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**CAN WE TALK?: The ADA Interactive Dialogue**
*by Michael J. Soltis*

When medical restrictions prohibit an employee with a disability from doing his or her job, the Americans with Disabilities Act requires an employer to communicate with the employee concerning an accommodation. This exchange has been described variously as the “core” or “proactive” process, “cooperative problem solving,” “open and individualized exchange,” a “search”, and a “flexible give-and-take.” Most frequently, it is called the “interactive process” or by the redundant term, “interactive dialogue.”

The purpose of this dialogue is to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” 29 C.F.R. § 1630.2(o)(3). This dialogue “is at the heart of the ADA’s process and essential to accomplishing its goals.” *Barnett v. U.S. Air*, 228 F.3d 1105, 1113 (9th Cir. 2000). It is “the key mechanism for facilitating the integration of disabled employees into the workplace.” *Id.* at 1116. Given the critical importance of the interactive dialogue, it is somewhat ironic that the ADA does not refer to it at all.

While the dialogue’s lofty role is clear, its nature and extent are not. “The exact shape of this interactive dialogue will necessarily vary from situation to situation and no rules of universal application can be articulated.” *Bartee v. Michelin N. Am., Inc.*, 374 F.3d 906, 916 (10th Cir. 2004) (quoting *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1173 (10th Cir. 1999)). Meeting a legal requirement “with no rules of universal application” presents obvious challenges. If the dialogue is successful, and the employer returns the employee to work, the employer’s dialogue is not likely to be critiqued. However, if the employer concludes that it does not have a position for which the employee is qualified, its dialogue efforts may be scrutinized. The typical challenge is that the employer did not dialogue sufficiently or appropriately and, had it done so, it would have identified a position which the employee could perform, with or without accommodation.

An employer needs to be able to defend its ADA dialogues. This article will discuss the dialogue and suggest guidelines for interacting appropriately.

**A. Triggering the Employer’s ADA Dialogue Responsibilities**

An employee’s request for accommodation or the employer’s recognition of the need for accommodation triggers the interactive dialogue responsibilities. *Barnett*, 228 F.3d at 1112; See *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 952 (8th Cir. 1999); *Midland Brake, Inc.*, 180 F.3d at 1172; *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315 (3rd Cir. 1999); *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996); *Taylor v. Principal Fin. Group Inc.*, 93 F.3d 155, 165 (5th Cir.

1996).

The employee need not use any specific words when making the request. An employee should “us[e] ‘plain English’ and need not mention the ADA or use the phrase ‘reasonable accommodation.’” EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, Requesting Reasonable Accommodation, Question 1 (Oct. 17, 2002). “What matters ... are not formalisms about the manner of the request, but whether the employee ... provides the employer with enough information that, under the circumstances, the employer can fairly be said to know of both the disability and the desire for an accommodation.” Phoenixville Sch. Dist., 184 F.3d at 313; EEOC v. Convergys Customer Mgmt. Group Inc., 491 F.3d 790, 795 (8th Cir. 2007) (employee who suggested several accommodations “exceeded what disabled employees at the initial stage of the interactive process must do.”).

An employee who does not provide sufficient information “cannot expect the employer to read [her] mind and know [she] wanted a particular accommodation and [then] sue the employer for not providing it.” Mole v. Buckhorn Rubber Prods., Inc., 165 F.3d 1212, 1218 (8th Cir. 1999). Also, that the employer had previously provided the employee an accommodation is not notice of the continuing need for it. See Conneen v. MBNA Am. Bank N.A., 334 F.3d 318, 331-333 (3rd Cir. 2003) (prior accommodation of allowing late arrival does not excuse subsequent lateness where employee did not request further accommodation). Similarly, if an employer believes it has provided an effective accommodation but it turns out to be ineffective, the employee must notify the employer of its shortcomings. Summerfelt v. Wawa Inc., 2007 U.S. Dist. LEXIS 4944, \*11-12 (E.D. Pa. Jan. 23, 2007) (employer thought it had accommodated employee’s need to sit on the job but employee had to stand from time to time).

