The Status of the "Interactive Process" as a Mandatory Legal Obligation for Employers in New York

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In Reeves & Durham, "Can We Talk? Reasonable Accommodation and the Interactive Process in the West: Spring 2003," NYSBA Labor and Employment Law Section, Fall Meeting 2003 ("Reeves & Durham"), the authors show that in most, but not all, of the federal circuits, there is a mandatory legal obligation for employers to engage in the "interactive process" described in EEOC regulations promulgated under the Americans with Disabilities Act (the "ADA"). See, e.g., 29 C.F.R. § 1630.2(o)(3); see also EEOC Interpretative Guidelines, 29 C.F.R. Part 1630, App. § 1630.9.] That process is intended as the means by which the parties can determine whether there are reasonable accommodations that would enable the employee with a disability to perform the essential functions of his or her job. The Second Circuit has cited some of these cases with approval, but has not yet held squarely that employers have a legal obligation to engage in the interactive process, nor has it opined on when such an obligation may be triggered or what the consequences of failing to engage in it might be. Moreover, the status of the "interactive process" under the New York State and City Human Rights Laws remains thus far almost wholly unaddressed by judicial opinion.

Since there are differences of opinion among the federal circuits both as to the existence of a mandatory legal obligation to engage in the interactive process and as to the legal consequences of failing to engage in that process, this paper will assess the current state of the law in New York on the issue of the interactive process under the ADA and the New York State and City Human Laws.

Note: Since it is unquestionably advisable for an employer to engage in the interactive process whenever he or she becomes aware that an employee has a disability and may need an accommodation, this discussion is more important for litigators who are trying to assess the rights and liabilities that flow from facts that have already taken place before they became involved in the case. In all but the rarest of cases, counseling practitioners who are trying to help employer clients avoid litigation should advise based on the assumption that the interactive process is a "best practices" model that should be followed to the extent applicable.

A. Federal Law

1. The statutory and administrative context
The ADA provides that it constitutes unlawful discrimination for an employer to fail to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . ., unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]." 29 U.S.C. § 12112(b)(5)(A). The statute does not address the process of determining what a "reasonable accommodation" is, and contains no provisions that refer to or require any "interactive process."

In fact, the ADA deliberately does not even define what a "reasonable accommodation" is. Instead, the definitional provision, 42 U.S.C. § 12111(9), says only that "[t]he term 'reasonable accommodation' may include" various enumerated examples, defining the term by means of broad-stroke illustrations rather than by crabbed limiting provisions. The breadth of this provision suggests that if an employer wants to avoid exposure to liability under the ADA for failing to provide a reasonable accommodation, at the very least some sort of discourse with the employee who has a disability will be necessary. However, as noted, the statute is silent as to the kind and extent of communication necessary.

The question whether employers have a legal obligation to engage in an "interactive process" to assess what accommodations are necessary appears to grow out of certain regulatory provisions that are couched in hortatory, rather than mandatory language. Regulations promulgated under the ADA provide that "[t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of accommodation. This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3) (emphasis added).

The highlighted language in these provisions suggests that the interactive process could be viewed as simply a regulatory recommendation. This possibility is amplified by EEOC interpretative guidelines, which provide, "If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed . . . Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." 29 C.F.R. Part 1630, App. § 1630.9 (emphasis added).
As can be seen by the emphasized words in these provisions, these regulations and guidelines, by their terms, do not necessarily prescribe a mandatory duty to engage in the interactive process; they could be read merely as setting forth "best practices" recommendations. Why should there necessarily be a violation if the employer failed to engage in an "interactive process" but still provided an effective accommodation, and what would be the statutory basis for such a violation? Similarly, why should there necessarily be a violation if the employer failed to engage in an "interactive process" but no effective accommodation would have been available in any event, and what would be the statutory basis for such a violation? And certainly it is not the law that engaging in the interactive process, even with utmost good faith, would constitute a defense if at the end of the process the employer failed to provide a reasonable accommodation that could have been provided, but the availability of that accommodation just never surfaced during the process. Cf. Parker v. Sony Pictures Entertainment, Inc., 260 F.3d 100, 106 (2d Cir. 2001) ("an employer enjoys no blanket shield from ADA liability based on the employer's incorrect belief that no reasonable accommodation could enable the plaintiff employee with a disability to perform his essential job duties").

