# LEARNING WHEN AND HOW TO ACCOMMODATE LEARNING DISABILITIES IN THE WORKPLACE

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## I. LEARNING DISABILITIES.

1. **Definition:** The National Institute of Neurological Disorders and Stroke defines "Learning Disabilities" as disorders that affect the ability to understand or use spoken or written language, do mathematical calculations, coordinate movements, or direct attention. *See* National Institute of Neurological Disorders and Stroke. (2011). NINDS learning disabilities information page. Retrieved, Aug. 9, 2012, from http://www.ninds.nih.gov/disorders/learningdisabilities/learningdisabilities.htm.

2. **Types:** LDs can be divided into three broad categories: developmental speech and language disorders, academic skills disorders, and others (such as coordination disorders). Each category includes more specific disorders, for instance, Specific Learning Disability, Dyslexia, Dyscalculia, Dyspraxia, Auditory Perceptual Deficit, Visual Perceptual Deficit. For a more exhaustive description of each LD *see Representing Individuals With Learning Disabilities*, New York State Bar Association Materials, Geoffrey A. Mort, Esq., Sept. 2012, at 2-5.

3. **Prevalence**: Approximately 15 million adults, adolescents, and children have learning disabilities in the United States. *See* National Center for Learning Disabilities. (2006). *Fact Sheet: Learning Disabilities In Adulthood.* Retrieved August 9, 2012, from http://www.ncld.org/ld-basics/ld-explained/ld-across-the-lifespan/learning-disabilities-in-adulthood-the-struggle-continues. Even so, while disclosure of learning disabilities is fairly common in academic settings, the issue takes on a new set of complexities in the workplace context.

4. **Disclosure:** In a study which surveyed one hundred thirty-two graduates with learning disabilities, the *Journal of Learning Disabilities* discovered that about 85% of respondents who applied for jobs did not disclose their LD to their employer. *See Employment Self-Disclosure of Postsecondary Graduates with Learning Disabilities: Rates and Rationales*, Journal of Learning Disabilities, Aug. 2002, at 365 ("[t]he primary reason for not self-disclosing was fear of discrimination--specifically, that the applicant would not be hired because of the learning disability.") Even more shocking is the finding that once employed, roughly 90% of those surveyed admitted that their LD had an affect on their work, yet 87.6% of those employees still did not disclose their LD to their employer. *Id.* at 368; *see also, Adults with Learning Disabilities: Occupational and Social Status After College,* Journal of Learning Disabilities, Mar. 1996, at 167; *Self-Disclosure Of College Graduates With Learning Disabilities*, Learning Disabilities: A Multidisciplinary Journal, Win. 2000, at 25.

## II. REASONABLE ACCOMMODATION OBLIGATIONS.

### A. ADA, ADAAA AND IMPLEMENTING REGULATIONS.

1. **The ADA: Amendments Act:** Effective January 1, 2009, the Americans with Disabilities: Amendments Act ("ADAAA") of 2008 expanded the definition of the term "disability," thereby significantly increasing the number of persons protected by the Americans With Disabilities Act ("ADA"). *See* 42 U.S.C. § 12101, *et seq.* Congress' goal in amending the ADA was to shift the focus away from whether an employee's impairment qualifies as a disability within the meaning of the law to whether the employer has complied with their obligations under the law. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

a. As was the case in the original statute, under the ADAAA "physical or mental impairments" include any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness as well as what the statute terms "specific learning disabilities." *See* 42 U.S.C. § 12102(1)(A); 29 C.F.R. § 1630.2(h)(1). The ADAAA, however, instructs courts and employers to adopt a broad standard when determining whether an individual is considered disabled. *See,* 42 U.S.C. § 12102(4)(A). In fact, the ADAAA states that it provides "a broad scope of protection" for employees and instructs courts examining ADA cases to provide coverage for plaintiffs "to the maximum extent permitted" by the statute. *Id.*

b. In addition, the Amendments reject the previous interpretation of "substantial limitation in a major life activity" as having created an inappropriately high level of limitation necessary to obtain coverage under the ADA. *See, e.g.,* 42 U.S.C. § 12102(4)(E). Under the ADAAA, an impairment no longer needs to prevent or severly or signifcantly restrict a major life activitity to be considered "substantially limiting." *See Id.*[1] As a result, establishing that an individual is "substantially limited" under the ADAAA requires a lower degree of functional limitation than prior to the ADAAA.

[1] Further, the determination of whether an impairment substantially limits a major life activity must now, generally, be made without regard to ameliorative effects of mitigation measures. *See* 42 U.S.C. § 12102(4)(E).

c. Further, the Amendments expand the definition of major life activities to include major bodily functions such as brain functions and functions of the neurological and genitourinary systems. *See, e.g.,* 42 U.S.C. § 12102(2)(B).

d. The ADAAA did not, however, change the definition of "reasonable accommodation," which continues to be defined as any change in the workplace that enables a qualified individual with a disability to enjoy equal employment opportunities. *See* 42 U.S.C. § 12111(9).

