave, in some instances, could be a reasonable accommodation to a disability.

Many employers utilize attendance policies under which an employee is automatically terminated after a certain number of absences, regardless of the reason for such absences. Many state courts have consistently held that an employer may terminate an employee pursuant to such a policy without committing a retaliatory discharge, even if the absence is caused by an injury compensable under workers' compensation. See, e.g., Anderson v. Standard Register Co., 857 S.W.2d 555 (Tenn. 1993) (affirming summary judgment for an employer who terminated, pursuant to a facially neutral absence control policy, an employee who had a workers' compensation injury and missed work); Fortner v. World Color Press, Inc., 19 TAM 39-3 (Tenn. Ct. App. 1994) (employee failed to show that exercising his workers' compensation rights caused his discharge; he was terminated for excessive absences according to an attendance policy); Abraham v. Cumberland-Swan, Inc., 1992 Tenn. App. LEXIS 739 (plaintiff was legally discharged for failing to report to work, not illegally in retaliation for filing a workers' compensation claim). It should be noted, however, that Anderson, Fortner and Abraham all involved activity predating the effective dates of the ADA and FMLA.

Although nothing contained in the ADA or the FMLA renders such facially neutral attendance policies per se illegal, these statutes often require employers to modify their approach in the application of such policies. Specifically, an employer should no longer automatically terminate an employee pursuant to such a policy. In order to make sure that a termination does not violate the ADA, for instance, the employer should first determine whether the employee has a "disability" within the meaning of the ADA.

If the employee has a disability, the employer must then determine if a reasonable accommodation would enable the employee to perform the essential functions of his or her job. This could include modification of work schedules and attendance policies. 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o). For example, if providing one week of leave in excess of the policy's maximum limit would enable a disabled employee to recover sufficiently to perform the essential functions of his or her job, then such accommodation would likely be reasonable. See, e.g., Dutton v. Johnson County, 859 F. Supp. at 506-07 (use of vacation time might be a reasonable accommodation for plaintiff frequently absent due to severe migraine).

The Sixth Circuit Court of Appeals, in Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775 (6th Cir. 1998), highlighted the need to make

individualized determinations about leave. The employer terminated a plaintiff with psoriasis, which the Court found to be a disability, after her leave expired. The plaintiff argued that an additional unpaid leave of absence would have been a reasonable accommodation. The Court of Appeals agreed, rejecting the presumption of many courts that "regular and predictable attendance is a job requirement." The Court held that there should be no per se rule that an unpaid leave of absence of a indefinite duration could not constitute a reasonable accommodation, going so far as to suggest that a one year leave of absence might be a reasonable accommodation.

In Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998), however, a different panel of the Sixth Circuit Court of Appeals reached a different conclusion with respect to a company's return to work policy. Wilson Sporting Goods had a policy under which an employee could take a one year leave of absence, after which time his or her employment would be terminated. The Court of Appeals held that the policy was lawful because it did not distinguish between disabled and non-disabled employees, but instead was uniformly applied.

At some point in time, providing additional leave likely is no longer reasonable, and an employer is not required to hold a job open indefinitely until an employee's health problems improve. In Hudson v. MCI Telecommunications Corp., 87 F.3d 1167 (10th Cir. 1996), a customer service representative developed carpal tunnel syndrome, which prevented her from doing typing and keyboard work for an indefinite period of time. The plaintiff conceded that she was unable to perform the essential functions of her job but argued that temporary leave would be a reasonable accommodation that would ultimately enable her to perform her essential job functions. In support of her position she pointed out that Colorado's workers' compensation statute permitted MCI to remove her from the payroll temporarily. The Court, however, affirmed summary judgment for MCI, holding that the plaintiff had failed to present any evidence as to the length of time that her impairment was expected to last or as to the length of time that she would need leave.

An employer that desires to maximize its flexibility in the area of attendance issues is wise to require that all types of medical leave be taken concurrently and should put that policy in writing and make sure that everyone who takes leave is aware of that policy when leave is taken.

Before an employer dealing with employees at-will[3] discharges an employee pursuant to an attendance policy, the employer must make sure that (1) the discharge is not in retaliation for exercising rights protected by a statute or other well-defined public policy, including a workers' compensation statute; (2) it has examined whether the employee is a "qualified individual with a disability" under the ADA, and, if so, whether reasonable accommodation, including modification of an attendance policy,

[3] A collective bargaining agreement and grievance system may alter the analysis that an employer must make.

has been made; and (3) it has complied with the requirements of the FMLA. Each inquiry is separate and distinct.