The employee’s request for accommodation must be timely. An employee’s post-termination request was “too little, too late.” Alexander v. Northland Inn, 321 F.3d 723 (8th Cir. 2003); See also Hill v. Kansas City Area Transp. Auth., 181 F.3d 891 (8th Cir. 1999) (request after plaintiff was caught twice sleeping on the job is a request for a “second chance”, not for accommodation); Hammon v. DHL Airways, Inc., 165 F.3d 441 (6th Cir. 1999) (request for accommodation three days after resignation untimely); Scott v. Memorial Sloan-Kettering Cancer Ctr, 190 F.Supp. 2d 590 (S.D.N.Y. 2003) (request for accommodation following termination is ineffective). But see EEOC v. Sears, Roebuck & Co., 417 F.3d 789 (7th Cir. 2005) (summary judgment to employer reversed since jury could find that employer caused breakdown in interactive process even though employee quit during the process).

“An employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.” EEOC Reasonable Accommodation Guidance. “[I]f it appears that the employee may need an accommodation but doesn’t know how to ask for it, the employer should do what it can to help.” Bultemeter, 100 F.3d at 1284.

## **B. The ADA Dialogue Outline**

In its 1991 Interpretive Guidance on the ADA, the EEOC listed the steps an employer should follow to dialogue appropriately:

1. Analyze the particular job involved and determine its purpose and

essential functions;

2. Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

3. In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position and;

4. Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

29 C.F.R. pt. 1630, App. §1630.9.

### **C. The ADA Dialogue in Action**

Numerous courts have evaluated an employer's interactive dialogue efforts. From these decisions, some general principles can be gleaned.

#### **1. Both employer and employee must dialogue appropriately**

Both the employer and employee must participate in good faith in the search for a reasonable accommodation. See, e.g., *Principal Fin. Group Inc.*, 93 F.3d at 165; *Beck v. Univ. of Wisconsin Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996). This effort is a "shared responsibility." *Convergys Customer Mgmt. Group Inc.*, 491 F.3d at 795; see *Allen v. Pacific Bell*, 348 F.3d 1113, 1115-1116 (9th Cir. 2003) ("[b]ecause [plaintiff] failed to cooperate in the job-search process, we cannot say that Pacific Bell failed to fulfill its interactive duty."); *Roberts v. Cushing Reg'l Hosp.*, 2000 U.S. App. LEXIS 39 (10th Cir. Jan. 4, 2000) (rejecting ADA claim because plaintiff refused an offered accommodation and refused to participate in the interactive process); *Steffes v. Stepan Co.*, 144 F.3d 1070, 1073 (7th Cir. 1998) (when the employee "fail[s] to hold up her end of the interactive process by clarifying the extent of her medical restrictions, [the employer] cannot be held liable for failing to provide reasonable accommodations"); *Seaman v. CSPH, Inc.*, 179 F.3d 297, 301 (5th Cir. 1999) ("[A]n employee cannot remain silent and expect his employer to bear the burden of identifying the need for and suggesting appropriate accommodation."); *Whelan v. Teledyne Metalworking Prods.*, 226 F.App'x 141 (3d Cir. 2007) (employee who insisted on a single, unreasonable accommodation caused the breakdown of the interactive process). The employee's obligation includes clarifying the employer's misunderstanding concerning the nature and extent of the employee's limitations. *Russell v. TG Mo. Corp.*, 340 F.3d 735 (8th Cir. 2003) (where employer believed it satisfied doctor's scheduling instructions but plaintiff disagreed, plaintiff had obligation to contact her doctor for clarification.)

#### **2. Parties have a duty to provide relevant information.**

To dialogue in good faith includes the duty to provide requested, relevant information. See *Kleiber v. Honda of Am. Mfg. Inc.*, 485 F.3d 862, 872 (6th Cir. 2007) (employer's failure to provide unrequested information concerning possible jobs is not bad faith); *Sears, Roebuck & Co.*, 417 F.3d at 806 (employer not liable for failure to engage in interactive process if employee refuses to participate or withholds essential information); *Templeton v. Neodata Services, Inc.*, 162 F.3d 617, 619 (10th Cir. 1998) (employee's failure to provide medical information "precludes her from claiming that

the employer violated the ADA by failing to provide reasonable accommodation.”); *Tatum v. Hosp. Of the Univ. of Pa.*, 57 F. Supp. 2d 145, 150 (E.D. Pa. 1999) (where employer gave plaintiff numerous opportunities to produce required information, court asks: “what more should the Hospital have done?...’[o]ne cannot negotiate with a brick wall.”).