In addition, the regulations contain provisions which could be read as suggesting that an employer may meet its obligation to provide a reasonable accommodation without necessarily engaging in the interactive process. See, e.g., 29 C.F.R. § 1630.14(c) and 29 C.F.R. Part 1630, App. § 1630.14(c) (permissible to make inquiries or require medical examinations to determine whether an employee is still able to perform the essential functions of the job or as "necessary to the reasonable accommodation process"); see also, 29 C.F.R. Part 1630, App. § 1630.9 ("if more than one . . . accommodation[] will enable the individual to perform the essential functions or if the individual would prefer to provide his or her own accommodation, 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, and may choose the less expensive accommodation or the accommodation that is easier for it to provide").

2. Case law from other circuits

As Reeves & Durham demonstrate, courts in Circuits other than the Second have relied on the "interactive process" regulations and interpretative guidelines to hold that the interactive process is mandatory as a matter of law. See, e.g., Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1113-16 (9th Cir. 2000), rev'd on other grounds, 535 U.S. 391 (2002); Taylor v.
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Phoenixville School District, 184 F.3d 296, 311 (3d Cir. 1999); Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 951-52 (8th Cir. 1999); Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996).

The circuits are not unanimous on this point, however. At least two hold that the interactive process is not a mandatory obligation at all. See, e.g., Willis v. Conopco, Inc., 108 F.3d 282, 284-5 (11th Cir. 1997) (rejecting argument that employer has obligation to enter into interactive process upon employee's request for accommodation; court adds that even if such there were such an obligation, "where a plaintiff cannot demonstrate 'reasonable accommodation,' the employer's lack of investigation into reasonable accommodation is unimportant"); Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 513-15 (1st Cir. 1996) (rejecting proposition that interactive process is a mandatory legal requirement; court notes that the use of the word "may" in the EEOC regulations suggests that the process is not obligatory, and finds further that on the facts of the case "[t]he jury reasonably could have concluded that engaging in an interactive process simply was not necessary in order to determine the appropriate reasonable accommodation").

Nor is there unanimity among the courts which hold that the interactive process is a legal requirement as to what consequences flow from the employer's failure to engage in it. Barnett v. U.S. Air, Inc., for example, holds that "the interactive process is a mandatory rather than a permissive obligation on the part of employers . . ., and that this obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation. [Where] the employee is unable to make such a request, if the company knows of the existence of the employee's disability, the employer must assist in initiating the interactive process." 228 F.3d at 1114. Barnett further holds that an employer may "face liability for remedies imposed by the statute" for failure "to engage in the interactive process in good faith," albeit only "if a reasonable accommodation would have been possible" had the process gone forward. Id. at 1116.

The Third and Seventh Circuits hold that when the employee asks for an accommodation (or, without an express request from the employee, when the employer has enough information to know that the employee has a disability and desires an accommodation), both parties have an obligation to enter into the interactive process; although failure to engage in the process does not per se trigger liability, bad faith failure to participate in the process typically will preclude summary judgment even if the employer contends that no accommodation was possible. See Taylor v. Phoenixville School District, 184 F.3d at 311-318; Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285-85 (7th Cir. 1996); Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011, 1020-22 (8th Cir. 2000).
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The Tenth Circuit seems to straddle the fence. In *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999), the court held that once the employee supplies the employer with appropriate notice of disability and desire for accommodation, both parties have a duty "to proceed in a reasonably interactive manner" to identify a reasonable accommodation; the court found that this obligation "is inherently in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee." *Id.* at 1172. However, in the same decision, the court observed that the interactive process is not a statutory requirement, and that "there may be occasions where a reasonable accommodation can be determined without an interactive process." *Id.* at 1172 n. 10. But since "typically the interactive process will be indispensable," the court declared that this process is "frequently an essential component of the statutory obligation to offer a reasonable accommodation." *Id.*

