



Spring 2025 CLE Workshop · March 26 – 28, 2025

Higher Education Discrimination Law

Complex Employee Accommodation Issues

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Leave as Reasonable Accommodation

What is a Reasonable Accommodation?

ADA defines “reasonable accommodation” by providing non-inclusive list of examples:

- Making existing facilities accessible and usable
- Job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position
- Acquisition or modifications of equipment/devices
- Appropriate adjustment of examinations
- Training materials or policies
- Providing qualified readers or interpreters
- And other similar accommodations

Is Leave a Reasonable Accommodation?

- ADA: Leave is not listed as an example of a reasonable accommodation
- EEOC: Employers may be required to provide leave as a reasonable accommodation, including when employee needs:
 - To obtain treatment
 - To recuperate from illness or episodic manifestation of disability
 - To avoid temporary adverse conditions at work (e.g., AC breakdown)
- EEOC's 2016 Guidance: Leave is a reasonable accommodation when it enables an employee to return to work following the leave.

Is Leave a Reasonable Accommodation?

- Courts: Leave may be a reasonable accommodation at least *in some circumstances*
 - Is the requested leave finite and reasonably likely to enable the employee to return to work?
 - No obligation for employer to provide indefinite leave
 - EEOC 2016 Guidance: Employers not required to provide indefinite leave (i.e., employee cannot say whether or when she will be able to return to work at all) because it constitutes undue hardship

Scenario 1

- College has a small student health center with two nurses
- Nurse 1 takes FMLA due to serious health condition
- Upon exhausting FMLA leave, Nurse 1's provider opines that Nurse 1 has a mental health condition that requires him to need off work for the next 8 weeks
- College approves ADA leave for up to 8 weeks
- Near end of 8 weeks of ADA leave, Nurse 1 requests an additional 8 weeks off work and provides letter from provider supporting need for additional leave, noting that Nurse 1 will be assessed again at end of 8 week leave as to whether she will be able to return at that point
- Does College have to provide the leave?

How Much Leave is Reasonable?

- Employers will need to engage in interactive process and analyze employee's individual situation, including:
 - Health/disability condition
 - Requirements of their position
 - Nature of the employer
 - Jurisdiction in which employee works

Scenario 2

- Residence hall custodian takes 12 weeks of FMLA leave to deal with serious back pain
- On last day of FMLA leave, custodian undergoes back surgery
- Physician opines that custodian needs to remain off work for additional 2-3 months while recovering from surgery
- Is the college required to provide the leave as accommodation?

See Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017), cert. denied, 138 S. Ct. 1441 (2018)



Remote Work Accommodations

Scenario: Frost Bank University

Tim works for Student Programs & University Resources Services. He was recently diagnosed with a chronic autoimmune disorder that causes severe fatigue and joint pain. On occasion, the symptoms flare up, making it difficult for Tim to commute to work. After several instances where he was unable to make it to work because of his condition, Tim requested permission to work from home whenever needed as a reasonable accommodation.

Scenario: Frost Bank University

Tim's role as the Director of Student Engagement involves creating programs, meeting with students, and attending university sponsored events. He believes these duties can be done effectively from home using the same tools he uses in the office, such as email, video conferencing, and project management software.

Scenario: Frost Bank University

The university has a remote work policy that requires employees to identify a set schedule; prohibits more than two work-from-home days per week; and is subject to approval of the employee's manager. Tim's supervisor, Gregg, is uncertain how it would work to have Tim working from home on an indefinite and uncertain schedule. He is also concerned about productivity, especially if other employees want to work from home too. Gregg responds by permitting Tim to take up to two days per week when Tim's disability flares up. Gregg tells Tim that if more leave is needed during any workweek Tim can use paid time off from his leave bank.

Scenario: Frost Bank University

Tim is frustrated that Gregg is offering only a partial accommodation. Tim thinks he has a “slam dunk” case and he files a complaint arguing that Gregg refused to provide reasonable accommodations. The university contends that in-person attendance is an essential function of Tim’s job. Tim counters that he has demonstrated his ability to perform his essential job functions remotely when he worked from home for almost 6 months during the COVID pandemic.

