



We Goofed. Now What? An Accommodations Tale

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Agenda

- ADA and PWFA Overview
- ADA – Are you disabled?
- PWFA “leave as an accommodation” goof
- ADA – Is the request reasonable?
- PWFA predictable assessments goof
- ADA – Is that an undue hardship?
- PWFA documentation goof
- Takeaways
- Questions

The Americans with Disabilities Act of 1990 (ADA)

The ADA is a civil rights law that prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the public.

The goal of the ADA is to ensure equal opportunities and access for people with disabilities by requiring reasonable accommodations and modifications to policies, practices, and physical structures.



Title I of the ADA



Title I of the ADA prohibits employers with 15 or more employees from discriminating against qualified individuals with disabilities in all aspects of employment, including hiring, firing, promotions, training, and other terms and conditions of employment.

Employers are required to provide **reasonable accommodations** to qualified individuals with **disabilities**, unless doing so would cause **undue hardship**.

ADA Terminology Review

Disability: A physical or mental impairment that substantially limits one or more major life activities.

Reasonable Accommodation: Any change in the way things are done that enables a qualified individual with a disability to have equal employment opportunities.

Interactive Process: A discussion of accommodations requested by a qualified individual with a disability to enable them to have equal employment opportunities.

Undue Hardship: When providing an accommodation is significantly difficult or expensive considering the resources and circumstances of the employer.

Pregnant Workers Fairness Act (PWFA) Overview

- Passed by Congress in late December 2022
- Effective June 27, 2023
- Final rules published by EEOC on April 15, 2024 and effective June 18, 2024



PWFA Overview

- Applies to employers with 15 or more employees
- No eligibility requirements for employees
- Requires a covered employer to provide a reasonable accommodation to an employee's known limitation related to:
 - Pregnancy
 - Childbirth, or
 - Related medical conditions
- Unless the accommodation would cause an undue hardship

PWFA Overview – the ADA for pregnancy?

Covers many conditions related to pregnancy/childbirth (e.g., infertility, miscarriage, lactation, endometriosis, etc.)

Generally, requires an interactive process – without delay

Limited medical documentation can be requested/required

Certain accommodations are assumed to be reasonable

Cannot require leave if another accommodation available

Cannot fire, demote, etc. based on need for a reasonable accommodation

Enforced by the EEOC – extensive regulations

Violations may result in back pay, front pay, compensatory and punitive damages, attorneys' fees, and reinstatement



Once upon a time at Weir Widgets

Weir Widgets is the premier widget maker in the world so you can imagine how excited Nancy was to get a job there working on the assembly line.

She has received excellent performance reviews over the years, and her Multiple Sclerosis (MS) has not impacted her ability to perform the essential functions of her job ... until recently.

As Nancy's condition progresses, she finds it increasingly challenging to perform tasks that require physical stamina such as standing at her position on the assembly line for a full shift.

Recognizing the need for accommodations to be able to continue to perform the functions of her job, Nancy approaches her supervisor, Bill, to discuss her situation.

The story continues ...

Nancy tells Bill that she has a disability that is making it difficult for her to do her job.

She requests a stool to sit on while she is working on the assembly line and more frequent breaks to manage her fatigue related to the medical condition.

Nancy has not had any performance issues and she looks fine to Bill.

To Nancy's surprise, Bill denies her requests, stating that he doesn't believe she is disabled enough to require any accommodations.



Is Bill required to provide Nancy an accommodation?

A. No, Nancy has not had any performance issues, so she is able to perform the essential functions of her job without accommodations.

B. Yes, Nancy has a right to the accommodations that she has requested for her disability.

C. Maybe, Bill needs more information. He should have an interactive discussion with Nancy to discuss her requests.

Answer

C. Maybe, Bill needs more information. He should have an interactive discussion with Nancy to discuss her requests.

But why?



First some history ...



The ADA Amendments Act of 2008 (ADAAA)

Congress amended the ADA after multiple court decisions narrowed how the definition of disability was applied.

There was concern in Congress that these decisions changed how the ADA was functioning so much that it no longer reflected the intent of the original legislation to provide broad protections to qualified individuals with disabilities.

What are some of the major impacts of the ADAAA?

- The act clarified that the definition of disability should be applied broadly to provide coverage to the maximum extent permitted by the terms of the ADA and that the application should generally not require extensive analysis.
- The focus should be whether an individual is substantially limited in performing a major life activity rather than on any available mitigating measures.

Back to the Why

Bill made a common mistake.

