LABOR & EMPLOYMENT COFFEE CHAT

ENGAGING EMPLOYEES IN THE ADA'S INTERACTIVE PROCESS

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"Housekeeping Notes"

Q&A Box – Please submit your questions

Tell us your feedback – Please complete the survey at the end of the webinar

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TODAY'S AGENDA

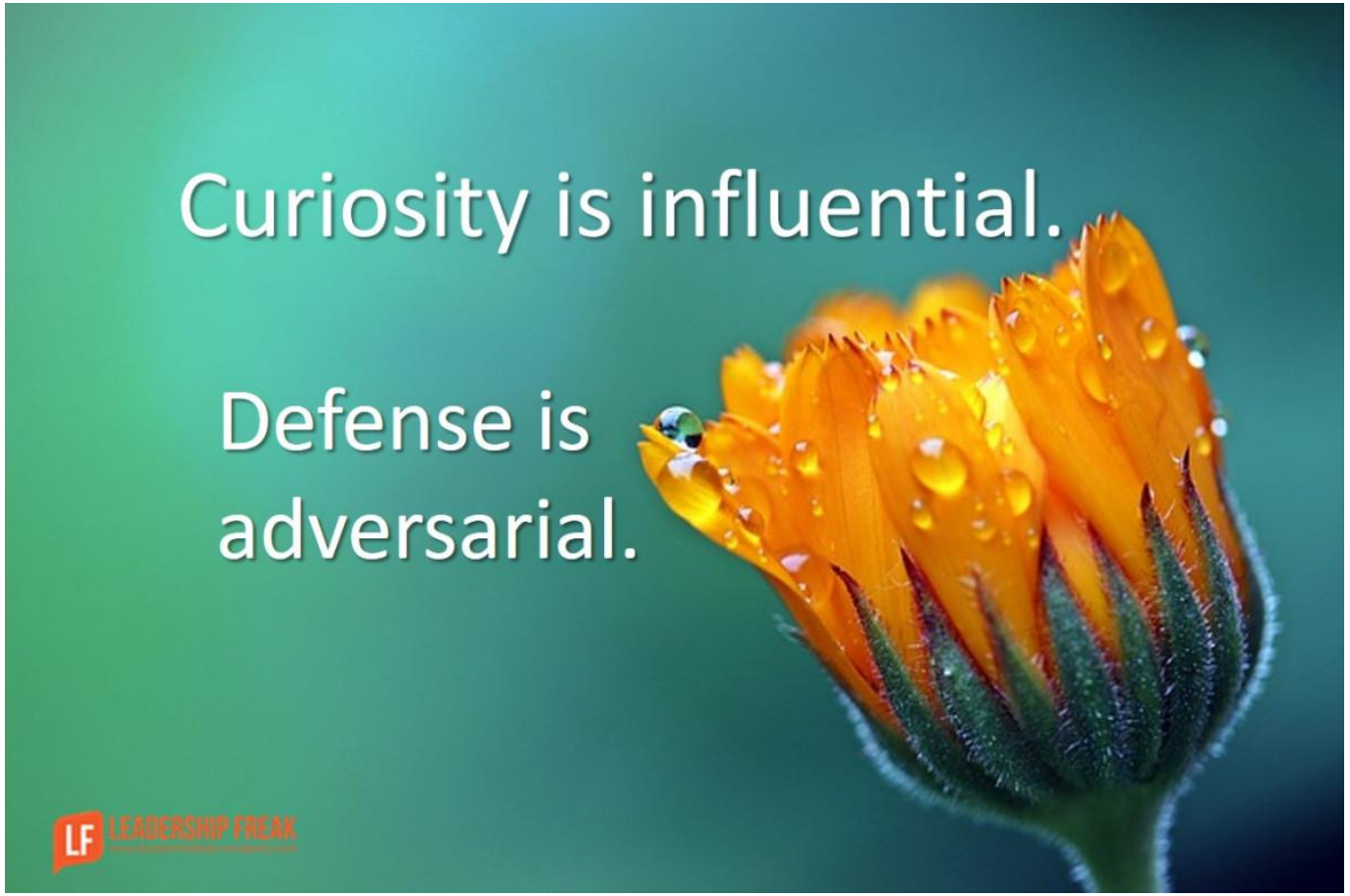
- All about the ADA's Interactive Process
- The ADA in Action – Case Studies
- Recent EEOC Settlements

KEY STEPS IN THE INTERACTIVE PROCESS

OVERVIEW – THE BASICS

- FMLA v. ADA – what comes first?
- Failing to reasonably accommodate = disability discrimination
- Once aware of a physical or mental limitation, employers must initiate an informal, interactive process to determine the appropriate reasonable accommodation.
- Goals
  - Identify limitations caused by the disability.
  - Explore potential reasonable accommodations so that the individual can perform the essential functions of the job.

