Advocates’ Guidance: Reasonable Accommodation in Employment for Workers with Epilepsy

I. Introduction

The Americans with Disabilities Act (ADA) is different from most other civil rights laws in that it imposes an affirmative obligation upon employers – to provide a reasonable accommodation to an individual with a disability who is otherwise qualified to perform the position. Reasonable accommodations are changes in the way things are usually done that enable a qualified person with a disability to (a) be

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1 This document is a chapter from a manual, under development, for attorneys and other advocates on fighting epilepsy-related employment discrimination. It was prepared by the Epilepsy Foundation’s Jeanne A. Carpenter Epilepsy Legal Defense Fund. The Fund works to protect the civil rights of people with epilepsy by promoting education, advocacy and increased access to legal services. The program provides legal guidance to individuals nationwide experiencing discrimination because of their epilepsy, as well as referrals to attorneys (who have agreed to provide some or all of their services for free) for legal representation. Individuals may request help from the Fund through its Web site – www.epilepsylegal.org (where they will also find many helpful legal resources) -- or by calling 1800-332-1000. Attorneys representing persons experiencing epilepsy-related discrimination may contact the Fund for assistance via email (legalrights@efa.org) or by calling 301-459-3700.

While this material is designed to provide accurate and current information on the subject matter involved, the Epilepsy Foundation and the authors cannot guarantee the accuracy or completeness of the information contained in this document. This material is not a legal document and does not provide legal advice or opinion. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

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2 Discrimination under the ADA includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.” See 42 U.S.C. § 12112(b)(5)(A). To establish a prima facie reasonable-accommodation claim, a plaintiff must show that: (1) he or she is a person with a disability within the meaning of the ADA; (2) an employer covered by the statute had notice of plaintiff's disability; (3) with reasonable accommodations, plaintiff could
perform the essential functions of the job at issue; and (4) the employer refused to make such accommodations. See Rodal v. Anesthesia Group, 369 F.3d 113, 118 (2d Cir.2004).

considered for a job, (b) perform the essential functions of a job, or (c) enjoy equal benefits and privileges of employment.  

Accommodations vary in form and should be individually tailored to suit the person’s unique needs. Accommodations should be considered on a case-by-case basis with attention to the person’s individual limitations or needs. There are no so-called “blanket accommodations” that would be appropriate for every individual with epilepsy or seizures. For example, an individual experiencing memory problems due to side effects of certain medications may request that specific instructions or directions be put in writing instead of given orally. For the person in the process of changing medications, the possibility of breakthrough seizures may necessitate a request for flexible hours for a period of time as an accommodation, or require a short break if a seizure occurs at work. The Job Accommodations Network has developed a very helpful fact sheet, “Accommodation Ideas for Employees with Epilepsy,” which can provide a starting point for advocates to negotiate with employers on this issue. 

3 An 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.” 29 CFR 1630.2(o) and Pt. 1630, App. § 1630.2(o). “Essential functions” are defined in the Equal Employment Opportunity Commission’s regulations implementing the ADA at 29 CFR 1630.2(n) as follows:

--(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.
The fact sheet is available at http://www.jan.wvu.edu/media/epilepsy.html (hereinafter referred to as “JAN Factsheet”).

The discussion below reviews case law, regulations and other legal authorities concerning the obligations of both the employer and the employee with respect to the accommodation process under the ADA, and suggests some advocacy strategies. (Advocates should independently review state and local employment-related disability discrimination laws, which are not addressed in this document and may provide greater protections than the ADA in some cases.) Also provided is a detailed review of issues related to specific reasonable accommodations people with epilepsy commonly seek.

II. General Requirements

The ADA requires employers to make a “reasonable accommodation” to the known physical or mental limitations of an otherwise qualified individual with a disability. The employer must accommodate the employee if an accommodation is needed, and one is available that would be effective. The only exception is if accommodating would impose an undue hardship.

An “undue hardship” means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business. The employer bears the burden of proving that making the requested accommodation would impose an undue hardship. To assist in determining whether an accommodation would be considered an “undue hardship,” the following factors should be looked at and taken into consideration:

- the nature and cost of the accommodation needed, including the availability of tax credits, tax deductions and access to outside funding

5 42 U.S.C. § 12112(b)(5).
6 42 U.S.C. § 12111(10). Chevron v. Echazabel, 536 U.S. 73 (2002). “The presumption is that the accommodation is required unless the employer can demonstrate that the accommodation would impose an undue hardship.” McAlindin v. County of San Diego, 192 F.3d 1226, 1237 (9th Cir. 1999).
7 See 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p); 29 C.F.R. pt. 1630 app. § 1630.2(p).
8 An employer cannot claim undue hardship due to the fears or prejudices of co-workers, or due to low employee morale about a proposed accommodation. 29 C.F.R. Part 1630, App. § 1630.15(d).

Section 44 of the Internal Revenue Code establishes a tax credit to help small businesses cover ADA-related eligible access expenditures. A business that for the previous tax year had either revenues of $1,000,000 or 30 or fewer full-time workers may take advantage of this credit. The credit can be used to cover a variety of expenditures related to accommodations. The amount of the tax credit is equal to 50 percent of the eligible access expenditures in a year, up to a maximum expenditure of $10,250. There is no credit for the first $250 of expenditures. The maximum tax credit, therefore, is $5,000.

Section 190 of the Internal Revenue Code allows for tax deductions related to providing accommodations of a maximum of $15,000 per year. Small businesses can use these incentives in combination with allowed credits if the expenditures incurred qualify under both Section 44 and Section 190. For example, a small business that spends $20,000 for access adaptations may take a
tax credit of $5000 (based on $10,250 of expenditures), and a deduction of $15,000. The deduction is equal to the difference between the total expenditures and the amount of the credit. For more

- the size, type and financial resources of the specific facility where the accommodation would have to be made
- the size, type and financial resources of the covered employer
- the covered employer’s type of operation(s) including the composition, structure, and functions of the work force and the geographic separateness and administrative or fiscal relationship of the facility to the covered employer and
- the impact of the accommodation upon the operation of the facility.\(^\text{10}\)

However, even if a particular accommodation would impose an undue hardship, the employer is not necessarily justified in taking adverse action. Under the law, an employer is required to make a good faith effort to identify another reasonable accommodation or to try to minimize the burden, for example, by seeking outside funding from a vocational rehabilitation agency, or by giving the employee the opportunity to provide his own accommodation.\(^\text{11}\)

An employer is not required to make an accommodation that would basically change the job requirements or the type of the services the job provides. For example, an employer with 50 employees in an office environment may be able to provide a flexible work schedule as an accommodation without much difficulty or disruption to the operation of the business. However, a customer service position that operates on a fixed schedule in order to reach its customers may not be able to offer flexibility in the work schedule without possible consequences to the operation of the business, although other accommodations could be considered. When an employer is unable to provide an accommodation, it is the employer’s responsibility to show that the accommodation that an employee requested would create too much of a problem and be considered an undue hardship.

An accommodation is reasonable if it “seems reasonable on its face, \textit{i.e.}, ordinarily or in the run of cases.”\(^\text{12}\) This means an accommodation is “reasonable” if it appears to be “feasible” or “plausible.”\(^\text{13}\) However, certain types of accommodations have been held to be unreasonable as a matter of law.\(^\text{14}\) For example, an employer is generally not required to eliminate essential job functions,\(^\text{15}\) to reassign an employee


\(^{10}\hspace{1em}42\hspace{1em}U.S.C.\hspace{1em}§\hspace{1em}12111(10)(B);\hspace{1em}29\hspace{1em}CFR\hspace{1em}1630.2(p)\)

\(^{11}\hspace{1em}See\hspace{1em}29\hspace{1em}CFR\hspace{1em}Pt.\hspace{1em}1630,\hspace{1em}App.\hspace{1em}§\hspace{1em}1630.2(p).\)

\(^{12}\hspace{1em}US\hspace{1em}Airways,\hspace{1em}Inc.\hspace{1em}v.\hspace{1em}Barnett,\hspace{1em}535\hspace{1em}U.S.\hspace{1em}391,\hspace{1em}401\hspace{1em}(2002).\)

\(^{13}\hspace{1em}Id.;\hspace{1em}Mason\hspace{1em}v.\hspace{1em}Avaya\hspace{1em}Communications,\hspace{1em}Inc.,\hspace{1em}357\hspace{1em}F.3d\hspace{1em}1114,\hspace{1em}1122\hspace{1em}(10th\hspace{1em}Cir.\hspace{1em}2004);\hspace{1em}Sprague\hspace{1em}v.\hspace{1em}United\hspace{1em}Airlines,\hspace{1em}Inc.,\hspace{1em}2002\hspace{1em}U.S.\hspace{1em}Dist.\hspace{1em}LEXIS\hspace{1em}14519,\hspace{1em}at\hspace{1em}*8\hspace{1em}(D.\hspace{1em}Mass.\hspace{1em}2004);\hspace{1em}Picinich\hspace{1em}v.\hspace{1em}UPS,\hspace{1em}321\hspace{1em}F.\hspace{1em}Supp.\hspace{1em}2d\hspace{1em}485,\hspace{1em}504\hspace{1em}(N.D.N.Y.\hspace{1em}2004).\)

\(^{14}\hspace{1em}29\hspace{1em}C.F.R.\hspace{1em}App.\hspace{1em}§§\hspace{1em}1630.2(n),\hspace{1em}1630.9\hspace{1em}(reasonable\hspace{1em}accommodations\hspace{1em}do\hspace{1em}not\hspace{1em}include\hspace{1em}lowering\hspace{1em}production\hspace{1em}standards\hspace{1em}that\hspace{1em}are\hspace{1em}applied\hspace{1em}to\hspace{1em}all\hspace{1em}employees,\hspace{1em}providing\hspace{1em}personal\hspace{1em}use\hspace{1em}items\hspace{1em}such\hspace{1em}as\hspace{1em}prosthetic\hspace{1em}limbs,\hspace{1em}wheelchairs,\hspace{1em}hearing\hspace{1em}aids,\hspace{1em}eyeglasses,\hspace{1em}etc.,\hspace{1em}or\hspace{1em}excusing\hspace{1em}a\hspace{1em}violation\hspace{1em}of\hspace{1em}a\hspace{1em}uniformly\hspace{1em}applied\hspace{1em}conduct\hspace{1em}rule\hspace{1em}that\hspace{1em}is\hspace{1em}job-related\hspace{1em}and\hspace{1em}consistent\hspace{1em}with\hspace{1em}business\hspace{1em}necessity).\)
See 42 U.S.C. § 12111(8) (“qualified individual with a disability’ means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the to a position that is to be filled through an established seniority system (unless there are special circumstances), or to provide a workplace that is completely free from stress or criticism.