Scenario: Frost Bank University



Unanswered Questions

- When does Tim experience flare ups?
 - Predictable, like following treatments?
 - Or unknown?
- How often are Tim's flare ups?
 - Rare or multiple times per week?
- Are there other effective accommodation alternatives?
 - Is the impact limited to commuting?
 - Are there accommodations that would minimize need to work from home?

Interactive Process Pitfalls

- Failure to engage in sufficient back-and-forth to understand limitations and identify possible effective accommodations
- Inflexibility
 - Employee refusing to accept alternative accommodations
 - Employer insisting on accommodations that do not address all needs
- Failure to cooperate
 - Employer refusing to engage
 - Employee refusing to provide information / documentation
- Delays

Is Remote Work Request Reasonable?

- Interferes with essential job functions?
 - Create student programs
 - Meet with students
 - Attend events
- What does job description say?
- What was the arrangement during COVID?
- What about Gregg's concerns over productivity or other employees' resentment?



Fitness for Duty

Required Medical Exams

- Procedures or tests that seek information about an individual's physical or mental impairments or health
- Examples:
 - Blood Pressure
 - Vision
 - Tests of breath, blood, or urine
 - Psychological test to identify mental disorder or impairment
 - X-ray, CAT scan, MRI
 - Pulmonary function
 - Range of motion

When Permitted?

- Medical examinations and disability-related inquiries permitted only if job-related and consistent with business necessity
- Employer must have a reasonable belief based on objective evidence that the employee's ability to perform essential job functions will be impaired due to a medical condition or the employee will pose a direct threat due to a medical condition

Choosing the Health Care Provider

- Employee's choice
 - Limitations of a Return to Work note
 - Employer follow-up
- Employer's choice
 - Employer's expense
 - Adversarial

Post-Exam

If the employee cannot perform the job or do so safely:

- Other positions
- Unpaid leave
- Discharge from employment

Legal Considerations

- ADA/State Civil/Human Rights Law
 - Exam may result in restrictions or requests for reasonable accommodation
 - Risk of a “regarded as” disability discrimination claim even if no impairment
- FMLA/Other Leave
 - Involuntary leave from work
 - Paid or Unpaid

