Office of
The City Attorney
City of San Diego

MEMORANDUM

(619) 236-6220

DATE: May 11, 2012

TO: Scott Chadwick, Director, Human Resources Department

FROM: City Attorney

SUBJECT: Disability Law: Reasonable Accommodation and the Interactive Process

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INTRODUCTION

You requested a general description of the legal requirements for the City as an employer with respect to reasonable accommodations and the interactive process under applicable disability law.

QUESTIONS PRESENTED

1. What is a reasonable accommodation under state and federal law?

2. What is an interactive process under state and federal law?

SHORT ANSWERS

1. A reasonable accommodation is any modification or adjustment to a job or work environment that will enable a qualified individual with a disability to participate in the job application process or perform the essential functions of his or her position.

2. An interactive process is the dialogue between the employer and the individual with the disability to clarify the nature of the individual's needs and functional limitations so as to be able to identify a reasonable accommodation.

ANALYSIS

Title I of the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability in employment. 42 U.S.C. §§ 12101-12213. California's Fair Employment and Housing Act (FEHA) also prohibits discrimination in employment because of a disability or medical condition. Cal. Gov't. Code §§ 12900-12996. The City of San Diego is a covered employer under the ADA and FEHA.

I. REASONABLE ACCOMMODATION

A. ADA

The ADA prohibits discrimination against an employee because of physical or mental disability. 42 U.S.C. § 12112. The ADA covers employers with fifteen or more employees. *Id.* The ADA provides that "no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.*

Generally, under the ADA the term "disability" means an individual with a physical or mental impairment that substantially limits one or more major life activities of the individual; a record of such an impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102. To provide equal employment opportunity to disabled persons, employers must make "reasonable accommodations"[1] to enable an employee or applicant with a known disability to perform a position's essential functions. California Practice Guide, Employment Litigation Chapters 8-14 (2011) (citing 42 U.S.C. §§ 12111(8), (9); 12112(a)).[2]

Under the ADA:

> [T]he term "reasonable accommodation" may include: (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 or equipment or devices, appropriate adjustment or modifications or examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9)(A)(B).

B. FEHA

Under the FEHA, it is unlawful for an employer to discriminate against an employee because of physical or mental disability. Cal. Gov't. Code § 12940(a). The FEHA covers California employers with five or more employees as well as the state or any political subdivision of the state, and cities. Cal. Gov't. Code § 12926(d). The FEHA provides even broader protections for employees with disabilities.

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[1] Under the ADA and FEHA, employers must make reasonable accommodations unless the employer can demonstrate that the accommodation will cause an undue hardship. 42 U.S.C. § 12112(b)(5).

[2] For a discussion on "qualified individual with a disability" and "essential function" under the ADA, please refer to 1993 City Att'y MOL 0478 (93-76; Aug. 18, 1993).

Like the ADA, the FEHA requires that employers make reasonable accommodations for the known disability of employees. Title 2, section 7293.9 of the California Code of Regulations states "[a]ny employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the disability . . . ."

The FEHA has almost identical provisions as the ADA regarding what qualifies as a reasonable accommodation, defining it as one that may include either of the following: (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; (2) job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions. Cal. Gov't. Code § 12926 subd (o); Cal. Code Regs. title 2, § 7293.9(a)(2).

II. SCOPE OF REASONABLE ACCOMMODATION

Title I of the ADA requires an employer to provide reasonable accommodations to qualified individuals with disabilities. 42 U.S.C. § 12112(a), (b)(5)(A). Likewise, California Government Code section 12940(m) makes it unlawful for an employer to fail to make reasonable accommodation for the known physical or mental disability. The ADA supersedes the provisions of state and local laws that provide less protection for individuals with disabilities, but does not invalidate or limit the remedies, rights and procedures of other federal, state or local laws that guarantee greater protection for individuals with disabilities. ADA Compliance Guide, vol. 1, § 401, p. 3; 29 C.F.R. § 1630.1(c)(2) (2011). Consequently, the employer has an affirmative duty to comply with the ADA or FEHA, whichever gives the most protection to the individuals with disabilities, to make reasonable accommodations.

