Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

Briefly

November 2021 Volume 21, Issue 11

WHO KEPT THE DOG OUT? AND WHY IT MATTERED – ADA INTERACTIVE PROCESS REQUIREMENTS REGARDING ACCOMMODATION REQUESTS FOR SERVICE ANIMALS

Kelly A. Campbell

"[The employer] failed to present any evidence on its 'overall financial resources' or the 'number of its employees,' which are relevant to the determination of whether [the employee's] requests were reasonable or posed an undue hardship."

In our September newsletter, we discussed the general obligations under the Americans with Disabilities Act (ADA) regarding accommodation of service animals in various settings, highlighting a recent jury award from a federal court in Arkansas in favor of an employee who sought to have his service dog accompany him at work.

This article will highlight the specific interactive process obligations under Title I of the ADA pertaining to employee requests for accommodation of service animals. These obligations were recently discussed in an opinion issued by Chief U.S. District Judge for the Middle District of Tennessee, Waverly D. Crenshaw, Jr., in the case of *Wayne Schroeder v. AT&T Mobility Services, LLC*, No. 3:20-cv-00893 (U.S. D.C. M.D. Tenn. October 22, 2021).

The *Schroeder* case involves claims that an employer failed to adequately engage in the interactive process and provide reasonable accommodations for an employee's request to bring his service dog to work. In the opinion, the Court denied motions for summary judgment filed by both the employee and the employer.

Mr. Schroeder is employed as a senior specialist RAN engineer, traveling throughout the U.S. detecting electronic interference with AT&T's cell signal frequencies. He suffers from anxiety, depression and post-traumatic stress disorder related to his prior military service and experiences from working as an Emergency Medical Technician. In 2019, he requested a variety of accommodations from AT&T to allow his service dog, Dakota, to accompany him while working. These requested accommodations included a different company vehicle to provide space for Dakota, as well as modifications to the vehicle including "removal of the backseat, installation of a barrier to contain equipment, installation of a barrier to protect Dakota, installation of LED lighting, installation of a fan in Dakota's door to help cool him, window tinting and remote start to help cool or heat the vehicle, and placards to notify others that a service animal was in the truck." Mr. Schroeder also requested "more overnight stays when he was on the road to cut down on travel stress on Dakota."

An HR specialist at AT&T discussed the accommodation requests with Mr. Schroeder on the phone and via email and reviewed a PowerPoint presentation that Mr. Schroeder prepared. However, AT&T did not conduct a cost-analysis of the requested accommodations, nor did AT&T propose any alternative accommodations prior to rejecting Mr. Schroeder's accommodation requests. The ADA lawsuit followed, with both parties filing motions for summary judgment.

In denying both parties' motions, the District Court Judge noted that the ADA prohibits discrimination in employment "on the basis of disability," and that discrimination includes "not making reasonable accommodations" for disabled individuals, unless the accommodations "would impose an undue hardship." 42 U.S.C. §12112. Further the Court recognized that the ADA requires employers to engage in an "interactive process" with employees who have a disability and to make reasonable accommodations. The interactive process

Continued on page 4

EEOC ISSUES UPDATED COVID-19 TECHNICAL ASSISTANCE TO DISCUSS RELIGIOUS EXEMPTIONS AND ACCOMMODATION CONSIDERATIONS

Rosalia Fiorello

"Title VII protects nontraditional religious beliefs that may be unfamiliar to employers … [and] defines 'religion' very broadly."

On October 25, 2021, and October 28, 2021, the EEOC posted an updated and expanded technical assistance related to the COVID-19 pandemic, addressing questions about religious objections to employer COVID-19 vaccine requirements and how they interact with federal equal employment opportunity (EEO) laws. This technical assistance comes as the Occupational Safety and Health Administration's ("OSHA") COVID-19 emergency temporary standard, which would require vaccination or weekly testing of workforces with 100 or more employees, remains under review at the Office of Information and Regulatory Affairs. The technical assistance aims to answer COVID-19 questions from an EEO perspective. Therefore, it is important to note other federal, state, and local laws will also apply to employers, employees, and applicants.