The duty to provide reasonable accommodation is ongoing. Certain individuals require only one accommodation, while others may need more. Still others may need one reasonable accommodation for a period of time, and then at a later date, require another form. If an accommodation turns out to be ineffective, the employer must consider whether another accommodation would be effective.

III. Requesting a Reasonable Accommodation

A. In General

Normally, the burden is on the employee to request the accommodation, but someone else, such as a family member or caseworker, may also request a reasonable accommodation on behalf of the employee. The request may be made orally or in writing. As a practical matter, though, it is usually better to put the request in writing so that there is adequate documentation if a dispute arises later. The employee may decide when to request the accommodation, and may even do so at the job-application stage, although this is generally not required. If an applicant chooses to disclose disability-related information or a need for reasonable accommodation during the application process, an employer may not legally refuse to hire the person on the basis of that information.

Practically speaking, though, an applicant who discloses a disability (by, for example, requesting a reasonable accommodation) at the application stage may

employment position”); see also Earl v. Mervyns, Inc., 207 F.3d 1361 (11th Cir. 2000); Feliciano v. Rhode Island, 160 F.3d 780 (1st Cir. 1998) (ADA does not require an employer to accommodate disability by foregoing or reallocating essential functions).


Reasonable Accommodation Guidance, supra note 18, q. 2; The U.S. Equal Employment Opportunity Comm’n, Questions and Answers About Epilepsy In the Workplace and the Americans with Disabilities Act q. 12 (2004), http://www.eeoc.gov/facts/epilepsy.html [hereinafter “EEOC Epilepsy Q&As”].

Reasonable Accommodation Guidance, supra note 18, at q. 3.

For more information on disclosures of information related to epilepsy, see chapter

http://www.eeoc.gov/policy/docs/preemp.html [hereinafter “Preemployment Guidance”]. For a detailed discussion of issues related to disclosure of medical information, see chapter ___.

harm his chances of being hired. Proving discrimination in the selection of a new hire can be difficult since the employer can often articulate a facially legitimate reason for preferring another candidate. To avoid this result, many people with hidden disabilities wait, and only disclose when and if they need to – for example, when they are seeking an accommodation (even if it is months or years later)\(^1\) – or after they have established themselves on the job.

Still, while it is the employee’s decision when, if at all, to ask for a reasonable accommodation, if he is having difficulty performing his job because of his disability, he should request the accommodation before the employer takes disciplinary action or other adverse action. Also, although the burden is usually on the employee to request the accommodation, a number of courts have concluded that the employer had the obligation to provide an accommodation even where a direct request was not made, because the employer had notice that one may be needed.\(^2\) Courts have also excused the failure to make an explicit accommodation request in other circumstances.\(^3\)

In requesting a reasonable accommodation, the employee does not need to use any magic words, such as “disability” or “reasonable accommodation.”\(^4\) But the employee must provide the employer with enough information to show that he has

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1 See id. at 12-14, q. 14.
2 C.F.R. § 1630.2(o). See Barnett v. US Air, 228 F.3d 1105, 1111-112 (9th Cir. 2000) (“The employer has to meet the employee half-way, and if 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.”); Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1087 (“[T]he interactive process is triggered either by a request for accommodation by a disabled employee or by the employer’s recognition of the need for such an accommodation.”); Schmidt, 864 F. Supp. at 997 (rejecting employer’s defense that the employee must expressly request accommodation in order for the employer’s duty of reasonable accommodation to arise); Taylor v. Phoenixville School Dist., 184 F.3d 296, 314-315 (3rd Cir. 1999) (if the employer learns that the employee has a potential disability that may require some accommodations, the employer has a duty to initiate discussions concerning the need for an accommodation). See also Reasonable Accommodation Guidance, at 53, q.41.
3 For example, courts have held that no accommodation request is necessary if the request would be futile, e.g., Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999) (employer’s “no reassignment” policy which would have made such request futile); Bullemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir. 1996) (plaintiff “may have thought it was futile to ask, after [his supervisor] told him that he would not receive any more special treatment”), might result in discipline, e.g., Jackson v. Heidelberg L.L.C., 2005 WL 735961 (W.D.N.Y. 2005), the employer does not give the employee a chance to make a request, e.g., Barnes v. Northwest Iowa Health Center, 238 F. Supp. 2d 1053, 1087 (N.D. Iowa 2002), the job duties requiring accommodation were adopted to target an employee’s disability, Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1364 n.3 (11th Cir. 1999, the employer was already providing some accommodation, Loulseged v. Akzo Nobel Inc., 178 F.3d 731, 736 (5th Cir. 1999), or the employee’s disability interferes with the ability to make such a request. Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1089 (9th Cir. 2002). See Barnett, 228 F.3d at 1112, vacated on other grounds by US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (a request for reasonable accommodation may be in plain English and need not say “reasonable accommodation”).
an impairment and that it affects a major life activity.\textsuperscript{4} From a practical standpoint, however, the employee may wish to use words such as “disability,” “impairment,” “limiting,” “major life activity” and “accommodation”.

Once the employer is aware of the need for an accommodation, the employer must provide one at no expense to the employee unless to do so would impose an undue burden, or there is no reasonable, effective accommodation possible.

The EEOC’s Q&As on epilepsy in the workplace (see footnote 20) state that employees may want to disclose their condition in order to work with their employer to establish a plan to address seizures in the workplace. In this regard, the guidance provides as follows:

> Although many individuals who have seizures do not require any first aid or assistance, an employee who might need assistance may want to work with his employer to create a plan of action that includes such information as: who to contact in an emergency; warning signs of a possible seizure; how and when to provide assistance; when to call an ambulance, etc. The employee and employer also should discuss who in the workplace should know this information. Some individuals also might want to ask their employers for an opportunity to educate their co-workers about epilepsy to dispel any misperceptions or unsubstantiated fears they may have about the condition.

**Advocacy Tip:** If epilepsy is not affecting job performance or relationships in the workplace, it is generally inadvisable to disclose the condition -- because discrimination, unfortunately, remains a real possibility. The decision to disclose is a personal one that should be based on a weighing of the potential costs and benefits, including:

- Need for accommodation to perform the job
- Need for accommodation to avoid discipline or termination
- Need for accommodation to protect health and safety
- Whether modification may be obtained without disclosing disability
- Risk of stigma and harassment
- Risk of loss of privacy
- Potential for more successful and supportive employment experience

**B. Who has the Right to Choose the Accommodation?**

\textsuperscript{4} The employer may require documentation which describes the nature, severity and duration of the impairment, the activities it limits and a justification of why the accommodation is needed. See section II.C below.
The accommodation provided need not be the one specifically requested. Nor does the accommodation need be the best one available. Rather the accommodation only needs to be effective.

If there are two possible reasonable accommodations, and one is more expensive or burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective (i.e., it would remove a workplace barrier, and thus provide the employee with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment). Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. In either situation, the employer does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation.  

Once the employer suggests a reasonable accommodation, the employee has the option of accepting or refusing it. However, depending upon the facts, the employer may satisfy its obligations under the ADA merely by making an offer of accommodation, as long as it would be reasonable and effective. Additionally, an employee who rejects such an accommodation may no longer be considered “qualified” to perform the job. Thus, as a practical matter, the employee may wish to be proactive in the discussion of reasonable accommodations. He may do this by suggesting alternative accommodations, scheduling meetings to discuss accommodations, or contacting the Job Accommodation Network or the regional Disability Business Technical Assistance Center. It may also be helpful to be able to present employers with information about what courts have said about particular accommodations.

C. Required Documentation

If an employee requests an accommodation and the individual's epilepsy-related limitations or the need for the accommodation is not obvious, the employer may request “reasonable documentation” showing the employee’s right to accommodation. Reasonable documentation means documentation from an appropriate health care professional (e.g., a doctor’s note) that verifies the disability and the need the accommodation. The employer may submit a list of questions tailored to the question of disability, limitations, and need for accommodation.

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5 If more than one accommodation is effective, “the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations.” 29 C.F.R. App. § 1630.9; Reasonable Accommodation Guidance, supra note 16, at 15, 17-18, q. 6, 9.  
6 29 C.F.R. § 1630.9(d).  
7 Id.  
8 The Job Accommodation Network (JAN) can be contacted at 1-800-526-7234 or www.jan.wvu.edu.  
9 For a listing of these centers, see for listing, see www.dbtac.vcu.edu.  
10 See Reasonable Accommodation Guidance, supra note 16.  
11 Reasonable Accommodation Guidance, at qs. 6, 7, 8.  
12 Reasonable Accommodation Guidance, at q. 6.  
13 Id.
Absent unusual circumstances, a request for a complete release of medical records exceeds the employer’s legitimate need for information, and is not permitted. According to the EEOC, documentation under the ADA is sufficient if it (1) describes the nature, severity, and duration of the employee’s impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee’s ability to perform the activity or activities; and (2) substantiates why the requested accommodation is needed. Documentation may be insufficient if it does not verify the existence of a “disability” (e.g., does not specify functional limitations), it does not explain the need for accommodation, the health care professional lacks relevant expertise, or circumstances indicate fraud or lack of credibility. If an employee provides insufficient information to support the request for reasonable accommodation, the employer may request that the employee be examined by a health professional of the employer’s choice. Prior to making this request, the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner. Any examination must be limited to verifying a disability, the need for reasonable accommodation, and related limitations.