The statutes and courts are clear about the responsibilities of an employer when an employee has made a request for a reasonable accommodation based on his or her disability. Once an employee requests an accommodation, the employer must engage in a timely, good faith, interactive process to determine the appropriate reasonable accommodation. Cal. Gov't. Code 12940(n); *U.S. Equal Employment Opportunity Commission v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1110 (9th Cir. 2010) (citing *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002)). Failure to engage in this process is a separate violation under FEHA. *Wilson v. County of Orange*, 169 Cal. App. 4th 1185, 1193 (2009) (citing *Wysinger v. Automobile Club of Southern California*, 157 Cal. App. 4th 413, 424-425 (2007)). The term "reasonable accommodation" should be interpreted flexibly. *Sargent v. Litton Systems, Inc.*, 841 F. Supp. 956, 961 (N.D. Cal. 1994). It also requires direct communication between the employer and employee to explore in good faith the reasonable accommodations, consideration of the employee's request, and offering an accommodation that is reasonable and effective. *Zivkovic v. Southern California Edison Co.*, 302 F.3d at 1089.

Employers are not obligated to provide all conceivable accommodations or the most expensive accommodations. In *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997), the court said an employee is entitled to a reasonable accommodation and not to "a preferred accommodation." Stated plainly, under the ADA a qualified individual with a disability is "not entitled to the accommodation of her choice, but only to a reasonable accommodation." *Id.* at 1285-86 (quoting *Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 948 (W.D. Wis. 1994)).

Additionally, in *Stewart*, the plaintiff had, as part of her request for a reasonable accommodation, taken on the role of advocate for longer lunch breaks for all the employees. In addressing the issue of advocating for others, the court said "[i]n this case, Stewart clearly crossed the line from seeking an accommodation on her own behalf to becoming an advocate for a policy goal." *Id.* at 1286.

Further, the employer has discretion to choose between effective accommodations, and may choose the less expensive or one that is easier to provide. *Kiel v. Select Artificials*, 169 F.3d 1131, 1137 (8th Cir. 1999). However, the accommodation must be effective, and the ADA implementing regulations explain that an employee's preference should be given primary consideration. 29 C.F.R. App. § 1630.9 (2011).

An example of a reasonable accommodation offered by an employer is found in *Vande Zande v. State of Wis. Dept. of Administration*, 851 F. Supp. 353 (W.D. Wis. 1994). The plaintiff requested that the counters and sinks in the kitchen be redone because they were too high for her to reach from her wheelchair. Rather than do a costly kitchen renovation, the employer built a separate counter at an accessible level and provided a coffee pot, and other amenities and asked plaintiff to wash her dishes and get her water from the bathroom sink which was at an accessible height.

The plaintiff argued that the failure to make the entire kitchen accessible violated the ADA because forcing her to use the bathroom sink amounted to a "separate but equal" facility that could not rise to level of a reasonable accommodation. *Id.* at 362. The *Zande* court found that by providing the separate lower counter and accessible bathroom sink, the employer had provided a reasonable accommodation, and noted that "an employer can satisfy the ADA by choosing an effective accommodation that is less costly or easier to provide." *Id.*

Finally, an employee cannot reject reasonable offers of accommodation and maintain his or her qualified status. 29 C.F.R. § 1630.9(d) (2011); *Smith v. Quikrete Companies, Inc.*, 204 F. Supp 2d. 1003, 1013 (W.D. Ky. 2002). If the City has acted in good faith to try and find a reasonable accommodation for a disabled employee, but the employee has rejected the City's offers, the City may continue to seek options and reasonable accommodations, but it has met its burden.

III. INTERACTIVE PROCESS

Federally, the EEOC's Enforcement Guidance recommends that the employer and employee participate in an informal, interactive process to clarify what the individual requires and to identify the appropriate reasonable accommodation. The employer may ask relevant questions to

ascertain the specific workplace barriers, get suggestions from the individual as to what are possible accommodations, and utilize various resources to determine an effective, reasonable accommodation.

California state law, however, is stricter and makes it an unlawful employment practice for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations . . . . " Cal. Gov't. Code § 12940(n).