IT IS NOT A BATTLE



KEYS TO SUCCESS

- Do not focus on the disability per se – the key defense is engaging in the interactive process
- Do have policies and procedures governing workplace accommodation
- Do centralize the accommodations process
- Document the process
- Get your job descriptions in order
- Train, train, train

WHAT TRIGGERS THE DUTY TO ENGAGE?

- The employee asks – plain language, no magic words required.
- When the disability is obvious or apparent
- EEOC:
  - Employer knows about the disability
  - Has reason to know about the disability
- Employer need not go further if the individual states no accommodation is needed – *i.e.*, obligation is fulfilled.

FIRST KEY STEP – ESSENTIAL FUNCTIONS

- If job description is not updated, as expeditiously as possible, develop a list of essential and non-essential job functions.
- If medical documentation is necessary for a non-visible limitation, the treating provider must be given a JD or list of essential functions to assess.

SECOND KEY STEP – LEARN THE INDIVIDUAL'S LIMITATIONS

- Employers cannot ask for documentation when:
  - Both the limitation and need for accommodation are obvious; or
  - The employer already has sufficient information to support the limitation and the need for the request accommodation.
- Employers are entitled to documentation about the individual's limitation if the limitation is not obvious.
  - Only ask for necessary medical information related to the limitation at hand.
  - Get information from the employee when possible.
  - Work with the employee to obtain the written documentation from the treating provider.
  - Obtain only reasonable documentation to support the request.
  - Employers may obtain "second opinions" at their cost.

THIRD KEY STEP – EXPLORE POTENTIAL ACCOMMODATIONS

- Primary goal of interactive dialogue is determining a reasonable accommodation that will enable the employee to perform their essential job functions.

- However, you may need to consider an "accommodation of last resort."

FOURTH KEY STEP – SELECT THE MOST APPROPRIATE ACCOMMODATION

- It is the employer's choice.
- Consider the preference of the employee.
  - No requirement to adopt the employee's preference if a reasonable, effective accommodation is available.
- You are not stuck – this is an iterative process
- Consider a trial period.

FIFTH KEY STEP – IMPLEMENT THE ACCOMMODATION

- Equipment to be installed?
- Schedule change or policy modification?
- Transfer to alternative position as an accommodation?
- Leave as an accommodation?
- Communicate with the supervisor(s) on a need-to-know basis to assist with implementation.

SIXTH KEY STEP – MONITOR THE ACCOMMODATION

- Periodically check the ongoing effectiveness of the accommodation.
- Ongoing communications are key for an effective process.
- Encourage supervisors and employees to raise any concerns they have about the selected accommodation.

SEVENTH KEY STEP – DOCUMENT THE PROCESS

- A necessity for your defense to a charge or eventual litigation.
- Consider using a log to record all accommodation attempts and employees' responses.
- Consider using an ADA compliant medical questionnaire/form to gather medical documentation.
- Memorialize every discussion with the employee/applicant.
  - Follow up email or note to file.
- The record should be complete and reflect your good faith efforts to engage.

WHAT IF NO REASONABLE ACCOMMODATION CAN BE MADE?

- First, consider an alternative position for which the individual is qualified to perform, with or without a reasonable accommodation.
- Then, termination because the employee is not qualified to perform the essential job functions (back to those job descriptions!)