One highlight of the October 25, 2021, technical assistance details whether an employer must accept an employee's assertion of a religious objection to a COVID-19 vaccination at face value and whether an employer may inquire or ask for additional information. The technical assistance notes that under Title VII, employers should assume an employee's request for religious accommodation is based on sincerely held religious beliefs. However, if an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer would be justified in making a limited factual inquiry and seeking additional supporting information. Further, an employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation.

Title VII protects nontraditional religious beliefs that may be unfamiliar to employers. Title VII defines "religion" very broadly. It includes traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism but it also includes religious beliefs that are new, uncommon, not part of a formal church or sect, or only held by a small number of people. Therefore, an employer should not assume any employee's request is invalid because it is based on unfamiliar religious beliefs. The technical assistance does makes clear employees may be asked to explain the religious nature of their belief and should not assume that the employer already knows or understands their beliefs.

Keep in mind Title VII does not protect social, political, or economic views, or personal preferences. Thus, employees' objections to COVID-19 vaccination that are based on social, political, or personal preferences, or on nonreligious concerns about the possible effects of the vaccine, do not qualify as "religious beliefs" under Title VII. For more guidance on religious accommodations, visit https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_790763467358216107498601 35.

Another highlight of the October 25, 2021, technical assistance discusses how an employer would show that it would be an "undue hardship" to accommodate an employee's request for religious accommodation. Under Title VII, employers should thoroughly consider all possible reasonable accommodations, including telework and reassignment. If there is no reasonable accommodation that will allow the unvaccinated employee to be physically present to perform his or her current job without posing a direct threat, the employer ***must*** consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible. In an earlier technical assistance piece in May 2021, the EEOC suggested employers consult the Job Accommodation Network ("JAN") as well as the applicable Occupational Safety and Health Administration ("OSHA") COVID-specific resources. (For more information as it pertains to JAN and OSHA COVID-specific resources, visit https://askjan.org/ and https://www.osha.gov/coronavirus.)

On October 28, 2021, the technical assistance was updated and asked the following question:

> *Do employees who have a religious objection to receiving a COVID-19 vaccination need to tell their employer? If so, is there specific language that must be used under Title VII?*

The technical assistance advises that employees must tell their employer if they are requesting an exception to a COVID-19 vaccination requirement because of a conflict between that requirement and their sincerely held religious beliefs, practices, or observances. However, the technical assistance makes clear there are no magic

Continued on page 3

words that must be used by the employee. Specifically, the employee does not need to use the words "religious accommodation" or "Title VII." The key to an employee's request is that there is a conflict between their sincerely held religious believe and the vaccine requirement by employer.

The EEOC suggests employers should provide employee and applicants with relevant information as to who to contact and applicable procedures for requesting a relations accommodation. In a rare occurrence, the EEOC provides an example form for employers and noted, "[a]lthough the EEOC's internal forms typically are not made public, it is included here given the extraordinary circumstances facing employers and employees due to the COVID-19 pandemic." A copy of the form can be found at https://www.eeoc.gov/sites/default/files/2021-10/EEOC%20Religious%20Accommodation%20Request%20Form%20-%20for%20web.pdf.

An employer's preparedness and plans in response for employee requests for religious accommodations associated with COVID-19 are vital to running an effective business and avoiding any potential discrimination claims. Consider updating your employee handbook to communicate any new guidelines, policies, and recommendations to your employees to include accommodating employees who may be more vulnerable to the effects of COVID-19. Also, it may be in a company's best interest to conduct training sessions to educate your employees on how to follow new policies. As always, consider consulting with counsel to ensure compliance with all federal, state, and local regulations when implementing any new COVID-19 policies.

Wimberly Lawson Wright Daves & Jones, PLLC, is the exclusive Tennessee member of the *NATIONAL WORKERS' COMPENSATION DEFENSE NETWORK*, a nationwide network of AV-rated law firms providing employers and insurers with access to the highest quality representation, education, expertise, counsel, and advice in workers' compensation and related employer liability fields.