e. A qualified individual with a disability is someone who can perform the essential functions of the job with or without reasonable accommodation. *See, e.g.,* 42 U.S.C. § 12111(8). What constitutes "essential functions" of a job is a fact specific inquiry. *See, e.g., Hall v. United States Postal Service,* 857 F.2d 1073, 1079-80 (6th Cir. 1988) (reversing a grant of summary judgment on the basis that there was a genuine issue of material fact as to whether a 70-pound lifting requirement was an essential function of a Postal Service distribution clerk, despite fact that job description and affidavit from defendant stated that it was an essential part of the job). Factors to consider in determining if a function is essential include, *e.g.*, whether the reason the position exists is to perform that function, the number of other employees available to perform the function or among whom the performance of the function can be distributed and the degree of expertise or skill required to perform the function. *See* 29 C.F.R. § 1630.2(n)(1)-(3). An employer's determination as to what functions are essential to a job (memorialized in a written job description) will generally be afforded deference. *See id.*; *see also, Reville v. Niagara Frontier Transp. Auth.,* 04

Civ. 0258, 2009 WL 5167645, at *8 (W.D.N.Y. Dec. 20, 2009) ("employer's written job description, especially, is given substantial weight") (internal citations omitted).

2. **Implementing Regulations Promulgated by the EEOC**: On March 25, 2011 the EEOC published regulations implementing the 2008 Amendments to the ADA to provide "predictable, consistent and workable application of the ADA." *See* 29 C.F.R. § 1630, *et seq*; 76 Fed. Reg. 16977 (2011).

   a. Under the EEOC regulations, a disability is defined as "(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (ii) A record of such an impairment; or (iii) Being regarded as having such an impairment . . .." 29 C.F.R. § 1630.2 (g). All mental or physical impairments are not necessarily disabilities, "rather there are two additional requirements: the impairment must limit a major life activity and the limitation must be substantial." *See, e.g., Capobianco v. City of New York*, 422 F.3d 47, 56 (2d Cir. 2005), citing, 42 U.S.C. § 12102(2)(A).

   b. The EEOC defines "major life activities" as those activities that are of central importance to daily life and include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *See* 29 C.F.R. § 1630.2(i); *Quintero v. Rite Aid of New York, Inc*., No. 09-Civ-6084, 2011 WL 5529818, at *7 (S.D.N.Y. Nov. 10, 2011).

   c. EEOC regulations define the phrase "substantially limits" to mean "[u]nable to perform a major life activity that the average person" can perform, or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can

perform a particular major life activity as compared to" the average person. *See* 29 C.F.R. § 1630.2(j)(1)(ii).

3. **The Amendments Are Not Retroactive**: The ADAAA does not apply retroactively to conduct pre-dating the Amendments' January 1, 2009 effective date. *See, e.g., Thomsen v. Stantec, Inc.*, No. 11-2458-cv, 2012 U.S. App. LEXIS 10351, at *4-5 n.2 (2d Cir. May 23, 2012) (collecting cases). Since the Amendments do not apply retroactively, we have not seen many cases applying it in the context of employees with LDs.

4. **EEOC's Guidance to Employers.** In addition to implementing regulations, the EEOC has developed various forms of guidance with respect to an employer's obligation to provide reasonable accommodation. This guidance can be found in at least five different publications including: "Workers' Compensation and the ADA" (September 1996); "EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities" (March 1997); "Enforcement Guidance: Disability-Related Inquiries And Medical Examinations of Employees Under the Americans With Disabilities Act (ADA)" (July 2000); "Policy Guidance On Executive Order 13164: Establishing Procedures To Facilitate The Provision Of Reasonable Accommodation" (October 2000) and "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act" (October 2002).[2]

[2] Additional guidance is available in the form of EEOC promulgated "Fact Sheets" available on its website. *See e.g.,* Enforcement Guidance: Disability-Related Inquiries And Medical Examinations Of Employees Under The Americans With Disabilities Act (ADA); The Family and Medical Leave Act, the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964; Small Employers and Reasonable Accommodations; The Americans with Disabilities Act: A Primer for Small Business; The ADA: Your Responsibilities as an Employer and Work At Home/Telework as a Reasonable Accommodation.

a. The EEOC has not, however, provided updated and cohesive guidance in one place on what, exactly, is required by employers. The EEOC announced it would issue such comprehensive guidance in the summer of 2011, a deadline which was extended to the fall 2011. As of January 2012, the EEOC announced it is still working on preparing new guidance.

5. **Why Is the ADA Important In New York?** Notwithstanding the existence of the New York State's Human Rights Law ("NYSHRL") (and various other local and city anti-discrimination laws in New York) the ADA is still important in New York State for a number of reasons. First, as we will discuss below, the EEOC has taken an aggressive stance with respect to violations of the ADA and has been a staunch watchdog for plaintiffs in this area. Indeed, where the EEOC finds certain conduct is particularly egregious, it will commence litigation against employers on behalf of disabled individuals. Second, if a plaintiff prevails on an ADA claim, he or she may recover compensatory and punitive damages as well as attorneys fees, remedies which are not available under the NYSHRL. Finally, a cause of action under ADA allows entrance into federal court, where at least some attorneys prefer to practice.[3]

B. **RECENT CASES.**

1. ***E.E.O.C. v. IESI Louisiana Corp.,* 720 F.Supp.2d 750 (W.D.La. 2010).** In *EEOC v. IESI*, the EEOC litigated a claim on behalf of Ronald Harper, a truck driver, who was terminated from his job shortly after he told his employer he had Dyslexia. *See IESI*

[3] Employers should note, however, that the ADA requires the filing of a timely administrative charge of discrimination before the EEOC or other equivalent state FEPA agency prior to commencing suit. Failure to file a timely or substantively sufficient charge can defeat a lawsuit. *See, e.g., Singh v. New York State Dep't of Taxation & Fin.,* 06-CV-00299C(F), 2011 U.S. Dist. LEXIS 83483 (W.D.N.Y. July 28, 2011).

