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This term first appears in the EEOC's appendix to the regulations. There remains much confusion about this key concept, which as I like to say, simply means that an employer and an individual need to talk to and listen to each other. Sounds simple, doesn't it?

But when studying the charges we get at the EEOC, reading the reasonable accommodation cases that end up in court, and reviewing the questions posed to me and to my colleagues, it is hard to avoid the conclusion that the ability to having meaningful productive discussion about a request for reasonable accommodation is often not simple.

Too often it is unfortunately nonexistent or very circumscribed. Too often the wrong questions are asked, vital information is withheld, and both sides view the other with doubt and suspicion.

For me, the most interesting part of reading any judicial decision involving request for reasonable accommodation is what happened or did not happen during the interactive process. Most times when I am asked to discuss case law, everyone wants to know the bottom line. Did the Court find that a particular type of reasonable accommodation was or was not required?

Sometimes courts gloss over the interactive process. But more and more they are not. Instead more courts are providing a detailed summary of what did and did not happen during the interactive process.

Even more notable, increasingly judges understand how this process or the lack of one influences or even determines whether a reasonable accommodation was legally required.

You can take any two cases, each involving an employer who denied a request for the same accommodation. In one case an employer uses the interactive process and gains information that led to a legally supportable justification to deny a reasonable accommodation that was later upheld by a court.

In the other case, the employer did not engage in any meaningful interactive process, denied the accommodation, but when the court reviewed all the information, the employer failed to obtain, found that an accommodation was required.

If I just focused on the bottom-line result, then I would note one court found the accommodation was required, another court did not.

But that is misleading. Not to mention unhelpful, whether you are an employer or an individual with a disability.

Rather the courts appropriately ended up with different results because the use or non-use of an effective interactive process led to different legal outcomes.

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information are intended to better understand the request and to provide, if possible, a reasonable accommodation can help in getting employees to cooperate. This process can also help employees learn about their employer's concerns, concerns that they might be able to address that can ultimately lead to obtaining an accommodation. Too often the EEOC is confronted with employers and individuals with disabilities who simply favor their own proposals without any meaningful justification for their choices, or any indication they have listened to the other party's proposal.

I have dealt with employers who simply disagreed with specific accommodations requested. For example, a request to tele-work four days a week or to move a starting time from 8:00 a.m. to 10:00 a.m.

Their refusals were not based on any showing that the accommodation would not permit performance of all essential functions or any showing of undue hardship or that the disability did not necessitate the accommodation being requested. These employers never asked any questions about why the employee was seeking the specific accommodation or how the employee anticipated performing all essential functions with that accommodation.

Instead these same employers offered an alternative they were prepared to provide. So instead of four days a week of tele-work, they respond with "I'll give you one." Or moving a starting time to 8:30 a.m. rather than the 10:00 a.m. request. But as with any peremptory refusal, these alternatives were offered without having any information that supports a conclusion they would effectively meet the employee's disability-related needs.

In fact, often an employer has no idea what those needs are when they make their counter proposal. In short, these counteroffers are as arbitrary as the refusal to consider the employee's request.

Now, please don't misunderstand me. I am in favor of employers making counter offers as long as the employer first knows and understands what the disability-related limitations are and how its counter proposals will address those limitations. An employer that favors its choice of accommodation without explaining why it is equally effective or why an individual's choice is not effective in permitting satisfactory performance of all essential functions has failed at the interactive process.

Similarly, I have spoken with individuals who refuse an employer's suggestion of an alternative accommodation without providing a meaningful explanation of why it is deficient in meeting the employee's disability-related needs when compared with the individual's choice of accommodation. Or they refuse to share information an employer is entitled to receive, yet expect to get their accommodati

Number four... the interactive process is a flexible process that requires individualized decision making about what information is and is not needed.

There is not and should not be one way to proceed. Sometimes employers fear incorrectly that they could get into legal trouble if they don't follow the exact same process each time a reasonable accommodation is requested. Including asking everyone the same set of questions.