Because Nancy has been able to perform the essential functions of her job without accommodation and her performance has been excellent, he doesn't think she is disabled and eligible for reasonable accommodations.

Bill should not be assessing whether Nancy has a disability or the severity of her disability.

The focus should be on having an interactive dialogue with Nancy to discuss the accommodations that she is requesting and whether Weir Widgets can provide those accommodations or offer alternatives.

Can this mistake be corrected?



Yes, Bill can notify Nancy that he would like to meet with her to discuss her requests.

- Nancy's first request may be easy to provide if she is able to perform the essential functions of the job from a seated position and if there are no safety concerns.
- The second request may be more challenging if Weir Widgets is not able to accommodate the request for more frequent breaks, but when they meet Bill can suggest alternative accommodations to help Nancy manage her fatigue.

PWFA accommodation request

- Maya has been the executive assistant to Weir Widgets' CEO, Randall Weir, for about 10 months. Mr. Weir thinks Maya does a wonderful job and wants to keep her happy.
- After years of trying, Maya is finally pregnant with her first child.
- During her third trimester, Maya emails Mr. Weir that she is suffering from extreme fatigue. She asks that she be allowed to lay down in the break room as needed and that she be relieved from attending any out-of-office meetings for the remainder of her pregnancy.

Mr. Weir's response

- Mr. Weir wants Maya to stay healthy and successfully deliver her child. He emails Maya to state that she should stay home for the remaining few weeks of her pregnancy and he will hire a temp to fill in until she is ready to return to work.
- Maya objects and emails back, writing that she is happy to continue to work as long as she can lay down every so often, and that she doesn't want a temp to undo all of the work that Maya has done.
- Mr. Weir responds that he insists that she stay home and not come back until after her child is born.



Did Mr. Weir goof?

- A. No, Mr. Weir was looking out for Maya's best interests and is entitled to choose any reasonable accommodation that will be effective, so no goof.
- B. Yes, Mr. Weir is not allowed to insist that Maya take time off when she didn't ask for time off so that was a goof.
- C. Maybe – it depends on whether Maya will be paid for her time off; if she is paid, no goof.

Best Answer

B. Yes, Mr. Weir is not allowed to insist that Maya take time off when she didn't ask for time off so that was a goof.

Why?

- Weir Widgets may not require that Maya accept an accommodation other than one arrived at through the interactive process (was there an interactive process here?)
- Weir Widgets may not require that Maya take leave, whether paid or unpaid, if there is a reasonable accommodation that will allow her to continue to work (absent undue hardship)

Can this goof be corrected?

Once the goof is realized, yes, it can be corrected. Suggestions:

- Revoke the forced leave
- Engage in a dialog (interactive process) with Maya
- Discuss whether Maya's preferred accommodation is reasonable or whether it would cause an undue hardship
- Jointly decide on a reasonable accommodation based on Maya's known limitation(s)
- Document the discussion and decision

Maya's Saga Continues



- Maya gives birth to a baby boy! Unfortunately, he cries A LOT!
- Maya quickly feels overwhelmed – she is sleep deprived, anxious, and depressed.
- Maya's husband calls HR at Weir Widgets to tell them that Maya will be unable to return to work for the foreseeable future.
- HR terminates Maya's employment because an indefinite leave is never a reasonable accommodation.

Did HR goof by terminating Maya's employment?

- A. No, an indefinite leave is not a reasonable accommodation.
- B. Yes, because it was premature – HR should have obtained medical documentation related to the need for leave rather than relying on Maya's husband.
- C. Yes, because HR did not engage in an interactive process with Maya.
- D. B and C
- E. I don't know – this stuff is hard!

Best Answer

D. B and C

B. Yes, because it was premature – HR should have obtained medical documentation related to the need for leave rather than relying on Maya's husband.

C. Yes, because HR did not engage in an interactive process with Maya.

Why?

- Although it is fine for a family member to notify Weir Widgets of Maya's condition and work limitations, the husband likely doesn't know the consequences of his words.
- Weir Widgets also failed to engage with Maya and discuss possible accommodations.

Can this goof be corrected?

Yes! Recommendations:

- Reverse the termination decision
- Engage in the interactive process with Maya
- Ask for medical documentation to support the need for leave
- Offer an interim or temporary accommodation, if possible (e.g., 4 more weeks of leave and then re-evaluate)
- Don't forget to analyze whether other state or federal laws apply!



Back on the widget assembly line ...

Nancy has been using her stool to avoid standing for long periods of time on the assembly line and taking more frequent breaks to manage her fatigue, but she is not getting as much rest as she needs to stay healthy.