*Louisiana Corp.*, 720 F. Supp. 2d at 752. The defendant argued that Harper was terminated because he could not do "paperwork and was a danger while driving." *Id.* at At the time of his termination, Harper had not had any accidents and had not otherwise been assessed to be a safety risk while driving for the Defendant. *IESI Louisiana Corp.*, 720 F. Supp. 2d at 751. Accordingly, the EEOC took the position that at the time of his termination, Harper was qualified to perform the essential functions of his job. *See id.* The EEOC commenced litigation on Harper's behalf and the action settled for $95,000. The parties entered into a consent decree, which authorized the EEOC to, *inter alia,* regulate Defendant's anti-discrimination and disability awareness training.

2. ***Kamrowski v. Morrison Management Specialist*, No. 05–CV–9234, 2010 WL 3932354 (S.D.N.Y., Sept. 29, 2010).** In this case commenced prior to the ADAAA, Kamrowski alleged that her employer discriminated against her on the basis of her Dyslexia and ADHD by terminating her employment. *See Kamrowski v. Morrison Management Specialist*, No. 05–CV–9234, 2010 WL 3932354, at *5 (S.D.N.Y. Sept. 29, 2010). The Court held that the Plaintiff failed to raise a genuine issue of material fact as to whether her Dyslexia or ADHD substantially impaired a major life activity, *i.e.*, her ability to read and write. *Id.* at *9. The Court explained that although there was no dispute that Kamrowski's impairment required her to take extra time to complete tasks, "completing work at a slower pace due to Dyslexia does not ordinarily qualify as a disability under the ADA." *Id.,* citing *Teachout v. N.Y.C. Dep't of Educ.*, No. 04-CV-945, 2006 WL 452022, *5 (S.D.N.Y. Feb. 22, 2006). *Kamrowski* is an excellent example of a post-ADAAA case in which the court explicitly refused to apply the heightened protections afforded by the Amendments because they were not retroactive. *See id*. at *9-10.

3. However, there are also pre-Amendment cases in which the courts refuse to dismiss discrimination claims based on LDs. *See, e.g., Sussman v. New York City Health and Hosp. Corp.*, No. 94-Civ-8461, 1997 U.S. Dist. LEXIS 8531, at *39 (S.D.N.Y. June 3, 1997) (pre-amendment ADA case finding issues of fact as to whether "Plaintiff's dyslexia [] impairs his ability, to some degree, in the 'major life activities' of 'performing manual tasks,' 'seeing' and 'learning'"), citing, *Merry v. A. Sulka & Co.,* 953 F. Supp. 922, 926 (N.D. Ill. 1997); *see also Shaw v. New York Dept. of Corr. Services*, 451 Fed. Appx. 18, (2d Cir. 2011) (affirming denial of motion to dismiss and finding plaintiff's allegation of sufficient suffering from dyslexia to states an ADA cause of action).

## III. NEW YORK STATE AND CITY HUMAN RIGHTS LAWS.

1. The definition of "disability" under the NYSHRL and the New York City Human Rights Law ("NYCHRL") are broader than that under the ADA, even after implementation of the Amendments. *See Missick v. City of New York*, 707 F. Supp. 2d 336, 354 (E.D.N.Y. 2010) (noting that dismissal under ADA does not require dismissal under state and city laws, because state and municipal disability claims are "analytically distinct" from their federal counterpart); *Giordano v. City of New York*, 274 F.3d 740, 754 (2d Cir. 2001). Furthermore, neither the NYSHRL or the NYCHRL require a plaintiff to show that his or her disability "substantially limits a major life activity." *See, e.g., Giordano*, 274 F.3d at 754; *Hatzakos v. Acme Am. Refrigeration, Inc*., No. 03-cv-5428, 2007 U.S. Dist. LEXIS 49034, at*1 (E.D.N.Y. July 6, 2007).

2. Under the NYSHRL, a disability is "a physical, mental, or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or

laboratory diagnostic techniques." *See Duttweiller v. Eagle Janitorial, Inc*., No. 5:05 cv-0886, 2009 U.S. Dist. LEXIS 48211, at *63-65 (N.D.N.Y. June 4, 2009); *Nugent v. The St.Luke's/Roosevelt Hosp. of New York*, No. 05-CV-5109, 2007 WL 1149979, *18 (S.D.N.Y. Apr. 18, 2007).

3. The NYSHRL defines a "reasonable accommodation" to be an action which permits "an employee to perform in a reasonable manner the activities involved in the job…". *See* N.Y. Exec. Law § 292(21-e); *Miloscia v. B.R. Guest Holdings LLC,* 33 Misc. 3d 466, 467 (Sup. Ct. N.Y. Cnty. 2011).