3. Case law in the Second Circuit

The Second Circuit has not yet weighed in on the question of whether the interactive process is a mandatory legal obligation. *See Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 219 (2d Cir. 2001) ("[b]ecause we find sufficient evidence of an outright refusal to accommodate to preclude summary judgment on this claim, we need not decide whether the refusal of NOCO to enter into an 'interactive process' alone would foreclose summary judgment"); *Jackan v. New York State Department of Labor*, 205 F.3d 562, 566 (2d Cir. 2000) (noting that the ADA "envisions an 'interactive process' by which employers and employees work together to assess whether an employee's disability can be reasonably accommodated"; court describes burdens of proof and persuasion as to availability of reasonable accommodation when that process breaks down, but does not opine as to whether failure to participate in the process constitutes an independent violation of the ADA or whether the fault for the breakdown by one party or the other may be grounds for refusing to enter summary judgment in favor of that party).

Most of the district courts in our Circuit to have considered the question, however, have adopted the views expressed by the Third, Seventh, and Eighth Circuits and hold that both parties have an obligation to enter into the interactive process once the employer has notice of the employee's disability and desire for accommodation. Where the plaintiff fails to engage in that process in good faith, typically it will be fatal to her claim, and where the employee fails to engage in the process in good faith, summary judgment will be precluded.
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a. Cases where plaintiff caused breakdown of interactive process

The Second Circuit's citation in *Jackan* (205 F.3d at 562) of *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996), and its citation of *Sidor v. Reno*, 1997 WL 582846 (S.D.N.Y. 1997), in its unpublished decision in *MacGovern v. Hamilton Sunstrand Corp.*, 2002 WL 31540652 (2d Cir. 2002), suggest that when our Circuit does have occasion to address the issue, it will hold at the least that employees have an obligation to engage in the interactive process, the failure of which may be fatal to their claims.

The plaintiff in *Beck* was a secretary at a university who had returned to work after an extended leave of absence due to "multiple medical conditions" and "post viral fatigue." During the ensuing months she experienced additional maladies that resulted in a few more extended leaves of absence. Although the parties had engaged in an "interactive process" in an effort to find an accommodation for her, ultimately, as the court later found, the process broke down -- the university gave her an assignment she did not like, and she was fired after refusing to report to work in that position. She sued and alleged, *inter alia*, failure to provide a reasonable accommodation. The court affirmed summary judgment for the employer on the ground that the employee caused the breakdown of the interactive process, holding,

No hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.
75 F.3d at 1135-36. The court found that the employee had refused to provide information necessary to enable the employer to know how to accommodate her disability, including refusal to sign a release so it could obtain information from her doctor. Id. at 1136. Stating that once the employer knows about the employee's disability, the ADA requires both parties to engage in an interactive process to determine what accommodations are necessary, the court affirmed summary judgment for the employer because liability for failure to provide reasonable accommodations may be imputed only where the employer is responsible for the breakdown in that process. Id. at 1137.

Sidor, following Beck, held that the employee has a duty to initiate the interactive process by requesting an accommodation. 1997 WL 582846 at * 6 - "7. See also, Parker v. Sony Pictures Entertainment, 260 F.3d 100, 106, 113-14 (2d Cir. 2001) (identifying as a "serious question" the plaintiff’s responsibility for the employer's misunderstanding of his abilities and for the "breakdown in the 'interactive process' of assessing the feasibility of accommodation that is required by the ADA"); Thompson v. City of New York, 2002 WL 31760219, * (S.D.N.Y. 2002) (teacher alleged that she was disabled because, as a result of prior cancer treatment, she had to take frequent restroom breaks, but during two medical examinations after her return to work she failed to mention her condition to the doctor, nor did she say anything about it in any other circumstances; following Beck, supra, the court held plaintiff responsible for the breakdown of the interactive process and awarded summary judgment to employer); cf. Adams v. Rochester General Hospital, 977 F.Supp. 226, 233 (W.D.N.Y. 1997) (employer is not obligated to "divine" that employee's strange behavior and negligent work performance are the result of a disability).

