

WORKPLACE ACCOMMODATIONS POLICY HIGHLIGHTS 1.03

May 2003

Overview

The third issue of the Workplace Accommodations Policy Highlights examines several court decisions dealing with topics such as the interactive process of finding reasonable accommodations for employees with disabilities, creating positions to accommodate employees with disabilities, and handling reasonable accommodation requests by employees who do not have a disability. The issue also highlights the efforts of corporations such as Hewlett-Packard Co., Xerox, and HiSoftware that are creating products to increase the education and employment opportunities of people with disabilities, and working to implement the use of these products in communities. Finally, the efforts of the Department of Labor (DOL) and the Office of Disability Employment Policy (ODEP) to support President Bush's New Freedom Initiative are examined. This support has been demonstrated by recognizing those who support the employment objectives of the initiative, establishing work programs to increase the number of students with disabilities placed in summer jobs and full-time employment, and publicizing tax breaks to employers who hire people with disabilities.

Legislative/ Regulatory Activities

Interagency Working Group on Assistive Technology Mobility Devices Established

02.12.03: In order to increase educational and employment opportunities for individuals with disabilities, President Bush has established the Interagency Working Group on Assistive Technology Mobility Devices. Power wheelchairs and scooters are examples of assistive technology mobility devices and are often necessary to allow individuals with disabilities to access education, training, and competitive employment. Federal, State, and local programs are in place to assist individuals with disabilities in obtaining assistive technologies; however, according to President Bush these programs are "not adequately coordinated." The Working Group will function to identify existing Federal, State, local, and tribal programs and resources designed to help individuals with disabilities obtain assistive technology mobility devices that they need for education and employment. The establishment of the Working Group is part of President Bush's New Freedom Initiative, which strives to provide people with disabilities increased opportunities to lead more independent lives through expanding education and job opportunities.

[<http://www.whitehouse.gov/news/releases/2003/02/20030212-12.html>]

[<http://www.ed.gov/legislation/FedRegister/other/2003-2/042503a.html>]

New Freedom Initiative Award Honors Corporations, Organizations and Individuals

05.19.03: Established in 2002 by the Department of Labor, the New Freedom Initiative Award is made annually to corporation(s), organization(s), or individual(s) who have worked to promote the employment objectives of President Bush's New Freedom Initiative. The award was founded to

encourage public-private partnerships to develop and implement comprehensive strategies to help people with disabilities lead more independent lives by expanding their employment opportunities. These strategies include increasing access to assistive technologies and utilizing innovative training, hiring, and retention strategies. Nominees of the New Freedom Initiative Award must have developed and implemented a multi-faceted program designed to increase the employment opportunities of persons with disabilities. The deadline for nominations was June 6, 2003 and the awards ceremony will be held in fall 2003. Complete eligibility criteria and nomination guidelines were published in the Tuesday, Feb. 18, 2003 issue of the *Federal Register* and can be accessed at www.dol.gov/odep. [<http://www.dol.gov/opa/media/press/opa/OPA2003084.htm>]

Tax Breaks to Companies Hiring People with Disabilities Publicized by the Office of Disability Employment Policy (ODEP)

03.31.03: In March 2003, the ODEP began a campaign to make companies aware of the tax incentives available when they hire employees with disabilities. "According to a recent General Accounting Office (GAO) report, a very small portion of either corporate taxpayers, or individual taxpayers with a business affiliation, use the tax credits to encourage the hiring, retention, and accommodation of workers with disabilities," said ODEP Assistant Secretary Roy Grizzard. The ODEP hopes that publicizing the information on its website, along with including it in meetings and listening sessions with stakeholders, will make companies more knowledgeable about the tax incentives. The credits available include the "Work Opportunity Tax Credit," the "Small Business Tax Credit: IRS Code Section 44, Disabled Access Credit," and the "Architectural/Transportation Tax Deduction: IRS Code Section 190, Barrier Removal." Explanations of the tax benefits can be found in the "Frequently Asked Questions" section on ODEP's website [<http://www.dol.gov/odep/faqs/main.htm>.]