A WORD TO THE WISE

Many claims employers face *are insured*. These can include workers' compensation, employment practices, or a variety of commercial or general liability disputes. If you are interested in making sure that your insurer permits you to work with your Wimberly Lawson attorney when claims come up, there are various steps you can take. ***When a claim is filed***, ask for us. We are on many panels. ***When you renew your coverage***, specify in the policy that you can use our Firm. Many insurers are open to this. ***When you are considering new coverage***, ask your broker or the insurer in advance whether we are on the panel. We love working with you, and sure hope you will want to work with us when needs arise. So we wanted to offer some tips for how you can make sure that happens.

requires an employer to identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

AT&T argued that Mr. Schroeder's requests were per se unreasonable, because he could perform his job duties without his service dog. However, the Court explained that accommodation requests are not automatically unreasonable merely because the employee is physically capable of performing his job absent a requested accommodation. The duty of reasonable accommodation requires an employer to do what is necessary to enable the disabled employee to work in reasonable comfort, and to enjoy equal benefits and privileges of employment as similarly situated employees without disabilities.

AT&T also asserted that the specific accommodations requested were unsafe or illegal, and thus unreasonable. However, the Court noted that AT&T failed to work with Mr. Schroeder to narrow down his proposed accommodations to find ones that were practical. The Court acknowledged that a reasonable jury could find that AT&T failed to satisfy its obligation to actively participate with its employee in the "exploration of possible accommodations" under the ADA.

AT&T's argument that Mr. Schroeder's requests for accommodation were *per se* unreasonable and imposed an undue hardship were also rejected. First, AT&T failed to perform a cost analysis of the requested accommodations. Second, AT&T failed to present any evidence on its "overall financial resources" or the "number of its employees," which are relevant to the determination of whether Mr. Schroeder's requests were reasonable or posed an undue hardship.

The Court also denied Mr. Schroeder's request for summary judgment based on his assertion that AT&T failed to sufficiently engage in the interactive process with him. The Court noted that AT&T certainly communicated with Mr. Schroeder regarding his proposed accommodations (10 email exchanges and 3 phone calls). There was no evidence that AT&T interacted in bad faith. Nor was AT&T required to propose an alternative accommodation to demonstrate good faith participation in the interactive process. The Court stated a reasonable jury could find that AT&T adequately participated in the interactive process.

Lessons to be learned from this decision include a reminder of the importance of the interactive process and in articulating objective reasons for a determination of unreasonableness. Mr. Schroeder's primary complaint revolved around the failure of AT&T to propose any alternative accommodations prior to a complete rejection of his requests. Had AT&T done so, or more fully communicated their concerns with his requested accommodations, this expensive litigation might have been avoided.

The ADA's interactive process requires both the employer and the employee to participate in good faith. This process should include ample communication, including face-to-face meetings whenever possible, as well as other forms of direct communication. While written communications (emails, letters, etc.) are helpful to document discussions, these types of communications should never replace direct communications between the employer and employee.

Employers should respond promptly to an employee's request for accommodation, initiating and engaging in the interactive process with the employee. One of the first goals after receiving the request for accommodation is to identify and determine the precise limitations resulting from the employee's disability. In other words, how does the employee's disability impact his or her ability to perform the job? Then, the employer must assess potential accommodations which would enable the employee to perform the job while enjoying the same benefits and privileges as similarly situated employees without disabilities. These potential accommodation options should be fully discussed with the employee prior to reaching a decision.

Before an employee's requested accommodation is rejected, an employer should formulate and communicate to the employee all specific reasons why the employee's request is unreasonable or imposes an undue hardship. This may include a cost analysis when necessary. However, cost is certainly not the only factor. Other factors include the nature of the requested accommodation; the overall financial resources of the business; the number of persons employed by the business; the effect on expenses and resources of the business; and the impact of the accommodation on the business. If cost is an issue, then the employer should consider whether funding is available from an outside source or tax credits are available to offset the cost of the accommodation.

Employers should consider suggesting alternative accommodation proposals if the employee's requested accommodation is determined unreasonable. This will certainly demonstrate an employer's good faith in the process and will foster continuing discussions between employer and employee about potential ways to accommodate the employee's disability.