## Reasonable Accommodation under the LAD

# Let's Talk

by Maxine Neuhauser and Jiri Janko

Although the statutory duty of employers to provide reasonable accommodation to eligible employees was only enacted this year in an amendment to the Law Against Discrimination (LAD), adding pregnancy as a protected classification, the obligation has long been a part of the LAD jurisprudence.[1]

Under the law, an employer must provide reasonable accommodation to permit an employee who is disabled, pregnant, or who requires religious accommodation to perform the essential functions of his or her job. As part of this obligation, the employer must engage in an "interactive process" with the employee to identify potential accommodations the employer might be able to provide to enable the employee to overcome the limitations affecting his or her ability to fulfill job requirements.[2] An employer is not required to provide an accommodation that imposes an undue hardship.

Interactive communication serves several functions. First, of course, it is required by the law. Second, it helps the employer create a record that, if necessary, can be invaluable in proving its compliance with the law by documenting: 1) its communications with the employee about reasonable accommodation, 2) the employee's responses, 3) the reasons an accommodation request would have constituted a burden and was denied, 4) alternatives, if any, the employee offered, and 5) proposed accommodations, if any, the employee rejected. The process permits employers to confirm both the employee's essential job duties, and the duties the employee can or cannot perform, and those for which the employee might need an accommodation to perform. Third, and perhaps most important, the process helps ensure the employer fairly treats an employee who has sought accommodation. This can be a critical element: 1) in avoiding litigation, and 2) in the event of litigation, prevailing.

Employers have various options at their disposal to satisfy the interactive process requirement. For example, they can meet with the employee to request information about the condition and the employee's limitations, consider the employee's specific request, and offer potential alternatives if the employee's demands are too burdensome.

Determining whether an accommodation imposes an undue hardship requires a case-by-case analysis that takes into account numerous factors. These factors include: the size of the employer's workforce, facilities and budget; the type of the employer's operations (including the composition and structure of the employer's workforce); the nature and cost of the accommodation required; and the extent to which accommodation would involve waiver of an essential requirement of a job.[3] Thus, employers should also engage in an internal interactive process, which may need to include various stakeholders, including human resources, management, supervisors, and also, conceivably, a union, if the workforce is organized.

The regulations implementing the LAD, and, now the statute itself, provide examples of accommodations an employer might be required to provide. These include making facilities used by employees readily accessible and usable by people with disabilities, job restructuring (including part-time or modified work schedules), acquisition or modification of equipment or devices; job reassignment, bathroom breaks, periodic rest, and temporary transfers to less strenuous or less hazardous work. The lists are intended to be illustrative, not exhaustive. Moreover, the examples are not *per se* reasonable; in other words, employees are not automatically entitled to one or more of the specifically enumerated accommodations. If the accommodation will create an undue hardship on the employer, it need not be provided.[4]

When these accommodations, or others, will be reasonable and when they constitute an undue hardship is not easy to determine. However, recent case law emphasizes that employers who communicate with employees about their requests and provide thoughtful, not dismissive, responses to accommodation requests are likely to be in a better position to defend themselves against litigation.

The law requires that each employee's situation be considered on a case-by-case basis. Therefore, employers and their lawyers may feel that determining what accommodations are

reasonable, as opposed to what constitutes an undue hardship, amounts to little more than a guessing game. To provide guidance, this article discusses three areas that have seen litigation in recent years.

### Request for an Accommodation Others Already Received

Consider the following: A corrections officer hired on a probationary basis pending successful completion of training at a police academy becomes lightheaded during a vigorous physical training session. His employer requires the officer to see a doctor before being permitted to return to training. The doctor orders a series of tests to determine if the officer has coronary heart disease. The testing, however, will take several days, which means the officer must miss several days of training. This is a problem, because under state statute any trainee who fails to satisfactorily complete 80 percent of the course must be dismissed. The officer's inability to complete the ordered tests will result in him completing only 75 percent of the training. He therefore asks for a medical withdrawal and the right to be allowed to restart the program in the next session, a request the employer has discretion to grant and has previously granted. This time, however, the employer denies the request without providing any reasons and without offering any alternatives. Although the medical tests uncover no heart problem, the officer is dismissed from the academy because of absenteeism, and then fired for failure to complete required training. He sues, and after discovery the employer moves for summary judgment. Will the employer prevail?[5] Did the employer act reasonably to protect the public's health, safety and welfare, or was the employee caught in a bureaucratic catch-22 that violated his rights under the LAD?

