

SHIRLEY RYAN ABILITYLAB  
WHAT JOB SEEKERS WITH DISABILITIES AND EMPLOYERS  
NEED TO KNOW ABOUT JOB ACCOMMODATIONS

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>> SHARON RENNERT: Everyone can hear me?

Good!

Well, thank you very much. I am so pleased to join you for this program today, and quite a responsibility to get it started. So hopefully I get this off on the right foot. I'm pleased to begin today's program by focusing on an aspect of reasonable accommodation law that often gets limited attention and yet plays a necessary, indeed a critical role in the provision of reasonable accommodations. The interactive process that generally should follow a request.

To me the principle of reasonable accommodation is the centerpiece of the ADA's employment provisions, because it recognizes and addresses the barriers found in our workplace that must be removed to ensure an equal employment opportunity to compete for work, to perform a job, and to gain access to the benefits and privileges of employment.

The concept of reasonable accommodation recognizes that the issue or the problem is not the disability itself but the many types of workplace barriers, whether knowingly or unwittingly erected that prevent individuals from getting a job or being allowed to perform one.

Just as the concept of reasonable accommodation is the centerpiece of the ADA's employment provisions, the interactive process is the centerpiece of the reasonable accommodation obligation.

Yet neither the statute of the regulations mention the term "interactive process" when discussing the obligation to provide reasonable accommodation.

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.

Now, the EEOC and most courts have recognized that an employer's failure to engage in an interactive process is not by itself a violation of the ADA. The bottom-line legally will be whether a reasonable accommodation was provided or not. But this fact should not lead an employer or an individual with a disability to minimize the importance of the interactive process. Because the EEOC and courts have also found that employers are more likely to face serious legal consequences by neglecting all that an interactive process offers in obtaining the information needed to make an informed legally justified decision.

Similarly, individuals with disabilities who do not participate in this process risk losing their charges or lawsuits.

In my long career at the EEOC working on the ADA, I have specialized in the subject of reasonable accommodation and all that resolves around it. My focus has never been only the strict legal requirements. Rather, much of my work is focused on how the reasonable accommodation obligation actually works in what we like to call "the real world."

The statute and regulations cannot dictate how the interactive process should be conducted. There are too many variables. But my work with employers and individuals with disabilities who reach out for assistance in navigating the interactive process has taught me some valuable lessons that I would like to share with you today.

One note: Most requests for reasonable accommodations come from employees seeking accommodations connected with the job or with the work environment. So most of my comments will be in that context. But everything I'm discussing also applies to requests for accommodations in the hiring process or to gain access to a benefit or privilege of employment.

So, number one...

It does help to have some understanding of what the ADA does and does not require. For example, sometimes I must explain to an employer that the ADA requires them to provide effective accommodations. There are no legal brownie points for just providing something, even if it is ineffective when there was an effective accommodation possible.

Similarly, sometimes I must explain to individuals with disabilities that the ADA does not give them the right to dictate the form of accommodation they may receive. Sometimes an employer can meet an individual's needs effectively by providing an alternative accommodation. A right to reasonable accommodation does not necessarily mean the right to the reasonable accommodation of one's choice. Concerns about medical privacy have generally grown in the past two decades. But when seeking a reasonable accommodation, individuals with disabilities have to give up some of that privacy. For those with hidden disabilities perhaps more than those with obvious ones. I sometimes need to inform employees who are wary of disclosing the diagnosis that employers are

entitled to know the name of your medical condition for which you are seeking a reasonable accommodation.

A refusal to provide such information can justify denial of accommodation. I recognize providing this information can be difficult. The people with certain types of disabilities still face a lot of stigma and discrimination.

And I cannot promise them that in return for making this disclosure they will receive a reasonable accommodation or that they will not face termination or some other negative employment action.

Nonetheless, an employer is entitled to more than a vague description of a condition.

Employers often have the right with an employee's permission, to seek relevant medical information from one's healthcare provider. Now, the individual can refuse such permission, but if the employer cannot gain information, it is otherwise entitled to, again, the risk is that the employer now has a lawful reason to refuse the request.

In a few minutes I will discuss ways employers may be able to help address legitimate employee concerns, ways that help to build trust and cooperation so necessary in order for information to be exchanged.