Humphrey v. Mem'l Hosps. Ass'n., 239 F. 3d 1128, 1138 (9th Cir. 2001), advances the proposition that "the duty to accommodate is a continuing duty that is not exhausted by one effort." Here, Ms. Humphrey suffered from obsessive compulsive disorder which resulted in chronic lateness and absenteeism from work. While Ms. Humphrey received initial accommodations, once the employer realized that these accommodations were not working, it had an obligation to explore alternative accommodations suggested by Ms. Humphries, which included working from home. Instead, the employer denied her request without offering any alternative solutions or exploring other possible accommodations. The EEOC Enforcement Guidance asserts that an employer must consider each request for reasonable accommodation, and if a reasonable accommodation turns out to be ineffective and the employee with a disability is still unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not create an undue hardship.

[A]n employer has discretion to choose among effective modifications, and need not provide the employee with the accommodation he or she requests or prefers, but an employer cannot satisfy its obligations under the ADA by providing an ineffective modification." *U.S. Equal Employment Opportunity Commission v. UPS Supply Chain Solutions*, 620 F.3d at 1113. To effectuate an effective accommodation or modification, "[t]he interactive process requires communication and good faith exploration of possible accommodations between employers and individual employees, and neither side can delay . . . the process." *Humphrey*, 239 F.3d at 1137.

The court in *Stewart*, referenced previously, said that Stewart had failed to engage in the interactive process because she never gave "any substantive reasons as to why all five of the proffered accommodations were unreasonable given her medical needs. Instead, Stewart simply demanded that Happy Herman's capitulate and provide a thirty minute paid break for her and all of her coworkers." *Stewart v. Happy Herman's*, 117 F.3d at 1286-87.

Thus, the employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. Both employer and employee have an obligation to make good faith efforts in the interactive process. The ultimate goal is to identify an accommodation that allows the employee to perform the job effectively. *Jensen v. Wells Fargo Bank*, 85 Cal. App. 4th 245 (2000). For the process to work, "[b]oth sides must communicate directly, exchange essential information, and neither side can delay or obstruct the process." *Id.*

IV. CITY POLICY

It is the City's policy to comply with the ADA and FEHA and any other applicable law prohibiting discrimination against individuals with disabilities. The City's regulation on reasonable accommodations and the interactive process is set forth in Administrative Regulation 96.21, "City Policy for People with Disabilities: Employment." This regulation states:

> It is the City's policy to provide a reasonable accommodation for the known disability of an applicant or employee unless it would impose an undue hardship to the City or result in a direct threat to the applicant, employee, or others.

San Diego Admin. Reg. 96.21 § 3.2.

The regulation further states:

> The City will engage in a timely, good faith, interactive process with the applicant or employee to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an applicant or employee with a known disability.

San Diego Admin. Reg. 96.21 § 4.3.

The City's annual EEO Policy, which refers to San Diego Admin. Reg. 96.21, also states that pursuant to the ADA and FEHA, the City will provide reasonable accommodation to a qualified employee with a disability, and will engage in a timely, good faith interactive process with an employee in need of a reasonable accommodation. Further, there is also reference to the City's non-discrimination policy regarding individuals with disabilities and the duty to provide a reasonable accommodation in Personnel Manual Index Code K-2.

CONCLUSION

The ADA is federal law with which the City must comply. The FEHA is the California law with which the City must also comply. The City is obligated under both statutes to reasonably accommodate an employee with a disability. A reasonable accommodation is any modification or adjustment to a job or work environment that will enable a qualified individual with a disability to participate in the job application process or perform essential functions of his or her position.

Upon learning of an employee's need for accommodation, the City should engage in an interactive process to find a reasonable accommodation. The interactive process is not a one-time occurrence but a continuing responsibility. The employee is entitled to a reasonable accommodation, but not necessarily the most expensive or preferred accommodation.

The City is committed to ensuring that employees with disabilities are provided the same opportunities to work and thrive as other employees. By engaging in the interactive process and providing effective, reasonable accommodations, the City will continue to achieve its mission of providing equal opportunities to its employees.

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