Workforce Recruitment Program (WRP) Shows Promise in First Month of Operation

05.27.03: The Labor Department's (WRP) has placed more than 260 college students and recent graduates with disabilities in summer or permanent jobs. WRP statistics indicate that one-third of the students placed in jobs under the program identify themselves as a member of a minority. The WRP is administered by the Office of Disability Employment Policy (ODEP), which, in conjunction with the Department of Defense, provides employers a complimentary CD-ROM database of qualified students. Students from a wide range of disciplines are listed according to their field of study, state or school. Searches result in candidate profiles, academic and demographic data, and contact information from applicants recruited from more than 180 colleges and universities. Roy Grizzard, Assistant Secretary for ODEP, noted that the "WRP is a key resource for potential employers to find qualified students and graduates who are eager to enter the workforce and prove what they can do." The CD-ROM and additional information on WRP are available from <http://www.wrpjobs.com>, or by contacting ODEP at (202) 693-7880. [<http://www.dol.gov/odep/media/press/wrp2.htm>]

Enforcement Activities

U.S. Equal Employment Opportunity Commission (EEOC) Reaches Largest Ever Voluntary Settlement for ADA Violation in Agricultural Industry

05.25.03: The EEOC reached a conciliation agreement with Gilroy Foods and its owner ConAgra Foods, Inc. over allegations of disability discrimination at an onion and garlic dehydration plant in King City, California. ConAgra purchased Gilroy Foods in November 2000 and in August 2001 successfully negotiated with the Teamsters Local 890 to end a two-year strike at the facility, with a new contract and a recall of workers based on seniority. A federal investigation found that when ConAgra recalled workers after resolving the strike, it denied jobs to workers having a history of medical impairment or illness, and workers who were on leave due to injury or illness at the time the company was purchased. ConAgra's violation of the Americans with Disabilities Act (ADA) resulted in the largest voluntary settlement for disability bias in the agricultural industry. The company will provide compensation of \$993,500, job offers (estimated at \$500,000) for 39 workers, and ADA training for employees.
[<http://www.eeoc.gov/press/5-20-03.html>]

Judicial Activities

Alternative Accommodations by Employer Fulfills ADA's "Interactive Process" Mandate

03.04.03: A Minnesota state appeals court ruled that under state law, employers are not liable for disability discrimination when failing to participate in the interactive process of resolving a dispute about workplace accommodation with a disabled employee. In the case of *Danielson v. AT&T Corp.*, No. C4-02-1046, 2003 WL 225360 (Minn. Ct. App. Feb. 4, 2003), the court rejected the plaintiff's argument that her employer, AT&T, was obligated to provide her with one of the accommodations deemed necessary by she and her physician, as long as the accommodations did not impose an undue hardship on the company. AT&T did not argue that providing the plaintiff's accommodations would impose an undue hardship on the company. It did, however, suggest alternative accommodations after finding the plaintiff's suggestions would not solve the problem. "As long as an employer has provided some accommodation and has taken no adverse employment action against the employee, there is not violation court observed, citing decisions from federal courts in other jurisdictions. The ruling by the court raises the question of what role physician recommendations concerning workplace accommodations ought to have in the decisions of the courts.
[*Employment Litigation Reporter*; 03/04/2003 Vol. 17, No. 15, p. 6]