4. Similarly, the NYCHRL defines "disability" as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." *See* N.Y.C. Admin. Code at § 8-107 (16)(a). The term "physical, medical, mental, or psychological impairment" means "an impairment of any system of the body including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system" or "a mental or psychological impairment." *See* N.Y.C. Admin. Code at § 8-107 (16)(a).

5. The NYCHRL defines a "reasonable accommodation" as such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business. No accommodation that is categorically excluded from the universe of reasonable accommodations and the covered entity has the burden of proving undue

hardship. *See* Administrative Code of the City of NY § 8-102(18); *Miloscia v B.R. Guest Holdings LLC,* 33 Misc. 3d 466, 467 (N.Y. Sup. Ct. 2011).

6. We are unaware of any cases which specifically analyze learning disabilities under the NYSHRL. *See, e.g., Geoghan v. Long Island Rail Road*, No. 06-CV-1435, 2009 WL 982451, at *1 (E.D.N.Y. Apr. 9, 2009) (finding Plaintiff's ADHD *may* constitute disability within the meaning of the ADA and thereby allowed Plaintiff's disability claims to survive under the more expansive NYSHRL and NYCHRL).

## IV. HOW THE INTERACTIVE PROCESS IS TRIGGERED.

1. Most frequently, the interactive process is triggered by an employee's request for an accommodation. *See, e.g., Timmel v. West Valley Nuclear Servs. Co*., LLC, NO. 10-538, 2011 U.S. Dist. LEXIS 132661, at *33-34 (W.D.N.Y. Nov. 6, 2011). Indeed, courts have routinely dismissed ADA claims where the plaintiff has failed to prove he or she has requested an accommodation. *See, e.g., Mazza v. Bratton,* 108 F. Supp. 2d 167, 176 (E.D.N.Y. 2000) (holding that "[a] claim of disability discrimination arising from . . . failure to accommodate is not made out under the ADA unless the employee's request for reasonable accommodation has been denied by the employer"); *Gaston v. Bellingrath Gardens Home, Inc.,* 167 F.3d 1361, 1363 (11th Cir. 1999) (holding that duty to provide reasonable accommodation is not triggered until specific demand for accommodation has been made).

2. In requesting an accommodation, there is no obligation for an employee to use magic buzzwords or to specifically indicate he or she is formally requesting an accommodation. *See, e.g., Phillips v. City of New York*, 66 A.D.3d 170, 189 n. 24 (1st Dep't 2009), citing

EEOC fact sheet, Small Employers and Reasonable Accommodation, http://www.eeoc.gov/facts/accommodation.html (employee must let the employer know that "s/he needs an adjustment or change at work for a reason related to a medical condition. An individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.'"). The request, however, must "nonetheless [] make clear that the employee wants assistance for his or her disability" and be sufficient to put employer on notice of both the "disability and the employee's desire for accommodation[]." *See, e.g., EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011), citing, *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002) ("[a]n employee is not required to use any particular language when requesting an accommodation but need only 'inform the employer of the need for an adjustment due to a medical condition.'") (internal quotations and citations omitted).

3. There are limited exceptions to the requirement that an employee initiate the interactive process. For example, an employer may have a duty to initiate the interactive process if an employee's disability is obvious and noticeable and has an adverse impact on their performance. *See, e.g., Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 130 (2d Cir. 2008) (defendant found to be liable for not initiating interactive process where Plaintiff had cerebral palsy, which manifested itself in noticeably slower walking and speech and job functions). However to avoid giving rise to an inference of discrimination or incurring liability for stigmatizing the employee, the focus of any employer initiated inquiry should be limited to whether the employee's job performance is impaired, as opposed to the mere existence of a disability.

4. Finally, an accommodation is only reasonable if linked to the impairment caused by the employee's qualifying condition. *See, e.g., Felix v. New York City Transit Auth.*, 154 F. Supp. 2d 640, 641 (S.D.N.Y. 2001) (granting summary judgment where requested accommodation was not connected to impairment caused by plaintiff's disability). For example, in *Felix*, the plaintiff suffered from Post Traumatic Stress Disorder ("PTSD"), which led to an impairment in her ability to sleep, and also an alleged difficulty working underground, an essential function of her position within the New York City Transit Authority's Department of Subways. *See id.* Plaintiff requested that she no longer have to work in subways to alleviate symptoms of her PTSD. *Id.* Plaintiff however, argued only that she was substantially limited in the major life activity of sleeping (not in the activity of working). *See id.* Accordingly, the Court, in granting summary judgment for the employer, held that Felix's request for a reasonable accommodation of not working underground was unrelated to her inability to sleep and therefore not required by the employer. *See Id.*

## V. OBLIGATION TO INTERACT.

1. **Once an employee's need for an accommodation is known, what is your obligation?** The ADA "envisions an 'interactive process' by which employers and employees work together to assess whether an employee's disability can be reasonably accommodated." *See, e.g., Hatzakos v. Acme American Refrigeration*, No. 03-cv-5428, 2007 U.S. Dist. LEXIS 49034, at *1 (E.D.N.Y. July 6, 2007); *Jackan v. New York State Dep't of Labor*, 205 F.3d 562, 566 (2d Cir. 2000). As part of this process, the employer and employee "should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." *See Timmel v. West*

*Valley Nuclear Servs. Co., LLC*, No. 09-cv-55, 2011 U.S. Dist. LEXIS 132661, at *33-34 (W.D.N.Y. Nov. 6, 2011).