Second, the interactive process is a tool to help employers make an informed decision. It's a tool to aid an employer in obtaining information it often needs to fully understand and evaluate a request for accommodation. The intent behind encouraging an interactive process is to lessen decision making that is based on assumptions, generalizations, or erroneous information that can amount to discrimination.

The employer, not the individual requesting accommodation, really drives this process. Certainly an individual can be proactive in providing information, but employers have the greater responsibility to begin and guide this process. If an employer fails to ask questions and instead makes a peremptory decision to deny the request, the employer cannot defend itself later by saying the individual failed to provide sufficient information to merit a positive response.

Both the EEOC and courts have recognized that as long as there was a valid request for accommodation, a simple statement that an employee needs something from the employer because of a medical condition, the employer has the responsibility to follow up by seeking more information. The individual's responsibility in the interactive process will be to respond to the employer's questions.

Number three...

The interactive process is meant to be a cooperative process, not an adversarial one. There are several elements required for successful cooperation. Starting with everyone having an open mind. For employers, explaining that your questions and requests for

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 accommodation anyway.

These individuals, unfortunately, are sabotaging the interactive process. Thereby giving the employer a lawful reason to deny their requested accommodation. As indicated earlier, the interactive process is primarily meant to be a learning process for the

employer. This may include learning about the specific limitation or limitations that necessitate a reasonable accommodation, why these limitations necessitate an accommodation, and whether there are different ways to address the limitations.

Sometimes the process begins with the employer seeking information to establish that the medical condition is a disability as defined by the ADA.

The process may require an employer to understand how specific accommodations will accomplish their purpose, both to meet a disability-related need and enable job performance.

As well as reviewing any negative impact of a potential accommodation. In other words, undue hardship.

An individual with a disability should aid in this process. The sooner information is provided, the sooner a decision can be reached.

Sometimes when we have lived with a disability for a long time or have successfully worked with accommodations provided by other employers, or perhaps other supervisors within the same organization, we forget that when we need to ask a new employer or a new supervisor or HR person for accommodation, they do not know what we know. We may find it tedious and repetitive, but if this is the first time we are asking this employer or this person for this accommodation, then we need to be prepared to provide the information they need. Now, if the same information has already been provided to someone else within the organization, by all means point this out. I'm not suggesting reinvent the wheel. But sometimes we need to step into somebody else's shoes and try to understand their concerns, their confusion, their reluctance.

One key element of cooperation is having trust that the other party is acting in good faith. Let's face it... it's hard to cooperate when we don't trust the other party.

I understand that as we approach the interactive process, many of us bring memories of bad experiences with it. As individuals with disabilities, we think about employers who simply denied our request for accommodation, treated us disrespectfully or with suspicion. As if we had asked for something we are not entitled to seek. Who made us jump through unnecessary hoops or who viewed our need for accommodations as signifying we were not fully capable employees.

As employers, we think about persons with disabilities who withheld necessary information that we were entitled to have or provided vague or unhelpful answers to appropriate questions, or refused even to consider or respond to alternative suggestions.

But these past encounters need to be put aside. Do not let such bad experiences poison the current interactive process.

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 doctor stating why a notetaker was necessary if a sign language interpreter was already provided.

Think about this.

I see the employee's problem. And I know everyone in this room does also.

But this agency had a uniform requirement. All requests for reasonable accommodation had to be supported by a doctor's note. But the ADA requires that any request for medical information, including confirmation of need from a healthcare provider be legally justifiable.

There was no such justification here. The agency could have discussed with the employee other possible alternatives to providing a notetaker.

For example tape recording the interview and having someone transcribe it later for the investigator. I'm not sure whether this would be a cost effective or efficient alternative, but exploring other options to a notetaker would have been permissible.

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 outright refuse to respond to requests from employers, because for them that's legally dangerous. While you may feel a question or a request is unnecessary or flat-out illegal, and maybe ultimately you will be proven right, it is still far better to cooperate, let the process play out and then when you get a final decision on your request, if you want to go back and challenge the employer's question or request for medical documentation, like here the request for the doctor's note, then file a complaint at that point. Or cooperate, answer or provide what the employer is looking for and simultaneously file a complaint. But it is dangerous because ultimately someone is going to second-guess you if you decide to say "no."

The EEOC has been asked many times if we have a form that lists the questions for an employer to ask in the interactive process. The answer is no. And we never will develop such a form because we believe a standardized form is wrong for the interactive process.