Her doctor has suggested she work from home two days a week to reduce the stress and fatigue from her commute.

Nancy has requested an accommodation of working from home two days a week.

Bill doesn't know what to do – last time when he denied Nancy's request for accommodations he got in trouble with HR and Legal.

Maybe he should just approve it this time ...

What should Bill consider?

A reasonable accommodation in the workplace is a **modification** that enables a qualified individual with a disability **to perform the essential functions of a job**.

Reasonable accommodations vary depending on the **specific needs of the individual** and **the nature of the job**.

Examples include:

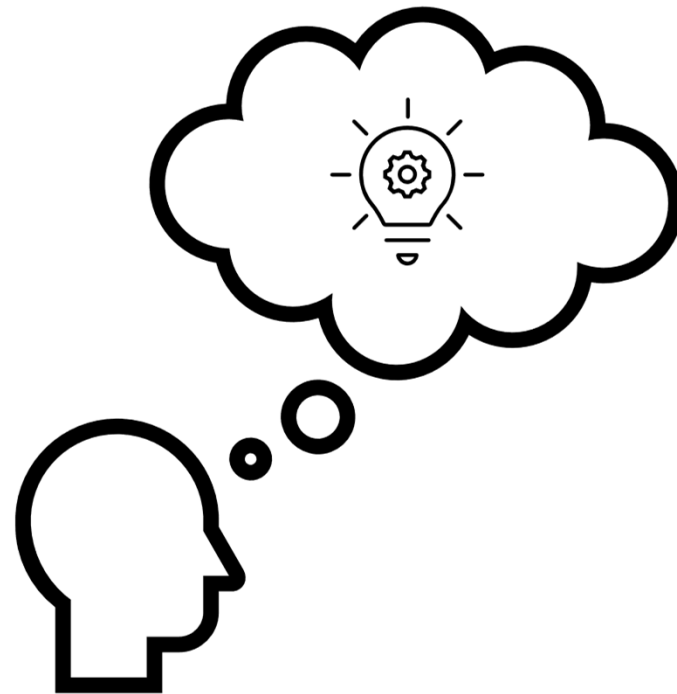
- Modifying work schedules or providing telework options
- Providing assistive technology or specialized equipment
- Modifying job duties or restructuring the job
- Making changes to workplace policies or procedures

Should Bill approve Nancy's request to work from home two days a week?

- A. Yes, the last time Bill refused Nancy's request for accommodations he got in trouble with HR and Weir Widget Legal – he doesn't want to have to deal with that again!
- B. No, Nancy will not be able to perform the essential functions of her assembly line job, so her request is not reasonable.
- C. No, the request is not reasonable because of the nature of Nancy's job but Bill should meet with her to discuss accommodation options that may be reasonable under the circumstances.

Answer

C. No, the request is not reasonable because of the nature of Nancy's job but Bill should meet with her to discuss accommodation options that may be reasonable under the circumstances.



Why?

Not all requested accommodations are reasonable under the circumstances.

In this scenario, Nancy could not perform her assembly line job from home so working from home was not a reasonable accommodation that Weir Widgets was required to provide.

However, Bill still needed to engage in the interactive process with Nancy to determine if there are other accommodations that will enable her to continue to perform the essential functions of her job.



Where's the goof?

No goof here but Bill almost goofed when he considered approving the work from home request without doing any further review.

Fortunately, he took a step back and considered the nature of Nancy's job which made a request to work from home unreasonable.

He then took the correct next step by meeting with Nancy to discuss why the requested accommodation was not reasonable under the circumstances and to discuss other available options.

That was a close one!

PWFA predictable assessments



- Barbie works on the assembly line at Weir Widgets and is 3 months pregnant.
- Barbie asks her supervisor, William, to take additional breaks to eat and drink while pregnant.
- William tells Barbie that she can't take any additional breaks unless her doctor **ORDERS** him to allow more breaks. Plus, he says that 6 months of extra breaks is outrageous! Barbie starts to cry.
- A month later, William feels bad and calls HR. HR tells him that he must give Barbie more breaks to eat and drink during her pregnancy.

William calls Barbie into his office. What should he tell Barbie?

- A. Barbie, HR tells me that you are allowed to take extra breaks to eat and drink. If you need a break, please tell me before you leave the assembly line so that I can make sure we have coverage.
- B. Before I can authorize you to take additional breaks, I'm going to need to see a doctor's note.
- C. You can take up to 2 extra breaks per day as long you tell me at the start of the day when you will be taking them.