2. Once initiated, the process requires communication and a good faith exploration of possible accommodations between employers and employees. *See, e.g., Felix,* 154 F. Supp. 2d at 656-57; *see also, e.g., Jacques v. DiMarzio, Inc.,* 200 F. Supp. 2d 151, 171 (E.D.N.Y. 2002) (internal citations omitted). As the legislative history makes clear, "[a] problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations." *Id., Jacques v. DiMarzio, Inc.*, 200 F. Supp.2d 151, 151 (E.D.N.Y. 2002), citing, H.R. Rep. No. 101-116, at 34 (1989)); *see also,* H.R. Rep. No. 101-485, pt. 2 at 65 (1990).

3. The continuing nature of the interactive process also allows the employer flexibility to change, modify and/or alter provisions of a particular accommodation in the event it becomes unworkable or too burdensome. *See, e.g., Uhl v. Home Depot U.S.A., Inc.,* No. 08-Cv-3064, 2010 Dist. LEXIS 84565, at *15 (E.D.N.Y. Aug. 13, 2010). In *Uhl,* the plaintiff injured his knee and was unable to perform the essential functions of his Sales Associate position. *Id.* at *2. In response, Home Depot crafted a "light duty" position for Plaintiff enabling him to work while excusing him from, *inter alia,* the walking, bending and standing requirements of his job. *Id.* Thereafter, Plaintiff had knee surgery and was unable to return to work without additional restrictions with respect to, *inter alia,* the walking, standing and bending functions of his position. *Id.* at *2-4. Home Depot requested medical documentation evidencing Uhl was able to perform the essential functions of his job prior to allowing him to return to work and extended his medical leave. *Id.* Uhl's employment was terminated after he failed to provide medical

documentation evidencing his ability to perform the essential functions of his job. *Id.* at *2-6. The Court rejected Plaintiff's argument that he was entitled to the light duty position originally created for him (which excused him from performing the essential functions of his job) on a continuous basis, holding that having given plaintiff a particular accommodation in the past does not mean that Home Depot "must afford [it to] him again. Instead, . . . Home Depot previously exceeded its legal obligations, by affording him a more than reasonable accommodation. Home Depot's prior, voluntary effort to accommodate Mr. Uhl in excess of its legal obligations is admirable, but it does not compel Home Depot to continue to accommodate him beyond what the law requires." *See id.* at *12-13.

4. Liability attaches to an employer for failing to provide a reasonable accommodation where "'the employer knows of the employee's disability; the employee requests accommodations or assistance; the employer does not in good faith assist the employee in seeking accommodations; and the employee could have been reasonably accommodated but for the employer's lack of good faith.'" *See Timmel*, 2011 U.S. Dist. LEXIS 132661, at *34 (W.D.N.Y. Nov. 6, 2011) (internal citations omitted); *see also*, 29 C.F.R. § 1630.2(o)(3). In other words, an employer can be held liable for failing to engage in the interactive process. *See, e.g., Brady*, 531 F.3d at 130.

5. Indeed, in the event of litigation, the party responsible for the "breakdown" in the interactive process will likely be unsuccessful. *See, e.g., Gingold v. Bon Secours Charity Health Sys.*, 768 F. Supp. 2d 537, 543 (S.D.N.Y. 2011) (where plaintiff submitted his notice of resignation one day after request for accommodation, plaintiff was found to have unilaterally terminated the interactive process, releasing defendant "from any

further obligation to consider possible accommodations."); *see also, e.g., Jochelman v. New York State Banking Dep't,* No. 103533/07, 2010 N.Y. Misc. LEXIS 4823 (Sup. Ct. New York Co. Oct. 5, 2010) (finding question of fact as to whether employer participated in interactive process where, *inter alia*, after three months of deliberation, employer rejected employee's request to a vacant workstation which would allow him to reach the bathroom in time to avoid painful and embarrassing accidents).

## VI. EMPLOYER'S ABILITY TO OBTAIN MEDICAL INFORMATION.

1. An employer may require an employee to provide documentation that is sufficient to substantiate that an employee has a disability and needs the reasonable accommodation requested, but cannot ask for unrelated documentation. *See Enforcement Guidance: Disability-Related Inquiries And Medical Examinations Of Employees Under The Americans With Disabilities Act (ADA),* http://www.eeoc.gov/policy/docs/guidance-inquiries.html#7; *Davis v. N.Y. State Office of Mental Health*, 05-cv-5599, 2009 U.S. Dist. LEXIS 121365, at *28-29 (E.D.N.Y. Dec. 29, 2009) (Plaintiff's failure to provide medical documentation of his alleged sleeping difficulties and difficulties working renders his "substantial limitation" showing insufficient as a matter of law). Courts in the "Second Circuit have consistently held that when a plaintiff fails to offer any medical evidence substantiating the specific limitations to which he claims he is subject due to his condition, he cannot establish that he is disabled." *See Davis,* 2009 U.S. Dist. LEXIS 121365 at *28; *see also, e.g., Thomas-Bagrowski v. LaHood*, 361 Fed. App'x. 694, 698 (7th Cir. 2010).

