

The Interactive Process: Lessons from Case Law

will begin at 12:30 PM ET

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 - Mission Statement: Improving lives of people with disabilities through meaningful work and community inclusion
- **Mid-Atlantic ADA Center, a project of TransCen, Inc.**
 - Funded by National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR), Administration for Community Living, U.S. Department of Health and Human Services

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Illinois ADA Project

EQUIP FOR EQUALITY

The Interactive Process: Lessons from Case Law

Presented by:
Rachel Weisberg
Equip for Equality

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ILLINOIS CIVIL RIGHTS COMMISSION

CLE Credit for Attorneys

- This session is eligible for 1.5 hours of continuing legal education credit for **Illinois** attorneys.
- We can provide certifications to attorneys in other states; some other states will accept CLE certification.
- Attorneys** interested in obtaining continuing legal education credit should contact Rachel Weisberg at: rachelw@equipforequality.org

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Today's Webinar

- Background and Legal Framework
 - Legal Result of Failing to Engage in the Interactive Process
- Lessons from Case Law
 - Triggering the Interactive Process
 - Engaging in the Interactive Process
 - Selecting and Implementing Accommodations
- Recap of Lessons Learned

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What is the Interactive Process?

- **Generally speaking**

- An informal process where an employer and an individual with a disability work collaboratively and in good faith by engaging in discussion and sharing information with the goal of identifying an effective, reasonable accommodation

- **Unique aspect of the ADA**

- Recognizes that communication is often the key to identifying workable accommodations
- Forces parties to be problem solvers

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Legal Framework

- **Statute:** No reference to the interactive process

- **Regulations:** 29 C.F.R § 1630.2(O)(3)

- Definition of “reasonable accommodation”

- “To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, **interactive process** with the individual with a disability in need of the accommodation.”
- “This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”

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Guidance Material

- **EEOC**

- Appendix to 29 C.F.R § 1630.9 (Title I Regulations)
 - “Process of Determining the Appropriate Reasonable Accommodation”
- EEOC Enforcement Guidance on Reasonable Accommodation
 - www.eeoc.gov/policy/docs/accommodation.html

- **Job Accommodation Network**

- <https://askjan.org/topics/interactive.cfm>

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Legal Result of Failing to Engage in the Interactive Process

- Not an independent claim under the ADA
- But courts examine interactions to pinpoint which party is responsible for the breakdown in communication
 - Employee responsible? Employer typically prevails
 - Employer responsible?
 - Some courts deny summary judgment *Snapp v. United Trans. Union*, 547 Fed. Appx. 824 (9th Cir. Nov. 5, 2013)
 - Some courts examine whether breakdown prevented parties from finding accommodation and if so, deny summary judgment *Stern v. St. Anthony's Health Center*, 788 F.3d 276 (7th Cir. 2015)

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Triggering the Interactive Process: Lessons from Case Law

Step 1: The interactive process is generally initiated by an employee, who requests a reasonable accommodation

Lesson: Employees can request reasonable accommodations without following specific processes and without using specific forms

Jones v. Clark County School District
2017 WL 1042463 (D. Nev. Mar. 17, 2017)

- Jones worked as a bus driver for students with disabilities
- He developed depression and other mental health disabilities, including anxiety about driving kids
- Jones took a medical leave

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Triggering Interactive Process: Lessons from Case Law

Jones v. Clark County School District (continued)

- During his leave, it became clear that Jones could not return to his position as a bus driver
- Jones asked his supervisor if he could be accommodated through a transfer to a different position where he did not have to drive
- Supervisor told Jones to talk to the County's ADA Coordinator about a potential placement as an accommodation
- Jones sent a fax to the ADA Coordinator
- Fax said: Doctor advised Jones to retire from driving due to his medication and mental health disabilities
- ADA Coordinator interpreted this fax as a resignation
- Jones filed a charge of discrimination with the EEOC and then lawsuit under the ADA

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Triggering Interactive Process: Lessons from Case Law

- District asked court to dismiss case (filed motion for summary judgment)
 - Argued: Jones did not request an accommodation from the ADA coordinator
- Court: Found for Jones (denied summary judgment)
 - Jones needed to inform the District about his condition and his requested reasonable accommodation and he did that
 - "The fact that one of [the District's] administrators did not communicate Jones's request to another administrator is not Jones' fault."