Best Answer



A. Barbie, HR tells me that you are allowed to take extra breaks to eat and drink. If you need a break, please tell me before you leave the assembly line so that I can make sure we have coverage.

Why?

- Taking extra breaks to eat or drink during pregnancy is considered to be a “predictable assessment.”
- It is not reasonable for an employer to seek supporting documentation for “predictable assessments.”
- There are no specified limits to the number of breaks – it is “as needed.”

The Saga Continues

- Barbie takes 4-5 extra breaks per 8-hour shift.
- William feels that her breaks are excessive and is impacting production on the assembly line.
- William talks to HR and they conclude that Barbie's unlimited breaks are causing an undue hardship. HR tells Barbie that she is limited to 2 additional breaks per 8-hour shift.

Has Weir Widgets goofed?

- A. Yes, an employer may not consider a “predictable assessment” - such as breaks to eat or drink - an undue hardship.
- B. Maybe – although Weir Widgets may assert an undue hardship caused by unlimited extra breaks, it still is not entitled to put a limit on the number of extra breaks that Barbie can take each shift.
- C. No, even though “predictable assessments” will not cause an undue hardship in most cases, Weir Widgets may still conduct an individualized assessment of a “predictable assessment” accommodation request to determine if it causes them an undue hardship.

Best Answer

B. Maybe – although Weir Widgets may assert an undue hardship caused by unlimited extra breaks, it still is not entitled to put a limit on the number of extra breaks that Barbie can take each shift.

Why?

- The undue hardship analysis from the ADA can apply to PWFA accommodation requests.
- In virtually all cases, “predictable assessments” will not cause an undue hardship. However, an employer may bring forward facts to show an undue hardship based on significant difficulty or expense, including when an accommodation is unduly disruptive or would fundamentally alter the operation of the business.
- Consider whether a limited number of extra breaks meets the “as needed” language in the regulations.



Another day dawns at Weir Widgets ...

Nancy has been able to maintain her excellent performance with the accommodations of a stool at her workstation on the assembly line and additional breaks to manage her fatigue.

Unfortunately, her disability is progressing, and her eyesight has been impacted which is making it difficult for her to read the computer screen at her workstation.

Nancy asks Bill to meet to discuss a new software her doctor has recommended that will read the screen to her and allow her to continue to perform her job.

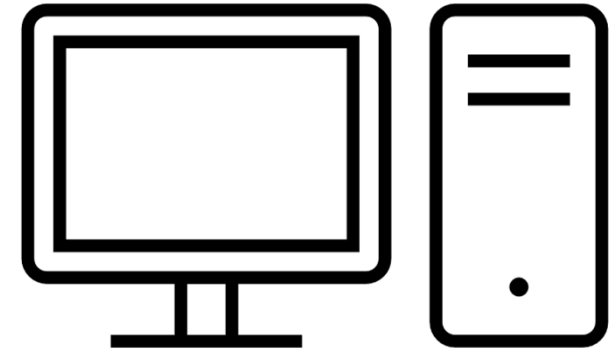
Bill agrees to speak to IT to determine if the software can be installed at Nancy's workstation.

Bad news!

IT has notified Bill that the software Nancy is requesting is not compatible with the system software that Weir Widgets uses for monitoring the widget assembly line.

Further, IT has determined that there is no compatible software and upgrading the system software will cost \$100,000.

Bill notifies Nancy that providing the software would be an undue hardship for Weir Widgets so they will not be able to provide it.



Is updating the system software an undue hardship for Weir Widgets?

- A. Yes, updating the system software will be very difficult and expensive so it is an undue hardship.
- B. No, Weir Widgets is the world's leading widget manufacturer so \$100,000 system update is not an undue hardship considering the company's resources.

Answer

B. No, Weir Widgets is the world's leading widget manufacturer so \$100,000 system update is not an undue hardship considering the company's resources.

But why?



Why?

Providing an accommodation is an undue hardship if doing so would be significantly difficult or expensive.

Difficulty includes whether an accommodations is unduly extensive or disruptive, or if it would fundamentally alter the nature or operation of the business.

The analysis focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing the specific accommodation.

In this scenario, updating the system software would not be significantly difficult or expensive for a large, successful company like Weir Widgets so they do not have the supporting facts for an undue hardship argument.



Can this mistake be corrected?



Yes!

Bill and IT can work together to take the necessary steps to update the system software.

Bill can notify Nancy that Weir Widgets will install the requested reading software at her workstation once the system software update is complete.