**Advocacy Tip:**
- Ensure that requested accommodations are feasible for the employer to implement
- Submit medical documentation which supports a finding of coverage under the ADA, and which describes any limitations in the ability to perform the job and needed accommodations
- Document all communications with the employer (e.g., send follow up emails)

**IV. The Interactive Process and the Good Faith Requirement**

Though ultimately it is the employer’s decision as to which accommodation to offer, under the ADA the employer typically must engage in a good faith effort and work in cooperation with the employee to identify a reasonable accommodation. “Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the

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13 *Id.*
14 Preemployment Guidance, *supra* note 23, at q.11.
15 Reasonable Accommodation Guidance, at q. 7.
16 *Id.*
17 *Id.;* Preemployment, *supra* note 12, at q.11.
18 U.S.C. § 12112(b)(5)(A) (employer must make reasonable accommodations to an employee’s known disability); 29 C.F.R. § 1630. App., sec. 1630.9. *See also Beck v. Univ. of Wis.*, 75 F.3d 1130 (7th Cir. 1996).
employee to identify and implement appropriate reasonable accommodations."

The process is intended to be informal and flexible so as to respond to the unique needs and abilities of individual employees. One accommodation may not effectively accommodate all employees with the same or similar disabilities.

The interactive process should include the following steps by the employer:

- analyze the particular job involved and determine its purpose and essential functions
- consult the individual with epilepsy to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodations
- consult the individual to be accommodated, identifying potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position and
- consider the preference of the individual to be accommodated and select the accommodation that is most appropriate for both the employee and the employer.

Additionally, in some instances, it may be necessary for the employer to consult qualified experts to gather the information needed to identify an appropriate reasonable accommodation, including the employee’s doctor, rehabilitation specialists, and others with expert knowledge about dealing with epilepsy.

The interactive process is a two-way street, and requires both parties to communicate with each other, exchange necessary information, and act in good faith. The employer’s participation is critical, as the employee usually possesses incomplete, and often inaccurate, information about the options available, including

F.3d 775, 783-784 (6th Cir. 1998); Criado v. IBM Corp., 145 F.3d 437, 444 (1st Cir. 1998); Mengine v. Runyon, 114 F.3d 415, 419 (3d Cir. 1997); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 317 (3d Cir. 1999); Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 693 (7th Cir. 1998); Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285-86 (7th Cir. 1996); Feliberty v. Kember Corp., 98 F.3d 274, 280 (7th Cir. 1996); Taylor v. Principal Fin. Group, Inc., 93 F.3d 375, 165 (5th Cir. 1996); Beck v.

19 Humphrey v. Memorial Hosps. Ass’n., 239 F.3d 1128, 1137 (9th Cir. 2001); see also Barnett, 228 F.3d at 1114 ("[T]he interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA and . . . this obligation is triggered by an employee . . . giving notice of the [his] disability and the desire for accommodation."); Hansen v. Henderson, 233 F.3d 521, 523 (7th Cir. 2000); Barnett, 228 F.3d at 1111; Fjellestad v. Pizza Hut of Am., 188 F.3d 944, 952 (8th Cir.
20 ); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1172 (10th Cir. 1999); Loulaseged v. Akzo Nobel Inc., 178 F.3d 731, 735-36 (5th Cir. 1999); Gehrs v. Northeast Ohio Alzheimer’s Research Ctr., 155
An employer that fails to engage in the good faith, interactive process violates the ADA when a reasonable accommodation would have been possible but for the employer’s failure.\textsuperscript{21} Courts have also held that an employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process.\textsuperscript{22}

Additionally, the employer may have to consider possible accommodations beyond those specifically suggested by the employee.\textsuperscript{23}\textsuperscript{24} Similarly, employees who fail to participate fully in the interactive process, or who unreasonably reject proposed effective accommodations, may lose their rights under the ADA.\textsuperscript{52}

The reasonable accommodation also must be provided within a reasonable time from the date of request. A delay in granting a request for a reasonable accommodation may itself violate the ADA.\textsuperscript{25}\textsuperscript{26} A delay in providing an

\textsuperscript{21} Humphrey v. Memorial Hosps. Ass’n, 239 F.3d 1128, 1137-38 (9th Cir. 2001) (“Given [the employer’s] failure to engage in the interactive process, liability is appropriate if a reasonable accommodation without undue hardship to the employer would otherwise have been possible.”); Barnett, 228 F.3d at 1116 (“We hold that employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible.”).

\textsuperscript{22} Barnett, 228 F.3d at 1116; Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011, 1021 (8th Cir. 2000); Fjellestad v. Pizza Hut, 188 F.3d 944, 952 (8th Cir. 1999); Taylor, 184 F.3d at 318-319; Criado v. IBM Corp., 145 F.3d 437, 444 (1st Cir. 1998).

\textsuperscript{23} See, Humphrey, 239 F.3d at 1138; Barnett, 228 F.3d at 1113 (“To put the entire burden for finding a reasonable accommodation on the disabled employee or, effectively, to exempt the employer from the process of identifying reasonable accommodations, conflicts with the goals of the ADA.”).\textsuperscript{52} 29 C.F.R. pt. 1630 app. § 1630.9 (1997); Loulseged v. Akzo Nobel, Inc., 178 F.3d 731, 740 (5th Cir. 1999); Stewart v. Happy Herman’s Cheshire Bridge, Inc., 117 F.3d 1278, 1286-87 (11th Cir. 1999).

\textsuperscript{24} Beck v. Univ. of Wis., 75 F.3d 1130, 1136 (7th Cir. 1996).

\textsuperscript{25} Battle v. United Parcel Service, Inc., 438 F.3d 856, 863-884 (8th Cir. 2006); Buttemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir. 1991); Picinich v. United Parcel Service, 321 F. Supp. 2d 485, 514 (N.D.N.Y. 2004); and Branson v. West, 1999 WL 311717, at *15 (N.D. Ill. 1999).

\textsuperscript{26} Reasonable Accommodation Guidance, supra note 18, at q. Question 10.

See also, Krocka v. Riegler, 958 F.Supp. 1333, 1342 (N.D.Ill. 1997) (a delay in the interactive process is not acting in good faith).
accommodation becomes unlawful when it amounts to a denial of accommodation. In a claim of delay, courts will consider the length of the delay, the reasons for the delay, whether the employer has offered any alternative accommodations while evaluating a particular request, and whether the employer has acted in good faith.

V. Common Reasonable Accommodations for People with Epilepsy

The type of accommodation required for individuals with epilepsy will vary from person to person, depending upon their specific job and their medical condition. Some common accommodations include:

- modified or part-time work schedule
- modifying workplace policies
- job restructuring
- adjusting supervisory methods
- modified or additional training
- telecommuting
- environmental changes
- reassignment or transfer to a vacant position and
- leave of absence

These accommodations and related-legal issues are explored in detail below.

A. Modified or Part-Time Work Schedule

In some situations, a modified or part-time work schedule may be an appropriate accommodation. For example, a person with epilepsy who suffers from morning drowsiness as a result of her anticonvulsant medication may seek a later arrival time. A reduced work schedule or a part-time schedule may be appropriate where the long hours the employee works may trigger seizures.

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27 See generally, Taylor, 184 F.3d at 312 (party that delays the interactive process of finding a mutually acceptable accommodation is not acting in good faith and may violate the ADA); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1173 (10th Cir. 1999) (party that obstructs or delays the interactive process is not acting in good faith); Krocka v. Riegler, 958 F. Supp. 1333, 1342 (N.D. Ill. 1997). (eight-month delay in implementing reasonable accommodation was not reasonable delay as matter of law).


30 Reasonable Accommodation Guidance, supra note 18, at 32-34, q. 22.

31 See e.g., Franklin v. Consolidated Edison of NY, Inc., 16 NDLR § 181 (S.D.N.Y. 1999)(the court upheld as reasonable accommodation, a fixed, late arrival time for a lawyer with epilepsy, who suffered from morning drowsiness as a result of her anticonvulsant medication); Holly v. Clairson Industries, L.L.C., 492 F.3d 1247 (11th Cir. 2007) (court found that employer must modify tardiness policy for
Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may require modifying leave or attendance procedures or policies. For example, barring undue hardship, it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability-related medical problems. However, a scheduling accommodation is not reasonable if it, in essence, requires an employer to eliminate an essential function of a job.

Some employers have successfully argued that they are not required to provide an employee with a part-time schedule as a reasonable accommodation, because this is comparable to eliminating an essential job function or creating a new job. Some courts have found that the ADA does not require accommodations like this that would result in other employees having to work harder or longer hours. Other authorities have supported a part-time schedule as an accommodation, barring undue hardship. If modifying an employee’s schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested.

Here are some examples, set out in the EEOC’s Q&As, of modifications to scheduling that would be required as an accommodation:

- adjustments to work schedules

**Example:** A library schedules employees to work eight-hour shifts starting as early as 8:00 a.m. and as late as 1:00 p.m. A librarian who has epilepsy and experiences nocturnal seizures, which leave her tired in the early morning, requests that her shifts start in the late morning or early afternoon. The employer determines that because there are a sufficient number of staff available between 8:00 a.m. and 10:00 a.m. to respond to requests from the public for assistance, the accommodation can be granted without undue hardship.

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32 See, Rodal v. Anesthesia Group of Onondaga, 369 F.3d 113, 120 (2d Cir. 2004); see also, Lamb v. Qualex, Inc., 33 Fed. Appx. 49, 56-57(4th Cir. 2002) (“[A] plaintiff who can work only on a part-time basis cannot be a ‘qualified individual with a disability’ if the ability to work full-time is essential to his job.”); Devito v. Chicago Park District, 270 F.3 532, 534 (7th Cir. 2001) (stating that the ability to work full-time is an essential job function of a full-time job).