APPLICANTS – SAME BUT DIFFERENT

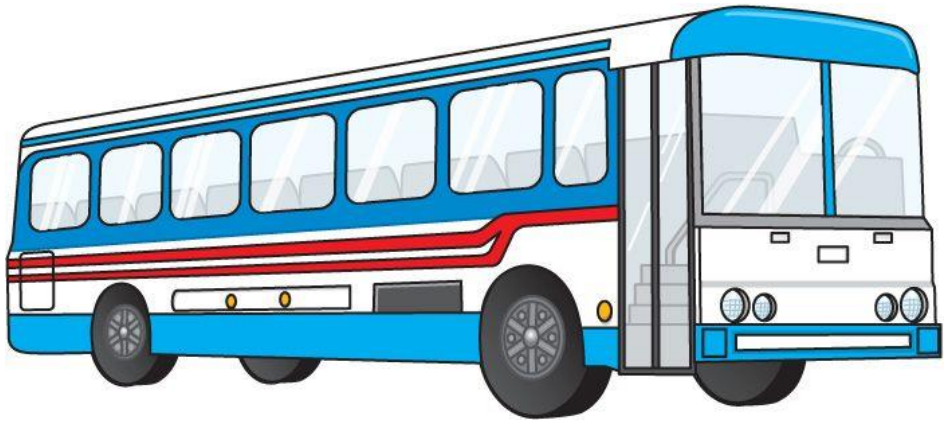
- Ensure that the website and application form include information on how to request an accommodation;
- Regarding medical documentation, consider first talking with the applicant about what is needed and why and then consider what documentary support may be needed;
- Exploring alternative accommodations may or may not be necessary, so listen to the applicant's needs before rejecting the requested accommodation; and
- As with employees, be sure to maintain confidentiality.

MISTAKES TO AVOID

- Waiting for the employee to say the magic words.
- Resisting or avoiding the process.
- Failing to train supervisors and others who handle accommodations.
- Making things too complicated.
- Sharing confidential information about a person's medical condition.
- Gathering unnecessary medical information.
- Inaccurate job descriptions.
- Not documenting the interactive process.
- Not trying hard enough.
- **What about light duty and the ADA?**

CASE STUDIES

DAVIS v. COLUMBUS CONSOLIDATED GOVERNMENT



QUICK FACTS

- Plaintiff, James Davis worked as a bus operator for Columbus's public transportation service.
  - In late 2015, Davis began missing work due to neck pain related to spinal stenosis.
  - After exhausting his employer's paid leave and his FMLA leave, he requested light-duty and an additional nine-week unpaid leave of absence to recover from cervical spine surgery.
  - After engaging in the interactive process with Davis, Columbus denied his request for the additional leave.
    - He was terminated and encouraged to reapply once he was cleared to return to work

THE ELEVENTH CIRCUIT'S ANALYSIS

- Columbus asserted the "undue hardship defense" in response to Davis's lawsuit alleging that they failed to accommodate his disability under the ADA.
- The Court agreed, finding that Columbus demonstrated that granting Davis's nine-week extended leave would cost his employer "significant difficulty or expense," the standard for showing undue hardship under the ADA.
- Under these specific facts and circumstances, Davis's absence would cause significant, coverage, overtime, and retraining issues for his employer.

LESSONS LEARNED

- Undue hardship is a complete defense to ADA liability, but the employer bears the burden of proof.
- Demonstrating the effects the accommodation would have on other employees is a persuasive argument.
- Employers should assess the "undue hardship" issue earlier in the interactive process.

HOSTETTLER v. COLLEGE OF WOOSTER

QUICK FACTS

- In late summer **2013**, the College of Wooster (in Ohio) hired Heidi, HR Generalist, knowing she was pregnant.
- At hire, promised 12 weeks of maternity leave.
- Heidi takes a leave of absence in **February 2014**.
- Not eligible for FMLA, but college granted "FMLA" and she took 12 weeks of leave.
- All was good, until she exhausted the 12 weeks – diagnosed with "severe postpartum depression and separation anxiety" – College gave her four more weeks for **a total of 16,** then . . .
- Cleared to return to work on a reduced schedule for the "foreseeable future" – she returned to a five half-day a week schedule.

QUICK FACTS (cont'd.)

- Heidi was able to get her job done on the reduced schedule, and her July review stated, "Heidi is a great colleague and a welcome addition to the HR team!"
- Her manager was feeling stressed because another employee was on maternity leave, they were working on certain projects, and school would soon be starting up.
- Supervisor tells Heidi she must return to a full-time schedule; Heidi countered with working until 2:00 p.m. instead of 12:00 p.m.
- Thereafter, later in July, supervisor fires Heidi.
- No replacement hired *until Octo*ber.

HEIDI SUES THE COLLEGE

- Pregnancy discrimination under Title VII
- Disability discrimination under the ADA
- FMLA interference and retaliation
- Equivalent claims under Ohio state law
- Trial court ruled *in favor* of employer – finding that **"full-time work was an essential function of the position of HR Generalist"**
- Heidi appeals and gets decision reversed – *i.e.*, case goes to a jury unless the parties settle

WHAT WENT WRONG?

- **The ADA**
  - College tried to convince the court that Heidi was not disabled, but the medical records substantiated otherwise.
  - Core issue: whether there was a genuine dispute of material fact about if Heidi was *otherwise qualified*, with or without accommodation, to perform her HR Generalist position.
  - Rejected the suggestion that full-time attendance by itself is an essential function: "An employer must tie time-and-presence requirements to some other job requirement."

