

WHAT'S AN "INDIVIDUALIZED ANALYSIS" – AND WHY SHOULD I CARE?

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The Americans with Disabilities Act (ADA) poses ongoing compliance challenges and attracts significant attention from plaintiffs' lawyers and the Equal Employment Opportunity Commission (EEOC). The resulting litigation continues to illustrate that inflexible policies and practices are a recipe for disaster.

To manage effectively, especially if they suspect that an employee is trying to "game the system," employers *must* perform and *document* detailed, individualized analyses of each situation. Additionally, as a recent appeals court decision makes clear, employers cannot afford to lose sight of the bigger picture when considering requests for accommodation.

Since the ADA Amendments Act and implementing regulations went into effect over four years ago, a much larger proportion of the workforce can now be considered "disabled" and thus entitled to reasonable accommodation under the law. So the focus of litigation has moved much more toward determining when and whether an accommodation is reasonable and required, rather than determining whether the employee is "disabled." This was precisely the issue presented in *Feist v. State of Louisiana*.

ANALYZING REASONABLE ACCOMMODATIONS

Pauline Feist, a former assistant attorney general at the Louisiana Department of Justice, had osteoarthritis of the knee, a condition that her employer acknowledged could

Related People



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entitle her to a reasonable accommodation under the ADA. The question was whether a reserved onsite parking space would constitute a required accommodation. Feist filed suit in federal district court, which dismissed her “failure to accommodate” claim, reasoning that she did not prove that the “parking situation limited her ability to perform the ‘essential functions’ of her job.”

On appeal the U.S. Court of Appeals for the 5th Circuit disagreed, concluding that the ADA requires employers to look beyond a strict nexus between the requested accommodation and essential functions of the job. The court wrote that employers must also consider whether a requested accommodation would enable the disabled employee to enjoy workplace “benefits and privileges” in a manner equivalent to similarly situated, nondisabled employees.

So without deciding whether the requested onsite parking space would actually constitute a reasonable accommodation in this case, the 5th Circuit sent the case back to the district court for further consideration. Doing so, the appellate court noted that EEOC guidance explicitly states that a reserved parking space may constitute a reasonable accommodation under some circumstances.

The 5th Circuit’s ruling is consistent with a 2010 decision by the 3rd Circuit, concluding that a sight-impaired employee could be accommodated with daylight shifts, which would facilitate her commute. Again, although there was no *direct* connection between the accommodations and the designated essential functions of the job, the requested accommodation could nevertheless permit the disabled employee to enjoy workplace benefits and privileges equivalent to those enjoyed by similarly situated, non-disabled co-workers.

UNDERSTANDING YOUR LEGAL OBLIGATIONS

Before becoming too alarmed about wrestling with the meaning of “workplace benefits and privileges,” it’s worth recognizing that both of these appellate decisions involved commuting to or from work, or *access* to the workplace. Equal *access* is, of course, a cornerstone of the ADA. Additionally, courts have recognized that regular attendance can indeed be an essential job function. So even if not

specifically identified as such, regular attendance would implicitly be an essential function of most jobs.

Thus, courts and the EEOC have recognized that accommodations such as schedule changes or reserved parking spaces can be reasonable and necessary in order to provide a disabled worker equal benefits and privileges in the workplace. The key here is that an employer can only determine whether such accommodations are required by conducting an interactive, individualized, analysis of the circumstances. This is the most important lesson to be gleaned from the foregoing decisions.

Other recent developments underscore the importance of conducting individualized analyses. For example, the EEOC recently announced a \$125,000 settlement with a company that purportedly declined to provide a wheelchair ramp to an employee who had suffered a severe leg injury. It is suing another employer for allegedly refusing to consider alternatives when an employee suffering from kidney failure was unable to provide a urine specimen for pre-employment screening.

And the Commission sued yet another company for withdrawing a job offer to an experienced worker who had lost sight in one eye as a child, but had subsequently performed well in similar jobs.

In each of these cases, a documented, individualized, assessment of the relevant circumstances would have led to either a resolution of the situation or proof that the employer made good-faith efforts to accommodate an individual who is disabled.

THE CRITICAL ROLE OF SUPERVISORS

Of course potential accommodation issues can arise anywhere and any time. So to be successful, you must educate supervisors to recognize potential issues, and to confer with the company's human resources experts or legal advisors when such situations arise. If supervisors don't at least recognize and report these situations early, they will be much more difficult to manage later.

For example, when a hospital's explanation for terminating an employee kept changing as the situation unfolded, it was unable to defeat legal claims related to her allegations of ADA and Family Medical Leave Act violations.

On the other hand, when the employer had a well-documented process for addressing an employee's job performance problems, including an opportunity for the employee to present his side of the story, it was able to prove that the employee never requested an accommodation until after he was terminated. So that ADA claim was dismissed before trial.

THE MORAL OF THE STORY

ADA accommodation issues will continue to arise frequently in the workplace and there is no standard, one-size-fits-all solution for managing them. The only way to manage these situations successfully is to train supervisors to recognize and report them earlier. Then trained HR professionals can guide a documented, interactive process, addressing the employee's condition and the specific circumstances and requirements of the job.

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