33 See, e.g., Milton v. Scrivner, Inc., 53 F.3d 1118, 1124 (10th Cir. 1995).


35 Reasonable Accommodation Guidance, at 32-34, q.22.

36 See note 20, supra, at q. 10
• a consistent start time or a schedule change (e.g., from the night shift to the
day shift)

**Example:** A home nurse rotated from working the 7:00 am to 3:00 p.m. shift to
the midnight to 8:00 a.m. shift. His doctor wrote a note to the employment agency
indicating that interferences in the nurse’s sleep were making it difficult for him to
get enough rest and, as a result, he was beginning to have more frequent
seizures. If eliminating the nurse’s midnight rotation would not cause an undue
hardship, this would be a reasonable accommodation.

An employee working a part-time schedule as a reasonable accommodation is
entitled only to the benefits, including health insurance, that other part-time
employees receive. Thus, if non-disabled part-time workers are not provided with
health insurance, then the employer does not have to provide such coverage to an
employee with a disability who is given a permanent part-time schedule as a
reasonable accommodation.\(^{37}\)

Provisions in collective bargaining agreements regulating schedules and hours may
pose a problem when requesting a modified work schedule. For example, in one
case, a highway toll collector experienced a back injury and, as a result, could not
work more than eight hours at a time. However, under the terms of her collective
bargaining agreement, she was required to work forced overtime on occasion
because of her lack of seniority. The employee asked to be relieved from the forced
overtime requirement as a reasonable accommodation for her disability. Refusing to
grant the accommodation, her employer argued that granting the accommodation
would violate the terms of the collective bargaining agreement by requiring a more
senior employee to work forced overtime. The appeals court agreed with the
employer and ruled that relief from forced overtime was not a reasonable
accommodation in this case.\(^{38,39}\) Note that the outcome might have been different if
the employee had had enough seniority to avoid overtime under the terms of the
union contract, or if the union had agreed to the accommodation.

**B. Modifying Workplace Policies**

Sometimes neutral workplace policies, such as no animals allowed, will prevent a
person with epilepsy from being able to perform the job. In such situations, providing
a reasonable accommodation may require modifying the workplace policy to allow,
for example, a service animal that can assist a person having a seizure to
accompany the employee.\(^{40}\)

\(^{37}\) Reasonable Accommodation Guidance, at 34-35, q. 23; Waggoner, 169 F.3d at 485.

\(^{38}\) Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997); see also, Amos v. Wheelabrator Coal Svcs., Inc., 47 F.

\(^{39}\).

\(^{40}\) See 42 U.S.C. § 12111(9)(B); 29 CFR § 1630.2 (o) (1) (“The term reasonable accommodation
means . . . [m]odifications or adjustments to the work environment, or to the manner or circumstances
under which the position held or desired is customarily performed, that enable a qualified individual
with a disability to perform the essential functions of that position; or
[m]odifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal
benefits and privileges of employment as are enjoyed by its other similarly situated employees without
Other neutral policies that may need to be modified include those relating to attendance and the taking of notes during client meets. Such policies may be modified, for example, to allow time off, without penalty, when seizures occur to accommodate the disability-related needs of the employee; or, where the individual has difficulty concentrating, to allow him to take detailed notes during client presentations even though company policy discourages employees from taking extensive notes during such sessions. Or, a retail employer that bars cashiers from drinking beverages at checkout stations may need to modify this policy to accommodate an employee who needs to take medication at a regularly scheduled time.

C. Rules of Conduct Policies

A considerable number of courts have held that behavior caused by an underlying disability should be considered to be part of the disability, and, as a result, employers who take adverse action based on an employee’s disability-related misconduct are deemed to have taken that action on the basis of disability.

disabilities."

See also, US Airways, Inc. v. Barnett, 535 U.S. 391, 397-98 (2002); PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (modification of a rule concerning the use of carts in a golf tournament was a reasonable accommodation under Title III of the ADA, which prohibits discrimination against people with disabilities in public accommodations). See also, EEOC Epilepsy Q&As, supra note 20, at q. 10; Reasonable Accommodation Guidance at 35, q. 24.

41 Nielsen v. Moroni Feed Co., 162 F.3d 604, 608 (10th Cir. 1998) (“[T]he ADA’s general antidiscrimination provision . . . does not contemplate a stark dichotomy between disability and disability-caused misconduct, but rather protects both.” (internal citations and quotation marks omitted)); see also, Ward v. Massachusetts Health Research Inst., Inc., 209 F.3d 29, 38 (1st Cir. 2000) (finding that an employee’s tardiness could be considered to be a direct result of his disability, and as a result, it was improper to decide on summary judgment that he was not terminated on the basis of his disability); Teahan v. Metro-North C. R. Co., 951 F.2d 511, 515 (2d Cir. 1991) (In a case decided under the Rehabilitation Act, the court stated that “an employee who has excessive unexcused absences from work as the result of [his disability] is terminated ‘solely by reason of’ his disability when his employer relies on the absenteeism to terminate his employment.”); Salley v. Circuit City Stores, 160 F.3d 977, 981 (3d Cir. 1998) (“The application of a facially neutral policy to a disabled employee may be an unlawful ground for termination if the employee's violation stems from his or her disability . . . .”); Chandler v. Specialty Tires of Am. (Tenn.), Inc., 2005 WL 1432789, at *8 (6th Cir. 2005) (citation limited to specific circumstances by Sixth Circuit Rule 28(g)) (stating that it is impermissible for an employer to terminate an employee for “disability-related conduct that is not related to work performance and does not violate some work-place or societal rule”); Walsted v. Woodbury County, 113 F. Supp. 2d 1318, 1342 (D. Iowa 2000) (A women with a developmental disability who was terminated from her job after she decided to “play a trick” on a co-worker by hiding the co-worker’s wallet and who “decorated” paper and boxes with valuable parking validation stickers raised a triable issue of fact that she was improperly terminated because, except in the context of drug or alcohol related misconduct, “the ADA protects both the disability and the conduct caused by the disability.”); Humphrey v. Memorial Hosps. Ass’n, 239 F.3d 1128, 1139-1140 (9th Cir. 2001) (“For purposes of the ADA . . . conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination.”); Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1086 (10th Cir. 1997) (“[T]he language of the ADA, its statutory structure, and the pertinent case law, suggest that an employer should normally consider whether a mentally disabled employee’s purported misconduct could be remedied through a reasonable accommodation. If so, then the employer should attempt the accommodation. If not, the employer may discipline the disabled
See Reasonable Accommodation Guidance, supra note 18, at 35-36, q. 24. However, some courts have stated that is not a reasonable accommodation to permit employees to have sporadic and unpredictable attendance. Waggoner, 169 F.3d at 484-85 (“[i]n most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability.”); Jackson v. Veterans Admin., 22 F.3d 277, 279-80 (11th Cir. 1994), cert. denied, 513 U.S. 1052 (1994) (employee with history of sporadic unpredictable absences is not otherwise qualified). See the U.S. Equal Employment Opportunity Comm’n, Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities 25, q. 25 (1997), available at http://www.eeoc.gov/policy/docs/psych.html [hereinafter “Psychiatric Disability Guidance”].

Nevertheless, an employer may “hold a disabled employee to . . . the same standards of conduct as a non-disabled employee” if “such standards are job-related and consistent with business necessity.”

However, some courts disagree, finding that the ADA is not violated when an employer takes adverse action against an individual based upon his or her misconduct, even if the misconduct is related to a disability.” As a result, in the view of these courts, employers are permitted to take adverse action on the basis of disability-related misconduct without providing a reasonable accommodation or discriminating against an employee “solely by reason” of the underlying disability. Courts may also find that an individual is not “otherwise qualified” due to his misconduct and, as a result, is not entitled to a reasonable accommodation.

employee only if one of the affirmative defenses articulated in 42 U.S.C. §§ 12113, 12114 (1994) applies.”).

See, e.g., Den Hartog, 129 F.3d at 1086; Walsted, 113 F. Supp. 2d at 1342, n.7 (“A disabled employee may be held to any performance criteria that are job related and consistent with business necessity, so long as the disabled employee is given the opportunity to meet such performance criteria by reasonable accommodation.”).

Jones v. American Postal Workers Union, 192 F.3d 417, 429 (4th Cir. 1999). See also, e.g., Johnson v. Maynard, 2003 WL 548754, *5 (S.D.N.Y. 2003) (Finding that an employee experiencing schizophrenia and bipolar disorder who was terminated after making threatening statements was not protected by the ADA because “[w]hen an employer fires an employee because of that employee’s unacceptable behavior, the fact that that behavior was precipitated by mental illness does not present an issue under the ADA.”); Fullman v. Henderson, 146 F. Supp. 2d 688, 699 (E.D. Pa. 2001), aff’d, 29 Fed. Appx. 100 (3d Cir. 2002) (In a case where an employee was terminated for filing a false workers compensation claim, the court stated that “[a]lthough the ADA prevents an employer from discharging

42 See, e.g., Maes v. Henderson, 33 F. Supp. 2d 1281, 1289 (D. Nev. 1999) (“As a result of . . . misconduct [including bringing up sexual jokes in the workplace after having been asked to stop, bringing alcohol to work as a gift for certain employees, contacting employees at home, commenting on a female employee’s weight and attractiveness and yelling or screaming at various employees] . . . Plaintiff cannot be termed an ‘otherwise qualified’ employee. Therefore, once the Plaintiff had engaged in misconduct, the Postal Service did not have a duty to accommodate whatever limitations Plaintiff might have experienced as a result of his mental disability”); Wilber v. Brady, 780 F. Supp. 837, 840 (D.D.C. 1992) (Deciding under the Rehabilitation Act that “[a] disabled individual cannot be ‘otherwise qualified’ for a position if he commits misconduct which would disqualify an individual who did not fall under the protection of the statute”); Ray v. Kroger Co., 264 F. Supp. 2d 1221 (11th Cir. 2002) (employee’s inability to control his urges to shout out epithets rendered him unqualified to work in a job with customer contact); Palmer v. Circuit Court of Cook County, 117 F.3d 351, 359 (7th Cir. 1997) (The “[ADA] protects only ‘qualified’ employees, that is, employees qualified to do the job for which they were hired; and threatening other employees disqualifies one.”).
an employee based on his disability, it does not prevent an employer from discharging an employee for misconduct, even if that misconduct is related to his disability.