Thus, while the Second Circuit has not yet squarely held that employees have a duty to engage in the interactive process, it seems that it would be unwise to assume that when the case arises, the court would not so hold. An employee who fails to engage in the interactive process may well face an adverse judgment, even if the employer failed to provide a reasonable accommodation, upon a showing by the employer that the failure to identify a reasonable accommodation was the result of a breakdown in that process caused by the employee.
b. Cases where employer causes breakdown of interactive process

And while the Second Circuit has not yet squarely held that employers have a duty to engage in the interactive process, it would be equally unwise to assume that the court will not so hold when a case that presents the issue arises. All of the district courts in our Circuit to address the question whether the employer has an obligation to participate in the interactive process and may be held liable for failing to fulfill this obligation have answered it in the affirmative. Moreover, the author was unable to locate any case in which a court in our Circuit held that an employer had no obligation to participate in the interactive process.

*Donofrio v. New York Times*, 2002 WL 230820 (S.D.N.Y. 2002), for example, held that "[t]he determination of a reasonable accommodation is based on the particular disability and form of employment and is thus determined by an 'interactive process' between the employer and employee." *Id.* at *4. There, the employee claimed that he suffered from panic disorder and fear of public places and crowds, but at first had told the employer only that he had a viral infection. After his psychiatrist told the employer about the panic disorder, the employer had him examined by its own psychiatrist. The employer's psychiatrist concluded that the symptoms were fabricated and were consistent with malingering. Thereafter, while waiting to meet with the employer's labor representative, the employee had another panic attack and was taken to the hospital. Then, having discovered by use of video surveillance that the employee was carrying on a gift basket business during his absence, the employer fired him for lying about his medical condition in order to devote time to his gift basket business. The court later granted the employer's motion for summary judgment on the employee's claim that he would have been able to return to work. Rather than analyze this claim in terms of the employee's failure to engage in the interactive process, the court based its decision on the ground that the employer had fulfilled its responsibility. It stated, "The employer is required . . . to investigate the employee's request for accommodation and determine its feasibility. . . Here, the [employer] made several attempts to ascertain Plaintiff's condition and investigate his request for unspecified leave before terminating him." 2002 WL 239820 at *4.

In *Jacques v. DiMarzio*, 200 F.Supp.2d 151 (E.D.N.Y. 2002), the plaintiff was a factory worker who had bipolar disorder and was fired for "confrontational and irrational behavior with her supervisor" and "incessant conflict" with co-workers. Judge Block, following *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999), held that "interacting with others" is a major life activity and that her bipolar disorder constituted an ADA disability, at least for purposes of a summary judgment motion. 200 F.Supp.2d at 160-61. The court also held that there was a triable issue as to whether the employer's failure to allow her to work at home or "in a more enclosed work space" at the factory
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constituted a failure to provide reasonable accommodation. Id. at 161. In a sua sponte supplemental decision, the court followed the "vast majority" of courts to have considered the issue to hold that employers have a mandatory obligation to engage in the interactive process. The court also observed that, "[i]n a practical sense, therefore, the interactive process is more of a labor tool than a legal tool, and is a prophylactic means to guard against capable employees losing their jobs even if they are not actually disabled." Id. at 168–69.