In fact, the opposite is true. The greater legal danger is in adopting a cookie cutter approach. No two disabilities are alike. In fact, two people with the same disability are not alike. The variety of disabilities, jobs and workplaces, not to mention the enumerable types of reasonable accommodations means that a cookie cutter approach is bound to fail at some point. One common element in the cookie cutter approach is to always require verification from a healthcare professional.

I once was asked about a situation involving a federal agency that sent investigators onsite to collect information. One investigator was deaf and the agency sent a sign language interpreter along on these site visits.

Then the employee asked to have a notetaker sent along as well. Explaining that she needed to watch the interpreter and could not simultaneously take notes on what the person was saying. If she took time to write notes after the interpreter finished, it would lengthen the time necessary to conduct interviews. And since these notes were used to decide on appropriate steps going forward, including possible litigation, the investigator wanted simultaneous notes to ensure accuracy.

The employer's response to this request was to require a note from the employee's

I informed the agency that the EEOC would find the agency had violated the law twice. First in presumably asking for a doctor's note to support the original request for a sign language interpreter, and then to require such documentation to support request for a notetaker. It was obvious in both instances what the disability-related need was and its relationship to the requested accommodation.

By failing to provide the notetaker without the medical documentation, there would be a third potential violation of the law. Denial of a necessary reasonable accommodation.

Now, let me state here, I never ever suggest individuals with disabilities, that they

If there is no question that a medical condition is a disability, then there is no need for an employer to ask questions that seek to determine if it is one. If the request is for reasonable accommodation to access a parking lot or to access some other benefit or privilege of employment, questions asking an employee to identify the essential function of his or her position are irrelevant. If the need for accommodation is obvious, then there is no need to ask questions to design to understand why the accommodation is needed.

Now, maybe the need for accommodation is obvious, but not obvious is how a requested accommodation meets that need. Two different issues. And an employer needs to make sure its questions are designed to obtain information relevant to the issue or issues that exist.

At a minimum, if as an employer you still want to use standardized forms, they should be reviewed before being handed out each time so that irrelevant or inappropriate questions are crossed off and any missing questions pertinent to the particular requests are written in.

Number five...

Sometimes an employer's approach needs to signal sensitivity to the disability and the issues being raised.

Asking for reasonable accommodation is not always easy to do. As indicated earlier, individuals with disabilities have too often had some very bad experiences.

While there has been enormous progress made in lessening the stigma attached to disability in general, and certain disabilities in particular, too many myths, fears, assumptions, and misinformation still undermine the purpose of having an interactive process.

Or think about people who have to raise reasonable accommodation involving very private and sensitive issues. For example, where the issue is incontinence or body odors. And, yes, I have gotten a lot of questions about those issues.

Embarrassment or discomfort can exist, and usually does, for both the employee and the employer. And, yet requests for accommodations must be addressed and the interactive process must go on.

So much of my job is coaching employers and employees in these situations. There is nothing specifically legal about this coaching. Although difficulties handling these sensitive discussions can lead to allegations of discrimination. The more an employer can build trust and good faith by understanding how hard certain disclosures can be and demonstrating this understanding, the easier for an employee to provide information.

For example, I generally sug

The importance of communication throughout the interactive process. Communication by both the employer and the individual with a disability is critical to achieving the purposes of the interactive process. And by communication, I do not mean only what one says or writes but also the ability to listen to the other party.

This is not always easy to do, but this skill can be critical to the outcome of the interactive process.

EEOC's mediators with reasonable accommodation cases tell me their mediations, which basically mimic creation of an effective interactive process that never took place often require helping each party to listen to what the other is saying. Rather than strictly focusing on their next turn to speak.

No breakthrough is possible if one party cannot or will not listen to the other party's points and concerns and reasons and then respond to them. Often these mediations achieve a breakthrough when both sides realize that they each have legitimate concerns and find they can work out a solution.

Sometimes it is what an employee originally asked for. Sometimes it is something different. Ideally an employer and employee should want the same result from a reasonable accommodation. The ability of the employee to perform his or her job.

