

Mid-Atlantic ADA Center
THE INTERACTIVE PROCESS: LESSONS FROM CASE LAW
NOVEMBER 20, 2018

This text, document, or file is based on live transcription. Communication Access Realtime Translation (CART), captioning, and/or live transcription are provided in order to facilitate communication accessibility and may not be a totally verbatim record of the proceedings.

>> Recording started.

>> CALEB BERKEMEIER: Good morning or afternoon to everybody. My name is Caleb Berkemeier, a training specialist here at the Mid-Atlantic ADA Center, and we're pleased to present to you today the first part in a three-part series that is exploring concepts in the ADA through case law, and Rachel Weisberg will be joining us for all three of these sessions, so you can stay tuned for the further parts in the series. So I'm going to introduce Rachel first, and then I'll hand it over to her.

Rachel Weisberg is a staff attorney at Equip for Equality, where she has represented hundreds of clients in individual and systemic disability discrimination cases under Titles 1, 2, and 3 of the ADA, and analogous state and local laws. Rachel enjoys provided in-depth client counseling services, as well as direct advocacy services through negotiation and representation in administrative and judicial forums.

Rachel also manages Equip for Equality's Employment Rights Helpline, which aims to expand employment opportunities by providing legal and practical advice to applicants and individuals

with disabilities.

Rachel is a frequent trainer on the disability rights laws and speaks regularly at national conferences and on webinars. Prior to Equip for Equality, Rachel worked for the Civil and Disability Rights Bureau of the Illinois Attorney General's Office and as a law clerk for Chief Judge James G. Carr in the Northern District of Ohio.

Before law school, Rachel was an information specialist for the Mid-Atlantic ADA Center, and we're pleased to have her back with us for this webinar series.

Rachel, I'll turn this over to you.

>> RACHEL WEISBERG: Great. Thank you, Caleb. I worked with the Mid-Atlantic ADA Center before law school, so I'm excited to have this partnership and looking forward to speaking with you all during this three-part series.

So what we're going to do today -- I'm sorry, before I get to that, let me do just a little bit of housekeeping and that is Equip for Equality is a continuation credit for Illinois attorneys, so if you're an Illinois attorney you're eligible for .75 hours. We have, in the past, been able to get CLE certification for attorneys in other states. It's something we can provide you with a certification, and you can send it to your own state, so if you are an attorney and are interested in obtaining continuing legal education credit, please send me an email following today's presentation. Just let me know you were there for the entire thing, and I will send you a certification, and my email address is on the slide. It's rachelw@equipforequality.org.

Okay. So now let's get to our plan for today. What we're going to do is we'll start with some background on the interactive process. We'll talk about the legal results of failing to engage in the process. And then we're going to dive in and look at some cases. We'll look at the lessons that we learned from case law,

focusing on cases about triggering the interactive process, engaging in the interactive process, and then we'll talk a little bit about selecting and implementing accommodations. And then we'll wrap up with a recap of the lessons that we've learned today.

Okay. So just some general background. Of course, we're talking about the interactive process today, but what is this interactive process? And generally speaking, it is an informal process where an employer and an individual with a disability are going to work together, they're going to work collaboratively, they're going to work in good faith, they're going to talk, they're going to discuss, they're going to share information, and they're going to do this all with the goal of identifying an effective and a reasonable accommodation for an employee or an applicant with a disability.

I just want to pause for a minute and highlight just how unique this process is. It recognizes that communication between two parties is often the key to problem-solving and identifying workable solutions. And if you just think about it, how many problems could we all solve if the two parties really were forced to sit down and have a conversation and work together? And that's something that Congress recognized or the ADA recognized as something that was important and is part of the ADA.

And one of my favorite -- this is one of my favorite parts of ADA because it really forces all of us to be problem-solvers and, again, work together to come up with solutions.

So where does this interactive process come from? Well, if you look at the statute itself, you're not going to find any reference to the interactive process. It's not in the ADA statute itself. But, instead, it comes from the regulations that we have that were promulgated by the Equal Employment Opportunity Commission, so if you look at the Title I regulations, there's a definition of "reasonable accommodation," and within that definition of

"reasonable accommodation" is this quote: "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."

The regulations also say that "This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."