EEOC v. Yellow Freight, 2002 WL 31011859 (S.D.N.Y. 2002), involved an employer’s rejection of the request of an employee with a disability to transfer to a different position. In assessing the circumstances in which the employer made its decision not offer the transfer, the court focused on the employer's "utter refusal to engage in a meaningful dialogue with [the employee] concerning his disability." The court observed the Second Circuit’s statement in Jackan that the ADA "envisions" an interactive process and noted precedent from other circuits, it noted decisions by district courts in the Second Circuit which had held that the interactive process is a mandatory obligation, and it declared that the employer’s conduct had amounted to "the antithesis of participation" in that process. Id. at *23–24. The court declined, however, to hold that an employer’s failure to engage in the interactive process may constitute an independent source of liability irrespective of whether a reasonable accommodation was offered; instead, "the failure to engage in an interactive process is relevant only where it leads to the more fundamental failure to provide an accommodation." Id. at *24.

On remand in Lovejoy- Wilson, supra, the district court rejected the employer’s motion in limine to preclude evidence of its alleged failure to engage in the interactive process on the interesting ground that such evidence would be admissible in the question of whether the employer had acted in bad faith or in reckless indifference to the employee’s federally protected rights; then it denied the employer’s motion to dismiss the plaintiff’s claim for punitive damages. Lovejoy-Wilson v. NOCO Motor Fuels, Inc., 242 F.Supp.2d 236, 243–45 (W.D.N.Y. 2003).

In sum, particularly in light of the Second Circuit’s holding in Parker v. Sony Pictures Entertainment, Inc., supra, that an employer may not avoid liability for failing to provide a reasonable accommodation because of an incorrect belief that no reasonable accommodation could enable the plaintiff to perform his essential job duties, it seems unlikely that our Circuit will follow the Eleventh Circuit’s holding that the interactive process is not required because it is the plaintiff’s burden to identify the availability of a reasonable accommodation. The greater likelihood is that the court will follow the lead of the Third, Seventh, and Eighth Circuits and hold that there is indeed a legal obligation to engage in the interactive process.
B. New York State and City Human Rights Laws

Like the ADA, the New York State Human Rights Law ("NYSHRL") requires reasonable accommodation for known disabilities, but does not address the process of determining what a "reasonable accommodation" is. Nor does it contain any provisions that refer to or require an "interactive process" between employers and employees.

Section 296(3) of the NYSHRL provides,

(a) It shall be an unlawful discriminatory practice for an employer . . . to refuse to provide reasonable accommodations to the known disabilities of an employee . . . in connection with a job or occupation sought or held . . .

(b) Nothing contained in this subdivision shall be construed to require provision of accommodations which can be demonstrated to impose an undue hardship on the operation of an employer’s . . . business, program or enterprise.

In making such a demonstration with regard to undue hardship the factors to be considered include:

(i) The overall size of the business, program or enterprise with respect to the number of employees, number and type of facilities, and size of budget.

(ii) The type of operation which the business, program or enterprise is engaged in, including the composition and structure of the workforce.

(iii) The nature and cost of the accommodation.

Section 292(21-e) of the NYSHRL defines "reasonable accommodation":

The term "reasonable accommodation" means actions taken which permit an employee . . . with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with
impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.

The New York City Human Rights Law (the "NYCHRL") similarly establishes the obligation to provide reasonable accommodations, but does not prescribe any particular procedural requirements for identifying them, and does not refer to an interactive process. Section 8-107(15) of the NYCHRL provides,

(a) Requirement to make reasonable accommodation to the needs of persons with disabilities. Except as is provided in paragraph (b), any person prohibited by the provisions of this section from discriminating on the basis of disability shall make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity.

(b) Affirmative defense in disability cases. In any case where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question.

Varone v. City of New York, 2003 WL 21787475 (S.D.N.Y. 2003), may be the only case to address the question whether the interactive process is a mandatory obligation under these statutes. There the court held, in a case in which plaintiff’s ADA claims were dismissed as time-barred but the NYSHRL and NYCHRL claims survived, that the plaintiff "can defeat summary judgment by producing evidence that a given defendant (a) refused to enter into an interactive process of negotiation, or (b) refused to provide [the plaintiff] with a reasonable accommodation that would have allowed him to perform the essential functions of his job." Id. at *14. The court, however, cited no case law as authority for this proposition, nor did it engage in any supporting analysis.

