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REASONABLE ACCOMMODATIONS AND THE INTERACTIVE PROCESS

I. Americans with Disabilities Act (1990) (42 U.S.C. 12101 et seq.) / Law Against Discrimination (N.J.S.A. § 10:5-1 et seq.)

A. Discrimination against the disabled

B. Plaintiff must show under both laws:
   1. That he or she is disabled within the meaning of the Act.
   2. He or she is qualified, i.e. can perform the essential functions of the job with or without a reasonable accommodation.
   3. Employer terminated or took some adverse action because of disability.

C. What is a disability

   1. Broader under state law as opposed to Federal.

   2. Federal (42 U.S.C. 12102):
      (a) A physical or mental impairment that substantially limits one or more of the major life activities of an individual;
      (b) A record of such impairment; or
      (c) Being regarded as having such impairment.

      NOTE: Major life function includes functions such as caring for oneself, performing manual tasks such as walking, seeing, hearing, speaking, breathing, learning and working.

   3. State (NJSA 10:5-5q): "physical or sensory disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or

speech impairment, or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological, or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological, or neurological conditions which prevents the typical exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection."

Does not require impairment of a major life function, just prevention of the normal exercise of any bodily or mental function or is demonstrable. (Viscik v. Fowler Equip. Co., 173 N.J. 1, 16 (2002))

Specific ones found under statute or case law:

- Paralysis, any degrees
- Amputation
- Blindness or visual impairment
- Epilepsy
- Muteness or speech impediment
- AIDS or HIV
- Chronic back problems (Andersen v. Exxon Co., U.S.A., 89 N.J. 483 (1982))
- Heart conditions (Panettieri v. C. V. Hill Refrigeration, 159 N.J. Super. 472 (App. Div. 1978))
- Alcoholism (Clowes v. Terminix Int'l, Inc., 109 N.J. 575 (1988))
- Obesity (Viscik v. Fowler Equip. Co., 173 N.J. 1 (2002))
- Drug addiction (Matter of Cahill, 245 N.J. Super. 397 (App. Div. 1991))

4. Drug addiction under Federal -
   - Past drug use once rehabilitated is a protected handicap
     Current drug use is not (42 USC 12114)

D. Medical Examinations under the ADA (29 CFR 1630.14)

1. Pre-employment can only inquire about job-related functions
2. Employment entrance exam - can't do one unless:

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if -

(a) All entering employees are subjected to such an examination regardless of disability;

(b) Information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and it treated as a confidential medical record, except that –

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(c) the results of such examination are used only in accordance with this subchapter

3. Exam after Hire

Examination and inquiry

(a) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such an examination or inquiry is shown to be job related and consistent with business necessity.

(b) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job related functions.

E. Reasonable Accommodation

ADA forbids an employer from "not making reasonable accommodations 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 impose an undue hardship on the operation of the business of such covered entity" (42 USC 12112(b)(5)(A))

Law protects qualified individuals which include people who can perform the essential functions of a position with a reasonable accommodation. Consideration is given to what functions employer feels are essential and if he has prepared written job description before advertising or interviewing applicants. (42 USC 12111(8))

1. Federal law says a reasonable accommodation may include:

   (a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

   (b) job restructuring, part-time or modified work schedules, reassignment of a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examination, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

   (42 USC 12111(9))

29 CFR 1630.2(o):

(1): The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2): Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

Undue Hardship (42 USC 12111(10)):

(a) In general: the term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (b)

(b) Factors to be considered:

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include -

(i) the nature and cost of the accommodation needed under this chapter;

(ii) 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;

(iii) 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

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the work force of such entity; the geographic separateness, administrative of fiscal relationship of the facility or facilities in question to the covered entity. 1 L. 101-336, Title I §101, July 26, 1990, 104 Stat. 330; L. 102-166. Title I §109(a), Nov. 21, 1991, 105 Stat.

2. State Law

The statute states:

"All of the provisions of the act to which this act is a supplement shall be construed to prohibit any unlawful discrimination against any person because such person is or has been at any time disabled or any unlawful employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular employment." (N.J.S.A. § 10:5-4.1)

Mirror Federal Requirements (NJAC 13:13-2.5)

NJAC 13:13-2.5(b)(1): examples of reasonable accommodation:

i. Making facilities used by employees readily accessible and usable by people with disabilities;
ii. Job restructuring, part-time or modified work schedules or leaves of absence;
iii. Acquisition or modification of equipment or devices; and
iv. Job reassignment and other similar actions.