So that's it. That's -- this is kind of where this concept of the interactive process comes from in these regulations.

And, of course, there's a lot of additional information about the interactive process and how to engage in the interactive process in guidance materials. One way to access these guidance materials is by looking at the Equal Employment Opportunity Commission's Appendix to the Regulations, and then there's the -- the EEOC also has a number of other guidance materials out there, and, of course, there's also the Job Accommodation Network, which hopefully everyone on the phone is familiar with, but they're a wonderful resource that also has a lot of information about best practices and tips about engaging in the interactive process.

And if you start to look at all these materials, you'll see that this concept and this process can be broken down in all sorts of different ways. Today we're going to kind of break it down into four steps. We're going to talk about triggering the process, engaging in the interactive process, choosing an accommodation, and implementing the accommodation.

And, of course, although we've got all of this great guidance material out there that we're all familiar with, today our focus is going to be on the courts and the lessons learned from the courts and the case law.

Okay. So what do the courts say when one party fails to

engage in the interactive process? Well, generally speaking, it's not an independent claim under the ADA, so that means an employee can't file a lawsuit and have their sole claim and request for relief to be on the employer's failure to engage in the interactive process, but that doesn't mean we shouldn't engage in it. What that means is that it's not an independent claim -- it's not an independent claim, but it's still critically important for us all to engage in, and here's why.

One, it works. Engaging in the interactive process is what enables parties to come up with effective reasonable accommodations, and a failure to have a reasonable accommodation is, of course, an independent claim under the ADA.

And the second, perhaps more cynical, reason that it's really important for all of us to engage in the interactive process is that courts typically examine the interactions of the interactive process to determine which party is responsible for the breakdown in communication and, therefore, which party is responsible for failing to provide the accommodation.

So if a court will analyze the situation and they find that the employee is responsible for breaking down the interactive process, typically speaking, the employer is going to prevail in that lawsuit. And if the court examines the interactive process and determines that, really, it was the employer who was responsible for the breakdown, well, sometimes the court will say that that is enough to deny summary judgment for an employer.

Now, for all the nonlawyers out there, summary judgment is a part of the -- of a case or part of litigation that employers and defendants generally rely on to try to dismiss cases, and so if a court will say, hey, we're never going allow you to have summary judgment if you don't engage in this interactive process, that's a pretty big deal for employers, and it's a step that now allows the

case to move forward.

So, again, some courts will just say, if an employer doesn't engage in the interactive process, then an employer cannot win on summary judgment.

Some other courts will say, well, we're going to examine whether or not the breakdown actually prevented a party from finding and identifying a reasonable accommodation, and if that's the case, then we're going to deny summary judgment.

Again, in both of those instances, the courts really do look at who -- look at who is responsible for the breakdown.

And, I'm sorry, I got a message that I need to announce my slide numbers, so I apologize for that.

We're going to move on to Slide 17. Okay. We're going to start our lesson on -- with the first step, which is, of course, triggering the interactive process, and this is an area where we do see a lot of case law.

So generally speaking, the interactive process is going to be triggered by an employee's reasonable accommodation request, and the case law teaches us that employees can trigger the interactive process by making a reasonable accommodation request, even if they don't follow specific employer policies, they don't use specific forms, they don't use specific magic words, or, as this next case shows, they don't -- without asking for a specific person or contacting a specific person.

So an example of this principle comes from the Jones vs. Clark County School District case. What happened here was that the employee is a man named Mr. Jones who worked as a bus driver, and his job was to transport kids with disabilities, and throughout his job he ultimately developed depression and a number of other mental health disabilities, including a lot of anxiety specifically about driving these kids around, and so he ended up taking a

medical leave -- moving to Slide 18, and during this leave, he recognized that he was just not going to be able to return to his position as a bus driver, just because of his disability, it was just something he wasn't going to be able to return to. So he had a conversation with his supervisor, he asked if he could be accommodated through a transfer to a different position where he didn't have to drive.

So pause for a second. When he had this conversation with his supervisor, he was asking for a change to work based on his mental health disability, so that's a reasonable accommodation request; right?

