

How the ADA Interactive Process Has Become a One-Way Street

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ADA Title I

No employer shall discriminate against a qualified individual on the basis of disability in the terms, conditions, and privileges of employment.



ADA Title I

Employer must make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability unless it would impose an undue hardship

“Qualified Individual”

An individual who, with or without reasonable accommodation, can perform the essential function of the employment position that such individual holds or desires.

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“Reasonable Accommodation”

- Necessary to perform the essential functions of the job; or
- Necessary for “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”

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“Reasonable Accommodation”

- Six months of leave
- Let me work from home
- Transfer to another job
- Provide an interpreter for me
- Provide a scooter for me

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“Undue Hardship”

An action requiring significant difficulty or expense

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“Undue Hardship”

- Factors
 - The nature and cost of the accommodation needed under this chapter;
 - The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

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“Undue Hardship”

- Factors
 - The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
 - The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

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“Direct Threat”

A significant risk to the health or safety of the employee or others that cannot be eliminated by reasonable accommodation.

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INTERACTIVE PROCESS

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Interactive Process: EEOC Regulations

- “It may be necessary for the [employer] to initiate an informal, interactive process with the individual with a disability in need of the accommodation.”
- This process should identify:
 - the precise limitations resulting from the disability; and
 - potential reasonable accommodations that could overcome those limitations.

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“Interactive Process”

There is no per se liability under the ADA if an employer fails to engage in an interactive process, but . . .

Did the IP failure lead to failure to accommodate

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“Interactive Process”

“The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the employee with a disability.”

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“Interactive Process”

When an employee requests an accommodation, it becomes necessary for the employer to initiate an informal interactive process with an employee in need of accommodation.

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What is Failure?

- (1) the employer knew about the employee's disability;
- (2) the employee requested accommodation or assistance for his or her disability;
- (3) the employer did not make a good faith effort to assist the employee in seeking accommodation; and
- (4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

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Key Case:

Employer is expected to be "proactive"

- *Fjellestad v. Pizza Hut of America, Inc.*, (8th Cir. 1999)
 - "The interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome"

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Key Case:

Employer is expected to be "proactive"

- *Fjellestad v. Pizza Hut of America, Inc.*, (8th Cir. 1999)
 - "[I]t does not help avoid litigation by bringing the parties to a negotiated settlement, and it unfairly exploits the employee's comparative lack of information about what accommodations the employer might allow."

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Key Case:
Don't drop the ball

- Cravens v. Blue Cross and Blue Shield Kansas City (8th Cir. 2000)
 - "After employee identified the telecommunications position as a possibility for transfer and informed her supervisor of her interest in the job, the HR manager allegedly said that she would take care of it. Employee further asserts that, when she tried to continue the process, HR failed to respond to employee's repeated phone messages and attempted visits."

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Key Case:
Look for other jobs

- Cravens v. Blue Cross and Blue Shield Kansas City (8th Cir. 2000)
 - "Employee additionally claimed that she asked for assistance in identifying alternative positions from other members of the human resources department and received minimal help in that regard. "

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Key Case

Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc. (8th Cir. 2006)

- (1) never investigated employee's abilities which was "a step that [Dr Pepper] could have taken to avoid some of what we're going through here today";
- (2) never sent employee for a physician's evaluation because "we did not feel that it was necessary to do more";
- (3) never contacted the production manager at the facility about available positions for Canny;
- (4) knew of employee's willingness to go to any Dr Pepper facility to stay employed with Dr Pepper; and
- (5) nothing prevented Dr Pepper from making the offer they made during litigation two years earlier.

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Key Case

Kowitz v. Trinity Health, (8th Cir. 2016)

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Other Cases

- *Kallail v. Alliant Energy Corp. Servs., Inc.* (8th Cir. 2012)
- *E.E.O.C. v. Product Fabricators, Inc.* (8th Cir. 2014)

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Questions?

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