

# ADAAA ABC's

## Olympus Risk Conference



March 28, 2018

# Caveat #1



This training is provided for informational purposes only. Nothing in the training should be construed as legal advice, nor is it binding on any enforcement agency. You should consult with legal counsel before making any decision regarding any situation covered by the ADA.

# Caveat #2



All situations presented in this training are fictional and/or hypothetical, and should not be confused with any individual or animal, living or dead.

# Conversation Topics



- ☞ ADA Basics
- ☞ Reasonable Accommodation
- ☞ Service and Emotional Support Animals
- ☞ Questions

# ADA Basics



- ❧ Physical or mental impairment that substantially limits a major life activity
- ❧ Compared to most people in the general population
- ❧ Not taking into account any mitigating measures
- ❧ “Record of/Regarded as” provisions

# ADA Basics



## ☞ Rule of Construction #1

☞ The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.

-- 29 CFR § 1630.2(j)(1)(i)

# ADA Basics



## ☞ Rule of Construction #3

☞ The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity.

-- 29 CFR § 1630.2(j)(1)(iii)

# ADA Basics



## ☞ Rule of Construction #7

- ☞ An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

-- 29 CFR § 1630.2(1)(vii)



# ADA Basics



## ☞ Rule of Construction #9

- ☞ The six-month “transitory” part of the “transitory and minor” exception . . . Does *not* apply to the definition of “disability” under the . . . “actual disability” prong.

-- 29 CFR § 1630.2(j)(1)(ix)

# ADA Basics



- ❧ An employer is free to establish job-related qualifications standards
- ❧ An employer is free to hire the “best qualified” person for a job
- ❧ An employer is not required to lower existing job standards

# Advice



# Reasonable Accommodation



- ☞ An employer must make “reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would pose an undue hardship on the operation of the business of such covered entity.”

-- 42 USC § 12112 (b)(5)

# Reasonable Accommodation



- ❧ The purpose of reasonable accommodations is to remove workplace barriers (not necessarily/only physical barriers)
  
- ❧ The reasonable accommodation process may involve “preferences”
  - ❧ “By definition any special ‘accommodation’ requires the employer to treat an employee with a disability differently, i.e., preferentially.”
    - US Airways v. Barnett (S.Ct. May 2002)

# Reasonable Accommodation



- ❧ 3 Categories of Reasonable Accommodation
  - ❧ Modification to the job application process
  - ❧ Modifications or adjustments to the work environment or to the manner or circumstances under which the position held or desired is customarily performed
  - ❧ Modifications or adjustments that allow for “equal benefits and privileges of employment”

-- 29 CFR § 1630.2(o)

# Reasonable Accommodation

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- ☞ In order to obtain a reasonable accommodation, an individual must:
  - ☞ Be “Qualified”
  - ☞ Make a “Request”

# Reasonable Accommodation



## ☞ Qualified

☞ The term “qualified,” with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, *can perform the essential functions* of such position.

-- 29 CFR § 1630.2(m)



# Reasonable Accommodation



## ❧ Essential Function

- ❧ Employer judgment
- ❧ Written job description
- ❧ Performance plans/evaluations
- ❧ Actual work experience
- ❧ Time spent performing a function
- ❧ Consequences of not requiring function be performed
- ❧ Terms of a collective bargaining agreement

# Reasonable Accommodation



## ☞ Performing the Essential Functions

### ☞ Health Care Provider Documentation

☞ Leland Melvin Otto v. City of Victoria (8<sup>th</sup> Cir. Jul. 2012)

### ☞ Employee Performance

☞ Colon-Fontanez v. Municipality of San Juan (1<sup>st</sup> Cir. Oct. 2011)

### ☞ Statements in Other Processes

☞ Cleveland v. Policy Management Systems Corp (S.Ct. May 1999)

# Reasonable Accommodation



## ☞ Requests for Accommodation

☞ The regulations are silent regarding how a request is to be made

☞ The regulations do indicate that “ it may be necessary for a covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation.”