Wrong because it will inevitably ask questions that are irrelevant in a specific situation, wrong because it will inevitably leave out pertinent questions in a specific situation. Wrong because it could unnecessarily delay the process. And wrong because it so easily could lead to making an erroneous legal decision on the request for accommodation.

Also problematic, generic questions, which is what one inevitably asks when standardized questionnaires are used lead to generic answers. Many times when employers contact me to complain about unhelpful answers, I must point out that the generic or poorly-worded question it asked led to the unhelpful answer. Medical questions on standardized forms used in response to a request for accommodation pretty much guarantee that there will be occasions when such questions are not legally justified.

While there is no denying that it takes time to think about and develop questions relevant to a particular request, by doing this we stand a much better chance of asking those questions that are necessary and therefore we are more likely to get helpful information that aids in making an informed decision.

From the perspective of the individual with a disability being asked the right questions helped them to give the employer what he or she needs to make an informed decision.



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 suggest that an employer ask if an employee would prefer that someone of the same sex deal with the reasonable accommodation request when it involves issues around incontinence or body odor. Now, in my experience employers are only too happy to hand off these cases to anybody else if they can. But, again, everybody trying to be comfortable in these admittedly difficult situations.

When individuals express reluctance to reveal certain information about the disability, employers can help encourage cooperation and build trust by explaining the employer's obligation to maintain the confidentiality of any medical information that is provided, including that this individual is even requesting a reasonable accommodation.

Sometimes an employer must share certain medical information and have the legal right to do so.

In such situations the employer should explain who else may get this information and why. But employers should limit to the greatest extent possible what information they share with others, particularly those within the organization.

For example, I sometimes am consulted by an EEOC manager about a particular request for reasonable accommodation that my agency has received. I do not need to know the employee's name. Just withholding that piece of information allows EEOC's disability program manager to reveal a lot of sensitive medical or disability-related information pertinent to their question. Confidentiality is not violated because I have no idea who we are discussing.

To the extent identifying information must accompany disclosure of medical information, the employer official disclosing the information must ensure that anyone receiving it understands his or her obligation to maintain its confidentiality.

But, again, if we take just a few minutes sometimes to think about, do we really need to release someone's name, do we really need to release all the medical information in our possession in order to get the help and assistance we need, sometimes we'll be surprised how little we have to disclose. We can disclose just enough. By the way, when I talk to employers or individuals with disabilities, it is strictly on a confidential basis. Not as the ADA addresses confidentiality. Rather, EEOC prohibits me from revealing anything I learn to my enforcement colleagues. My job is to try to provide technical assistance, which requires that people divulge information to me. I need them to trust me in order to try to help them. A few times over the past two years I'll get a call from one of our enforcement people that -- sometimes it's an individual with a disability or sometimes it's an employer, who notes to investigator they have talked to me and they're being referred now to me. I will not confirm or deny to that investigator any conversation I have had. I am not part of the enforcement process.

So that's how I'm available to talk to all of you.

Number six...

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 always is going to come up if it's not crystal-clear why an accommodation is needed, is to exactly explore why is a reasonable accommodation needed.

Now, there are a whole host of questions that can fall under that issue, but that is generally where the interactive process is going to mainly be focused.

Every question posed to the requester or to a healthcare provider, or to any other relevant source should relate to one or both of these issues. I have long been perplexed that one of the questions that I think should almost always be asked, if not clear from the request, how long an accommodation is needed. It's often not raised at all. So often accommodations are provided without specifying any end date. Now, I'm not talking about accommodations that clearly will always be needed, but given that some disabilities or specific limitations caused by a disability will last only a short time, a few months, simply providing an accommodation on an open ended basis may create problems when an employer seeks in the future to withdraw the accommodation.

Now, to employees...

Even if not explicitly expressed, you are not necessarily legally entitled to keep an accommodation forever. Remember reasonable accommodations are only required because you have a disability-related need. If that need ends, then so does the legal obligation to provide you with an accommodation.

To employers...

Do yourself and the individual a favor and address upfront the period that an accommodation is needed.

Lack of communication on this issue may cause an employer and an employee to have different expectations. Silence or ambiguity is nobody's friend in the long run. The length of time an accommodation should be provided should not be determined arbitrarily but rather should be based on what the employer learns through the interactive process.

