

2012-2013 GRAND JURY REPORT

Riverside County Human Resources Department

Reasonable Accommodation Non-Compliance

Background

Title I and Title V of the Americans with Disabilities Act of 1990 (ADA), as amended, prohibits employment discrimination against qualified individuals with disabilities in the private sector and in state and local governments. The California Fair Employment and Housing Act (FEHA), prohibiting discrimination based on a disability, was passed in 1992. FEHA is intended to provide persons with disabilities equal access to that which is available to the general public. FEHA offers greater protection to employees than the ADA and incorporates guidelines developed by the Equal Employment Opportunity Commission (EEOC) that require an interactive process to occur between the employer and the employee/applicant with a known disability. These guidelines include the employer consulting with the employee/applicant to ascertain the precise job-related limitations and how they could be overcome with a reasonable accommodation. This interaction would include identifying potential accommodations and assessing their effectiveness.

The EEOC "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act" (Enforcement Guidance), updated as a result of the passage of "The Americans With Disabilities Act (ADA) Amendments Act Of 2008", clarifies the rights and responsibilities of employers and individuals with disabilities regarding reasonable accommodation and undue hardship.

For purposes of this report, the following ADA and FEHA definitions apply:

Employer is a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

Undue Hardship is an action to require an accommodation that results in significant difficulty or expense to the employer.

Disability is a physical or mental impairment of an individual that substantially limits one or more major life activities or a record of such an impairment.

Qualified is an employee who (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the position, with or without reasonable accommodation.

Interactive Process is the first step taken for the employer and employee to engage in a dialog to determine if the employee can be reasonably accommodated in his/her current position and if not in his/her current position then to a vacant position.

Reasonable Accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities.

The 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 of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Reassignment to a vacant position applies to employees not applicants.

The ADA specifically includes reassignment to a vacant position as a form of reasonable accommodation.

Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that:

- (1) *there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or*

- (2) *all other reasonable accommodations would impose an undue hardship.*

REFERENCES

See 29 C.F.R. pt. 1630 app. §1630.2(o) (1997); Senate Report, supra note 6, at 31; House Education and Labor Report, supra note 6, at 63.

FEHA outlines two major requirements of employers regarding disabled employees:

1. Employers must provide reasonable accommodation for those individuals who, because of their disability, are unable to perform the essential functions of their current job.
2. Employers must engage in a timely, good faith interactive process with individuals in need of reasonable accommodation.

One of the primary functions of a human resources department is to monitor legal compliance in order to ensure that supervisors and managers do not violate federal and/or state employment laws in the performance of their duties.

Riverside County Human Resources Department (HR) is charged with administering these federal and/or state laws and is responsible for ensuring compliance by Riverside County (County) employees. In addition, HR must provide reasonable accommodation for an applicant/employee unless the accommodation would cause undue hardship to the County's business operations.

Methodology

The Grand Jury began its investigation in July, 2012. The investigation consisted of an inquiry into and an examination of HR policies and procedures used by the Disability Access Office and other HR staffing units in providing reasonable accommodation for disabled employees. Laws and guidelines issued by the EEOC, ADA and FEHA have also been researched. Several witnesses, including HR personnel, were interviewed under oath.

Findings

1. Currently HR engages in the interactive process and determines that an employee, identified as needing reasonable accommodations, has work restrictions. If these restrictions cannot be reasonably accommodated within his/her current position or by being reassigned within his/her department, HR will search for other vacancies throughout the County for positions for which the Accommodation Candidate Work Restriction List (AR/List) candidate is qualified.

HR's current procedures are **not in compliance** with federal statutes in that they do not provide reasonable accommodation for a disabled employee when accommodations cannot be accomplished within the disabled employee's current position or department. The current practice is that HR places the disabled employee on an AR/List. The employee is then referred to the hiring department and interviewed, thus "competing", for vacant positions in other departments. The employee remains on this list until placed in a vacant position, or until a specified time period has elapsed, generally 90-days, depending on whether or not he/she is vested in a retirement plan.

Any type of meeting between an AR/List individual and a hiring official, whether cloaked as a "skills verification meeting" or a similar meeting, constitutes an interview; an interview constitutes competition, thus is a violation of the ADA.

The EEOC Enforcement Guidance document was originated by the ADA Division, Office of Legal Counsel Number 915.002 and examines reassignment as a form of reasonable accommodation and specifies who is entitled to reassignment and the extent to which an employer is required to search for a vacant position.

Under the subsection entitled "Types of Reasonable Accommodation as Related to Job Performance", discussion item Number 29 asks:

Does reassignment mean that the employee is permitted to compete for a vacant position?

No. Reassignment means that the employee gets the vacant position if she/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.

REFERENCES

42 U.S.C. §12111(9)(b) (1994) 29 C.F.R. pt. 1630 app. §1630.2(c) (1997). See Senate Report, supra note 6, at 31 (“If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker.”) See Wood v. County of Alameda, 5 AD Cas. (BNA) 173, 184 (N.D. Cal. 1995) (when employee could no longer perform job because of disability, she was entitled to reassignment to a vacant position, not simply an opportunity to “compete”); cf. Aka v. Washington Hosp. Ctr., 156 F. 3d 1284, 1304-05, 8 AD Cas. (BNA) 1093, 1110-11 (D.C. Cir. 1998) (the court, in interpreting a collective bargaining agreement provision authorizing reassignment of disabled employees, states that “[a]n employee who is allowed to compete for job precisely like any other applicant has not been “reassigned”); United States v. Denver, 943 F. Supp. 1304, 1310-11, 6AD Cas. (BNA) 245, 250 (D. Colo. 1996) (the ADA requires employers to move beyond traditional analysis and consider reassignment as a method of enabling a disabled worker to do a job).

The Grand Jury investigation revealed that AR/List individuals are currently being referred by HR personnel for interview by department personnel, contrary to EEOC guidance.

HR refers to an AR/List employee interview as a “skills verification interview” and is relying on the interviewing official to make the final qualification determinations.

2. The Grand Jury investigation revealed that many of the HR recruiting personnel responsible for filling vacant positions do not have the skills, experience or training to perform qualification determinations for verifying if an AR/List employee has the requisite skills to perform the duties of a vacant position. In addition, the HR recruiting personnel are relying on the hiring department personnel to perform the qualification determinations for AR/List employees who are awaiting placement to a vacant position. For qualification determination, the HR recruiting personnel are not using their own qualifications criteria entitled “recruiting guidelines” for qualification determination. Examples may be seen on <http://agency.governmentjobs.com/riverside/default.cfm?action/agencyspecs>
3. HR’s current policies and procedures do not address a procedure for when there are two or more AR/List qualified employees for a vacant position.

Recommendations

Riverside County Board of Supervisors Riverside County Human Resources Department

1. HR recruiters shall reassign a qualified AR/List employee to a vacant position without any department interview. HR procedures shall be amended to comply with the ADA requirements.
2. Only fully-trained and experienced HR recruiting personnel shall reassign a qualified AR/List individual after ascertaining his/her qualifications for the vacant position. It shall be the responsibility of the HR recruiter's supervisor to determine whether or not an HR recruiter is fully trained and/or experienced to make qualification determinations. In addition, all HR personnel shall be fully trained in ADA laws.

Recruiters shall apply the qualifications criteria as outlined in the Riverside County's job descriptions and recruiting guidelines listed at <http://agency.governmentjobs.com/riverside/default.cfm?action/agencyspecs>, or from job descriptions, resumes, and other sources. Compliance with ADA shall be implemented immediately.

3. HR shall develop a procedure to address the situation that exists when there are two or more AR/List employees qualified for a vacant position.