E. Light Duty Assignments

Many employers have found "light duty" work programs for employees who have suffered on the job injuries to be beneficial and cost effective. An employer's workers' compensation carrier or administrator may have reason to encourage such a program, as its implementation generally returns the injured employee to work. The ADA, like most workers' compensation statutes, does not require that an employer create a light duty assignment for employees. A covered employee with a "serious health condition," however, is entitled to up to twelve weeks of FMLA leave per year An employer may not, prior to exhaustion of that leave, require an employee with a serious health condition to return to work on a light duty basis.

Although an employer need not create a light duty position in order to comply with the ADA, (EEOC Guidance at Question 27), an employer still should consider light duty assignments as a form of reasonable accommodation where appropriate. EEOC Technical Assistance Manual § 9.4; see also OFCCP v. Cissell Mfg. Co., 87-OFC-26 (Department of Labor 1994) (an employer's blanket refusal to reassign employees to light duty tasks violates the Rehabilitation Act). First, if the "heavy-duty" tasks of a job are only marginal job functions, rather than essential job functions, an employer may have to reassign such functions to co-workers as part of the reasonable accommodation process. EEOC Guidance at Question 27. For example, a file clerk may be required to lift and move heavy boxes on occasion, but his or her essential job functions will likely consist of maintaining files. In such instances, reasonable accommodation might include reassigning the lifting function to one or more other employees in the office. For a delivery driver, however, lifting heavy boxes is likely an essential function of the job. In such an instance, the employer need not reassign such job functions.

Second, if a "light duty position" is already vacant, and if a worker with a disability can perform the essential job functions of that position, reassignment to that position is a reasonable accommodation that should be explored. EEOC Technical Assistance Manual § 9.4.

F. Reconciling the ADA and the FDA Food Code.

Faced with a flurry of questions about the seemingly inconsistent obligations imposed by the ADA and the FDA Food Code on hospitality employers, the Equal Employment Opportunity Commission and Food and Drug Administration issued in 2004 joint guidance to assist restaurateurs and other food service providers with their obligations as employers. (See Appendix). Using employment scenarios specific to the hospitality industry, the guide explains how the ADA applies to food service providers. It also addresses the often overlapping obligations imposed by

the ADA and the FDA Food Code – which has been adopted by public health authorities in most U.S. states.

Among the issues addressed by the guidance:

When job applicants may be asked about their health and diseases transmittable through food: The Food Code requires food employee applicants to report information about their health and activities as they relate to diseases that are transmissible through food. Of particular concern to the FDA are the "Big 4:" *Salmonella* Typhi, *Shigelli* spp., Shiga toxin-producing E. Coli, and Hepatitis A virus. The guidance acknowledges the Food Code's reporting requirements, but confirms the ADA's prohibition on inquiring into an applicant's health prior to making a conditional offer of employment. Prior to the conditional offer, the employer should decide only if an applicant is qualified for the job. After an offer is made, the employer can ask about an applicant's health and require a medical exam as long as all applicants in the same job category are treated the same.

Whether current employees may be required to report a disease transmittable through food: The guidance confirms that the ADA permits employers to follow the Food Code's disease reporting requirements, including requiring a current employee to report whether he has been diagnosed with an illness caused by one of the "Big 4" pathogens; whether he has symptoms related to intestinal illness, boils, or infected wounds; and whether he has had a past illness due to one of the Big 4 pathogens. Employers may also ask medical questions of a food-handling employee if there is are concrete reasons for linking the employee's condition to safety or job performance. Note that HIV/AIDS is *not* on the Food Code list of diseases transmittable through the food supply. If an employer learns or suspects that an employee or job applicant has HIV/AIDS, the ADA generally prohibits taking an adverse job action against the person because of the medical condition.