In a case involving a person with epilepsy, the court opined that while specific symptoms of a general disability should be considered part of the disability, “misconduct—even misconduct related to a disability—is not itself a disability, and an employer is free to fire an employee on that basis.”

Martinson v. Kinney Shoe Corp., 104 F.3d 683, 686 n. 3 (4th Cir. 1997) (In a case involving a person with epilepsy, the court opined that while specific symptoms of a general disability should be considered part of the disability, “misconduct—even misconduct related to a disability—is not itself a disability, and an employer is free to fire an employee on that basis.”)

Hamilton v. Southwestern Bell Tel. Co., 136 F.3d 1047, 1052 (5th Cir. 1997) (An employee with post-traumatic stress disorder who was terminated for “violent or emotional outbursts at work” was fired for his misconduct rather than his disability, and “[could] not hide behind the ADA and avoid accountability for his actions.”).

Other courts have rejected an employer’s assertion of workplace misconduct as a pretext for terminating an employee, including in at least one safety-sensitive case involving a worker with epilepsy. In this case, Dark v. Curry County Road Dep’t, Mr. Dark lost control of a construction vehicle he was driving for his employer, a county road department. A co-worker who was a passenger in the vehicle gained control and stopped the vehicle, without incident or injury. Dark had experienced an aura earlier in the day, which Mr. Dark admitted generally indicates that he will experience a seizure an hour or more later, but continued to work nevertheless. The employer terminated Dark, claiming that the reason was misconduct in that he drove after experiencing an aura and thus demonstrated a disregard for safety. The employer also claimed that, in any event, Dark posed a direct threat and was otherwise unqualified for the position.

The trial court granted summary judgment and the Ninth Circuit reversed, finding that there were material issues of fact warranting a trial. The court rejected the employer’s claim that its reason for the termination was misconduct rather than disability. This was suspect, the court found, because the plaintiff was not immediately fired after the incident and instead was subjected to a medical examination to determine his fitness for the position. The employer, the court noted, would not have needed a doctor’s opinion if its true motive was based on the misconduct of Mr. Dark. The court also found relevant evidence of six separate accidents caused by road workers who were not disciplined.

The position of the EEOC is that workplace conduct policies may be modified as a reasonable accommodation, but if a conduct rule is job-related and consistent with business necessity, an employer may discipline an employee for a disability-caused violation of that rule, provided other employees are held to the same standard. In its Conduct Standards Guidance, EEOC notes that the determination of job relatedness relies on several factors, including “the manifestation or symptom of a disability affecting an employee’s conduct, the frequency of occurrences, the nature of the job, the specific conduct at issue, and the working environment.” The Guidance notes that these “factors may be especially critical when the violation concerns ‘disruptive’

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43 F.3d 1078 (9th Cir. 2006), cert denied, 127 S.Ct. 1252 (2007).
45 Id.
behavior which, unlike prohibitions on stealing or violence, is more ambiguous concerning exactly what type of conduct is viewed as unacceptable."

Examples are provided in the Guidance on how these factors might apply in particular circumstances. In one example, a bank teller with Tourette Syndrome (a neurological disorder characterized by involuntary, rapid, sudden movements or vocalizations that occur repeatedly) loudly shouts and utters nonsensical phrases, which distracts other tellers, causing them to make errors, and interferes with service to customers. The EEOC concludes that termination of such an employee would be permissible as it would be job-related and consistent with business necessity to require bank tellers to conduct themselves in an appropriate manner when serving customers and to refrain from conduct which interferes with coworkers' job performance.

The guidance provides contrasting examples, where disability-related purportedly disruptive conduct would not justify an adverse decision. One example relates to the bank teller with Tourette Syndrome -- in this instance, he only manifests the condition by infrequently clearing his throat and blinking his eyes. In this case, the behaviors are not disruptive to other tellers or to customer service. Accordingly, the guidance concludes, the employer could not show that firing the teller would be jobrelated and consistent with business necessity. A second example involves an employee with a psychiatric disability that causes him to talk to himself in a low voice. The position does not involve customer contact or working in close proximity to others and his vocalizations do not interfere with his or his coworkers' job performance. In this case, even if co-workers were uncomfortable being around this employee, any adverse action against him on this basis would not be justified by jobrelatedness and business necessity.

A similar analysis should apply to employees who experience seizures in the workplace. For instance, complex partial seizures, a common seizure type, may cause an individual to lose awareness and engage in repetitive involuntary behaviors. These actions may include some of the following: chewing movements, picking at or fumbling with clothing, mumbling, performing simple, unorganized movements over and over again, wandering and yelling. These behaviors may be viewed as disruptive, but frequently will not actually interfere with job performance. Such seizures typically last only a very short period, and persons experiencing them usually will regain awareness quickly and return to normal functioning. Depending on the specific job duties and required interaction with co-workers and customers and other third parties, there may be little or no disruption.

According to EEOC guidance, an employer must make a reasonable accommodation to enable an otherwise qualified individual with a disability to meet the conduct standard in the future, assuming prior misconduct did not warrant termination. For

\[46\text{ Id. Here the guidance cites to } \text{Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1087 (10th Cir. 1997)(permitting "employers carte blanche to terminate employees with mental disabilities on the basis of any abnormal behavior would largely nullify the ADA's protection of the mentally disabled").}\n
\[47\text{ Conduct Standards Guidance, at q. 10; Reasonable Accommodation Guidance, supra note 18, at q. 36.}\]
instance, if a librarian’s epilepsy causes him to have seizures which result in behaviors that disrupt patrons in violation of a workplace rule, his employer may discipline him for this violation. However, if the employee then discloses his disability, his employer must grant him a reasonable accommodation—such as a leave of absence to adjust medication to facilitate seizure control—to enable him to meet this standard in the future, provided that the accommodation does not constitute an undue hardship.\textsuperscript{48} It is important to remember that because modifications are prospective, and not retrospective, an employer is not required to excuse past disability-caused misconduct.\textsuperscript{49} Therefore, it is best to request a reasonable accommodation before conduct problems occur, or at least before the misconduct results in a decision to fire the employee.

When a rule is \textit{not} job-related or consistent with business necessity, modification of the rule may be a reasonable accommodation. For instance, a company rule that requires employees to have a neat appearance at all times may be modified for a warehouse employee whose appearance deteriorates due to his disability. Such a rule is not job related and consistent with business necessity because the employee does not interact with customers or the public.\textsuperscript{50}\textsuperscript{51}

D. Job Restructuring

1. \textit{General Considerations}

Depending upon the type of job and the individual’s medical condition, a person with epilepsy may require job restructuring as a reasonable accommodation. The EEOC has recognized that job restructuring may be an appropriate reasonable accommodation in some situations,\textsuperscript{52} and may include reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability.

Job restructuring may also include altering when and/or how a function is performed.\textsuperscript{83} For example, when an applicant with epilepsy who may have cognitive or fatigue problems related to antiseizure medication needs to take a qualifying exam, the exam format can be restructured to allow the individual to take the exam in shorter segments with intervals to rest in between each segment.

Where the employer switches the marginal functions of two or more employees in order to restructure the job as a reasonable accommodation, the employer can require the employee with disabilities to perform a different marginal function in its place.\textsuperscript{84} Technical assistance in restructuring or modifying jobs for individuals with

\textsuperscript{48} See Psychiatric Disability Guidance, \textit{supra} note 68, at q. 31.
\textsuperscript{49} Conduct Standards Guidance, at q. 10; Reasonable Accommodation Guidance, at q. 36.
\textsuperscript{50} Psychiatric Disability Guidance, at 29-30, q. 30.
\textsuperscript{51} C.F.R. pt. 1630, App. 1630.2(o), 1630.9; Reasonable Accommodation Guidance, at 25; Technical Assistance Manual, \textit{supra} note 61, at § 3.19(2).
\textsuperscript{52} C.F.R. pt. 1630, App. 1630.2(o), 1630.9; \textit{Benson v. Northwest Airlines, Inc.}, 62 F.3d 1108 (8th Cir. 1995); \textit{Kiphart v. Saturn Corp.}, 251 F.3d 573 (6th Cir. 2001) \textsuperscript{84} Reasonable Accommodation Guidance, at 25, q. 16.
specific limitation can be obtained from state vocational rehabilitation agencies and other organizations with expertise in job analysis and job restructuring for people with various disabilities.

However, an employer is not required to reallocate the essential functions of a job as a reasonable accommodation, or to create a new job encompassing only those tasks which an employee with epilepsy or another disability is able to perform. These principles create tension in the context of employer requirements that an employee rotate through several core job functions, one of which the employee cannot perform.

If the employer does create a temporary light-duty job to accommodate an employee until the employee can return to his regular position, the employer is not normally required to transform the temporary light-duty assignment into a permanent position. However, if a vacant light-duty job already exists, the employer may be required to reassign the employee to that position. Likewise, if the employer has created light-duty jobs for others, it may have to provide equal treatment here.