Employee May Sue For Retaliation Under ADA Even if Without a Disability

03.12.03: In *Shellenberger v. Summit Bancorp Inc.*, Sally Shellenberger's fragrance sensitivity, a condition known as toxic encephalopathy, led her to make numerous requests for workplace accommodation that resulted in her discharge from the workplace. Initially, Summit tried to accommodate Shellenberger's requests by moving her workstation and allowing her to interact with particularly odiferous coworkers over the telephone. After asking for even greater accommodations, including an office fragrance-free policy, Shellenberger's physician and Summit's attorney began a four-month dialogue over the proper accommodation(s) for Shellenberger's condition, reaching no resolution. At this point, Shellenberger filed discrimination charges under the Americans with Disabilities Act (ADA) for failure to

accommodate her fragrance sensitivity. Summit subsequently fired Shellenberger, who then brought suit, claiming she has a disability under the ADA and had been retaliated against as the result of her request for accommodation(s) and for having filed a charge with the Equal Employment Opportunity Commission (EEOC). The trial court dismissed both claims, but the appeals court held that even though she did not have an “actual disability” under the ADA, she could still maintain her retaliation claim under the statute. This was based upon the court’s holding in *Krouse v. American Sterilizer*: “An individual who is not adjudged to be a ‘qualified individual with a disability’ may still pursue a retaliation claim under the ADA.” The court’s findings address important ADA issues for employers including the interactive process and retaliation claims.
[*Business Law*; Vol 228; No. 48; p.5]

Reproduction, Sexual Function and Workplace Accommodations

03.16.02: Reproduction and sexual function have both been deemed major life activities by the federal courts and the Equal Employment Opportunity Commission. To receive disability protection under the Americans with Disabilities Act (ADA) and the Rehabilitation Act, one must demonstrate that the activity in question is both a major life activity, and is substantially limited. These criteria are sometimes both satisfied when the disability adversely affects one’s reproductive capabilities. For example, in the 1998 case of *Bragdon v. Abbot*, NDLR 227, HIV was determined to be a disability because it substantially limits the major life activity of reproduction. According to the Federal Equal Employment Opportunity Advisor, “if an employee can prove substantial limitation in reproduction or sexual function, a workplace accommodation – such as a part-time or modified work schedule to receive treatment – might be needed.” A problem for both employees and employers is the lack of clear criteria regarding reproductive capabilities whose satisfaction is a sufficient condition for ADA protection. For example, limitations in reproductive capabilities resulting from the natural aging process are not likely to be covered under the ADA or the Rehabilitation Act.
[*Federal EEO Advisor*; 12/16/2002 Vol. 5, No. 11]

The Americans with Disabilities Act (ADA) and Light-Duty Positions Revisited

12.02: The Indiana Seventh Circuit Court of Appeals reaffirmed in *Tamara Watson v. Lithonia Lighting and National Service Industries, Inc.* that employers are not required under the ADA to create new positions to accommodate employees with disabilities. The Equal Employment Opportunity Commission (EEOC) and the courts have agreed that it is lawful for employers to set aside a pool of temporary light-duty positions to accommodate workers with medical restrictions returning from workers’ compensation leave. This system allows employees to continue receiving income and be productive, and upon recovery employers will have experienced workers available for reassignment. The Indiana court observed that if it allowed the permanent placement of workers with disabilities in light-duty positions, eventually all the positions would be filled and the rotation system would lose its benefits. Ultimately, this could increase the incidence of workplace injuries, as employees returning from workers’ compensation leave would be returned directly to their former positions, increasing the risk of aggravation of their injury. Permanent placement of workers with disabilities in light-duty positions could diminish the ability of employers to accommodate individuals with temporary disabilities.
[*Indiana Employment Law Letter*; Vol 12, No. 12]