NJAC 13:13-2.5(b)(3):

> In determining whether an accommodation would impose undue hardship on the operation of an employer's business, factors to be considered include:
> i. The overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget;
> ii. The type of the employer's operations, including the composition and structure of the employer's workforce;
> iii. The nature and cost of the accommodation needed, taking into consideration the availability of tax credits and deductions and/or outside funding; and
> iv. The extent to which accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.

3. Leave of Absence as a Reasonable Accommodation for a Disability

Although indefinite leaves of absence are not reasonable, an employee's request for a shorter, finite leave may be a required reasonable accommodation (Svarnas v. AT & T Commc'ns, 326 N.J. Super. 59, 79 (App. Div. 1999); Criado v. IBM Corp., 145 F.3d 437, 443 (1st Cir.1998))

29 CFR Part 1630 App., § 1630.2(o): "[O]ther accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment"

4. The Interactive Process

a. Under the ADA, once an employee gives notice to an employer of a claimed disability and the need for an accommodation, then determining what reasonable accommodation may be made occurs through a "flexible, interactive process that involves both the employer and the [employee] with a disability" (Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 311 (3d Cir. 1999), quoting 29 CFR Pt. 1630, App. Section 1630.9 at 359)

b. Courts have interpreted both the LAD and ADA to require employers to engage in an interactive process with handicapped or disabled employees

LAD: McQuillan v. Petco Animal Supplies Stores, Inc., Civil Action No. 13-5773 (FLW), 2014 U.S.

Dist. LEXIS 58464 (D.N.J. Apr. 28, 2014) (discussed infra); Spikes v. Chotee, Inc., Civil Action No. 16-0406-BRM-DEA, 2017 U.S. Dist. LEXIS 135597 (D.N.J. Aug. 24, 2017)

c. There are no magic words needed to commence the process. The request need not be written. (Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 399-400 (App. Div. 2002)). An employee must make clear though that assistance is desired. (Jones v. UPS, 214 F.3d 402, 408 (3d Cir. 2000))

d. Both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith (Taylor, 184 F.3d at 312). A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. (Ibid.)

e. Once the employer has knowledge of the claimed disability, it has the burden to request additional information that it believes it needs. (Id. at 315.)

f. "Participation is the obligation of both parties, however, so an employer cannot be faulted if after conferring with the employee to find possible accommodations, the employee then fails to supply information that the employer needs or does not answer the employer's request for more detailed proposals." (Id. at 317)

g. "Employers can show their good faith in a number of ways, such as taking steps like the following: meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee's request, and offer and discuss available alternatives when the request is too burdensome." (Ibid.)

h. "When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with

a disability provide documentation of the need for accommodation." (29 CFR Pt. 1630, App. Section 1630.9)

i. "To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: 1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith." (Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 319-20 (3d Cir. 1999))

Recent Cases

- Spikes v. Chotee, Inc., Civil Action No. 16-0406-BRM-DEA, 2017 U.S. Dist. LEXIS 135597 (D.N.J. Aug. 24, 2017)
    - The court found that the plaintiff established the first three factors of the interactive process test, and there was a genuine issue of material fact as to the fourth
    - Facts:
        - Plaintiff was hired by Defendant as an Executive Chef
        - "Plaintiff's job responsibilities included "hiring and training kitchen staff, creating menus, 'costing out' food, 'costing out' labor, managing inventory, 'ordering and receiving' food, overseeing and assisting with meal preparation, and cleaning and maintain kitchen equipment."" (Id. at *2)
        - "The Executive Chef position was "a very physical one, requiring long hours standing behind a hot stove, lifting heavy items, running up and down stairs with kitchen supplies and dealing with a stressful environment."" (Ibid.)

- One day, plaintiff suffered a major heart attack at work

- He went to the hospital and was informed that a portion of his heart was rendered dead, he would potentially need a heart transplant and he would have to wear a life vest to resuscitate him in the event of a complete heart failure

- He informed his supervisor and was granted a leave of absence; the employer delegated his responsibilities to other employees and hired another Executive Chef

- Despite the replacement, during plaintiff's recovery and leave of absence, plaintiff performed limited administrative work for defendant remotely

- Plaintiff informed his supervisor that he was starting "cardio rehab" the following day and the doctor informed him he had a "good outlook" and he planned to return to work the following week

- However, he spoke with his supervisor the following day, and the following day, he sent a letter to confirm his understanding that he was being terminated

- The supervisor requested a full release from the doctor

- Plaintiff provided a doctor note saying he could return to work "light duty" until further notice