Regulations promulgated under the NYSHRL go far toward fleshing out the substance of the "reasonable accommodation" requirement. And while the substantive provisions of these regulations clearly suggest that engaging in an interactive process is advisable as a means for identifying and providing accommodation, the regulations themselves say little about what that process should consist of or what the legal consequences might be for failing to engage in it. Nonetheless, these regulations contain many provisions that warrant noting here. We summarize the
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highlights below:

1. In order to be entitled to a reasonable accommodation, "the individual must meet the qualification and performance standards . . ., and must have a disability and a need for an accommodation which are known, or are made known, to the employer." Id. § 466.11(d)(2). Clearly it is contemplated that the employee should communicate the need for accommodation to the employer, although it seems equally clear that sometimes the obligation to provide accommodation also may arise when the need for an accommodation is known to the employer without such communication (e.g., because the need is obvious or because the employer learns about the need from someone other than the employee with a disability).

2. Once the employer knows about the need for accommodation, "[t]he employer has a duty to move forward to consider accommodation" and the employee "must cooperate with the employer in the consideration and implementation of the requested reasonable accommodation. Section 466.11(j)(4), (k)(3).

3. Notably, when accommodation is under consideration, "the employer has the right to medical or other information that is necessary to verify the existence of the disability or that is necessary for consideration of the accommodation " and the employee has a duty to cooperate in providing that information. Section 466.11(j)(5), (k)(4).

4. The determination of whether any particular accommodation is reasonable expressly takes into account the " convenience or reasonableness of the accommodation for the employer," as well as the hardships it would cause for other employees. Section 466.11(b) provides,

(1) Whether an accommodation that has been requested or is under consideration is a reasonable accommodation required by the Human Rights Law will turn on a balancing of the following factors:
(i) efficacy or benefit provided by the accommodation toward removing the impediments to performance caused by the disability;

(ii) convenience or reasonableness of the accommodation for the employer, including its comparative convenience as opposed to other possible accommodations; and

(iii) the hardships, costs, or problems it will cause for the employer, including those that may be caused for other employees.

(2) Accommodations that pose an undue hardship on the employer will not be required. Undue hardship means significant difficulty or expense to the employer. In determining whether an accommodation would result in undue hardship, consideration will be given to any relevant factor. Relevant factors can include, but are not necessarily limited to, those set for in the Human Rights Law, at section 296(3)(b) . . . .

5. One provision substantially limits the circumstances in which a reasonable accommodation is required for disabilities that result in disruptive workplace behavior. Section 466.11(g)(1) provides,

(1) The Human Rights Law does not require accommodation of behaviors that do not meet the employer’s workplace behavior standards that are consistently applied to all similarly situated employees, even if these behaviors are caused by a disability. This would include, but not be limited to:

(i) dress codes, grooming standards and time and attendance policy, though reasonable and necessary deviations must be allowed as accommodations;

(ii) conduct standards, including those which prohibit aggressive or threatening behavior;
(iii) discipline for theft of company property by a kleptomaniac;

(iv) discipline for intoxication or impairment on the job by an alcoholic.

4. "The employer has the right to select which reasonable accommodation will be provided, so long as it is effective in meeting the need." Section 466.11(j)(6).

6. Section 466.11(i) provides that the temporary disabilities of current employees also must be accommodated, albeit only in the form of "a reasonable time for recovery," or to "no more than [a] de minimis" extent in the areas of worksite accessibility, acquisition or modification of equipment, or job restructuring. Reasonable accommodation in the form of modified work schedules, reassignment to an available position or light duty work, or adjustments to work schedules may be required, but in this context, "[t]he employer's past practice, pre-existing policies regarding leave time and/or light duty, specific workplace needs, the size and flexibility of the relevant workforce, and the employee's overall attendance record will be important factors . . .."