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ADA Amendments Act of 2008 Brings Renewed Focus on the Interactive Process[1]

The Americans with Disabilities Act Amendments Act of 2008 has impacted employers ranging from small-sized law firms with 15 or more employees, to large corporations employing tens of thousands. With the broadening of disability coverage, the major battles in defense of claims of disability discrimination are now fought over whether the employer and employee have engaged in what is termed the "interactive process," whether the employee is qualified to perform the essential functions of available jobs, and whether the employee's disability can be accommodated without undue hardship. This article will focus on the interactive process, including what it means, when the requirement to engage in the process has been triggered, and how the employer may know in general terms that it has undertaken enough effort to meet its legal obligations.

Though the term "interactive process" is not contained in the Americans with Disabilities Act (ADA)[2], it has its genesis there. An employer unlawfully discriminates under the ADA if the employer does "not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]."[3]

The interactive process is the step employers take after they learn that an employee with a disability may need accommodation, but before a decision is made concerning what reasonable accommodation[4], if any, may be provided. The ADA's regulations state:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] 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.[5]

The Equal Employment Opportunity Commission's (EEOC) interpretive guidelines shed some light regarding when the interactive process is triggered: "Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive

process that involves both the employer and the [employee] with a disability."[6]

In general, the process is triggered when the employer learns of the employee's possible disability and receives a request for accommodation.[7] Several courts have held that the notice of disability and need for accommodation may not only come from the employee, but also third parties. Examples of the latter include requests for accommodation from a union representative, a psychiatrist, or an employee's family member.[8]

What happens if the employer fails to engage in the interactive process? Some circuits hold that employers have a duty to act in good faith and assist in the search for appropriate reasonable accommodations; breach of this duty results in liability when a reasonable accommodation could have been made.[9] Other circuits have held that there is no per se violation of the ADA for an employer's failure to interact in light of the ADA regulation's discretionary language.[10] However, these courts have further held that this same failure to interact can be evidence of bad faith. "An employer fails to participate in an interactive process if the employer knew of the employee's disability, the employee requested a reasonable accommodation, the employer did not make a good faith effort to assist the employee in seeking accommodations and the employee could have been reasonably accommodated but for the employer's lack of good faith."[11]

The ADA regulations beg the question of what an employer must do to prove sufficient engagement in the interactive process. "Employers may demonstrate a good faith attempt to find a reasonable accommodation for a disabled employee in many ways, such as meeting with the employee, requesting limitations, asking the employee what he wants for a specific accommodation, showing some sign of considering the employee's request and offering and discussing available alternatives when the employee's request is too burdensome."[12]

The ADA regulations and case law establish that the responsibility to engage in the interactive process is a shared one between employee and employer. As with employers, employees who fail to participate in the interactive process do so at their peril. An employee may not be heard to cry foul for the employer's failure to reasonably accommodate if the employer either did not know of the employee's disability or the employee refused to participate in the interactive process. P

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2 42 U.S.C. § 12101 et seq.

3 42 U.S.C. § 12112(b)(5)(A).

4 A "reasonable accommodation" can include, among other things, such actions as "job restructuring, part-time or modified work schedules", "reassignment to a vacant position," or "acquisition or modification of equipment or devices". 42 U.S.C. § 12111(9). The ADA does not require an employer to create a new position to accommodate a disability or to shift the essential functions of the current position to other employees. 29 C.F.R. § 1630, App. § 1630.2(o).

5 29 C.F.R. § 1630.2(o)(3). (emphasis added).

6 29 C.F.R. Pt. 1630, App. § 1630.9.

7 *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000), *vacated on other grounds*, 535 U.S. 391, 122 S.Ct. 1516 (2002). However, courts have recognized that the employer may be required to institute the interactive process in situations in which the employer is aware of the disability and its impact on performance, and the disability prevents the employee from requesting accommodation. *Id.; Bultemeyer v. Fort Wayne Community Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996).

8 *See e.g. Barnett*, 228 F.3d at 1114 (interactive process triggered by employee or employee's representative giving notice of disability and desire for accommodation); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999) (trigger by request for accommodation from family member or doctor); *Bultemeyer,* 100 F.3d at 1285-86 (request for accommodation from employee's psychiatrist).

9 *See e.g. Taylor v. Phoenixville Sch. Dist.*, 174 F.3d at 157; *Beck v. University of Wisconsin Bd. Of Regents,* 75 F.3d 1130, 1135 (7th Cir. 1996); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996).

10 *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944 (8th Cir. 1999); *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997); *White v. York Int'l Corp.*, 45 F.3d 357, 363 (10th Cir. 1995).

11 *Barnes v. City of Coon Rapids*, 2009 WL 1178555 (D.Minn. April 30, 2009) (citing *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 902 (8th Cir. 2006); *Fjellestad*, 188 F.3d at 952)).

12 Id. (citing *Fjellestad*, 188 F.3d at 953 n. 7).