Reasonable Accommodation and the "Interactive Process" for New York Employers
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Most employers by now are aware that the Americans with Disabilities Act (the "ADA"), as well as the New York State and New York City Human Rights Laws (respectively, the "State HRL" and "City HRL"), require them to provide reasonable accommodation for employees with disabilities that limit their ability to perform the essential functions of their jobs. However, it would surprise many employers to learn that within the last several years a body of law has been emerging that governs how to determine what accommodation will be deemed "reasonable" in any given case. A number of courts have cited regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") suggesting that employers may be required to initiate "an informal, interactive process" with the employee. Some courts have even suggested that the failure to engage in such an "interactive process" may constitute an independent violation of the ADA.

Notably, this requirement applies to employees as well as to employers. A number of courts have ruled that the employee's failure to engage in the process will result in dismissal of disability discrimination claims. Moreover, while the U.S. Court of Appeals for the Second Circuit in New York has not yet decided whether there is an obligation to engage in the "interactive process" in all cases, lower courts in the Second Circuit have held that failure to engage in the interactive process in good faith may support an award of punitive damages.

Therefore, it behooves employers to engage in this process whenever they learn that an employee has a disability, both in order to avoid liability for a failure to engage in that process, and to lay the foundation for getting the employee's claim dismissed without trial if the process breaks down due to the employee's intransigence.

A. Federal Law

1. The statutory and administrative context

It is unlawful under the ADA 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 constitutes a "reasonable accommodation," and contains no provisions that refer to or require any "interactive process."
In fact, the ADA does not even define what a "reasonable accommodation" is. Instead, it says only that "[t]he term 'reasonable accommodation' may include" actions such as:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

The breadth of this provision suggests that some sort of discourse with the employee is necessary.

The obligation, recognized by some courts, to engage in an "interactive process" to determine a reasonable accommodation appears to grow out of regulations promulgated by the EEOC, which 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." See 29 C.F.R. Part 1630, App. § 1630.9 (emphasis added). The use of the words "may" and "should" suggests that the interactive process could be viewed as simply a regulatory "best practices" recommendation, not a mandatory obligation. This possibility is amplified by the EEOC's interpretative guidelines, which provide that 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." 29 C.F.R. § 1630.2(o)(3) (emphasis added). The guidelines also state that the "appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." Id.

The regulations also contain other provisions which could be read as suggesting that an employer may meet its obligation to provide a reasonable accommodation without engaging in the interactive process. For example, 29 C.F.R. § 1630.14(c) and 29 C.F.R. Part 1630, App. § 1630.14(c) provide that it is permissible for an employer 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 ("[i]f 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
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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

A number of courts have relied on the "interactive process" regulations and the EEOC’s interpretative guidelines to hold that the interactive process is indeed mandatory. 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. 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 U.S. Court of Appeals for the Ninth Circuit in San Francisco, for example, ruled in Barnett v. U.S. Air, Inc. 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. The Barnett court further held 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.

However, at least two federal appeals courts have ruled that the interactive process is not a mandatory obligation. See, e.g., Willis v. Conopco, Inc., 108 F.3d 282, 284-5 (11th Cir. 1997); Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 513-15 (1st Cir. 1996) (court notes that the use of the word "may" in the EEOC regulations suggests that the process is not obligatory).

While other Circuits have not yet held that an employer’s failure to enter into the interactive process, standing alone, is an independent violation of the ADA, at least three Circuits have ruled that an employer’s bad faith failure to participate in that process typically will preclude dismissal of an ADA claim on summary judgment, even if the employer contends that no reasonable accommodation was possible. See, e.g., Taylor v. Phoenixville Sch. Dist., 174 F.3d 289, 293-94 (3d Cir. 1999); Matal v. Adobe Systems, Inc., 250 F.3d 1198, 1200-04 (9th Cir. 2001); EEOC v. Computer Sciences Corp., 257 F.3d 110, 119-20 (1st Cir. 2001).
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at 311-318; Bultermeyer 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).

3. What does the "interactive process" entail?

In Barnett, the Ninth Circuit Court of Appeals ruled that the obligation to engage in the interactive process entails the good faith exchange of information between both sides directly, without delay or obstruction. An employer with notice of an employee’s disability generally should (a) identify the essential and nonessential functions of the job at issue; (b) ask the employee to provide information about the medical condition at issue and identify the limitations caused by that condition; (c) ask the employee what, if any, accommodations the employee desires; (d) identify other possible accommodations; (e) assess the effectiveness of each identified accommodation; (f) discuss alternatives if possible accommodations seem ineffective or too burdensome; and (g) when possible, implement one of the accommodations. 228 F.3d at 1115.