2. Reallocating Driving Duties

A frequent barrier to employment for persons with epilepsy is the inability to qualify for a personal or commercial driver’s license. Oftentimes, driving is not an

53 See, Hoskins v. Oakland County Sheriff’s Dept., 227 F.3d 719 (6th Cir. 2000); Sutton v. Lader, 185 F.3d 1203 (11th Cir. 1999).
54 See, Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1117 (9th Cir. 2000), rev’d on other grounds, U.S. Airways v. Barnett, 535 U.S. 391 (2002) (holding that there is a triable issue of fact as to whether modifying the cargo position to require only desk work would have required eliminating any essential functions of the position); Kiphart v. Saturn Corp., 251 F.3d 573, 585-586 (6th Cir. 2001) (holding that there was sufficient evidence to support jury’s finding that the employer failed to reasonably accommodate by insisting on the fully rotational requirement, a non-essential job function of an automobile assembly worker); Benson, 62 F.3d at 1112 (holding there is a material factual issue on what functions of the mechanic position are essential). But see, Anderson v. Coors Brewing Co., 181 F.3d 1171, 1176 (10th Cir. 1999) (holding multiple job classification to be essential function of brewery production position where rotation to different parts of operation was required to respond to surges in demand for particular abilities); Laurin v. Providence Hosp., 150 F.3d 52, 59 (1st Cir.1998) (finding shift rotation essential function for position as nurse in twenty-four hour hospital facility); Malabarba v. Chicago Tribune Co., 149 F.3d 690, 700-01 (7th Cir.1998) (holding that the flexibility needed to allow newspaper to strictly adhere to its production and distribution schedules justified employer’s requirement that all packaging employees be trained in multiple areas).
55 Malabarba v. Chicago Tribune Co., 149 F.3d 690 (7th Cir. 1998).
56 Reasonable Accommodation Guidance, supra note 18, at q. 27-28.
57 Every state regulates the drivers’ license eligibility of persons with certain medical conditions, including epilepsy. For a non-commercial licenses, the most common requirements for people with epilepsy are that they be seizure-free for a specified period of time and submit a physician’s evaluation regarding their ability to drive safely. Another common requirement is the periodic submission of medical reports, in some states for a specified period of time, and in others for as long as the person remains licensed. Required seizure-free periods under state law range from three months to one year. A number of states do not impose an across-the-board seizure-free period, but rather review individual medical factors in determining licensing eligibility. Most states that do
essential function of a position, but rather, a means to accomplish an essential function, and thus, the duty can be waived or reallocated to other employees. One case in point is *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.* In this case, the plaintiff requested to be assigned to a store close to her home, where one of the responsibilities was depositing store receipts in the bank). Because the plaintiff’s epilepsy prohibited her from holding a driver’s license, the defendant instead assigned her to a distant store where receipts were picked up by an armored vehicle. The plaintiff argued that there were ways that her disability could have been accommodated at closer stores not serviced by the armored cars. The court found that the essential function at issue was depositing the receipts, not driving, and that the defendant violated the ADA by failing to provide other accommodations that would have allowed the plaintiff to hold the job at closer stores.

Moreover, if it can be shown that driving duties have been excused for other employees in similar positions, that would undermine an employer’s argument that the duty is an essential function.

maintain a specific seizure-free period allow exceptions under which a license may be issued after a shorter period. For example, in some states, a license will be granted where the individual had a breakthrough seizure due to physician-directed medication change.

Further, the Department of Transportation has issued regulations which greatly restrict persons with epilepsy from driving commercial motor vehicles (CMVs) interstate; these vehicles include trucks weighing more than 10,000 pounds. Specifically, an individual may not be medically certified to drive CMVs interstate if he has a diagnosis of epilepsy or who uses antiseizure medication, regardless of the present ability to control seizures. 49 CFR 391.41(b)(8). Guidance issued for the current rules

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59 F.3d 208 (2d Cir. 2001).

60 Plaintiff listed, among other options: having another manager pick her up on his/her way to the bank, allowing her to hire a service to drive her, adopting a policy whereby the company would hire an individual to drive employees with disabilities when necessary, and using public transportation. *Lovejoy-Wilson*, 263 F.3d at 213.

61 *Id.* at 217 (“NOCO neither asserts nor presents evidence to support an argument that the only way to satisfy the need for an assistant manager to deposit cash in the bank is for that assistant manager to drive herself to the bank. The plaintiff suggested several ‘plausible accommodations’ to enable her to be promoted at [the store in question], including having the manager of a nearby store drive her or hiring a car service or a driver at her own expense”). *See also Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894 (8th Cir. 2006) (Employer improperly failed to consider request of employee with deteriorating vision to transfer to job not requiring driving, finding that although requested job as merchandiser necessitated transport between job sites by car, employee could have arranged for his own transportation).

62 *See Kellogg v. Energy Safety Services Inc.*, 544 F.3d 1121, 1128 (10th Cir. 2008) (the court denying summary judgment on employer’s claim that driving is an essential function, concluded that the jury could find that driving was not an essential function of the job, because there was testimony that at least twice in the past, the employer’s office had allowed other employees in plaintiff’s position who had lost their driving privileges after driving-under-the-influence infractions to work in the shop until their licenses were restored).
states, however, that CMV drivers with a history of epilepsy may be certified to drive if they have been off antiseizure medication and have been seizure-free for 10 years or more. Many states have adopted the federal standard for purposes of certifying intrastate drivers, while other states have adopted somewhat less stringent standards. For a detailed overview of state driver licensing laws, see the Foundation’s Web site at http://epilepsyfoundation.org/answerplace/Legal/transit/drivelaw.

In an advisory letter, the EEOC has provided guidance on an employer’s obligation to provide reasonable accommodations in connection with driving. The letter was provided in response to an employer’s request that EEOC review its draft driving accommodation policy. The policy provided in part that, in cases where driving is a non-essential function, the employer will provide reasonable accommodation to a person who does not have a driver’s license because of a disability, and may reassign the driving duties to others. The EEOC letter notes, for example, that in determining whether driving is an essential function, the employer should evaluate each position, and not just each job classification, taking into account the factors set forth in the regulations implementing Title I of the ADA concerning essential functions (29 C.F.R. §1630.2(n)). It is also important to determine whether driving is the objective to be accomplished or an incidental means for accomplishing the true objective. If driving is a non-essential function because it is only the incidental means to accomplishing a certain task, an employee with a disability might still be able to perform the main task by using alternative forms of transportation. The letter also observes that if a team of employees typically drives to a work site, it may be reasonable to exempt one member of the team from the driving duties and permit him to be driven by other employees.

E. Adjusting Supervisory Methods

For some people with epilepsy, supervisors may need to modify their methods of supervision as a reasonable accommodation. For example, a person with epilepsy who has memory problems due to antiseizure medication may request that the supervisor modify the way that he communicates assignments, instructions or training—e.g., by using face-to-face communications or emails—so that their interactions are effective. Or, in the case of an employee who has a supervisor with the habit of calling last-minute staff meetings that interfere with previously scheduled medical appointments, it might be a reasonable accommodation for the employee to request that the supervisor provide 48-hours notice of critical meetings whenever possible.

Adjusting supervisory methods may also require that training be modified, such as by giving it in shorter segments, if an individual’s problem solving abilities are affected by medications, for example.


64 Reasonable Accommodation Guidance, supra note 18, at 46-47, q. 33.

65 Psychiatric Disability Guidance, supra note 68, at 26, q. 26.

66 Reasonable Accommodation Guidance at 47, q. 33.
Adjusting the level of supervision or structure may also enable the employee to perform the essential job functions. For example, an otherwise qualified individual with a disability who experiences problems in concentration may request more detailed day-to-day guidance, feedback, or structure in order to perform his job.

It is common for employees with disabilities, including epilepsy, to experience problems at work when a positive and supportive supervisor is replaced by an unsupportive or negative supervisor. However, according to the EEOC, an employer is generally not required to provide an employee with a new supervisor as a reasonable accommodation, unless the supervisor's conduct rises to the level of disability-based harassment.

**Advocacy Tip:** If an employee cannot change supervisors, there are other measures that can be taken to try and resolve tension. One example is scheduling a meeting to formally discuss the employee’s request for accommodation, followed by a letter or email confirming the details of the discussion. The employee may also ask a representative of the local Epilepsy Foundation affiliate to call the supervisor to explain epilepsy and to discuss possible accommodations. The employee may also consider seeking a transfer to a vacant position as a reasonable accommodation.

**F. Telecommuting**

Many people with epilepsy are unable to drive because of their seizures. As a result, while they are able to work, getting to work can be difficult if not nearly impossible in some situations. While there is some divergence of opinion, courts have ruled that telecommuting is an appropriate reasonable accommodation in some circumstances. EEOC guidance on telecommuting provides “that allowing an employee to work at home may be a reasonable accommodation where the person’s disability prevents successfully performing the job on-site and the job, or parts of the

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68 Id.; cf., *Kennedy v. Dresser Rand Co.*, 193 F.3d 120 (2d. Cir. 1999) (plaintiff not entitled to relief where proposed accommodation of absolutely no contact with offending supervisor was unreasonable as a matter of law).
69 Reasonable Accommodation Guidance, supra note 9, at 46, q. 33. See also, *Weiler v. Household Finance Corp.*, 101 F. 3d 519 at 526 (7th Cir. 1996) (finding that the ADA does not authorize shifting supervisors as a reasonable accommodation; cf., *Kennedy v. Dresser Rand Co.*, 193 F.3d 120 at 122-23 (2d. Cir. 1999) (although replacing a supervisor will be presumptively unreasonable, because “the question of whether a requested accommodation is a reasonable one must be evaluated on a case-by-case basis” it is inconsistent with the ADA to have “a per se rule stating that the replacement of a supervisor can never be a reasonable accommodation”).
70 Reasonable Accommodation Guidance, at 47, q. 33; *Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001) (GMC was liable to employee for a hostile work environment after supervisors harassed the employee because of his disability); *Flowers v. S. Reg’l Physician Servs.*, 247 F.3d 229, 223-35 (5th Cir. 2001) (social isolation, increased monitoring, increased drug testing, ninety-day probation and other actions by supervisors following employee’s disclosure of disability constituted sufficient evidence to uphold jury verdict finding liability for hostile work atmosphere). 103 See, Gabel, Joan and Mansfield, Nancy. *The Information Revolution and its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 Am. Bus. L.J. 301 (Winter, 2003).
job, can be performed at home without causing significant difficulty or expense.\textsuperscript{71} In situations where telecommuting has been recognized as a reasonable accommodation, the employee must be able to perform the “essential functions” of the job at home.\textsuperscript{72,73} Factors in determining whether a job can be effectively performed at home include the employer’s ability to adequately supervise the employee and the employee’s need to work with certain equipment or tools that cannot be replicated at home.\textsuperscript{106} For some jobs, the essential functions can only be performed at the work site, such as jobs requiring face-to-face contact with customers. Allowing permanent teleworking in this type of job would not be an effective modification, because it would not enable the worker to perform the essential functions. On the other hand, employees in other kinds of jobs, such as telemarketing or proofreading, may be able to perform the essential functions of their positions at home.\textsuperscript{74}

In making the argument for telecommuting as a reasonable accommodation, it is important to point out the practical considerations. First and foremost, advances in technology mean that even jobs that involve some contact and coordination with other employees can be amenable to telecommuting.\textsuperscript{75} Frequently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail. If the employer determines that some job duties must be performed in the workplace, then the employer and employee need to decide whether working part-time at home and part-time in the workplace will meet both of their needs.\textsuperscript{76} For example, an employee may need to meet face-to-face with clients as part of a job, but other tasks may involve reviewing documents and writing reports. Clearly, the meetings must be done in the workplace, but the employee may be able to review documents and write reports from home.\textsuperscript{77}

Further, an employer may be required to reassign minor job duties or marginal functions (i.e., those that are not essential to the successful performance of a job) if they cannot be performed outside the workplace and they are the only obstacle to permitting an employee to work at home.\textsuperscript{78} If a marginal function needs to be reassigned, an employer may substitute another minor task that the employee with a

\textsuperscript{71} The U.S. Equal Employment Opportunity Comm’n, Work at Home/Telework as a Reasonable Accommodation (2005), \url{http://www.eeoc.gov/facts/telework.html} [hereinafter “Telework”].