In deciding the claim, the court must consider two questions: 1) did the employer engage in the interactive process; and 2) was the officer's request to be permitted to withdraw from the training reasonable? The first question has an unequivocal answer: The employer failed to engage in the interactive process; it denied the officer's request without discussion or reasons. In addition, it made no apparent effort to look for or propose an alternative.

The answer to the second question (*i.e.*, whether the officer's requested accommodation was reasonable or posed an undue burden) depends on the circumstances. In this case, the employee argued that the request was reasonable because other trainees had been permitted to withdraw from and then re-enroll in training. The court ruled that this history created a jury question regarding whether the employer should have granted a withdrawal to the employee. Based on the opinion, it appears the employer did not attempt to distinguish the offi-cer's situation from circumstances under which the employer had granted permission to withdraw in the past. That is, the employer failed to establish what was different this time, for example that granting the officer's request for withdrawal and re-entry into another training session would have resulted in undue hardship.

By failing to engage in the mandated interactive process, the employer's denial of the officer's accommodation appeared arbitrary. If a similar request has been provided in the past, employers must be prepared to explain why offering it again would constitute an undue burden.

### Request for a Leave of Absence

Although New Jersey courts have recognized that employers may properly consider attendance to be an essential job function, the law also unequivocally considers time off to be a form of reasonable accommodation, which employers may need to provide, even if they are too small to be governed by the Federal Family Medical Leave Act (FMLA) and even if an employee has exhausted his or her FMLA leave entitlement.[6] The quandary for employers, however, is how much time constitutes reasonable accommodation, and when does a leave of absence become an undue burden? Absent an unusual circumstance, a short amount of time will be judged reasonable,[7] since employers are generally unlikely to fill an opening in just a week or two. And, as discussed above, leave the company has offered to other employees in the past is likely to be judged reasonable, absent distinguishing reasons showing why it would create a hardship this time.

What about a request for indefinite leave, or leave for an extended period of time? To date, courts have held that the LAD does not require employers to provide indefinite time off, and have accepted that indefinite leave creates undue hardship on an employer. The answer with regard to extended time off is more complicated. As illustrated below, it largely rests on the employer's demonstrated effort to engage in the interactive process.

Consider, for example, that on July 17, 2008, a female employee submits a request for leave with a doctor's note stating that due to "lupus flare-ups," the employee will be incapacitated for "at least a year." Can the employer reject the request outright and simply discharge the employee for the admitted inability to perform the essential job function of attendance? No.

Flatly denying the request, without engaging in the interactive process, may alone subject an employer to a lawsuit, because it forestalls the opportunity for the employer and the employee to consider whether there are other, less burdensome, accommodations the employer might be able to provide.[8] An employer may not simply stop the process upon receipt of a doctor's note. Thus, an unacceptable request for accommodation is best met with at least a discussion regarding why the accommodation would create an undue burden, and whether there is an acceptable alternative that might be

offered to the employee.

Continuing with the example, suppose the company grants the employee 12 weeks unpaid FMLA leave, from July 21, 2008, through Oct. 10, 2008, but in October the employee asks for two more weeks. Should the employer grant the request? Yes. Courts have held that an employer's failure to permit a short, finite extension of leave constitutes a failure to accommodate.[9]

What if instead of asking for an additional two weeks, the employee asks for more time off, without a definitive return date? Again, the request is one that must be the subject of interactive communication—unless, of course, the employer simply decides to grant the request.

The employer's obligation to suffer further absence is governed by operational needs; that is, it must decide whether providing additional time off will create an undue hardship. The employer may choose to offer an extension of leave for a defined period of time and state that inability to return will result in discharge.

Consider then, that the employer here agrees to extend the employee's leave with a firm return date of April 12, 2009, after which the employee will be discharged if she fails to or is unable to return to work. And consider that as April 12, 2009, nears, the employee's doctor provides a note stating the employee will not be able to return to work until "approximately May 29, 2009." Must the employer engage yet again in another interactive process? Must it offer more time off? Is a mere six additional weeks reasonable? Or can the employer, looking backward at nearly a year of leave, rely on the April 12, 2009, deadline for return and decide that further leave will create an undue burden?

In a recent decision, the Appellate Division ratified that repeated, incremental leave requests do not create an obligation on an employer to provide leave for an indefinite period of time, where the employee remains unable to provide a definite return date.[10]

## Requests that Alter the Employee's Duties

Requests that the employee's duties be changed can take many forms, including, for example, requests for light duty, to work from home, to work part-time, to change shifts, or to be transferred to another position.

Suppose an employee is injured on a job shift and is diagnosed with a torn rotator cuff. The employee's doctor contacts the employer directly to advise that the employee can return to work only on light duty, without having to use his right side. The employer informs the doctor that it does not have such a light-duty position. Can the employee be immediately discharged?