- Defendant contended that "light duty" was never described

- The parties disagreed as whether Plaintiff resigned or was terminated

- Plaintiff sued for failure to accommodate in violation of LAD

- Analysis of four factors of interactive process test:

  - 1. Whether employer knew about the disability: not disputed; Plaintiff called supervisor and informed her about his heart attack

  - 2. Whether employee requested reasonable accommodations

    - "The fact Plaintiff did not define or indicate what "light duty" meant or provide Defendant with any medical information as to what he was and was not physically capable of doing is irrelevant. While "both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith," McQuillan, 2014 U.S. Dist. LEXIS 58464, 2014 WL 1669962, at *6, it is the employer's duty to initiate an informal interactive process to determine what appropriate accommodation is necessary. Tynan, 351 N.J. Super. at 400. Therefore, it was Defendant's obligation to ask Plaintiff what "light duty" meant." (Id. at 22)

    - Also, plaintiff's letter confirming his understanding that he was fired, was actually a request for accommodations, since he stated that he had wanted to discuss accommodations; in response, defendant asked for a full release from plaintiff's doctor

    - This element was met

- 3. Whether the employer did not make a good faith effort to assist the employee in seeking accommodations

    - this element was met – defendant admitted that it never made any inquiry into plaintiff's request for light duty

- 4. Whether the employee could have been reasonably accommodated but for the employer's lack of good faith

    - court found that there was a genuine issue of material fact

    - there was an issue as to whether plaintiff would need to maintain a full-time physical presence in defendant's kitchen

    - there was an issue as to whether plaintiff could perform solely administrative duties and delegate manual labor

- Cook v. Gregory Press, Inc., No. A-5646-13T3, 2016 N.J. Super. Unpub. LEXIS 1885 (App. Div. Aug. 11, 2016)

    - The court held that plaintiff established a case of failure to participate in the interactive process

    - Facts:

        - Plaintiff worked for defendant as a five-color printing machine operator

        - "Plaintiff worked in a very loud environment and his job involved "[c]onstantly running back and forth, checking the paper, bending over, checking stuff, putting ink in the ink balance, setting the keys, just walking back and forth and looking, make sure everything is running correctly, there's no jam ups or nothing like that."" (Id. at *2)

- plaintiff began experiencing facial numbness and tingling, neck pain and tingling in his hands

- he requested and was granted time off work to undergo an MRI and spinal tap

- the MRI showed a lesion in plaintiff's cervical spine

- he told his supervisor about the spinal tap, and the company's owner, told plaintiff, despite knowing of the lesion on his spine, that he doubted anything was wrong with the plaintiff

- the defendants received plaintiff's doctor's note advising that plaintiff had an exacerbation in his neurologic condition and could not return to work until later that week

- plaintiff asked for the rest of the week off

- his supervisor ordered him back to work without further investigation

- as a result, plaintiff went back to work, still suffering a headache, and made a production mistake, and was fired

  - court: "We conclude a jury could reasonably infer from this evidence that defendants knew of plaintiff's disability, plaintiff requested a reasonable accommodation, plaintiff could have been reasonably accommodated, and defendants failed to make a good faith effort to provide a reasonable accommodation." (elements of failure to participate in the interactive process) (Id. at *20)

- McQuillan v. Petco Animal Supplies Stores, Inc., Civil Action No. 13-5773 (FLW), 2014 U.S. Dist. LEXIS 58464 (D.N.J. Apr. 28, 2014)

- The court found that the plaintiff sufficiently pled a failure to accommodate claim under LAD to survive a motion to dismiss

- Facts:

  - Plaintiff filed complaint against his former employer, Petco, for, inter alia, disability discrimination in violation of LAD

  - Plaintiff worked for Petco as an order picker at its distribution center in Monroe, NJ

  - He was injured during his shift

  - He was treated by Petco's medical provider, U.S. Healthworks

  - The doctor at U.S. Healthworks diagnosed him with a torn rotator cuff and advised him that he could return to work only if he was placed on light duty without having to use his right side

  - The doctor contacted Petco on plaintiff's behalf and requested accommodations

  - Doctor was informed by Petco that the Monroe facility did not have any available light duty to accommodate the plaintiff

- Reasoning:

  - Employer made no effort to discuss with employee whether any reasonable accommodations were appropriate

  - Although employer argued that no reasonable accommodation could have allowed employee to perform essential functions of his job, at this stage of litigation, employee was entitled to discovery on that issue, particularly because employer allegedly refused to engage in interactive process