\textsuperscript{72} Mason v. Avaya Communications, Inc., 357 F.3d 1114, 1122-1123 (10th Cir. 2004).

\textsuperscript{73} C.F.R. § 1630.2(o)(1)(ii), (2)(ii); Reasonable Accommodation Guidance, supra note 18, at 47, q. 34; Vande Zande, 44 F.3d at 545.

\textsuperscript{74} See Humphrey, 239 F.3d at 1136 (concluding that triable issue of fact exists as to whether medical transcriptionist would have been able to perform the essential duties of her job with the accommodation of a work-at-home position); Freeman v. Chertoff, 2009 WL 807520 (D.N.J. 2009) (finding triable issue of fact on reasonableness of request by a security assistant for the Department of Homeland Security to work at home two days a week, based on evidence that employee can effectively perform some of her work from home, does not need face-to-face interaction with coworkers, and that agency security would not be jeopardized).

\textsuperscript{75} Telework, supra note 104, at q. 4.

\textsuperscript{76} Id.

\textsuperscript{77} Id.

\textsuperscript{78} Id.
disability could perform at home in order to keep employee workloads evenly distributed.79

Where an employer offers telework for others, it must allow employees with disabilities an equal opportunity to participate in such a program. 80 Further, it may be required to waive certain eligibility requirements or otherwise modify its telework program as an accommodation for someone with a disability.81 For example, an employer may generally require that employees work at least one year before they are eligible to participate in a telework program. If a new employee needs to work at home because of a disability, and the job can be performed at home, then an employer may have to waive its one-year rule for this individual.115

For any job, an employer may deny a request to work at home if it can show that another accommodation would be effective or if working at home will cause undue hardship.82

Cases that reject working at home as a reasonable accommodation focus on evidence that personal contact, interaction, supervision, and coordination are needed for a specific position.8384 For instance, in an unpublished opinion, the 11th Circuit upheld an insurance company’s decision to prohibit a regional medical director with epilepsy from telecommuting for six months (her driver’s license had been suspended for this period following a seizure).85 The position involved medical management of insurance claims and supervision of a staff of regional medical directors who provide advice on those claims. The court found that plaintiff’s presence in the office was an essential function of the position, and that permitting her to telecommute for six months was not a reasonable accommodation. The lower court noted that the undisputed evidence shows that the plaintiff was required to interact with, be available as a resource for, and train the nurse case managers and claims adjusters working in the Tampa office.

G. Environmental Changes

In some situations, physical changes to the workplace may also be an effective accommodation. For example, if a person has photosensitivity-triggered seizures or other sensitivity to light, adjusting the flicker rate on the computer, or the flash rate on a strobe light in a visual fire alarm system, may be appropriate. Where the job requires that the person work around dangerous equipment, installing a safety device around a piece of machinery or padding a concrete floor at the employee’s worksite

79 Id.
80 Id. at q. 1.
81 Id. 115
82 Reasonable Accommodation Guidance, supra note 18, at 47, q. 34.
may be an effective accommodation. However, in making such accommodations, the employer is still required to comply with federal safety laws, and may need to identify an alternative accommodation if making such changes would violate those laws.

The JAN fact sheet notes the following suggested workplace/environmental changes\textsuperscript{86} to address particular limitations experienced by persons with epilepsy:

**Balancing/Climbing:** Depending on the type of seizure activity, employees who have epilepsy or seizure activity may have difficulty balancing or climbing.

- Use rubber matting on floor area to cushion a fall
- Use stepping stands with handrails
- Use rolling safety ladders with handrails and locking casters
- Reassign this duty to another employee, if climbing is not an essential job function,
- Provide head protection
- Provide eye protection
- Have arm rests on chairs to prevent falling out of chair

**Fatigue:** Employees with recent seizure activity, or who regularly use seizure medication, may experience fatigue.

- Use anti-fatigue matting on the floor
- Provide flexible start or ending times
- Adjust workweek
- Provide area to take nap during breaks or lunch

**Ensuring safety in the workplace:** Take some universal precautions to ensure that your agency is maintaining a safe workplace.

- Designate a person to respond to emergencies
- Keep aisles clear of clutter
- Provide a quick, unobstructed exit
- Post clearly marked directions for exits, fire doors, etc.
- Know plan of action (practice)
- Provide sensitivity training to employees
- Know when to (or not to) call 9-1-1

H. **Reassignment or Transfer to a Vacant Position**

In some situations, an individual will be unable to perform the essential functions of his job, at least temporarily. For example, when a person whose seizures were well-controlled suffers a seizure as a result of a viral illness and is unable to digest seizure control medications, he may be unable to drive for a particular period of time. If driving is an essential function of his job, a temporary reassignment may be an appropriate reasonable accommodation.

\textsuperscript{86} JAN Fact Sheet, *supra* note 4.
Caution should be used in requesting reassignment as a reasonable accommodation, however. The EEOC’s Interpretative Guidance states that reassignment to a vacant position is a reasonable accommodation of last resort. There are other restrictions on reassignment as described below, although employers may always choose to take actions that go beyond the ADA’s requirements.

Reassignment to a vacant position may be an appropriate reasonable accommodation when adjustments to an employee’s present job are not possible or would impose an undue burden, or if both parties agree that a reassignment is preferable to accommodation in the present position. If the employee requests reassignment as a reasonable accommodation, the employer should carefully consider whether the employee is capable of performing the work and whether the reassignment would enable him or her to successfully perform the job.

An employee who wants to transfer to another position as a reasonable accommodation must be able to perform the essential functions of the open position, with or without reasonable accommodation. The employer has a corresponding obligation to help the employee identify appropriate job vacancies. The employer is not required to create a new position as a reasonable accommodation.

A vacant position means one that is available when the employee asks for reasonable accommodation, or that the employer knows will become available within

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87 Technical Assistance Manual, supra note 61, at § 3.10(5).
88 See Tobin v. Liberty Mutual Insurance Co., 553 F.3d 121 (1st Cir. 2009) (affirming award of more than $1.3 in damages to a former insurance company salesman with bipolar disorder in his ADA and state law suit, finding that employer failed to assess merits of reassignment to a marketing position that would allow employee to emphasize his strengths; the court noted that this assignment was discretionary and that nondisabled low performers and new hires were given this assignment in the past, which undermined the company’s argument that this decision would have violated company policy and risked major accounts).
89 Reasonable Accommodation Guidance, supra note 18, at 39; 29 C.F.R. app. § 1630.2 (o). See also, e.g., Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011, 1016 (8th Cir. 2000) (In order for an employee to be eligible for transfer to a vacant position as a reasonable accommodation, the employee “must be otherwise qualified for the reassignment position . . . . To be considered qualified for this job, the individual must satisfy the legitimate prerequisites for that alternative position, and . . . be able to perform the essential functions of that position with or without reasonable accommodations.” (internal citations and quotation marks omitted)).
90 Reasonable Accommodation Guidance, at 42 - 43, q. 28 (“[T]he employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment.”); Barnett v. U.S. Air, Inc., 228 F.3d at 1113 (9th Cir. 2000) (“Employees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. Putting the entire burden on the employee to identify a reasonable accommodation risks shutting out many workers simply because they do not have the superior knowledge of the workplace that the employer has.”); Jensen v. Wells Fargo, 85 Cal. App. 4th 245, 264-65 (2000) (citing Barnett). See also, Gile v. United Airlines, 95 F.3d 492, 499 (7th Cir. 1996).
91 Reasonable Accommodation Guidance, supra note 18, at n.82; Technical Assistance Manual, supra note 61, at § 3.10(5).
a reasonable amount of time. What is a “reasonable amount of time” is determined on a case-by-case basis considering relevant facts, such as whether the employer, based on experience, can anticipate that an appropriate position will become vacant within a short period of time. If it will take several weeks to determine whether an appropriate vacant position exists, the employer and employee should discuss the employee’s status during that period, and consider putting the worker on a leave of absence or assigning him to a temporary “light duty” position. A position is considered vacant even if an employer has posted a notice or announcement seeking applications for that position.

Reassignment does not include giving an employee a promotion, and the employee must compete for any vacant position that would constitute a promotion. The employer does not have to bump an employee from a job in order to create a vacancy; nor does it have to create a new position. However, it may be a reasonable accommodation for an employee with a disability to transfer to a position by “bumping” an employee with less seniority, if there is a collective bargaining agreement that generally permits employees to bump less senior employee.

The employer must reassign the individual to a vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g., benefits, geographical location) if the employee is qualified for the position. Reassignment may not be used to limit, segregate or otherwise discriminate against an employee, nor may an employer reassign employees with disabilities only to certain undesirable positions, or only to certain offices or facilities.