“Treating Physician Rule” not Applicable in Private Welfare Benefit Plans

05.28.03: In *Black & Decker Disability Plan v. Nord*, the U.S. Supreme Court ruled that the Employee Retirement Income Security Act of 1974 (ERISA) does not require welfare benefit plan administrators to defer to the opinions of treating physicians, nor does it impose a “heightened burden of explanation” on employers choosing to reject a treating physician’s opinion. The court set aside a ruling by the Ninth Circuit court of appeals that had sided with Kenneth Nord, a former Black & Decker worker suing the company under ERISA to obtain disability benefits due to a back injury. Because the Social Security program must cope with more than 2.5 million claims for disability benefits annually, the “treating physician rule” is used to administer this large benefits system efficiently, fostering “uniformity and regularity in Social Security benefits determinations.” The “treating physician rule” accords special consideration to the opinions of the claimant’s treating physician in determining whether or not the claimant is entitled to Social Security disability benefits. However, the Supreme Court decision asserts that private companies with benefit plans are not subject to this rule and “have large leeway to design disability and other welfare plans as they see fit.” This decision by the court raises difficult issues about the uniform and equitable application of ERISA. Moreover, the decision seems to exclude people with disabilities employed by private companies from an important federal protection.

[<http://supct.law.cornell.edu/supct/html/02-469.ZO.html>]

Verizon Ordered to Pay \$1.7 M Verdict for Failure to Provide for Disabled Ex-Worker

05.31.02: In *Smith v. Bell Atlantic* (Verizon was formed by the merger of Bell Atlantic and GTE), a former Verizon employee, Doreen Smith of Dedham, MA, received one of the largest damage awards in a state disability case (\$1.7 Million) after a jury found that her former employer had failed to meet her requests for disability accommodations, causing a deterioration of her health and leading to total disability. According to the *Boston Globe*, Smith, who contracted the Polio virus at age 2 and currently has continued weakening due to post-Polio syndrome, claimed Verizon would not provide parking space large enough for her van and, although it allowed her to work from home, failed to provide her with the equipment to perform the necessary functions of her job. Smith spent \$6,000 out-of-pocket for a fax, phone and computer. Smith’s attorney argued that the stress associated with lack of workplace accommodation caused her health to deteriorate faster than it would have under less stressful circumstances. In its defense, Verizon argued that it went as far as to speak to the owners of local parking garages about reconfiguring their sprinkler systems to allow Smith’s van to enter the garage. Verizon claimed Smith’s deteriorating health is a result of post-Polio syndrome and not due to any lack of workplace accommodation on its part. This case has serious implications for employers, as it establishes a causal link between an employee’s worsening health and an employer’s failure to meet the workplace accommodation requests of the employee. [The *Boston Globe*; 05/31/2002, Third Edition, p.C1]

**Studies/Reports
/Publications**

National Organization on Disability (NOD)/Harris Survey Identifies Disability Gaps – National Health Interview Survey (NHIS) Confirms

01.30.03: The 2000 NOD/Harris Survey of Americans with Disabilities found that significant improvements in 10 key measures of the quality of life for individuals with disabilities occurred in the past decade. The measures of quality of life include employment, education, household income, access to transportation, health care, entertainment/going out, frequency of socializing, attendance at religious services, political participation/voter registration, and life satisfaction. However, gaps still exist between individuals with and without disabilities, and these gaps provide a standard by which progress in the next century can be measured. The widest gap between individuals with disabilities and the rest of the population is found in the area of employment. According to 2000 NOD/Harris survey results, three in ten working-age (18-64) people with disabilities are employed full or part time, compared to eight in ten working-age people without disabilities. A significant number of people with disabilities state they are unable to work due to their disability. However, among those who say they are able to work, 56% were working in 2000, compared to 46% in 1988. The 18-29 year old age group shows particular promise, as 57% of those who are able to work are working, compared to 72% of their non-disabled counterparts, a gap of only 15%. The improvements noted in the survey results are likely to be a result of several factors including the implementation of the Americans with Disabilities Act of 1990 (ADA), the Individuals with Disabilities Education Act (IDEA), the strong economy of the 1990's, and technological innovation. The 2001 NHIS, conducted annually by the National Center for Health Statistics, confirms the NOD/Harris survey results with findings that people with disabilities are less likely than people without disabilities to participate in a wide range of social activities. The NHIS of 2001 included for the first time questions about the social participation of persons with and without disabilities, specifically to measure the gaps between the two groups. NOD/Harris survey summary – [<http://www.nod.org/section.cfm?id=56>] NHIS summary – [<http://www.nod.org/content.cfm?id=1304>]

Slack, James D. (2001) The Americans With Disabilities Act and Reasonable Accommodation: The View from Persons with HIV/AIDS. *Policy Studies Journal*, Vol. 29 Issue 4, p649, 5p, 1 chart.