Reconciling the exclusion requirements of the Food Code with the ADA's duty to provide reasonable accommodation: The Food Code requires that employees with symptoms of gastrointestinal illness – e.g. diarrhea, fever, vomiting, jaundice, or sore throat with fever – be restricted from performing certain duties, including food-handling. An employee diagnosed with an illness caused by one of the Big 4 pathogens must be excluded from the food establishment altogether. The guidance notes that most people with a Big 4 disease are not disabled within the meaning of the ADA because the illness is short-term and/or minor. If an employee has a sufficiently long-term and serious illness, however, he may be disabled under the ADA. If a disabled employee requests a reasonable accommodation to perform his job, then the employer must engage in the interactive process to determine whether an accommodation is available.

Disclosing the identity of infected employees: The guidance reiterates the ADA's prohibition on the dissemination of an employee's medical information and concludes that the ADA prohibits an employer from disclosing to co-workers the identity of an employee diagnosed with a contagious disease. The employer is permitted, however, to notify its employees that they may have been exposed to a disease and may need to be tested.

IV. ADDRESSING MILITARY LEAVE OBLIGATIONS.

Reintegration into the workforce following military service imposes significant responsibilities on U.S. employers as required by the Uniformed Services Employment and Reemployment Rights Act (USERRA.). Because of the high degree of deference given to the rights of military reservists and National Guard members, hospitality employers are wise to understand how this law impacts the workplace.

A. Eligible Employees

Any employee who has been employed in a civilian position with an employer may be eligible for military leave if the job was not temporary or non-recurring. The employee must give notice (verbal notification is sufficient) of the need to take leave for military training or service. If the leave does not exceed five years, the employee may request reinstatement on a timely basis depending on the length of deployment. The five- year limit is expressly inapplicable in cases of a declared national emergency such as the current military conflict in Iraq. The service member must provide documentation issued by the military certifying discharge on conditions that would not disqualify the employee from reinstatement if service has exceeded thirty days. Typically, the military will issue a discharge document specifying the term of service, the nature of discharge and the date of availability of returning military personnel.

B. Notification Time Frames

Depending on the length of time served, the returning employee must offer to return to work:

- within the first regularly scheduled work day following release if military service was from one to thirty days (unless a full eight hours has not elapsed.).

- within fourteen days of release if the employee served thirty-one to one hundred eighty days (or the next business day if the business is closed on the fourteenth day.).

- within ninety days after completion of service if 181 days or more military duty has been served (or the next business day if the business is closed on the ninetieth day.)

These time frames may also may be extended for up to two years if the employee is hospitalized or recuperating from an injury incurred or aggravated during military service. Thereafter, the employer's policies on unexcused absences must be consistently applied to returning military personnel who have failed to make a timely offer to return.

C. Benefits of Military Leave

Wages are not required to be paid to employees on military leave. Nonetheless, many employers have chosen to supplement the pay reservists receive from the military. However, group health insurance must be continued for the employee at the employer's cost for the first thirty days of leave. COBRA-like continuation privileges must be provided thereafter. Also, student loan obligations may be suspended for military reservists during the period of leave.

Most significantly, returning military personnel are entitled to be reinstated to the same or similar position they held at the time of their departure under an escalator principle. Seniority and similar length of service benefits must continue from the time leave commences. This means that if the employee steps off the escalator of employment for military service, she is entitled to step back on the same step she would have occupied except for the time spent in military service. For example pension vesting and credit must be calculated as if there was no break in service. If wages increased because of a length of service factor, the returning employee is entitled to the same wage he would have enjoyed as if he had remained on the step.

Most benefits earned as an incident of time actually worked (rather than length of service) do not accrue during military leave. FMLA is an exception. According to the Department of Labor, time worked in the military is to be calculated as time worked for FMLA purposes. Although the returning reservist may not have worked the requisite 1250 hours for the civilian employer in the year preceding an FMLA leave request, employers are expected to count military time as time worked for the employer in order to afford returning military personnel the full benefit of FMLA. http://www.dol.gov/opa/media/press/opa/OPA2002416.htm

Employers are not prohibited from hiring replacement personnel, but must make room for returning employees in any event. If the same job is not available, one of similar status, pay and benefits must be provided. Employees on military leave for thirty days or less are entitled to be returned to the exact job they held prior to leave.

There are several "super-seniority" benefits available to military reservists as well:

- Returning employees are entitled to training to enable them to acquire required skills for the same or a similar job. If not capable of being

qualified for the similar job, employees are entitled to be placed in a job of lesser status and pay for which they are qualified.