- "In other words, Defendant cannot purportedly, on one hand, deny Plaintiff's request for accommodations without engaging in the interactive process, and on the other hand, during litigation, assert that there are no accommodations available. .... To permit an employer to do so would effectively excuse Defendant from engaging in the interactive process - and such an assertion by Defendant is not appropriately credited on a motion to dismiss." (Id. at *20-21)

- Lopez v. Lopez, 997 F. Supp. 2d 256 (D.N.J. 2014)

  - The court found no triable issue of fact as to employee's failure to accommodate claim, and granted summary judgment to employer

  - Facts:

    - Plaintiff was a Marine Corps veteran who had been diagnosed with bipolar disorder and PTSD

    - He worked for Verizon as a Bilingual Sales and Service Consultant in its call center

    - He requested to be transferred from Defendant Lopez's chain of command to Cirilo's chain of command

    - That request was granted in 2007

    - However, Cirilo transferred to another position in 2008

    - Plaintiff requested to be transferred again, but the transfer was not possible because Cirilo no longer occupied that kind of supervisory position, and did not have Bilingual Sales and Service team reporting to him

- Reasoning:

  - "Verizon's denial of Plaintiff's second reassignment request, after granting the first, does not suggest a cognizable claim that Plaintiff was denied a reasonable accommodation. While Defendants had a duty under the LAD to offer a reasonable accommodation, this duty does not "cloak the disabled employee with the right to demand a particular accommodation."" (Id. at 273.)

  - Plaintiff did not suggest any other accommodation. After an incident in which he became mad and slammed his computer monitor on his desk, he went on short-term disability leave and later applied for Social Security disability benefits. His application was granted, and the ALJ found:

    - "[G]iven the claimant's concentration deficit and his need for frequent absences from work as found in this decision, there would be no jobs in the regional or national economies that he would be capable of performing." (Id. at 266-67)

    - "Plaintiff "was not able to respond appropriately to others in a work environment that requires even limited interaction with supervisors and co-workers" and also that, at the time of the determination, Plaintiff was "unable to tolerate any interaction with the public."" (Id. at 267)

  - Going back to the District Court, it held:

    "I agree with the Defendants that the ALJ's finding strongly suggests that the Plaintiff could not have been accommodated. If there is no job, anywhere, that the worker is capable of performing, then it would be difficult to hold the company liable for failing

to design one for him. See Mengine v. Runyon, 114 F.3d 415, 417-20 (3d Cir. 1997). In order to so find, I would have to identify an effective accommodation that would be reasonable, yet result in a position that does not correspond to any position now existing in our economy.

Assuming there is such a case, I have not seen any evidence that this is it. Plaintiff has not identified a viable alternative position, or a viable alteration to the one he occupied (other than reassignment to Cirilo). I see no plausible showing that Plaintiff's position, or one reasonably available, could be tailored to avoid the effects of his PTSD and bipolar disorder." (Id. at 274)

- Thus, Plaintiff had no reasonable accommodation claim

II. Cf. Federal Family and Medical Leave Act (FMLA) and the New Jersey Family Leave Act

A. Both laws work together and employer must be sure to ensure employee's rights under both.

B. What employers have to worry about it.

1. State - Employs 50 or more employees for each working day during each of 20 or more calendar weeks in the current or immediately preceding calendar year. (NJSA 34:11B-3(f))

2. Federal - Same. (29 USC 2611(4))

C. What employees are eligible

1. State - Worked for employer at least 1,000 hours in the preceding 12 months and employed for at least 12 months. (NJSA 34:11B-3)

2. Federal - Worked for employer at least 1,250 hours in the preceding 12 months and employed for at least 12 months; and be employed by an employer with 50 or

more employees within 75 miles of that work site. (29 USC 2611(2))

a. Hours Worked - Must be actually worked by the employee, not leave time, but employer has the burden of showing the employee has not worked the requisite hours. (29 CFR 825.110(c); McConnell v. State Farm Mut. Ins. Co., 61 F. Supp. 2d 356 (D.N.J. 1999))

b. Leave eligibility based on when leave will commence.

c. Amount of Leave

i. State - 12 weeks during 24 month period. (NJSA 34:11B-4)

ii. Federal - 12 weeks in 12 month period. (29 USC 2612)

D. Reasons for Leave

1. State - Birth or adoption, serious health condition of parent, parent of spouse, child or spouse, civil union partner or parent of civil union partner (NJSA 34:11B-3)

2. Federal – allows employee to take leave for his/her own "serious health condition"; does not include parent-in-law; does not include civil union partner (29 USC 2612)