11.01: This article presents an examination of reasonable accommodation as characterized by the Americans with Disabilities Act (ADA), and its applicability to employees with the Human Immunodeficiency Virus (HIV) or Acquired Immunodeficiency Syndrome (AIDS). Providing reasonable accommodations for job applicants or employees with HIV/AIDS can be difficult. "AIDS constitutes a syndrome of diseases and cancers that occur simultaneously or in sequence." A constantly changing condition requires constantly changing accommodations to allow the individual to perform the essential functions of his/her job. Many HIV/AIDS medications have side effects that have adverse workplace consequences and require additional accommodations. Finally, employees with HIV/AIDS who are in the asymptomatic stage (looking and feeling healthy, but having emotional and medicinal side effects) need accommodations as well, but it is difficult for management to understand this need. Slack makes observations based on a volunteer sample of employed HIV/AIDS patients in California. Based on his observations, he identifies the types of reasonable accommodations needed by those in the HIV spectrum, and suggests employers look for ways to be creative in their accommodations of such individuals. He also examines the utilization of the reasonable accommodation component of the ADA by persons with HIV/AIDS, concluding that individuals who made requests were

accommodated. Participants who did not request accommodation often did so because they felt the nature of their job allowed no accommodation. Others, due to the social stigma of HIV/AIDS, feared disclosing their medical condition to their employer and also chose no accommodation instead. Slack concludes by stating that customizing accommodations for persons with HIV/AIDS is a difficult task due to the nature of the disease and its social stigma. However, he also notes that employers who are creative and look for effective customized accommodations for individuals in the HIV spectrum may have an easier time accommodating individuals with less complicated diseases or disabilities. Because the disabilities caused by HIV/AIDS are constantly changing, Slack's examination also highlights the tension between assistive technological and universal design approaches to workplace accommodations.
[*Policy Studies Journal*, Vol. 29 (4) 649-653]

Other Activities & Items of Interest

Hewlett-Packard Kicks Off Library Technology Access Initiative

10.29.02: Hewlett-Packard Co. (HP) has begun the Library Technology Access (LTA) initiative to design a "template" that all libraries can use to configure computers and workspaces for people with disabilities. The LTA initiative's primary goal is to increase access to libraries for people with disabilities. However, another goal is to provide information for people with disabilities about modern high-tech equipment and software, in the hopes of increasing the number of people with disabilities who are employed. HP has designed each workspace with a computer, printer, scanner, Microsoft Office software, ergonomic furniture and a range of assistive technology products for helping users who have visual, hearing mobility or learning disabilities. The LTA initiative began in October of 2002 at several public library systems and one university library system. It runs through 2003.
[<http://www.fcw.com/geb/articles/2002/1028/web-library-10-29-02.asp>]

HP Library Technology Access initiative:

[<http://www.hp.com/hpinfo/abouthp/accessibility/partnerships/ala/>]

HiSoftware Company Develops Resources for Testing Web Site Accessibility

05.28.03: The American Council of the Blind (ACB) has announced its endorsement and recommendation of HiSoftware Company solutions *Cynthia Says™* as well as *AccVerify Cynthia Says™*, as "excellent tools for guaranteeing that web sites will be accessible to people who are blind and visually impaired." *Cynthia Says™* was launched in March of 2003 to test web sites and report accessibility issues immediately through simple, self-explanatory web browser based reports. ACB praises *Cynthia Says™* software for its cost effectiveness, usefulness, and scalability. The software makes it possible for anyone to test a web page, while also educating the tester about the fundamental technology behind accessibility, and promoting accessible web design. A web master can receive feedback immediately as to whether or not the site being tested is accessible. Since its launch, *Cynthia Says™* has been used to test over one million web pages around the world.
[http://www.usbln.com/news/gen_news_05282003.html]