WHAT WENT WRONG?

- **FMLA**
  - College's policy was to grant FMLA leave to employees whether or not eligible (don't do this)
  - Thus, the court prevented the employer from arguing that Heidi was not eligible.

LESSONS LEARNED

- Just because a position is full-time does not mean you win on a failure to accommodate claim. You must prove **why** you cannot accommodate a part-time schedule.
- Document the reasons you cannot accommodate – and engage *fully* in the interactive process.
  - Obtain medical documentation to assist you (within the ADA's regs).
  - Talk with the employee about his/her request, your ideas and possible alternative accommodations.
  - Document the interactions with the employee, document why you rejected an accommodation.
- Your attendance policy will not save you – regular attendance is an essential function, but remote work, flex schedules and other creative solutions may be needed.

LESSONS LEARNED (cont'd.)

- Do not grant FMLA when the employee is not yet eligible – use the ADA instead!
  - Or, call it medical leave or non-FMLA leave (but note that if you do this, *you still must provide FMLA when eligible*).
  - Do NOT use the DOL's forms for non-FMLA leave.
- The college did not discriminate in hiring a pregnant applicant and neither can you.
- Remember not to count FMLA or ADA leave against the employee in any way.

BROWN v. MILWAUKEE BOARD OF SCHOOL DIRECTORS

QUICK FACTS

- Sherlyn Brown was an assistant principal with the Milwaukee Public Schools.
- Brown had arthritis, which caused knee pain and eventually required her to have knee surgery.
- The school system altered her duties to avoid physical intervention with students as an accommodation for her knee ailments.
- In 2009, Brown re-injured her knee while restraining an "unruly student."
- In 2010, Brown's doctor advised her employer that Brown's contact with "potentially combative students" should be avoided.

QUICK FACTS (cont'd.)

- About two and a half years into Brown's leave of absence, the school system advised her that her leave was about to expire and the School System worked to find her a suitable position.

- Nearly every available position required Brown to be in the vicinity of "potentially unruly students."

- Finding a lack of vacancies that would not involve being around potentially unruly students or potentially monitoring such students, the school system terminated Brown's employment.

BROWN SUES THE SCHOOL SYSTEM

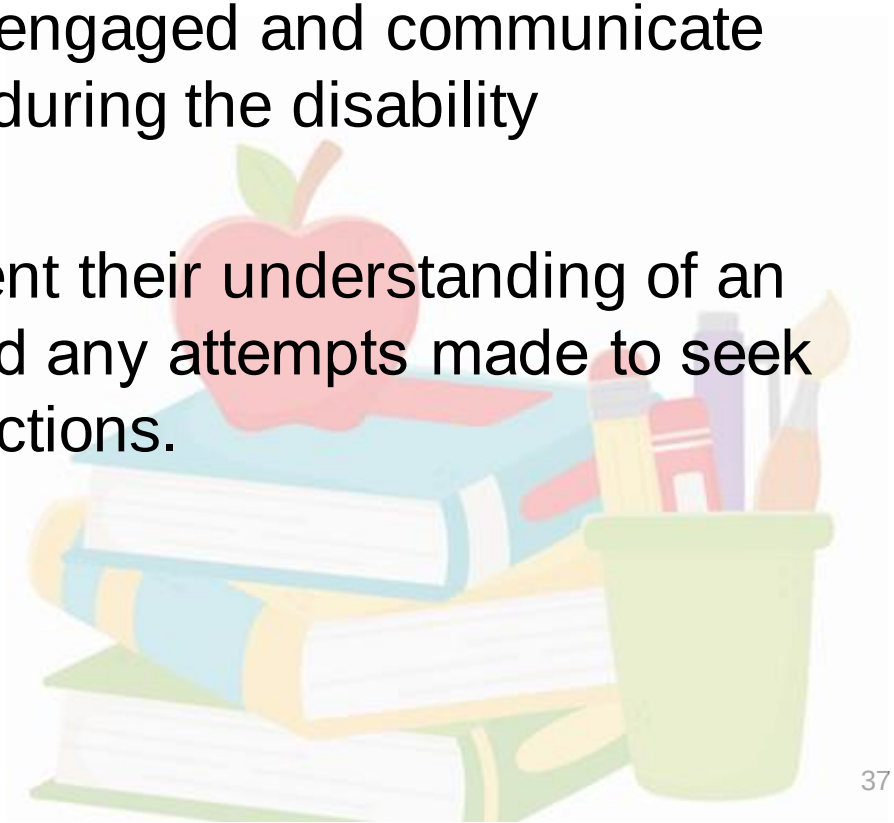
- Brown sued the school system in the U.S. District Court for the Eastern District of Wisconsin.
- Her lawsuit alleged that the school system failed to accommodate her disability by denying her employment in vacant positions and then terminating her in violation of the ADA.
- The district court granted summary judgment for Milwaukee Schools, and the Seventh Circuit affirmed the decision.