2. In most circumstances, an employer cannot ask for an employee's complete medical records because they are likely to contain information unrelated to the disability at issue

and the need for accommodation. *See Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* at 20-21, 8 FEP Manual (BNA) 405:7601, 7611(1999), note 6, at 13, 8 FEP at 405:7607 (an "employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation.")

3. Medical documentation is likely sufficient if it (1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed. *See Enforcement Guidance: Disability-Related Inquiries And Medical Examinations Of Employees Under The Americans With Disabilities Act (ADA),* http://www.eeoc.gov/policy/docs/guidance-inquiries.html#7.

4. Medical documentation is likely insufficient if it does not specify the existence of a disability within the meaning of applicable law and does not explain the need for reasonable accommodation. *See, e.g., Lugo v. Shinseki*, 06 Civ. 13187, 2010 U.S. Dist. LEXIS 49732 (S.D.N.Y. May 21, 2010) (dismissing disability claim where plaintiff failed to submit sufficient evidence as to limitations of his alleged impairment beyond fact of carpel-tunnel-syndrome diagnosis); *Enforcement Guidance: Disability-Related Inquiries And Medical Examinations Of Employees Under The Americans With Disabilities Act (ADA),* http://www.eeoc.gov/policy/docs/guidance-inquiries.html#7.[4]

[4] Documentation may also be insufficient where, for example: (1) the health care professional does not have the expertise to give an opinion about the employee's medical condition and resulting limitations; (2) the information does not specify the functional limitations; or, (3) other

5. If the employee provides insufficient documentation from his/her treating physician (or other health care professional) to substantiate that he or she has an ADA disability and needs a reasonable accommodation, the ADA does not prevent an employer from requiring an employee to go to an appropriate health care professional of the employer's choice. *Enforcement Guidance: Disability-Related Inquiries And Medical Examinations Of Employees Under The Americans With Disabilities Act (ADA),* http://www.eeoc.gov/policy/docs/guidance-inquiries.html#7. The employer also should consider consulting with the employee's doctor (with the employee's consent) before requiring the employee to go to a health care professional of its choice. *Id.*

## VII. WHAT IS REQUIRED TO ACCOMMODATE AN EMPLOYEE?

A. **An employer need not give the employee his or her requested accommodation.** An employer may choose among reasonable accommodations as long as the chosen accommodation is effective (*i.e.*, it removes the workplace barrier at issue). *See, e.g.*, *Ragusa v. UPS,* No. 05 Civ. 6187, 2008 U.S. Dist. LEXIS 15599, at *14-15; *Nugent v. The St. Luke's/Roosevelt Hosp. of New York*, No. 05-CV-5109, 2007 WL 1149979, at *18 (S.D.N.Y., Apr. 18, 2007) (employee is not entitled to his/her requested accommodation, but merely to reasonable accommodation).

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factors indicate that the information provided is not credible or is fraudulent. If an employee provides insufficient documentation, an employer does not have to provide reasonable accommodation until sufficient documentation is provided. *See, Enforcement Guidance: Disability-Related Inquiries And Medical Examinations Of Employees Under The Americans With Disabilities Act (ADA),* http://www.eeoc.gov/policy/docs/guidance-inquiries.html#7.

B. An employer need not create a new position for an employee with a disability or "bump" another employee out of a position to create a vacancy. *See, Doe v. Major Model Mgmt.,* No. 11-6182, 2012 U.S. Dist. LEXIS 32064, at *27 (S.D.N.Y. Mar. 9, 2012).

1. However, when an employee with a disability is unable to perform her present job even with the provision of a reasonable accommodation, you must consider reassigning the employee to an existing position that she can perform with or without a reasonable accommodation. *See, e.g., Norville v. Staten Island Univ. Hosp.,* 196 F.3d 89, 99 (2d Cir. 1999) ("[w]here a comparable position is vacant and the disabled employee is qualified for the position, and employer's refusal to reassign the employee to that position -- absent some other offer of reasonable accommodation -- constitutes a violation of the ADA."); Small Employers and Reasonable Accommodations, EEOC fact sheet, http://www.eeoc.gov/facts/accommodation.html. Of course, the employee must be "qualified" for any new position assigned. This means that the employee: (1) satisfies the skill, experience, education, and other job-related requirements of the position, and (2) can perform the primary job tasks of the new position, with or without reasonable accommodation. The employer does not have to assist the employee to become qualified. *See id.*

2. Reassignment should be to a position that is equal in pay and status to the position that the employee held, or to one that is as close as possible in terms of pay and status if an equivalent position is not vacant. *See, e.g., Ragusa,* 2008 U.S. Dist. LEXIS 1559, at *12-13 (reassignment to position that would "involve a significant diminution in salary, benefits, seniority or other advantages" does not constitute reasonable accommodation if position comporable to employee's former position is available); *see also,* Small

Employers and Reasonable Accommodations, EEOC fact sheet, http://www.eeoc.gov/facts/accommodation.html.

3. An employer is not required to eliminate a primary job responsibility. Indeed, "[a] reasonable accommodation can never involve the elimination of an essential function of a job." *See, e.g., Welch v. UPS*, No. 09-CV-4400, 2012 U.S. Dist. LEXIS 91687, at *49 (E.D.N.Y. June 30, 2012). In addition, an employer is not required to lower production standards that are applied to all employees, although it may have to provide reasonable accommodation to enable an employee with a disability to meet them and an employer never has to excuse a violation of uniformly applied conduct rule that is job related and consistent with business necessity. *See* Small Employers and Reasonable Accommodations, EEOC fact sheet, http://www.eeoc.gov/facts/accommodation.html.