### **3. In some circumstances, the “accommodation of last resort” must be part of the dialogue.**

The primary focus of the dialogue is to determine whether a reasonable accommodation will enable the employee to remain in his or her position. If such an accommodation cannot be provided without undue hardship, the employer must then consider the accommodation of last resort, i.e., a vacant position for which the employee is qualified, either with or without a reasonable accommodation. EEOC Enforcement Guidance, at 5453; 29 CFR App 1630.2; see, e.g., *Kleiber v. Honda of Am. Mfg. Inc.*, 485 F.3d 862 (6th Cir. 2007) (employer “has a duty under the ADA to consider transferring a disabled employee who can no longer perform his old job even with accommodation to a new position... for which the employee is otherwise qualified”) (internal citation omitted); *Office of the Architect of the Capital v. Office of Compliance*, 361 F.3d 633 (Fed. Cir. 2004) (same); *Allen*, 348 F.3d at 1115 (same).

In considering reassignment, an employer need not promote an employee. [Francis v. City of Meriden](#), 129 F.3d 281, 283 n.1 (2d Cir. 1997). The United States Supreme Court had agreed to resolve whether a disabled employee must compete for the vacant position or is absolutely entitled to it. *Huber v. Wal-Mart Stores, Inc.* 486 F.3d 480 (8th Cir. 2007) Because the parties resolved the matter before a decision, in January 2008, the Supreme Court dismissed the case.

### **4. Determining Responsibility for a Breakdown of the Dialogue**

If the employer’s dialogue efforts are challenged, “courts must examine the process as a whole to determine whether the evidence requires a finding that one party’s bad faith caused the breakdown.” *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789 (7th Cir. 2005) (citing *Beck v Univ. of Wisconsin Bd of Regents*, 75 F.3d 1130, 1135-36 (7th Cir. 1996)). In evaluating a breakdown, “courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary.... A party that fails to communicate, by way of initiation or response, may also be acting in bad faith.” *Sears, Robebuck & Co.*, 417 F.3d at 805 (citing *Beck v Univ. of Wisc. Bd of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996)). See also *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 219 (2d Cir. 2001) (president’s response to accommodation request that “NOCO ‘will not be entertaining further communication on this matter,’ was the antitheses of participation in an interactive process.”); *Cutrera v. Bd. of Supervisors of LSU*, 429 F.3d 108, 112-113 (5th Cir. 2005) (LSU “stymie[d] the interactive process” when it terminated plaintiff when she was unable to immediately identify an effective accommodation).

### **5. Failure to dialogue appropriately is generally not a per se violation.**

The dialogue is a means to an end, the “end” being the identification of a reasonable accommodation. Generally, an employer who fails to dialogue appropriately violates the ADA if a reasonable accommodation existed. See *Whelan*, 226 F.App’x, at 147; see also *Emerson v. Northern States Power Co.*, 256 F.3d 506, 515 (7th Cir. 2001) (employee must show that “breakdown of the interactive process led to the employer’s failure to provide a reasonable accommodation); *Kennedy v. Dresser Rand Co.*, 193

F.3d 120, 122 (2d Cir. 1999)(summary judgment for employer affirmed where plaintiff failed to identify a reasonable accommodation that the defendant refused to provide); Fjellestad, 188 F.3d at 952 (same); Phoenixville Sch. Dist., 184 F.3d at 319-320 (same); Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) (same); Soto-Ocasio v. Fed. Express Corp., 150 F.3d 14 (1st Cir. 1998) (same). This is so even if the employer behaves “callously.” Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (“the ADA...is not intended to punish employers for behaving callously if, in fact, no accommodation for the employee’s disability could reasonably have been made.”)