- Returning employees are entitled to training to enable them to acquire required skills for the same or a similar job.

- If not capable of being qualified for the similar job, employees are entitled to be placed in a job of lesser status and pay for which they are qualified.

- If disabled due to military service (whether a condition was incurred or aggravated), the returning reservist is entitled to reasonable accommodation or alternative placement if accommodation is not possible in a position for which she is qualified to perform. (This exceeds the duties under the Americans with Disabilities Act.)

- Returning reservists are entitled to be terminated only "for cause" for at least six months (or longer depending on the period of deployment.)

D. Beware Reverse Discrimination

Most employers will want to provide as much leeway as possible to employees called away for military service. However, extending benefits beyond those required by the provisions of USERRA may give rise to other claims of discrimination. For example, if a reduction in force would have eliminated the position of reservist, an employer that exempts that position may be subject to claims of discrimination on the basis of gender, age, race or other protected categories. An employer that permits a return to work outside the leave limits of USERRA may be subject to charges that the reservist was more favorably treated on the basis of age, race or gender. Some states (e.g. Louisiana) require pay for all employees on leave if the employer chooses to pay military reservists while on leave. Although juries may be sympathetic to employers that provide greater benefits than required by law, displaced or disadvantaged employees may not be so kind.

VI. CONCLUSION

Hospitality employers know well that the key to running a successful business is not only keeping the guests happy, but the many diverse people that make up their workforce. This is no small feat given the radically different legal landscape of the late twentieth century, and the many challenges employers now face in accommodating employees' disabilities, military obligations, pregnancy, religious practices, and the like. Anticipating, and accommodating, such situations can be done, and done well. How? Educating supervisors on the accommodation issues they are most likely to face is a critical first step. As important: Acting, not reacting, when accommodation issues arise. As IBM's Thomas J. Watson, Jr., once famously quipped: "The worst possible thing we could do [was] to lie dead in the

water with any problem. Solve it, solve it quickly, solve it right or wrong. If you solved it wrong, it would come back and slap you in the face, and then you could solve it right."

5th Annual Hospitality Law Conference
Presents

Tackling Tough Human Resource Issues – Addressing Accommodation Requests in the 21st Century Workplace

Presented by:
Stan Graham &
Carolyn Dinberg

Waller Lansden

Stan Graham

- Partner in Waller Lansden's Labor and Employment Practice Group
- Serves as Chair of the firm's Hospitality Industry Team
- Has extensive experience representing companies of all sizes in trial, litigation, and day-to-day labor and employment counseling
- Stan has broad experience in all aspects of labor and employment law, class action defense, and ADR.

Carolyn Dinberg

- Vice President & Managing Attorney for InterContinental Hotels Group
- Responsible for mid-scale hotel operations, labor and employment matters, and certain development projects
- Has been a guest lecturer at Emory University and Georgia State University on a variety of topics related to hospitality law
- During her time at Bondurant, Mixson and Elmore she tried employment, intellectual property, employment and constitutional matters, and argued at both the state and appellate levels

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TACKLING TOUGH HR ISSUES – ADDRESSING ACCOMMODATION REQUESTS IN THE 21ST CENTURY WORKPLACE

Hospitality Law Conference
February 8-9, 2007

Carolyn Gorwitz Dinberg, Esq.
Intercontinental Hotels Group
Atlanta, Georgia

Stanley E. Graham, Esq.
Waller Lansden Dortch & Davis, LLP
Nashville, Tennessee

InterContinental Hotels Group

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Religious Accommodation

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- Fastest growing category of EEOC charges
  - In the last ten years, number of religion-based EEOC charges has grown 60%, and since 2001, by 12%
  - "Revival of religious values"
  - Heightened sensitivity since 9/11
    - EEOC Q & A publication on employment of Muslims, Arabs, South Asians, and Sikhs

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What to Know . . .

- The duty to accommodate:
  - Two-step process:
    - Employee must request a reasonable accommodation
    - Employer must make a bona fide consideration and determine whether the accommodation would cause "undue hardship"

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What to Know . . .

- Good faith, interactive process required
- Reasonableness determined on a case-by-case basis
  - Cost to employer
  - Effect on employee
- "Reasonable" does not mean the accommodation of the employee's choice, or a special privilege

What to Know . . .