See also Dugger v. Stephen F. Austin State University, 2017 WL 478297 (E.D. Tex. Feb. 6, 2017) (rejecting defendant's argument that an injured police officer did not request an accommodation because did not fully follow University policy)

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Triggering Interactive Process: Lessons from Case Law

Lesson: Employers should initiate the interactive process if they know of an individual's disability and desire for accommodation, even if an employee does not use specific words or phrases in her request

Kowitz v. Trinity Health

839 F.3d 742 (8th Cir. 2016)

- Kowitz worked as a respiratory therapist
- She had cervical spinal stenosis and took FMLA leave to have corrective neck surgery
- She returned with a number of work-related restrictions
- Her employer posted a memo requiring all department employees to have their basic life support certifications
- Certification required a written test and a physical demonstration

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Triggering Interactive Process: Lessons from Case Law

- Kowitz told her supervisor that she could not do the physical portions of the exam until she had medical clearance following physical therapy – about four months
- Did not specifically request accommodation (temporary waiver of requirement or reassignment)
- She was fired
- **Issue:** Did Kowitz trigger interactive process?
- **8th Cir:** Found for Kowitz (reversed and remanded summary judgment to the employer)
 - Although she did not "ask for a reasonable accommodation for her condition in so many words ... her notification to her supervisor that she would not be able to obtain the required certification until she completed physical therapy implied that an accommodation would be required until then."

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Triggering Interactive Process: Lessons from Case Law

- “An employee is required only to provide the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.”
- Must take into account information an employer’s knowledge of the employee’s disability and prior communications
 - Here, employer was aware of the employee’s condition
- “She was not required to ‘formally invoke the magic words reasonable accommodation’ to transform that notification into a request for accommodation.”
 - Employer was aware of her specific condition
 - Her request referred to her surgery, prior leave and ongoing pain

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Triggering Interactive Process: Lessons from Case Law

Employers:

- Train staff to recognize accommodation requests
- Train staff about how to follow up on requests
- Document employee requests and follow up conversations

Employees:

- Even if not legally required:
 - Use employer-created processes, including specific forms
 - Use magic words “I am requesting a reasonable accommodation under the ADA”
 - Confirm the request in writing

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Engaging in the Process: Lessons from Case Law

- **Step 2: Both parties engage in the interactive process**
 - Parties exchange *reasonable* information
 - Discuss employee’s limitation and/or current work issue
 - Employer may request *limited* medical support if the individual’s disability or need for accommodation is not obvious
 - Parties explore accommodation ideas
 - Employer considers individual’s preference
 - Parties consult with others, as appropriate, including employee’s supervisor, human resources, doctors, computer experts, vocational rehabilitation experts, etc.
- **Case Law Lessons: Why things go wrong**

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Engaging in the Process: Lessons from Case Law

Lesson: Parties need to share information, especially information more readily available to one party

Suvada v. Gordon Flesch

2013 WL 5166213 (N.D. Ill. Sept. 13, 2013)

- Suvada was diagnosed with stage-four cervical cancer
- Suvada disclosed her disability during a meeting with her supervisor; she expressed concern that she was having difficulty lifting boxes and did not know what her treatment would be
- Suvada asked her supervisor if she knew of any easier jobs
- Her supervisor said no because all the jobs in her division were mail-room and print shop positions with similar work
- Supervisor asked Suvada if she was going to resign; Suvada later did because she didn't want to "screw over" her coworkers

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Engaging in the Process: Lessons from Case Law

- **Court:** Employer arguably broke down the interactive process (denied employer's motion for summary judgment)
 - Supervisor did not tell Suvada to check the company website for a comprehensive list of job openings
 - Supervisor did not tell Suvada to contact HR
 - Instead asked only about resignation, leading employee to believe that resignation was the only option
 - "Suvada needed direction from [her supervisor] about what her options were, and [her supervisor] failed to provide adequate guidance."
- Rejected employer's argument that the employee already had information from employee orientation calling the ADA's reasonable accommodation requirement "an affirmative duty"

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Engaging in the Process: Lessons from Case Law