Providing the employee with periodic updates about what is happening to the request tells the employee that the request has not been forgotten and is being handled.

If employers are working on the request, they should want the employee to know that.

If something is taking longer than expected, they should let the employee know that. But if the employee has not heard something for a while, then he or she should ask for an update. Again, remember these are not rules carved in stone. I have had employees say "why should I have to ask, it's up to the employer to tell me." I say, yes, it would be nice to get the updates. You haven't had one. Go ask. That's the cooperative interactive process.

Number seven...

A trial period to test an accommodation can be a useful tool. The ADA does not mention use of a trial period. And it is not a legal requirement to provide one. But I have found

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 workplace are the most common accommodation requests where I suggest the use of a trial period.

I generally suggest a period of anywhere from one to six weeks. Sometimes issues will arise during the trial period. But that doesn't necessarily indicate the accommodation doesn't or cannot work. Some tweaking of an accommodation may be necessary.

Sometimes where the accommodation seems to be working but there have been one or two issues, nothing definitive that shows the accommodation just can't work, then lengthen the trial period as you tweak the accommodation.

Again, don't indefinitely delay the trial period, but, for example, if my initial trial period was for four weeks, then maybe I do another four weeks.

If the trial period demonstrates the accommodation works, then as an employer I provide it for the length of time it is needed.

If, on the other hand, the trial period indicates it does not work, then now as an employer I have a right to say no, end the trial period. This form of accommodation will not be provided. Maybe I'm going to need to now look to see if there is another form of accommodation that will meet the employee's needs.

Generally a trial period is used for an accommodation suggested by an employee, but it can be used for an accommodation suggested by an employer. The objective here is to give the accommodation a good faith audition with the hope it will succeed until proven it does not.

Lastly, providing appropriate training for those charged with conducting the interactive process including not just basic ADA legal requirements but also addressing the elements of and skills necessary for an effective interactive process.

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 language interpreter, no real need for an interactive process.

But oftentimes the request for accommodation can be rather vague, the person saying they need something but not really clear what it is, or with things where I was talking about using a trial period, I get there's a disability as an employer, but I don't see how tele-work helps you. You're asking for tele-work as an accommodation but I'm not getting the connection. Or I don't understand why a modified work schedule is needed.

This is where the tool of an interactive process should come in. Now, do employers know that this is something they should do? Many of them do. But they may only know

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. Why is an employer asking you certain questions?

I try to help them understand why

So I don't know if that gets to your questions or not.

>> AUDIENCE MEMBER: Sort of, but I guess... I mean, if there are issues that need to be resolved to determine whether or not you're even going to take the job and --

>> SHARON RENNERT: Well, if the issue is simply one of qualifications, it's still with any applicant.

>> AUDIENCE MEMBER: I'm not talking about qualifications, I'm just saying, if they're willing to provide whatever you need to work -- your understanding of the job --

>> SHARON RENNERT: Again, employers should not necessarily be looking at doing a different kind of interview just as they happen to know they're interviewing somebody with a disability. Now, if that person has said that he or she might need accommodation in the job, then there are certain follow-up questions an employer could ask. But, again, generally they can't start delving too deeply. They can't start getting all kinds of information about the disability from an applicant who requested accommodation. It is sort of limited the amount they can do. If during an interview, as a reasonable person, not an expert on disability, but it's reasonable, I find out about a disability, it's obvious or the person discloses one, and I have a reasonable concern about a particular job duty -- not the job in general, but how would this disability can you do this particular task, I'm allowed to ask two questions. I certainly can ask about how you do it. I can ask, will you need an accommodation to perform this task? And if the answer is yes, I

can ask what it would be. That's as far as I can go in the application period, in those kind of questions.

But, again, is the person even asking for accommodation? If they're not, then, again, you should be interviewing people just like you would.

If I have concerns because of the disability, not necessarily accommodation, you can ask people to describe how they would provide a job duty. You can ask people to even demonstrate, if that's possible, how they would do it.

One of the things in your packets this morning is the current list of all of EEOC's disability-related publications. Which includes a publication on disability-related inquiries and medical exams during the hiring process. And that may be of some help to where you're going with your questions this morning.

Other questions?

>> AUDIENCE MEMBER: Thank you. I was curious if you have a perspective on or experience with companies that use an outside organization to administer and manage their accommodation process?