Assuming there is more than one vacancy for which the employee is qualified, the employer must place the individual in the position that comes closest to the employee’s current position in terms of pay, status, etc. If it is unclear which

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92 Reasonable Accommodation Guidance, at 39; Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 93 (2d Cir. 1999). See Dark v. Curry County, 451 F.3d 1078, 1089-90 (9th Cir. 2006), cert denied, 127 S.Ct. 1252 (2007) (in a case involving a truck driver with epilepsy, the court found that a fact issue existed as to whether plaintiff could have been accommodated through reassignment because “an employer must consider not only those contemporaneously available positions but also those that will become available within a reasonable period,” and there was evidence of openings at some point after plaintiff’s firing).

94 Reasonable Accommodation Guidance, supra note 18, at 39. See also, Technical Assistance Manual, supra note 61, at § 3.10(5).

95 Reasonable Accommodation Guidance at 43, q. 28 & n.89.

96 Reasonable Accommodation Guidance at 39.

97 Reasonable Accommodation Guidance at 39.

98 Id.; Technical Assistance Manual, supra note 61, at § 3(10(5). See also, 29 C.F.R. pt. 1630 app. § 1630.2(o); Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011, 1019 (8th Cir. 2000); Pond v. Michelin N. Am., Inc., 183 F.3d 592 (7th Cir. 1999).


position comes closest, the employer should consult with the employee about her preference before determining the position to which the employee will be reassigned.102 If there is no comparable position, then positions that are lower in status or pay may be considered.103 If there is no vacancy at either a comparable position or a lower position, then reassignment is not required.104

According to EEOC, employees with disabilities should be given priority in obtaining the reassigned position, and they need not compete for such vacancies with nondisabled employees or job applicants.105 However, courts have disagreed over whether the ADA allows an employer to reject a disabled applicant for reassignment solely on the ground that another candidate is better qualified.106

Generally, it is considered unreasonable for an employer to violate a seniority system in order to provide a reassignment.107 However, there may be special

102 Reasonable Accommodation Guidance, supra note 18, at 40.
103 Id. at 39; Technical Assistance Manual, supra note 61, at § 3.10(5). See also, Cravens, 214 F.3d at 1019; Smith v. Midland Brake, Inc., 180 F.3d 1154, 1177 (en banc) (reassignment to a lower level position is permissible only in cases where no accommodation can be made in the current position and no positions are vacant at the same level); Cassidy v. Detroit Edison Co., 138 F.3d 629, 634 (6th Cir. 1998).
104 Psychiatric Disability Guidance, supra note 68, at 28, q. 29.
105 Reasonable Accommodation Guidance at 43-44, q. 29. See also Wood v County of Alameda, 5 AD Cas. (BNA) 173, 184, 1995 WL 705139, * 14 (N.D. Cal. 1995) (“Allowing the plaintiff to compete for jobs open to the public is no accommodation at all.”); Aka v. Washington, 156 F.3d 1284, 1310-11 (D.C. Cir. 1998) (reading the ADA to allow an employer to force a current employee to compete for a “reassignment” would render redundant the ADA’s language providing protection to job applicants); States v. Denver, 943 F. Supp. 1304, 1310-11 (D. Colo. 1996) (the ADA requires employers to move beyond the traditional analysis used to appraise non-disabled workers and to consider reassignment to a vacant position as a method of enabling a disabled worker to do the job without creating undue hardship.”).
106 Compare, e.g., Smith v. Midland Brake, Inc., 180 F.3d 1154, 1165 (10th Cir. 1999) (en banc) (reassignment “must mean something more than merely allowing a disabled person to compete equally with the rest of the world for a vacant position . . . [which is] no accommodation at all”); with Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007), cert. dismissed by agreement, 128 S. Ct. 1116 (2008) (ADA does not require employer to reassign employee to a vacant position if such reassignment would violate employer’s legitimate nondiscriminatory policy of hiring the most qualified candidate).
107 Reasonable Accommodation Guidance, at 45, q. 31; U.S. Airways v Barnett, 535 U.S. 391, 394 (2002) (“[T]o show that a requested accommodation conflicts with the rules of a seniority system is
seniority system does not automatically guarantee access to a specific job; or where an employer retains the right to unilaterally alter the seniority system and has done so fairly frequently.\textsuperscript{142}

\textbf{Advocacy Tip:} Where the employer relies on an established seniority system as justification for refusing preferential job assignment, plaintiff’s counsel should pursue discovery to establish prior exceptions to the alleged seniority system.

I. Leave of Absence

A leave of absence may be appropriate where an individual with epilepsy is recovering from surgery, is undergoing a change in medication(s), or needs to establish seizure control. Although the ADA is silent on whether a leave of absence is a reasonable accommodation, the EEOC and most courts have determined that a leave of absence for treatment or recovery related to a disability can be a reasonable accommodation.\textsuperscript{143} As with other types of accommodations, there must be some basis for believing that the leave will be effective. That is, there must be evidence suggesting that the employee will be able to return to work upon recovery.\textsuperscript{144}

ordinarily to show that the accommodation is not ‘reasonable’ \textsuperscript{145}); \textit{EEOC v. Sara Lee Corp.}, 237 F.3d 349 (4th Cir. 2001) (transfer to a position with a fixed schedule was not a reasonable accommodation because it would violate the company’s seniority policy).

\textsuperscript{141} Reasonable Accommodation Guidance, at 45, q. 31.

\textsuperscript{142} \textit{Id.}; \textit{U.S. Airways v Barnett}, 535 U.S. at 405 (“The plaintiff might show, for example, that the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed -- to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference. The plaintiff might show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter. We do not mean these examples to exhaust the kinds of showings that a plaintiff might make.”).

\textsuperscript{143} 29 C.F.R. App. § 1630.2(o); Technical Assistance Manual, \textit{supra} note 61, at § 3.10(4); \textit{Humphrey v. Memorial Hosp. Ass’n}, 239 F.3d 1128, 1135-36 (9th Cir. 2001); \textit{Nunes v. Wal-Mart Stores}, 164 F.3d 1243, 1247 (9th Cir. 1999); \textit{Cehrs v. Northeast Ohio Alzheimer’s Research Ctr.}, 155 F.3d 775, 782-83 (6th Cir. 1998); \textit{Huschmann v. Time Warner Entm’t Co.}, 151 F.3d 591, 601-02 (7th Cir. 1998); \textit{Criado v. IBM Corp.}, 145 F.3d 437, 444 (1st Cir. 1998); \textit{Rascon v. U.S. West Communications, Inc.}, 143 F.3d 1324, 1333-34 (10th Cir. 1998).

\textsuperscript{144} \textit{See, Humphrey}, 239 F.3d at 1135-36 (leave of absence may be reasonable accommodation where it would “permit [employee] upon his return, to perform the essential functions of the job”); \textit{Kimbro v. Atlantic Richfield Co.}, 889 F.2d 869, 879 (9th Cir. 1989) (additional leave of absence may be reasonable accommodation where it would have “plausibly enabled a handicapped employee to adequately perform his job”).

When requesting a leave of absence under the ADA, the employee should include a return to work date, even if it needs to be modified later on. This is because an indefinite leave is more likely to be considered “unreasonable” or to impose an undue hardship.\textsuperscript{145} Courts have tended to look more favorably on employees who have requested a leave of fixed duration that enables them to complete a welldefined
course of treatment with reasonable prospects for recovery. By contrast, a leave that is “erratic” or unexplained may not be required.

Under the ADA, an employer may be required to provide a leave of absence that is longer than the maximum leave permitted under the employer’s policy. Indeed, EEOC guidelines prohibit the application of “no-fault” attendance policies (under which employees are automatically terminated after they have been on leave for a certain period of time) to an employee who requires a longer leave period. The EEOC also cautions against penalizing an employee for missing work during a reasonable accommodation leave. For example, if a salesperson has lower annual sales because she was on a disability-related leave during part of the year, she should be evaluated for the time that she did work, on a pro rata basis. Some courts have disagreed.

An undue hardship may occur even with a shorter leave where the employee was hired to complete a specific, time-sensitive task. Before terminating the employee,

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108 See, Rascon v. US West Communications, 143 F.3d 1324, 1334 (10th Cir. 1998) (triable issue on failure to accommodate where employee provided an estimate regarding the expected duration of leave, employee’s doctor provided confirming report, and the stated prognosis was good). See, e.g., Waggoner v. Olin Corp., 169 F.3d 481, 484-85 (7th Cir. 1999) (“[I]n most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability.”).

109 U.S.C. § 12111(9)(B) (reasonable accommodation may include modification of policies); 29 C.F.R. § 1630.2(o)(2)(ii); US Airways, Inc. v. Barnett, 535 U.S. 391, 397-98 (2002) (a modification of policy that provides a preference to a disabled employee is not per se unreasonable).


111 Id.

112 Matthews v. Commonwealth Edison Co., 128 F.3d 1194, 1197-98 (7th Cir. 1997) (layoff based on recent performance did not constitute discrimination against employee who had recently taken leave and was working part-time due to heart attack).

however, the employer must first consider whether there is another accommodation, such as an available vacancy to which the disabled employee may be transferred as a further accommodation. If such a transfer is possible without undue hardship, then the employee would continue her leave and, at its conclusion, be placed in the new position.

A central question in the context of a leave of absence as a reasonable accommodation is “how long is too long?”. Under the statutory scheme, each case should be evaluated individually to determine whether the length of the leave is imposing an undue hardship on the employer. The Family Medical Leave Act (FMLA), which is discussed in the next chapter, imposes a floor of 12 weeks, but the ceiling may depend upon the individual employer’s policies or the collective bargaining agreement. Leave becomes too long when it imposes an undue hardship on the operation of the employer’s business, at which point the employer may end the leave and replace the employee. The maximum leave is based on an individualized assessment, although most courts draw the line at about one year.

A leave of absence provided under the ADA is generally unpaid. During the leave, however, the employer should consider allowing use of accrued leave or advanced leave. An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees (but may choose to do so).

Additionally, before requesting a reasonable accommodation in the form of a leave of absence under the ADA, employees should consider whether they qualify for a leave under the FMLA.