Simply put, summarily dismissing the employee will preclude a successful motion to dismiss and potentially summary judgment, as well.[11] Discovery might well confirm that no light duty or other accommodation existed, that the employee could not have been reasonably accommodated, and that discharge was inevitable, but it might also uncover alternatives the company had not considered. The failure to engage in the interactive process risks triggering litigation, and with it significant litigation costs.

Requests for shift changes and transfers raise issues that particularly call for communication and consideration. Does a vacant, funded position exist? Is the employee qualified for the job? Is the employee able to perform the essential duties with (or without) reasonable accommodation? Requests for a transfer to an earlier shift may be unreasonable, for example, where no such positions are vacant and no employee is willing to switch shifts, or where the transfer would leave the company without an employee to perform an important late-shift function.[12]

Where an employee's request for shift change stems from factors outside of the job, the request may be rejected as not reasonable. For example, an employee who suffers from migraines, which he attributes to his insomnia stemming from working the late shift, is not entitled to a shift change; the late shift impacts his ability to sleep, but sleeping his not part of his job.[13]

The courts, employers, employees and their lawyers will no doubt continue to face the challenge of determining the fine line between what is a reasonable and what is an unreasonable accommodation. But the lesson learned from recent cases is clear: Employers must place a premium on a good faith, well-documented participation in the interactive process in determining the accommodations they can, and cannot, reasonably offer. A

***Maxine Neuhauser*** *is a member and* ***Jiri Janko*** *is an associate in the Newark office of Epstein Becker & Green, P.C. Stanton Lawyer, a summer legal assistant in the firm, assisted in the preparation of this article.*

**ENDNOTES**

1. N.J.S.A. 10:5-12.
2. *See Tynan v. Vicinage 13 of the Superior Court of N.J.*, 351 N.J. Super. 385, 400-01 (App. Div. 2002) (explaining what interactive process is required under the LAD).
3. N.J.A.C. 13:13-2.5(b)(3).
4. *See, e.g., Whalen v. New Jersey Mfrs. Inc. Co.*, 2012 N.J. Super. Unpub. LEXIS 1886, at *39 (Dec. 13, 2011) (where attendance at the workplace is an essential element of the job, telecommuting is not a reasonable accommodation).
5. *Dennis v. County of Atlantic County*, 863 F. Supp. 2d 372 (D.N.J. 2012).
6. *See* N.J.A.C. 13:13-2.5(b) (stating that a "leave of absence" may constitute a reasonable accommodation); *Cebula v. Catalina Marketing Corp.*, 2004 N.J. Agen. Lexis 1423, at *25-26 (D.C.R. Jan. 26, 2004) (holding that Catalina should have granted the employee's request for additional finite leave after the employee exhausted her FMLA leave).
7. *See, e.g., Maher v. Abbott Labs.*, 2013 U.S. Dist. LEXIS 171530, at *43 (D.N.J. Dec. 4, 2013) (holding that "a reasonable jury could conclude that Plaintiff could have been reasonably accommodated" when he requested "two weeks off for the purpose of dealing with stress and his heart condition").
8. "'[A]n employee who has received prop-

er notice cannot escape its duty to engage in the interactive process simply because the employee did not come forward with a reasonable accommodation that would prevail in litigation.'" *Maher*, 2013 U.S. Dist. LEXIS 171530, at *49-50 (*quoting Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 317 (3rd Cir. 1999).

9. *See Brown v. Dunbar Armored, Inc.*, 2009 U.S. Dist. LEXIS 115572, at *21 (D.N.J. Dec. 10, 2009) ("post-FMLA leave can be reasonable").
10. *Lozo-Weber v. State*, 2012 N.J. Super. Unpub. LEXIS 851, at *26 (App. Div. April 13, 2012).
11. *See McQuillan v. Petco Animal Supplies Stores, Inc.*, 2014 U.S. Dist. LEXIS 58464, at *20-21 (D.N.J. April 28, 2014) (denying employer's Rule 12(b)(6) motion to dismiss plaintiff's LAD claim alleging failure to accommodate, because the employer did not engage in the interactive process and the question of its ability to offer light duty was an issue on which the plaintiff was entitled to discovery).
12. *Rosefeld v. Cannon Bus. Solutions, Inc.*, 2011 U.S. Dist. LEXIS 115415, at *42 (Sept. 26, 2011).
13. *Id.* at *48-49.

This article was originally published in the December 2014 issue of *New Jersey Lawyer Magazine*, a publication of the New Jersey State Bar Association, and is reprinted here with permission.