- Examples of "Undue Hardship"
  - Increased operating costs
  - Premium wages to a replacement worker
  - Increased workloads on coworkers
- Must be more than the administrative costs of considering and implementing a reasonable accommodation
- Fear of "opening floodgates" not enough

What to Know . . .

<u>Observance of Sabbath/Religious Holidays</u>

- EEOC Guidelines suggest:
  - Co-workers swap shifts or off days, with approval of employer
  - Central file or bulletin board for matching voluntary substitutes
  - Create flexible work schedule of arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours to make up time lost

What to Know . . .

<u>Dress and personal grooming</u>

- Common requests: facial hair, turban, and head scarf
- If a valid business reason, then accommodation need not be granted
  - EEOC says perceptions about customer preference not sufficient to deny

What to Know . . .

- Days off
  - Alternative - Trading days – e.g. one religion wants Wednesday off, another wants Saturday
  - Requests for Saturdays/Sundays off is an increasingly common and therefore challenging request, especially in full service hotels
- Schedule changes – e.g. sunrise/sunset; e.g., early shift for waiter so waiter did not have to serve alcohol
- Uniform Accommodations
  - E.g. head apparel, skirts
- Food requirements
  - Kosher, vegetarian, etc.

What to Know . . .

<u>Prayer Break During Working Hours</u>

- Islam – Fastest growing religion in the world
  - Requires adherents to pray five times per day
    - Morning and evening prayers must be done within a one-hour window at the beginning and end of the day
  - Different scale and frequency from Sabbath observance: shorter increments, more frequent

What to Know . . .

- Case study: Muslim employees asked for place to pray
- Area of locker room designated for use
- No sign endorsing prayer, but openly known that area is available and relatively private.
- Facing East

Training Supervisors is Critical . . .

- A request for an accommodation to an immediate supervisor is a request to the company
- Supervisors are often the best guide in determining whether a requested accommodation is "reasonable" in practice

ADA Accommodation

- ADA failure to accommodate cases have substantial jury appeal
  - New York federal court jury recently awarded $7.5 million to plaintiff with cerebral palsy who alleged failure to accommodate and disability harassment
  - Colorado jury recently awarded $8 million in punitive damages for failing to accommodate blind employee in application process, including failing to install "adaptive software"

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

What to Know . . .

- Employee must not only be disabled, but also "qualified"
- Qualified = "An individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"
- Key is "essential functions," which are "the fundamental job duties" of the position

What to Know . . .

- "Reasonable accommodations"
- Possible examples:
  - job restructuring
  - modified work schedules
  - leave
  - reassignment
  - acquisition or modification of equipment
  - modifications of exams, training, policies

What to Know . . .

- Employer must accommodate "known" disability – if supervisor knows, employer knows
- To determine whether a job function is "essential," must consider whether the employees ***actually*** perform the function
  - Supervisors are *needed* to make this determination – they are the ones who see the job performed every day
- Again, supervisors are the key to determining whether an accommodation would be "reasonable" in practice

Mental Disabilities

- Determine whether it is a disability prior to addressing accommodations
  - Has the alleged mental illness been properly diagnosed?
  - Is the mental illness a long-term pervasive problem which substantially limits a major life activity?
  - Can the employee, with or without reasonable accommodation, continue to perform the essential job functions in light of the mental illness?

Mental Disabilities

- Courts:
  - 10th Circuit: "Concentration" not a major life activity
  - NY: "ADA was "not intended to categorize people with common personality traits as disabled."
  - No protection under the ADA if personality traits are aspects of an employee's character and not a mental illness.
    - 11th Circuit: "paranoid, disgruntled, oppositional, difficult to interact with, unusual, suspicious, threatening and distrustful" are behavioral characteristics, not qualifying mental impairments
    - Georgia: Job-related stress caused by an unlikeable boss or unpleasant duties is not a covered ADA impairment
    - NY: "poor judgment" not a covered ADA impairment

Mental Disabilities

- Case study: Steward with diminished mental capacity
  - Assisted with punching time clock and recording hours
  - Hours/work based on transportation
  - Assisted with enrolling in benefits

Online Support . . .