PWFA Documentation Goofs

- Patty is an accountant for Weir Widgets. She does computer work, creates spreadsheets and financial reports, and attends Zoom calls.
- Patty is pregnant with her first child. She is due on September 1.
- On June 17th, Patty tells the HR receptionist, Hannah, that she has frequent nausea and low back pain. Patty asks to work from home for the remainder of her pregnancy.
- Hannah hands Patty the company's ADA medical certification form and tells Patty to return it within 15 days. Hannah states that they won't decide on the WFH request until after the medical is received.

Did Hannah goof by asking Patty to complete an ADA medical form for a pregnancy condition?

- A. No, because it is unclear whether Patty has a disability under the ADA or a pregnancy-related condition under the PWFA.
- B. Yes, Hannah gave Patty the wrong form and should provide a PWFA-specific medical certification form.

Best Answer

B. Yes, Hannah gave Patty the wrong form and should provide a PWFA-specific medical certification form.

Why?

- The ADA medical form likely asks for information that may not be asked when evaluating a PWFA accommodation request.
- In most cases, it will be reasonable for Weir Widgets to request documentation to confirm that Patty has a limitation due to her pregnancy and that describes what accommodations or changes in work are needed, including work from home.

The Saga Continues

- After two weeks, Patty realizes that her OB/GYN has been too busy to complete the medical form. Patty asks her general practitioner to email Hannah to explain that Patty has nausea and low back pain and needs to be able to lie down throughout the day so work from home is recommended.
- Hannah sends an email to Weir Widgets' leave coordinator stating that Patty failed to provide a completed medical form. The leave coordinator denies Hannah's accommodation request for lack of supporting documentation.

Hannah failed to tell the leave coordinator about the email from Patty's general practitioner. When Patty forwards a copy of the email to the leave coordinator, what should the coordinator do?

- A. Inform Patty that if her doctor completes the PWFA medical form, Weir Widgets will re-evaluate her accommodation request. But until that happens, the denial stands.
- B. Revoke the denial and as long as the email from the general practitioner sufficiently describes the condition and accommodation needed, approve the accommodation request.
- C. Revoke the denial but tell Patty her request is pending until her treating OB/GYN provides some documentation of her condition (e.g., email, written note, PWFA form, etc.).

Best Answer

B. Revoke the denial and as long as the email from the general practitioner sufficiently describes the condition and accommodation needed, approve the accommodation request.

Why?

- Employers may not demand that supporting documentation be provided on a specific form.
- Employers may not require that the health care provider who is submitting the documentation be treating the employee for the condition at issue.

Patty Gives Birth!

- In early September, Patty gives birth to a healthy baby girl.
- After 6 weeks, Patty is ready to return to work. Upon her return, Patty tells her supervisor, Steve, that she will need additional breaks to pump breast milk.
- Steve calls Hannah and tells her that Patty is asking to take additional breaks for expressing milk. Hannah replies “this sounds like an accommodation request! I’ll send out the required paperwork.”
- Hannah send Patty the PWFA medical form and asks that she return the completed form within 15 days. Patty objects to completing yet another medical form.

Hannah researches the PWFA and realizes that lactation and pumping at work should not require supporting documentation. How should Hannah correct this goof?

- A. Tell Patty that she doesn't have to return the PWFA medical form but that Patty will need to provide a written self-confirmation regarding her need for more breaks due to pumping.
- B. Own up to her goof and tell both Patty and Steve that Patty has been approved to take more breaks for lactation.
- c. Own up to her goof and tell Patty that she may take additional lactation breaks for up to one year after the birth of her daughter.

Best Answer

B. Own up to her goof and tell both Patty and Steve that Patty has been approved to take more breaks for lactation.

Why?

- Self-confirmation of pregnancy or need for lactation may be all the documentation that can be required in some circumstances. It is not reasonable to seek supporting documentation when the reasonable accommodation relates to pumping at work.
- A self-confirmation can be spoken, written, in an email or text, etc. No particular form or document may be required.
- There is no time limit that may be placed on lactation (and other pregnancy-related) accommodations.



Takeaways

- ADA
 - Focus on assessing the requested accommodation rather than the disability
 - Always engage in the interactive process to determine what the employee needs and offer alternatives if the requested accommodation is not reasonable
 - Undue hardship is based on the specific employer and the specific accommodation requested – reasonableness will vary
- PWFA
 - PWFA is very broad and generous
 - Don't delay – consider interim accommodations
 - Be very careful about requiring documentation
- Most ADA and PWFA goofs can be corrected

QUESTIONS?

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