However, in some states, an employer’s mere failure to engage in the interactive process is a per se violation of the state’s anti-discrimination law, regardless of whether a reasonable accommodation exists. See, e.g., Wysinger v. Automobile Club of S.Cal., 69 Cal. Rptr. 3d 1, 10 (Cal. Ct. App. 2007).

#### **6. Not all dialogues will lead to a reasonable accommodation.**

Of course, engaging in the dialogue does not mean that an accommodation exists.

Sometimes, a disability cannot be accommodated without undue hardship. See, e.g., Albert v. Smith’s Food & Drug Centers, Inc., 356 F.3d 1242 (10th Cir. 2004) (“We do not mean to suggest that an employer may not terminate a disabled employee after concluding that it cannot reasonably accommodate the individual.”) Whelan, 226 F. App’x at 147. “The ADA is not a job insurance policy.” Rhodes v. Bob Florence Contractor, Inc., 890 F. Supp. 960, 967 (D. Kan. 1995). Where no reasonable accommodation exists, an employer need not continue to engage in a futile dialogue.

If there is a genuine dispute as to whether the employer engaged in the interactive process in good faith, and a reasonable accommodation existed, a court is likely to deny summary judgment to the employer. See Fjellestad, 188 F.3d at 953; Phoenixville Sch. Dist., 184 F.3d at 318; Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 633-34 (7th Cir. 1998).

#### **D. The Litigation Advance of Dialoguing Appropriately**

The 1991 Civil Rights Act (“CRA”) gave plaintiffs in federal discrimination cases the ability to recover emotional distress and punitive damages. It also gave employers a safe harbor when dealing with failure to accommodate claims. Under the CRA, if an employee has requested an accommodation, emotional distress and punitive damages “may not be awarded ... where the [employer] demonstrates good faith efforts, in consultation with the [employee] ... to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.” 42 U.S.C. §1981a(3) (emphasis added). Eliminating potential emotional distress and punitive damages may give an employer as strategic litigation advantage.

#### **E. Guidelines for the ADA Dialogue**

Despite the absence of rules of universal applications, some guidelines can be identified. The ten guidelines below are an amalgamation gleaned from case law, jury research and common sense.

##### 1. Aim to Succeed

Employees expect employers to help them succeed. Meet or exceed these expectations. “Success” is finding a way for the employee to remain in his or her current position or in a vacant position for which the employee is qualified.

##### 2. Keep Searching for Success

Strive to overcome obstacles. Avoid a “take it or leave it” approach.

3. Talk with the Employee

Face-to-face is preferred; telephone contact is a distant second. Avoid text messaging and email, at least for the initial discussion. Consider the employee’s suggestions. If you reject them, explain why. Make and discuss your proposals also and of course, document all steps.

4. Involve Necessary Parties

Necessary parties might include the employer’s human resources or safety person, the employee’s supervisor, the employee’s health care provider and union representative. See *Davis v. Lockheed Martin*, 84 F.Supp.2d 707, 712 (D. Md. 2000) (consultation with employee’s doctor is not always required). One court held that the employee’s lawyer or vocational counselor need not be included. *Ammons v. Aramark Uniformed Services, Inc.*, 368 F.3d 809, 819 (7th Cir. 2004).

5. Keep the Employee Involved

Keep the dialogue and fact-gathering moving. Involve the employee in obtaining information, such as from health care providers.

6. Document Your Efforts

Log your efforts. If you must defend your actions, the log will be invaluable. This includes documenting positions that are available that the employer believes the employee cannot perform with or without reasonable accommodation and the reasons why an accommodation requested by the employee is not reasonable or would pose an undue hardship.

7. Be Cautious Before Blaming the Employee for a Breakdown

Employers have more resources than employees. When the cause of a breakdown is the issue, employers should expect to be held to a higher standard than the employee.

8. Don’t Forget the Accommodation of Last Resort

If the employee cannot remain in his/her regular position, consider the “accommodation of last resort”—assignment to a vacant position for which the employee is qualified, either with or without accommodation.

9. Spend Time on the Process

Take time. Spend time. Avoid a rush—real or perceived--to judgment.

10. Engage in Earnest

Be sincere. Convey that sincerity in your words, tone of voice, and actions.

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