-- 29 CFR § 1630.2(o)(3)

# Reasonable Accommodation



## ☞ EEOC Interpretive Guidance

☞ “Once an individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation.”

-- EEOC Interpretive Guidance, 29 CFR

Ch. XIV (7-1-11 Edition)

# Reasonable Accommodation



☞ Douglas J. Dinse v. Carlisle Foodservice Products, Inc.  
(10<sup>th</sup> Cir. Nov. 2013)

☞ In fact, before an employer's duty to provide reasonable accommodations – or even to participate in the interactive process – is triggered under the ADA, the employee must make an adequate request, thereby putting the employer on notice. . . . More is required to trigger an employer's duty to engage in the interactive process than the mere awareness that the employee is disabled; specifically, the employee must make an adequate request for a reasonable accommodation for the disability.

# Reasonable Accommodation



- ❧ Douglas J. Dinse v. Carlisle Foodservice Products, Inc. (10<sup>th</sup> Cir. Nov. 2013)
  - ❧ In general, the interactive process must ordinarily begin with the employee providing notice to the employer of the employee's disability and resulting limitations. . . . Although the notice or request does not have to be in writing, be made by the employee, or formally invoke the words 'reasonable accommodation,' **it nonetheless must make clear that the employee wants assistance for his/her disability.**

# Reasonable Accommodation



❧ Zivkovic v. Southern California Edison Company  
(9<sup>th</sup> Cir. Sep. 2002)

❧ The interactive process requires:

- ❧ direct communication between the employer and employee to explore in good faith the possible accommodations;
- ❧ considerations of the employee's request; and
- ❧ offering an accommodation that is reasonable and effective

# Reasonable Accommodation



☞ *McMillan v. City of New York* (2<sup>nd</sup> Cir. Mar. 2013)

☞ This burden [identifying a reasonable accommodation] is not heavy: it is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, *facially*, do not clearly exceed its benefits.



# Reasonable Accommodation



**“His boss modified it so he could keep his job...”**



# Reasonable Accommodation



## ☞ Accommodation Hierarchy

- ☞ Accommodate current job in the workplace
- ☞ Accommodate current job away from the workplace
- ☞ Reassignment to a vacant position

# Without Barriers





# Reasonable Accommodation Scenarios

# Reasonable Accommodation

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A District designates all employees as “probationary” for one year. An employee has been working successfully for eight weeks when she becomes disabled in a car accident. The employee is unable to continue performing the essential functions of her current position and requests a reassignment.

# Reasonable Accommodation



## ☞ EEOC Enforcement Guidance

- ☞ Reassignment to an available, vacant position must be provided unless the employer can show undue hardship
- ☞ Employee must be qualified for the new position
- ☞ There is no requirement to assist the employee in becoming qualified via extraneous training

# Reasonable Accommodation



Debbie, has confided in you that she needs a new supervisor. When you ask her why, Debbie states that she has PTSD and depression and the way her supervisor interacts with her triggers her PTSD, making it very difficult to do her work.

# Reasonable Accommodation



## ☞ EEOC Enforcement Guidance

☞ An employer does not have to provide an employee with a new supervisor as a reasonable accommodation. . . . [A]lthough an employer is not required to change supervisors, the ADA may require the supervisory methods be altered as a form of reasonable accommodation.



# Reasonable Accommodation



Susan, an IT manager, has asked to telecommute due to her fibromyalgia, chronic fatigue and irritable bowel syndrome. The employer has a policy prohibiting telecommuting for employees with a history of performance or conduct issues. Susan's telecommuting privileges were revoked two years ago because she was not always responsive when called.

# Reasonable Accommodation



## ☞ EEOC Enforcement Guidance

☞ An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship

# Reasonable Accommodation



Jim self-reported his chronic depression. The employer has policies mandating disciplinary action after 2 unexcused absences or 3 unexcused “tardies.” It also has a policy prohibiting leave until an employee has worked six months. Jim was “put on notice” following 1 unexcused absence and 2 unexcused “tardies.” Jim asked for leave to obtain treatment and to adjust his medication. Jim’s manager said “He’d think about it and get back with him.” Two days later, Jim was tardy and is now being subjected to disciplinary action.