One lower court in the Second Circuit has observed that the process contemplates that the employer, "using a problem solving approach," will do the following:

(1) Analyze the particular job involved and determine its purpose and essential functions;

(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodation;

(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.
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4. A mandatory obligation? Case law in the Second Circuit

The Second Circuit has not yet decided 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 [the employer] 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 "envisons an 'interactive process,' but declining to state whether failure to participate in the process constitutes an independent violation of the ADA).

Most of the district courts in the Second Circuit which have considered the question, however, have adopted the views expressed by other Circuits and have ruled 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. The plaintiff’s failure to engage in that process in good faith is usually fatal to her claim. See, e.g., Sidor v. Reno, 1997 WL 582846 (S.D.N.Y. 1997) (stating that the employee has a duty to initiate interactive process and employee’s failure to participate may be fatal to her claim); Thompson v. City of New York, 2002 WL 31760219 (S.D.N.Y. 2002) (summary judgment awarded to employer where plaintiff failed to mention alleged need for frequent restroom breaks). 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").

In like fashion, courts have also denied employers' motions for summary judgment where the employer failed to engage in the process in good faith. See, e.g., Donofrio v. New York Times, 2002 WL 230820 (S.D.N.Y. 2002); Jacques v. DiMarzio, 200 F. Supp. 2d 151 (E.D.N.Y. 2002) (triable issue as to whether employer's failure to allow plaintiff with bipolar disorder to work at home or "in a more enclosed work space" at the factory constituted a failure to provide reasonable accommodation; court stated it was following the "vast majority" of courts which hold that employers have a mandatory obligation to engage in the interactive process).
In sum, it seems likely that the Second Circuit will eventually follow the lead of several other Circuits and hold that there is a legal obligation to engage in the interactive process. Inasmuch as this obligation both affords employers a procedure to identify accommodations that assure compliance with the ADA and provides employers a means to obtain dismissal of discrimination claims by employees whose intransigence results in the breakdown of the process, this probably will be a welcome development for the prudent employer who is willing to talk to the employee about what is needed to accommodate the employee's disability.

B. New York State and City Human Rights Laws

1. The statutory framework

Like the ADA, the New York State Human Rights Law ("State HRL") 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 require an "interactive process" between employers and employees. The New York City Human Rights Law (the "City HRL") 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.

The case of Varone v. City of New York, 2003 WL 21787475 (S.D.N.Y. 2003), may be the only one to address whether the interactive process is a mandatory obligation under the N.Y. State and City statutes. In Varone, the plaintiff’s ADA claims were dismissed as time-barred, but the State HRL and City HRL claims survived. The court held 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 otherwise explain how it arrived at this conclusion.

2. The regulatory framework
Regulations promulgated under the State HRL go far toward fleshing out the substance of the "reasonable accommodation" requirement. While the substantive provisions of these regulations clearly suggest that engaging in an interactive process is advisable, the regulations 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 of which employers should take note. For example, Section 466.11(d)(2) provides that an employee "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" (emphasis added). Clearly it is contemplated that an employee should communicate the need for accommodation to the employer, but the obligation to provide an accommodation also may arise when the need 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).

The regulations also state that 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). Notably, "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).

In a provision that marks a welcome consideration of the employer's perspective, Section 466.11(b) provides that the determination of whether any particular accommodation is reasonable may take into account the "convenience or reasonableness of the accommodation for the employer," as well as the hardships it would cause for other employees. Under Section 466.11(b), whether an accommodation that has been requested or is under consideration is reasonable turns 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.

Finally, Section 466.11(i) states that the temporary disabilities of current employees also must be accommodated. This is a major departure from federal law, which has not yet been held to provide protection for temporary disabilities. However, these regulations require only a limited form of accommodation for temporary disabilities; i.e., "a reasonable time for recovery," or "de minimis" accommodations for worksite accessibility, acquisition or modification of equipment, or job restructuring. With regard to modified work schedules, reassignment or adjustments to work schedules, "[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 . . . ." Section 466.11(i).

**Conclusion**

While the question is not yet finally settled, prudent employers should assume that the interactive process is a requirement of law. Moreover, they should use that process as a device to assure compliance with a difficult law and be alert to intransigence by employees who are trying to "work the system" instead of sincerely trying to work out an accommodation that will enable them to do their job.