>> SHARON RENNERT: And when you say "outside," you mean --

>> AUDIENCE MEMBER: Like a third-party vendor.

>> SHARON RENNERT: Really there is, again, a lot of different ways to do it, not necessarily right or wrong. My concern is always whether inside or outside the organization, as an employer, are you sure these people know what they're doing?

If you're going to hire somebody outside, whoever that might be, then you want to do your due diligence about what are you going to do. Because as the employer, you will be held legally responsible for what they do or don't do.

So if they end up asking illegal questions under the ADA, they had no legal justification for what they asked for, they may get in trouble, but you as the employer who hired them, you're going to get in trouble.

If they don't conduct an interactive process and just say "no" to something, again, to the extent that the -- you know, if a charge is filed and EEOC finds -- yeah, there was a reasonable accommodation, no undue hardship, but the fact they didn't bother to engage in the interactive process ends up hurting you. I won't tell you don't hire outside people to do it. But just do your due diligence that these folks have the training, that they have appropriate experience, that they can give you solid information that gives you confidence that you want to turn over this responsibility to them.



>> AUDIENCE MEMBER: I'm really more curious, we also have an audit vendor who does the ADA process, and we were advised to do so to avoid our teams internally from having very specific potential medical information about those associates, as we're often later asked later on to deal with performance-related issues that are not related to the ADA request.

Do you find that from your perspective as an investigator and an attorney that that is something that you would recommend to employers from a perspective of being able to separate in an opportunity you don't maybe have two people, one who handles performance and one who handles this ADA issue, where that way if someone different has a very specific diagnosis information, is there value to having that, from your perspective, when you investigate and advise clients? Or do you see a better interactive process when the client is actually more informed from the more specific medical diagnosis perspective?

>> SHARON RENNERT: Again, I understand it's a good question, but it's also a very hard one to answer. Because I can't tell you that it's -- sort of there's a right or wrong or one way is necessarily better than the other. I do appreciate the sensitivity about, okay, part of why we want an outside vendor is we want to limit the spread of medical information. And that could be an admirable objective to have.

But in terms of, again, making sure that your outside vendor is fully steeped in everything we have been discussing today, that to the extent I have to expect that times -- in order to appropriately evaluate a request, they're going to have to talk to the supervisor. If they're not, that's a problem. Because for a lot of requests for accommodation to know, does the supervisor see potential problems with this accommodation, are there any issues that the vendor needs to keep in mind here?

And also, ultimately, it is the supervisor who is going to have to implement the accommodation. So if they're not really getting a chance to kind of assist in the interactive process...

The EEOC, in terms of how we as an employer handle requests, we don't have an outside vendor. We have what is called a disability program manager, who handles all requests for accommodations. Not individuals, supervisors or managers, but our disability program manager.

Our disability program manager is the one who will collect any medical information. This is the person at the EEOC who collects, if necessary, from an individual's healthcare provider, medical information.

In terms of what is told to the supervisor, it's not handing over all the medical documentation received. Sometimes, the manager -- the disability program manager's discretion, might not even be fully identifying what the disability is, but at a minimum, they will identify what the limitations are. In some cases that may lead a supervisor to figure out what the disability is, but not always. But telling them about limitations and

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.

Supervisor, I mentioned earlier, sometimes the fact that people are getting accommodations, some supervisors think that means you're not fully capable, when the whole point of accommodation is to enable someone to perform the essential functions of their job.

These subtle ways sometimes that a supervisor's viewpoint can shift and shift in ways that could harm the employer by kind of... oh, I'm going to give you less -- a lesser rating when it comes time to performance review because you're getting an accommodation. Have I seen that? Sure, I've seen that.

You want to make sure supervisors understand the purpose behind accommodation. What it signifies and what it doesn't signify.

>> Any other questions?

>> AUDIENCE MEMBER: Thank you. As an employee, is it appropriate for the employee when asked for doctor's medical notes to ask for that request in writing, or is that more prohibitive, and then in the case where you're in a company that has a high management turnover and they request these and you provide that to them, and when the managers turn over, they have no idea where this paperwork is, which should be private, and each manager asks for the paperwork over and over and over again, do you just keep doing that? Or at some point you ask them to sign something that you have given it in?

>> 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 ]