4. The EEOC cautions, however, that an employer should not discuss an employee's accommodation with other employees because such a dsicussion would likely amount to a disclosure that the individual in question has a disability. *See* Small Employers and Reasonable Accommodations, EEOC fact sheet, http://www.eeoc.gov/facts /accommodation.html. An employer may, however, respond to a question from an employee about why a coworker is receiving what is perceived as "different" or "special" treatment by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. *Id.* The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy. *See id.*

## VIII. POSSIBLE ACCOMMODATIONS THAT MAY BE REASONABLE FOR AN EMPLOYEE WITH A LEARNING DISABILITY.

A. **Individualized Assessment**: Proposed accommodations must be assessed on an individualized basis and be tailored both to the job requirements and the individual seeking the accommodation. *See, e.g., Nixon-Tinkelman v. New York City Dep't of Health & Mental Hygiene,* No. 10-3317-CV, 2011 U.S. App. LEXIS 16569, at *1 (2d Cir. Apr. 10, 2011) (remanding to district court for fact specific analysis of whether accommodating employee's commute was reasonable); *Muhammad v. Wal-Mart Stores East, L.P.,* No. 10-cv-6074, 2012 U.S. Dist. LEXIS 108551, at *6 (W.D.N.Y. Aug. 2, 2012) (holding "'[w]hether or not something constitutes a reasonable accommodation is necessarily fact-specific. Therefore, determinations on this issue must be made on a case-by-case basis'").

B. **Accommodations That May Be Reasonable:** Employees with learning disabilities experience a variety of limitations with multiple degrees of limitation. While not all people with learning disabilities need accommodations to perform their jobs, many will depending on a variety of circumstances, including, *e.g.*, the individual's particular abilities and disabilities. Below is a non exhaustive list of reasonable accommodation techniques provided by the Job Action Network ("JAN"), in their employer's Practical Guide to Reasonable Accommodation Under the Americans with Disabilities Act. Numerous other accommodation solutions may exist.

1. **Reading from a paper copy:** Employees with learning disabilities may have limitations that make it difficult to read text. Because it can be difficult to visually discern letters and numbers, these characters may appear jumbled or reversed. The following

accommodations may be reasonable: converting text to audio; providing larger print; utilizing double space in the text of printed material; using color overlays (Irlen lenses) to help make the text easier to read; providing materials that are type-written, in a font that is not italicized; if handwritten material must be provided, using print, not cursive; having someone read the document aloud to the employee; scanning the documents into a computer and using an Optical Character Recognition (OCR), which will read the information aloud; using a reading pen, which is a portable device that scans a word and provides auditory feedback.

2. **Reading from a computer screen:** The following accommodations may be reasonable: using voice output software which highlights and reads aloud the information from the computer screen; using form-generating software that computerizes order forms, claim forms, applications, equations, and formula fields; using an on-screen "ruler" or strip or screen highlighting software to help focus and read from a computer screen; altering the color scheme or font on computer screen to suit the employee's visual preferences.

3. **Spelling:** Employees with learning disabilities might have difficulty spelling, which can manifest itself in letter reversals, letter transposition, omission of letters or words, or illegible handwriting. Potential reasonable accommodations may include: allowing the use of reference materials such as dictionary or thesaurus; providing electronic and talking dictionaries; using word prediction software that displays a list of words that typically follow the word that was entered in a document; using word completion software that displays sample words after someone starts typing part of a word; allowing coworker or supervisor to proofread written material.

4. **Cognitive process of writing:** Employees with learning disabilities might have difficulty organizing a written project, identifying themes or ideas, structuring sentences or paragraphs, or identifying and/or correcting grammar errors. Potential reasonable accommodations may include: using Inspiration software, a computerized graphic organizer; using Texthelp Read & Write Gold, a software program assisting with spelling, reading, and grammar; providing electronic/talking dictionaries and spellcheckers; creating a written form to prompt the employee for information needed; allowing the employee to create a verbal response instead of a written response; permitting the use of reference books such as a thesaurus or dictionary.

5. **Physical process of writing:** Employees with learning disabilities may have difficulty with the physical process of writing. It may be difficult to fill in blanks, bubble in dots, line up numbers or words in a column, on a line, or within a margin and handwriting may be illegible. Potential reasonable accommodations may include: providing writing aids; using line guides and column guides; supplying the employee with bold line paper; permitting type-written responses instead of hand-written responses; allowing the use of personal computers, including devices like Alpha Smart, Palm, tablet PC, and Blackberry; using Inspiration software, a computerized graphic organizer; using speech recognition software that recognizes the employee's voice and changes it to text on the computer screen.

6. **Mathematics:** An employee with a learning disability could have difficulty recognizing or identifying numbers, remembering sequencing of numbers, understanding the mathematical sign or function (whether symbol or word) or performing mathematical calculations accurately and efficiently. Potential reasonable accommodations may

include: allowing the employee scratch paper to work out math problems; permitting the use of fractional, decimal, statistical, or scientific calculators; using a talking calculator; using calculators or adding machines with large display screens; providing a talking tape measure; using talking scales; using pre-measurement guides or jigs; posting mathematical tables at the desk or in work area of the employee.