- http://www.jan.wvu.edu/

Bipolar Disorder – tips from JAN

- ***Difficulty Handling Stress and Emotions***:
  - Provide praise and positive reinforcement
  - Refer to counseling and employee assistance programs
  - Allow telephone calls during work hours to doctors and others for needed support
  - Provide sensitivity training to coworkers and supervisors
  - Allow the presence of a support animal
  - Reinforce peer supports
- ***Working Effectively with Supervisors***:
  - Provide positive praise and reinforcement
  - Provide written job instructions
  - Develop written work agreements including the agreed upon accommodations, clear expectations of responsibilities and the consequences of not meeting performance standards
  - Allow for open communication to managers and supervisors
  - Establish written long term and short term goals
  - Develop strategies to deal with problems before they arise
  - Develop a procedure to evaluate the effectiveness of the accommodation

Other Common Hospitality Issues

- Allergies
  - Perfume
    - Can ask employees not to wear fragrances, if reasonable
  - Food
    - Bring own lunch or order specific lunch at events
  - Dust
    - Get doctor note and determine if accommodation is reasonable (e.g. front desk staff wearing mask vs. housekeeper wearing mask)

Common Hospitality Issues . . .

- **Light Duty Requests**
  - Most common in housekeeping and maintenance
  - The accommodations vary significantly based on how limiting the restrictions are to their normal duties.
  - Reduce hours and/or shift job duties
  - Reasonableness varies on degree and scope of request for light duty – e.g. no lifting, bending, stooping, pushing, pulling
  - In full service hotels, may temporarily reassign to work in laundry

Common Hospitality Issues . . .

- **Temporary vs. Permanent**
  - If temporary and not too limiting (e.g. no reaching above a certain height) can accommodate at employer option by having coworkers help. Not required by law.
- **Standing v. sitting**
  - Bar stool at front desk/host/hostess stand
  - When possible, stand when greeting guest
  - **Case Study**: Casino Supervisor had to learn "dice" because it was only seated table where he could perform other functions
  - **Case Study**: Temporary change from Guest Services to PBX Operator so employee could sit while injury to foot healed

Common Hospitality Issues . . .

- Case study: Blind employee. Purchased software to allow use of computer-based reservation system.
- Case study: Breastfeeding – not a disability but commonly protected by state law
  - Mother allowed use of a guest room each day to use a breast pump in privacy.
  - Allowed a small refrigerator in their department to store the breast milk.

Common Hospitality Issues . . .

- Case Study: Server with Hepatitis C
  - Moved from food handling position to doorman position.
  - EEOC and FDA have issued Joint Guidance for food handling positions.
- Case Study: Server with Medication side effects
  - Employee not scheduled for morning shift when side effects most severe

Accommodating Military Service

- Prevents discrimination in employment for military service
- You must have maintained benefits during leave
- It creates rights to return to work following service

What to Know . . .

- Applies irrespective of employer size, employee hours, or length of service
- Creates personal liability, and
- Cannot be prospectively waived

What to Know . . .

- Returns are inevitable – 80% return to work with the same employer
- More are now absent than any time since World War II
  - Since 9/11/01, 390,000 have been released from duty
  - As of 3/06, 127,000 are serving in guard or reserve

What to Know . . .

  - 35% of returnees seek mental health services, and of these 12% have serious health disorders
  - As of 3/06, 18,000 wounded (of these, 60% are traumatic brain injuries and amputations)
- There is little "employer sympathy" for difficulties from our returning troops. Employer's "work issues" caused by departure/return pale to theirs and no one will care.

What to Know . . .

- "Return to work" issues under USERRA are only the tip of the employment iceberg.
- Downstream effect with many will be physical and mental impairments, including sleep disturbances, mood disorders, problems with organization, and impulsivity

Requirements upon Return:

- "Return" is to the position they would have obtained, with reasonable certainty, had they not been absent
- Must consider them in the "returned," not "departing" condition

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Requirements upon Return (cont'd):

- Employee usually must be returned to work within two weeks
- If employee is no longer qualified, must be returned to a position most closely approximating the one held, whether higher or lower in organization

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Requirements upon Return (cont'd):

- Reasonable accommodations required, and "extra" assistance, too
- Protection from non-RIF/layoff terminations for 6 months or a year, depending upon length of duty, except if "for cause"

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Return from Weekend Duty

- Employees generally must return at the next regularly scheduled shift

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Returns After >6 Months of Service

- 90 day grace period to report back to work
- Two years or more grace period if a service-related illness or injury

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