Ortiz-Martinez v. Fresenius Health Partners, PR, LLC

853 F.3d 599 (1st Cir. 2017)

- Ortiz-Martinez injured her hand while working as a social worker
- Took leave and returned with diagnoses of sprained left shoulder, arm, forearm, and hand and bilateral carpal tunnel syndrome
- She returned with information about her diagnoses and some information about her restrictions (ex: difficulty with repetitive tasks, lifting, holding/manipulating heavy and large objects)
- Employer asked for clarification (ex: how much weight could employee lift; what repetitive movements she needed to avoid)
- Ortiz-Martinez did not provide any additional information
- **1st Cir:** Found for employer – Ortiz-Martinez caused breakdown
 - Requested additional details were "not unreasonable"

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Engaging in the Process: Lessons from Case Law

Lesson: Parties should not make accommodation decisions before engaging in the interactive process

Mosby-Meachem v. Memphis Light, Gas & Water Div.
883 F.3d 595 (6th Cir. 2018)

- Mosby-Meachem asked to telework for 10 weeks while she was on bed rest for pregnancy-related complications
- Employer held a telephonic process meeting with an ADA Committee; Mosby-Meachem explained how she could do job
- Request still denied
- **Jury Trial:** Jury found for Mosby-Meachem
- **6th Cir:** Affirmed decision. Employer did not engage in an interactive process because it had already made decision
 - Ex: "nobody can telecommute" and we "said no already"

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Engaging in the Process: Lessons from Case Law

Lesson: Parties should discuss *alternative* accommodation ideas in good faith

Romero v. County of Santa Clara
666 Fed.Appx. 609 (9th Cir. 2016)

- Romero asked for an additional medical leave after he already had received three extensions
- He refused to discuss anything other than medical leave and called employer's attempt to initiate process "harassment"
- **9th Cir:** Found for employer. Romero responsible for breakdown

See also Lafata v. Church of Christ Home for Aged, 325 F. Appx. 416 (6th Cir. 2009) (offering a lower position on a "take it or leave it" basis without further discussion of possible accommodations may indicate a failure to participate in the interactive process in good faith)

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Engaging in the Process: Lessons from Case Law

Lesson: Parties should let other side respond to concerns

Keith v. County of Oakland
703 F.3d 918 (6th Cir. 2013)

- Keith was given a conditional job offer to work as a lifeguard
- County doctor cleared him to work but because he is deaf, said he would need "constant accommodation"
- County concluded that Keith could not safely do job
- **6th Cir:** County failed to engage in interactive process
- If the County had discussed with Keith, Keith could have:
 - Explained that he can detect loud noises through his cochlear implant if he wears an external sound transmitter
 - Referred County to people with expertise about deaf lifeguards
 - Clarified needs for an ASL interpreter

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Selecting and Implementing Accommodation

- **Step 3: Employer chooses accommodation**
 - Employer must give employee's preference "consideration"
 - Employer can ultimately choose an alternative accommodation, so long as it is effective
- **Step 4: Employer and employee implement accommodation and evaluate its effectiveness**
 - Implementation should occur in a timely fashion
 - Employer should follow up to ensure the accommodation is effective
 - The duty to accommodate is ongoing – changes may be needed over time as individual's disability or job changes

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The Interactive Process: Lessons from Case Law

Employers:

- Engage in the interactive process in good faith before making any final decisions and any employment decisions
- Share information that is easier for employers to access (especially job vacancies)
- Identify your concerns and give the employee a chance to respond to them
- Consider employee's preferred accommodation
- If you want to use an alternative accommodation, explain why, discuss employee's concerns and try to find solutions
- Make sure medical requests are limited to information that you need to evaluate the request
- Use all available resources – like Job Accommodation Network
- Document your process

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The Interactive Process: Lessons from Case Law

Employees:

- Remember that the interactive process is a two-way street
- Respond to reasonable requests for medical documentation
 - If your employer asks for too much information, don't just refuse – explain what is too broad and propose solution
- Be open minded about alternative accommodations
 - If you know an alternative accommodation won't work, explain why
 - If you're not sure, agree to give the alternative accommodation a try, so long as your employer will revisit your initial request with you
- If it doesn't work, document why and follow up with your employer

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QUESTIONS?



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