7. **Speaking/Communicating:** Employees with learning disabilities may have difficulty communicating with co-workers or supervisors. Poor communication may be the result of underdeveloped social skills, lack of experience/exposure in the workforce, shyness, intimidation, behavior disorders, or low self-esteem. Potential reasonable accommodations may include: providing employees with advance notice of topics to be discussed in meeting and/or if the employee is required to speak; allowing the employee to provide a written response in lieu of verbal response; allowing the employee to have a coworker attend meeting.

8. **Behavior on the job**: Similarly, employees with learning disabilities may have difficulty exhibiting appropriate social skills on the job which can impact an employee's ability to adhere to conduct standards, work effectively with supervisors, or interact with coworkers or customers. Potential reasonable accommodations may include: thoroughly reviewing the conduct policy with employee; providing concrete examples to explain inappropriate behavior; providing concrete examples to explain consequences in a disciplinary action; rewarding appropriate behavior; providing detailed day-to-day guidance and feedback and positive reinforcement; explaining expectations and consequences of not meeting expectations, and establishing long term and short term goals for employee.

9. **Organizational Skills:** An employee with a learning disability may have difficulty getting organized or staying organized. Potential reasonable accommodations may include: hiring a professional organizer or a job coach; using a color-code system to label or identify materials; using calendars (paper, electronic, or both) to remind employee of deadlines, meetings, and upcoming tasks; building organization skills by attending time management workshops; building organization skills through self-education at websites like mindtools.com; building "catch up" time into work week or work day.

10. **Memory:** An employee with a learning disability could have memory deficits that affect the ability to recall something that is seen or heard. This may result in an inability to recall facts, names, passwords, and telephone numbers, even if such information is used regularly. Potential reasonable accommodations may include: providing checklists to help employee remember job tasks; using flowchart to describe steps to a complicated task (such as powering up a system, closing down the facility, logging into a computer, etc.); maintaining paper lists of crucial information (such as passwords); prompting the employee with verbal or written cues; allowing the employee to use voice activated recorder to record verbal instructions; providing additional training time on new information or tasks; providing refresher training as needed.

11. **Time Management**: An employee with a learning disability may have difficulty managing time. This can affect the employee's ability to organize or prioritize tasks, adhere to deadlines, maintain productivity standards, or work efficiently. Potential reasonable accommodations may include: making to-do lists and checking items off as they are completed; using a calendar to mark important meetings or deadlines; dividing

large assignments into smaller tasks and goals; reminding the employee verbally of important tasks or deadlines.

12. **Interacting with co-workers:** Potential reasonable accommodations may include: providing sensitivity training to promote disability awareness; allowing employee to work from home, if feasible; providing a mentor; making employee attendance at social functions optional; allowing employee to transfer to another workgroup, shift, or department.

## IX. UNDUE HARDSHIP & OTHER EXCEPTIONS.

A. Employers may avoid the sometimes difficult obligation of providing a reasonable accommodation by establishing that the accommodation causes an "undue hardship" to the employer's business. *See* 42 U.S.C. § 12112(b)(5)(A); *see, e.g., Jones v. National Conference of Bar Examiners,* 801 F. Supp. 2d 270, 290 (D. Vt. 2011) (ruling that Defendant's refusal to accommodate the legally blind Plaintiff's learning disability by purchasing a $5,000 software program and thereby allowing her to take the MPRE was not an undue burden in light of Defendant's "significant financial resources."). Undue hardship under the ADA means "significant difficulty or expense" for the employer. *See* 42 USC § 12111(10)(A). Factors the employer may consider in weighing undue hardship include: 1) the nature and cost of the accommodation; 2) the financial resources of the facility requiring the accommodation; 3) the number of workers at the facility; 4) the impact of the accommodation on the facility's expenses, resources or operations; 5) the employer's overall size, nature and resources; 6) the type of operations covered; and 7) the relationship between the facilities covered and the business entity (employer) as a whole. *Id.* at 10(B). The EEOC instructs employers that if providing a particular

accommodation would result in undue hardship, consider whether another accommodation exists that would not. *See* Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act http://www.eeoc.gov/docs/accomodation.html.

B. Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.

C. Undue hardship is determined based on the net cost to the employer, thus employers should consider all possible sources of outside funding when assessing whether a particular accommodation would be too costly. An employer should determine whether funding is available from an outside source or whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation. *See* Small Employers and Reasonable Accommodations, EEOC fact sheet, http://www.eeoc.gov/facts/accommodation.html.

D. An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability. Nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees. *See* Small Employers and Reasonable Accommodations, EEOC fact sheet, http://www.eeoc.gov/facts/accommodation.html.

E. According to a JAN study, 56% of reasonable accommodations in the workplace cost nothing and most others cost less than $500.00. *See* Job Accommodation Network.

*Accommodation Benefit/Cost Data (1999)* at p.4 (available at http://*askjan.org/media /LowCostHighImpact.doc*)**.** The same study claims that, on average, an employee experiences a return of $28.69 in benefits for every dollar invested in making a reasonable accommodation. *See Id.*