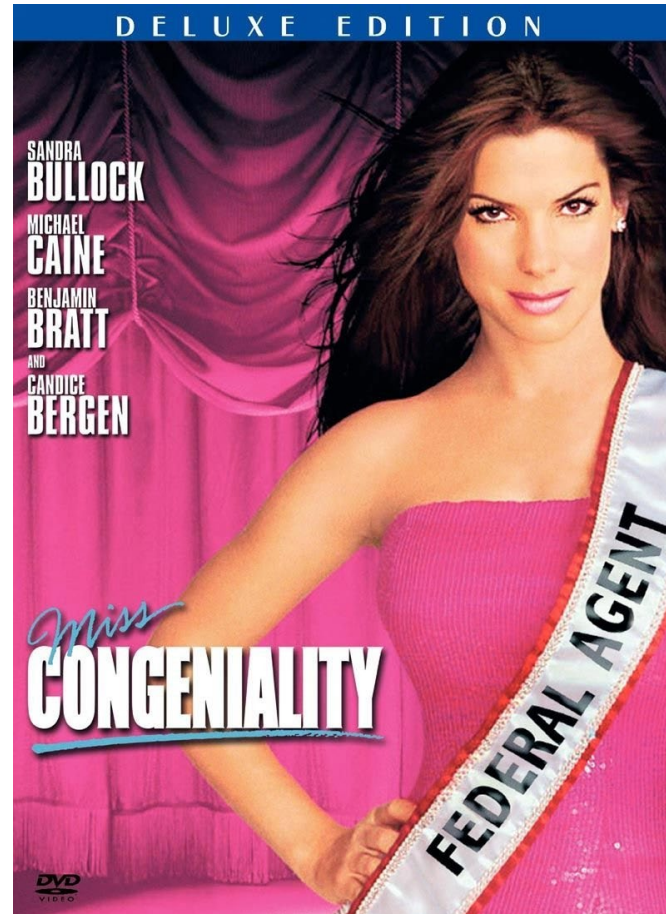
Scenario: Friendship College

Gracie Hart is an accountant in the business office of Friendship College. Everyone loves her relentless work ethic. Last month, a concerned department head reported that Gracie said a spy she referred to as “The Citizen” is messing with the numbers so Gracie can’t trust anyone to help her. Gracie is fully remote now, has taken her files out of the office’s electronic management system, and told the office assistant that “they” are watching her house. Gracie’s boss, Victor Melling, knows she needs to do something. Gracie will not respond to calls, texts, or emails.

Scenario: Friendship College

Eric Matthews works in a lab within the college's Forensics Business Institute (FBI). As part of his job duties, he often has to use a dropper to put just one drop of a liquid into each vial on a tray of 50 vials. He has just been diagnosed with a neurological disease that can cause tremors. Eric's supervisor, Stan Fields, has been watching Eric very closely since the diagnosis. When reviewing Eric's lab records (not a normal practice), Stan sees that Eric marked three trays as unusable last week. Stan wants Eric to be examined by a doctor chosen by the lab to determine if he can do his job.

Scenario: Friendship College





Consistency of Accommodations

Why is Consistency Important?

- Consistency across multiple, varied employee units
- Different jobs may require different accommodations
- Different units may have different hardships
- Reasonable accommodation vs. undue hardship

Scenario: Arlen University

Hank Hill is an administrative assistant to the Dean of the School of Propane and Propane Accessories (SPPA) at Arlen University. He is responsible for managing a wide range of clerical and administrative tasks, including answering phone calls, scheduling appointments, managing calendars, handling incoming and outgoing mail, preparing documents, maintaining filing systems, and providing general office support. Hank has a disability that affects his eyesight and has multiple accommodations in place:

1. University-supplied 30-inch monitor and laser printer at home/work
2. University-supplied software that improves readability on a screen
3. Ability to take frequent breaks to rest his eyes
4. Ability to take extra time to print and read e-mails if needed

Scenario: Arlen University

Hank applies for an Administrative Assistant position supporting Dean Boomhauer in the School of Charcoal Studies (SCS) and is hired for the role. On his first day of work, he tells Dean Boomhauer, about his disability and his previously-approved accommodations. Dean Boomhauer was unaware of any of these accommodations and tells SCS HR Director Luanne Platter that he never would have hired Hank if he knew he required these accommodations. He tells Luanne that the SCS does not have the budget to provide the costly hardware and software Hank requires and that Dean Boomhauer's busy schedule does not allow for Hank to take these frequent breaks and extra time to complete essential tasks.

Scenario: Arlen University

Luanne calls Bobby Hill, Associate General Counsel for Arlen University, and explains the situation. Luanne is feeling pressure from Dean Boomhauer to deny the accommodation and possibly even revoke the job offer. Luanne understands that the University has an obligation to provide reasonable accommodations, but she thinks these accommodations might be too difficult for SCS to manage and is not sure why SPPA ever approved for them for Hank in the first place.

What advice should Bobby provide to Luanne?

Cost as Undue Hardship

- Must present tangible evidence of cost impact
- Need not be provided with “mathematical precision”
- Evidentiary burden of cost is higher than plaintiff’s burden to show reasonableness of cost

Cost as Undue Hardship

Searls v. Johns Hopkins University (D. Md. 2016)

- JHU denied ASL interpreter for deaf nurse, citing \$120,000 cost
- JHU argued the unit “had no budget” for reasonable accommodations
- Court granted SJ for plaintiff on this undue hardship defense
- JHU failed to explain how \$120,000 was undue hardship to unit’s \$88 million budget or JHU’s \$1.7 billion budget

Scenario: Arlen University



How Can Institutions Ensure Consistency?

- Comprehensive policy
- Training for decisionmakers
- Regular audits
- Technology tracking tools
- Centralized/hybrid approach



Questions?

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