The chosen accommodation may not be what an individual originally requested or what an employer proposed. But if it will enable satisfactory performance of the job, then the accommodation has achieved its objective.

Clarity is an important component of communication. An employer being clear in what information it is seeking and why. An employee being clear in his or her answers to these questions. And it is vital to seek clarification if a question or an explanation is not understood.

Sometimes an employer asks me to review the questions it intends to ask an individual as part of the interactive process. I will ask for clarification about a certain question if I don't understand what information is being sought, I will ask why it is relevant. Or if I don't understand exactly what the employer is trying to obtain, I will ask for clarification.

If the employer is unable to answer my questions, that is a problem. And it's one I see too often. An employer should be able to explain why each question is being posed. Remember that there are two possible issues that may need exploring in the interactive process. First whether the medical condition is a disability as defined by the ADA -- and that's not always going to be necessary, given the broad definition of disability -- but second, and the one that 6 2 92 reW* nBT/F1 12 Tf1 0 (f)11(i)22(n)23(i)22(nJEQ0.00000912 0 0 G 0.0

Now, there are a whole host of questions that can fall under that issue, but that is

over the years it can be a highly effective tool. Certainly not for every request. Indeed for some requests where it's clear the accommodation is needed and would be effective, then employers should not resort to a trial period. Nor is a trial period warranted if there is sufficient evidence the accommodation would not work or would cause undue hardship. The purpose of a trial period is to establish whether a proposed accommodation works as intended, or not, when the interactive process has not divulged clear evidence one way or the other.

I first started suggesting and using this tool years ago for certain types of accommodations where supervisors or managers often have concerns. Even if they have -- even if they lacked solid reasons to deny the accommodation.

tele-work, schedule modifications, and bringing an emotional support animal into the

As I hope I have illustrated this morning, ideally training should address not just the specific legal requirements but also the elements of a strong interactive process and the skills required to meaningfully engage in an effective one.

Understanding the legal requirements of reasonable accommodation is critical, but that understanding is undermined if an employer and an employee cannot find a way to meaningfully talk to one another to enable the sort of informed rather than discriminatory decision making the ADA is meant to foster.

I hope this is helpful. I thank you all for the opportunity to participate in this worthwhile program. And now I would be happy to try to answer any questions you may have.

Thank you.

[Applause]

>> Does anyone have a question?

>> AUDIENCE MEMBER: I'm just curious if you think, is the interactive process something that is known to the employer? Is this something you should go through as you're interviewing for your position? Or is this something that just comes up randomly while you're working and then they should initiate interactive process?

>> SHARON RENNERT: The interactive process is triggered by a request for reasonable accommodation. That's the context in which you have an interactive process. The fact that I am interviewing somebody with a disability for a job isn't about starting an interactive process. It's about conducting the job interview.

If I am doing a performance review with an employee with a disability, I'm doing a performance review as I do with everybody else. It's not about having an interactive process.

The interactive process, as I said, is meant to be a tool to assist the employer once it receives a request for reasonable accommodation. If the requested accommodation is so obvious, a deaf person asking for a sign langua23(e)23(d)23(23( )- 1 0 0 1 238.7 34.95 Tm reW* nB

about it in a very general limited sense. The problem is they don't really know, as I tried to go through this morning, what does an interactive process look like?

How do I know what questions to be asking, hence a lot of people resort to standardized forms, and not necessarily correctly in using them. But it's kind of generally know for a lot of employers, but it becomes kind of a throwaway. So one of the things I'm doing and some of my colleagues at EEOC is we're trying to put a spotlight on the interactive process more and more to help employers to really understand the intent of this tool, how to help them figure out what to do when facing a request, if they can understand the sort of basic components of it, then the hope is no matter what the disability or what the type of accommodation being requested, then they can figure out -- because commonsense can help here if you've got commonsense, to sort of see what do I need to know. I get lots of kinds of requests for assistance, all kinds of disabilities, all kinds of accommodations, all kinds of jobs in workplaces. I am by no means an expert in every disability, every job, every workplace. But I don't need to be. With a thorough grounding in the interactive process, I can think about, what is it I need to know? What would help me evaluate this request?

