

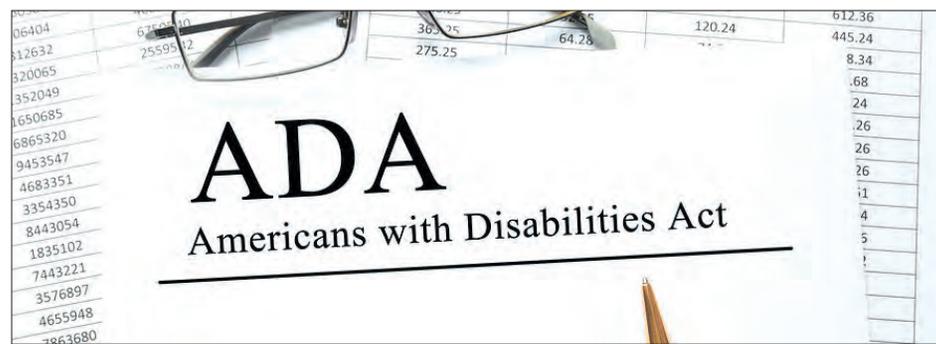
Navigating Interactive Dialogue on Workplace Accommodations

By Terri L. Pastori

Both employers and employees have ample opportunity to mishandle requests for workplace accommodations, and such missteps can, and do, result in claims of disability discrimination. New Hampshire's Law against Discrimination, RSA 354-A, and its federal counterpart, the Americans with Disabilities Act, as amended, prohibit workplace discrimination against qualified persons because of their disabilities. Those laws also require covered employers to make reasonable accommodations for any known physical and/or mental disabilities so that employees can perform the essential functions of their jobs, unless the employer can demonstrate that the accommodations would impose an undue hardship on it. (See 42 U.S.C. § 12112(b)(5); RSA 354-A:7, VII)

"A reasonable accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities," including modifications to the work environment or manner or circumstances of work, and modifications that allow an employee to enjoy equal benefits and privileges of employment. (See 29 C.F.R. § 1630.2(o)(1)(i-iii)).

In order to assess a request for a reasonable accommodation, the employer and employee generally are required to engage in an interactive, good faith dialogue



about the request. Although the interactive process varies depending upon the circumstances of each situation, federal law "nevertheless requires both the employer and employee to engage in a meaningful dialogue, in good faith, for the purpose of discussing alternative reasonable accommodations" for the disability, so that the employee can perform his or her job, per *Ortiz-Martinez v. Fresenius Health Partners, PR, LLC*. To the extent that there is a breakdown in the interactive dialogue, courts will inquire whether the employer or the employee failed to participate in the dialogue in good faith, or to make reasonable efforts to help the other party determine what specific accommodations are necessary in a given situation. If an employee fails or refuses to cooperate in the process, the courts will not hold an employer liable under the ADA for failure to provide reasonable accommodations.

While there are no published opinions from the New Hampshire Supreme

Court adopting the federal requirements, in *Dartmouth Hitchcock Medical Center v. Patricia Gould*, an unpublished order dated April 10, 2014, the Court cited federal law in noting that "[a]bsent any communications from an employee regarding the inadequacy of her accommodations, an employer cannot be held responsible for either a breakdown in the interactive process or for failing to correct an inadequate accommodation because it was not made aware that a deficiency existed."

In several published decisions following public hearings of disability discrimination charges, the New Hampshire Human Rights Commission (HRC) has ruled that an employer has an obligation to engage in the interactive process with a disabled employee regarding accommodations for the disability.

According to the Equal Opportunity Employment Commission, the federal agency tasked with investigating charges of discrimination, charges of disability

discrimination have risen steadily since 2008. As of 2017, disability discrimination constituted nearly 32 percent of the charges filed with the EEOC, ranking third among the most common bases of discrimination after retaliation and race discrimination. To that end, the EEOC has issued numerous press releases in 2018 announcing its lawsuits against, and settlements with, employers across the country for disability discrimination and/or the failure to reasonably accommodate disabilities. Such employers include ABM Aviation, Inc., Zachry Construction Corp., InsideUp Inc., The Cheesecake Factory, West Meade Place, LLP, and the Heritage Home Group, LLC. Likewise, the HRC's published statistics show an uptick in disability discrimination charges in 2016.

There are a host of steps employers and employees can take to increase the productiveness of the interactive dialogue, and decrease the likelihood of frustrations and dissatisfaction that ultimately may lead to discrimination claims. For example, employees should not wait until they are about to receive a negative review to alert their employers about disabilities for which an accommodation may be necessary. Employees also should promptly and truthfully respond to appropriate requests for information from their employers, and meaningfully explain how their requested accommodation is related to the disability

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and job duties. Further, employees will be well served to document the communications with their employers to ensure that there is a record of the requests for accommodations and prompt responses to their employers' requests for information.

On the flip side, employers should engage in a meaningful, interactive dialogue with employees seeking a reasonable accommodation. Ideally, the process should include in-person meetings or communications by phone as opposed to exclusively relying on email, letters, or text messages, which can be less effective for the process. Employers should make good faith and earnest attempts to find reasonable accommodations for employees, and document such communications with employees, including requests for information and the need for repeated follow up requests for information with employees. When an employee raises the issue of disability and/or the need for an accommodation during a disciplinary meeting or performance review, employers would be wise to hit the "pause button" to allow an adequate opportunity to assess the situation before either proceeding as planned, or changing course, as the specific circumstances may require.

Both employers and employees have many resources available to them to assist in navigating the process and complying with the law. For instance, there are various resources available on the HRC's and the EEOC's websites, and both agencies

have hotlines for anonymous assistance. Employers and employees can engage attorneys if needed. In addition, the Job Accommodations Network (askjan.org), hosted by the United States Department of Labor, is a great resource for employers and employees alike in assessing possible reasonable accommodations based upon specific disabilities.

In the end, there is a strong business case for meaningfully engaging in interactive dialogues with employees concerning their accommodation requests. Non-exhaustively, doing so will help to reduce liability exposure and increase the likelihood of employee satisfaction and success in the workplace. Satisfaction in the workplace leads to less attrition, which is disruptive to businesses. When employers and employees engage in meaningful dialogues concerning reasonable accommodations, everyone wins, even in situations where the conclusion is reached that there is no reasonable accommodation that would allow the employee to perform his or her job duties, or that the accommodation will impose an undue hardship on the employer.

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