THE SEVENTH CIRCUIT'S REASONING

- The U.S. Court of Appeals for the Seventh Circuit affirmed the trial court's decision.
- The court held that the facts of this case show that Milwaukee Schools acted consistently with the restrictions imposed by Brown's doctor.
- The court also found that **Brown failed to hold up her end of the interactive process** by not clarifying the extent of her medical restrictions.
- The court held that the school system was not liable under the ADA for not placing Brown into a position that it believed would violate her doctor's restrictions.

LESSONS LEARNED

- An employer is not required to offer a promotion as an accommodation if the employee is not the most qualified candidate.
- Employers should remain engaged and communicate clearly with the employee during the disability accommodation process.
- Employers should document their understanding of an employee's restrictions and any attempts made to seek clarification on those restrictions.



Recent EEOC Settlements of ADA Lawsuits

EEOC v. OCEANIC TIME WARNER CABLE LLC

- The U.S. Equal Employment Opportunity Commission (EEOC) filed suit against Oceanic Time Warner Cable LLC on September 19, 2018.
- The lawsuit alleged that Time Warner terminated employees rather than engaging in the interactive process to determine if reasonable accommodations, including additional leave were needed, in violation of the ADA.
- This case resulted in an $800,000 settlement between Time Warner and the EEOC.

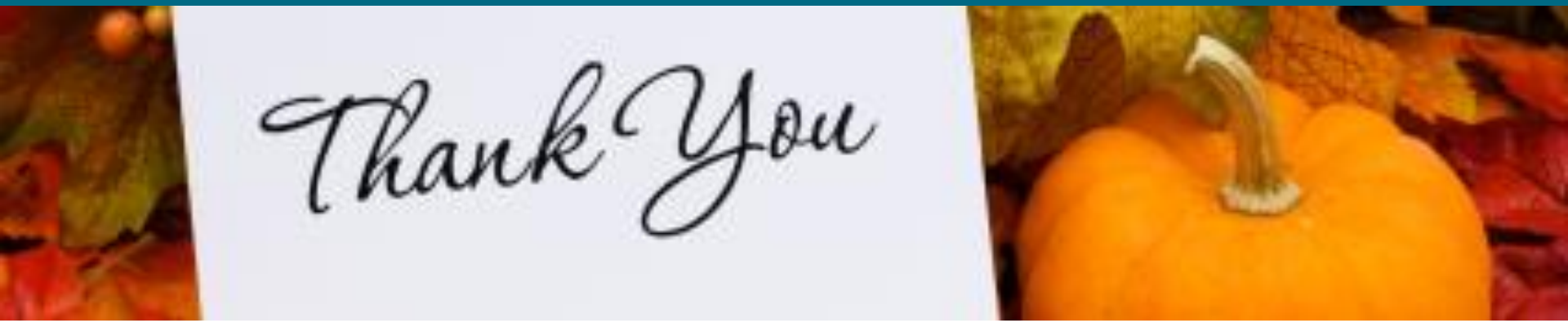
EEOC v. PRESTIGE CARE, INC.

- The EEOC filed a lawsuit against Prestige Care, Inc, alleging that its inflexible leave policies violated the ADA.
  - Prestige had a policy requiring employees to be 100% healed while at work and would not allow employees to return to work after medical leave unless they did so without medical restrictions.
  - The EEOC found that a policy denying leave to employees with disabilities without a meaningful interactive process frequently leads to violations of the law.
  - This lawsuit resulted in a $2 million settlement

EEOC v. KTF ENTERPRISES, INC.

- The EEOC recently settled a case against a nail polish manufacturer for failing to accommodate two disabled factory workers who requested stools to sit on periodically as they performed their work.
- The EEOC found that the requested accommodation would not have caused an undue burden on the company and that if the manufacturer attempted to engage in the interactive process with the employees, it would have discovered that the employees would be able to periodically use the stools without impacting operations.
- The former employees will be receiving $175,000 in monetary relief from the settlement.

QUESTIONS



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