And this is what I try and demonstrate when I'm working with specific employers or with individuals with disabilities.

>> AUDIENCE MEMBER: I'm really more curious, we also have an audit vendor who

about exploring potential accommodations. So if it's about tele-work or modified schedules, things that, hey, as a supervisor, I need to know when this person is going to be here, that is something they're entitled to. Remember that the ADA's confidentiality provision, by the way, does allow the sharing of medical information with supervisors who need to know it in order to provide accommodation. That's one of the very few exceptions to the general prohibition on sharing medical information.

So, again, I think it is really about making sure in hiring the vendor, they know what their role is and about how the interaction with supervisors are going to go. But to the extent to remember also your objective in not having the supervisor know a lot is you don't want when it comes time for performance evaluations, you don't want that to be impacted or somehow affected by the knowledge.

You may be able to kind of separate but also in a lot of instances you can't. Even if the supervisor hasn't been told a lot of specific medical information, again, if they have to implement an accommodation, they have provided that, the tele-work, they're providing the schedule change, they know that. And could that infect how they're going to evaluate someone? Of course it can.

So, again, I think it's also sometimes -- I'm a big proponent of training, but the correct kinds of training.

>> SHARON RENNERT: Again, there are no hard-and-fast rules. If I'm the employee being asked to provide medical documentation and I want to say, can you make that request in writing? Sure, I can ask them to do it. But I would also say to give a reason for why you're doing it. You know, if there's kind of hesitation on behalf of the employer. And what I'm encouraging either side -- when I'm dealing with employer or employee, is don't try to get adversarial about it. Again, the kind of bad experiences. But as soon as you start going down that road, it's going to make it a lot tougher. So the greatest extent possible to kind of like, you know, I've had some bad experiences, would it be possible to put it in writing that you want it?

Hopefully when I'm working with employers, I want them to come up with questions, not tell someone -- tell your healthcare provider to send a note in. And then, you know, then I get employers going, the note was useless. So look at your question. You know? You didn't specify anything. Of course it's useless. I'm trying to work with employers to get them to put questions down, which means it should be in writing.

Now, in terms of the turnover here, again, I tell from the employee's perspective, tell the employer you're concerned about the confidentiality, that you're willing to cooperate, you're going to provide information, but how is that stored? How is that kept? To you it's personal, it's sensitive, it's up to employees if they want to mention the ADA, and it's confidentiality provisions. Some do, some don't. You know, I'm not here to dictate.

But certainly it's fair game to be asking and expressing why I'm concerned. Don't hide that fact from the employer. So I'm just asking, how is this protected here?

And, again, there are different ways it can be protected. Now, to the extent that you express a concern about their asking for the same thing over and over, again, without more specific information, I can't tell whether that is appropriate or not. If it's information that has already been collected, that hasn't changed. Establish, okay, this is a permanent disability, never going to change. The fact there is a new manager coming in, I should not be starting the process coming in. Here is where an employee can say, I gave it to your predecessor. For an employer as a whole, they need to think about the issue you're raising. What about turnover? Where are things stored? It should not be so diffuse that as the new person I have no idea. What, the old manager took it with them? That's a problem if I'm an employer. You don't want that happening. So the employer has to be thinking about where is this stored and what happens when -- there's always going to be turnover at some point. So you want to make sure.

But also because we don't want to reinvent the wheel. If it's already in the system somewhere, then a new supervisor should be able to get access to it. Oh, we already have it. Is it stored in HR? Is it stored someplace else? Then I can see that I should not be saying you still got to give me something else. On the other hand, if it's a new issue, oh, this tells me that your disability-related need was going to last a year, this is from three years ago. I need you to bring in something now updated about that. Well, then, yes, the employer has a right to ask for that.

The details matter here. I can't stress that enough. That's why there's no cookie cutter approach. I don't want to go over, because I'm going to affect the rest of your program.

I'm going to be here for a bit, so if you want to corner me during the break, please feel free.
>> All right, let's thank Sharon.

[Applause]

[Break]