# Reasonable Accommodation



## ∞ EEOC Enforcement Guidance

∞ If an employee needs additional unpaid leave as a reasonable accommodation, the employer must modify its “no-fault” leave policy to provide the employee with additional leave, unless it can show that there is another effective accommodation that would enable to person to perform the essential functions of his/her position

# Reasonable Accommodation



Amy, a recently hired employee, informed her supervisor that she suffers from asthma and has multiple chemical sensitivities, such that exposure to some scents and fragrances may result in anaphylactic shock. Amy is requesting fans in her workspace and notices to her coworkers asking them to refrain from using scented soaps, shampoos, and deodorants.

# Reasonable Accommodation



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- ❧ Kaufmann v. GMAC Mortgage (3<sup>rd</sup> Cir. 2007 (unpublished))
    - ❧ Plaintiff failed to show it would be possible for an employer to provide an odor-free environment
    - ❧ Employer installed air fans/filters and relocated plaintiff twice
    - ❧ Employer asked employees not to wear perfumes

# Reasonable Accommodation

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Pat, a custodian, has insulin dependent diabetes, which requires her to periodically check her blood sugar and self-administer medication. After some recent episodes of severe dizziness, Pat has provided her supervisor with a schedule related to her self-exams and has asked the supervisor to “keep her on track.”

# Reasonable Accommodation

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## ☞ EEOC Enforcement Guidance

- ☞ Medication monitoring is not a reasonable accommodation because doing so does not remove a workplace barrier
- ☞ Monitoring an employee's medical treatment or ensuring that s/he is receiving appropriate treatment is not a reasonable accommodation because such treatment does not involve modifying workplace barriers\*\*\*



# Hard Decisions



# Service Animals



- œ Department of Justice Regulations
  - œ By definition, ONLY DOGS are service animals
  - œ Service animals are issues of ACCESS, not accommodation
  - œ Service animals can go ANYWHERE \*



# Service Animals



- ☞ If either the disability or the need for the service animal is obvious, no inquiries about either the animal or the disability may be made
- ☞ If either the disability or the need for the service animal is not obvious, only two (2) inquiries may be made

# Service Animals



- ⌘ Is the dog a service animal required because of a disability?
- ⌘ What work or task has the dog been trained to perform?



# Service Animals



- ⌘ Service animals must be “controlled” by the handler (e.g., voice control, tether, etc.)
- ⌘ Service animals must be housebroken
- ⌘ Service animals may not be disruptive



# Service Animals



- ❧ Allergies or fear of dogs are not valid reasons for denying access to people using service animals
- ❧ Establishments that prepare or sell food must allow services animals even if state or local health codes prohibit animals on the premises



# Service Animals



∞ There can be *no requirement* for advance notice or for registration, certification, identification, grooming, vaccination, etc.



∞ Utah law has provisions for service animals in training (UCA Section 62A-5b-102(3)(a)(i) and UCA Section 62A-5b-104(c))



# Service Animals



## ☞ Miniature Horses

☞ The DOJ Regulations have a separate provision about miniature horses that have been individually trained to do work or perform tasks for people with disabilities





# Emotional Support Animals

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- ❧ Emotional Support Animals (ESA) are matters of reasonable accommodation under Title I of the ADA, the FHA and the ACAA
- ❧ An ESA must generally be a domesticated animal
- ❧ HCP documentation may be required to support the need for an ESA



# Emotional Support Animals

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- ❧ There must be a nexus between the individual's disability and the function performed by the ESA
- ❧ Considerations regarding training, disruption and control apply to ESA's
- ❧ Companionship is not considered a "task"



# Emotional Support Animals

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**“I can install this virus software if you bend over.  
But a flu shot would be easier for both of us.”**

# Questions



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