Inventor Builds Practical and Comfortable Quadcycle

05.17.03: Designer, engineer, and avid cyclist David Sauter is also the proud inventor of the Pedalcoupe, a four-wheeled bicycle that he hopes to be the first in a line of human-powered vehicles (HPVs). The Pedalcoupe was born out of Sauter's desire to create a HPV that did not require its rider to focus on balance. The Pedalcoupe is an environmentally friendly transportation alternative that nearly everyone can use, regardless of level of fitness or presence of a disability. The Pedalcoupe has a wide-sling chair, a built-in child seat, an optional trunk and ergonomically correct steering. Electric assistance is available for those people who desire an added boost in performance, or for those with physical limitations. Sauter has built every one of the nearly two dozen bikes he has sold, and hopes to generate enough interest to open a small factory someday. A base model Pedalcoupe retails at \$1,895 including shipping. The Pedalcoupe website (<http://www.pedalcoupe.com>) contains testimonials from Pedalcoupe owners, a Pedalcoupe photo gallery, frequently asked questions, and Pedalcoupe specs/features. [Minneapolis Star Tribune; 5/17/2003; Variety, p. 1E].

Xerox Expands Offerings to the Blind and Visually Impaired

03.20.03: In March of 2003, Xerox launched digital copier software for people who are visually impaired or blind. The Xerox Copier Assistant offers an enlarged onscreen user interface, keyboard navigation buttons such as tab, arrow and function keys, and embedded text-to-speech software. The text-to-speech software walks the user through various steps of the copying process, including stapling, collating and two-sided copying. Creating products that are accessible to people with disabilities has become a principal goal for Xerox and other Information Technology (IT) and electronics makers. The move to accessible products expands the companies' offerings to people with disabilities, and also helps companies secure sales with the federal government. According to Section 508 of the Rehabilitation Act of 1998, all electronics and information technology developed, procured, and maintained by the federal government must be accessible to people with disabilities. Section 508 is geared toward increasing the number of employed people with disabilities by making government offices accessible. A number of IT vendors are increasing the speed by which they adapt their products to work with products for persons with disabilities, and are launching new products that are specifically targeted to persons with disabilities. [<http://www.news.com.com/2100-1012-993526.html>]

Workplace Accommodations Policy Highlights 1.3

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The Office of Technology Policy and Programs (OTP) produces a monthly newsletter, *Workplace Accommodations Policy Highlights*, for the purpose of identifying policy, regulatory framework and market factors that can be useful in reducing barriers to integrating people with disabilities into the workforce. These monthly highlights support the Center's other research efforts and provide people with disabilities and industry with a centralized source of information supportive of the principles of the ADA and other regulations whose intent is to promote fairness and equity for people with disabilities.

The primary objectives of the Rehabilitation Engineering Research Center on Workplace Accommodation, a federal program funded by The National Institute on Disability and Rehabilitation Research (NIDRR), U.S Department of Education, are to identify, design, develop, and promote new assistive devices and universally-designed technologies that will enable all individuals, and particularly those with disabilities, to achieve the greatest degree of independence and integration in the workplace. To accomplish its mission, the RERC engages in a comprehensive program of research, development, training, and information dissemination.

For further information on items summarized in this report, or if you have items of interest that you would like included in future editions, please contact the editor, Lynzee Head (lynzee.head@gcatt.gatech.edu) or Andrew Ward, PH.D., MPH, Project Co-Director, Workplace Accommodations Policy Initiatives (RERC) (andrew.ward@gcatt.gatech.edu).