So what did the supervisor do? Well, the supervisor told Mr. Jones that he needed to talk to the county's ADA coordinator about a potential placement as an accommodation, and that's where things kind of broke down here. Mr. Jones did that. He sent a fax to the district ADA coordinator, and in the fax, he advised -- he said that his doctor advised him to retire from driving due to his medication and his mental health disabilities, and, again, he used that phrase "retire from driving," and so the ADA coordinator said, oh, okay, you want to retire from driving, I'm going to interpret this as a resignation, not as a reasonable accommodation request, and so there was never any follow-up from the district, never a discussion about transfer, never a discussion about reassignment, and so Mr. Jones filed a charge of discrimination with the EEOC and then filed a lawsuit under the ADA.

Moving to Slide 19. So in defense of this ADA lawsuit, the district said, hey, court, you need to dismiss this case, and the reason why is that Mr. Jones never requested a reasonable accommodation from the ADA coordinator; how can we possibly be liable if Mr. Jones never made this request to the ADA coordinator? He used the word "retire."

Well, I'm here to tell you that the court found for Mr. Jones by denying -- and this legal phrase -- summary judgment to the employer, and the court went over an employee's obligations again, and said, you know, Mr. Jones needed to inform the district about his disability or about his condition; he did that. He needed to request a change to the workplace. He did that. He requested a reasonable accommodation. And I'm going to read this quote, "The fact that one of the district's administrators did not communicate Jones' request to another administrator is not Jones' fault." You know, again, he was the one that did every -- that made the initial request, and that should have been enough.

So an important lesson learned from this case about making sure that, you know, departments communicate with one another and recognizing that an employee can trigger that interactive process, even if they don't follow the precise policies and practices that an employer puts into place.

And the Dugger case, which is on the bottom of Slide 19 is just another example of that. We've got really similar facts where a plaintiff had requested an accommodation and didn't fully go through the university's ADA request -- accommodation request policy, and so in defending the case, the university made a really similar argument. They said, you know, this guy -- we have an accommodation policy. He didn't go through this policy; therefore, he didn't request an accommodation under the ADA, and just like in the Jones case, the court rejected that and said, you know, the employee did enough to trigger this process.

Okay. Moving on to Slide 20, we've got one more case about triggering the interactive process, and the lesson we learned here is that employers should initiate the interactive process if they know of an individual's disability and desire for an accommodation, even if the employee doesn't use specific words or phrases in her request,

and we learned this lesson in the Kowitz case, the Kowitz vs. Trinity case that we have here on Slide 20. In this case, Kowitz worked as a respiratory therapist, and she had cervical spinal stenosis and took an FMLA or Family and Medical Leave Act to have corrective neck surgery.

Following the leave, she returned to work, and she did have a number of work-related restrictions, but she's back in the workplace, and after a couple of weeks, her employer posts a memo, and this memo says that all employees of the department have to have their basic life support certification. Okay, well, what does the basic life certification require? Well, it requires both a written test and a physical demonstration.

Moving to Slide 21. Well, Ms. Kowitz told her supervisor that she couldn't do the physical portions of the examination until she had had a medical clearance following physical therapy, and that was going to be in about four months, okay. So that's what she did do.

What didn't she do? She didn't ask for anything, she didn't specifically request an accommodation, she didn't ask for a waiver of this requirement for a couple of months, she didn't ask for a reassignment to a job that didn't have this requirement, either on a permanent or temporary basis, but, you know, her employer did know of the issue, and she explained again that she couldn't do this for four months.

Well, lo and behold, she was ultimately fired from her job because she didn't have the certification, and so she filed a lawsuit and sued under the ADA, and the issue in this case ultimately was whether or not Ms. Kowitz triggered the interactive process, and the court in this case, again, found for Ms. Kowitz, and the court said, although the employee here didn't 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 fiscal therapy implied that an accommodation would be required until then.

So before I want to continue, I just want to acknowledge that in this case, there's been a lot of discussion from different legal scholars and analysis about whether or not this requires employers to grant implied accommodations, whether this really stretches the ADA, you know, far beyond where we had it, and although I may be in the minority here, I don't really think so because if we look at this -- at what happened in this case -- and I'm going to move on to Slide 22 -- well, we know it's well settled that an employee's only required to provide an employer with enough information about their disability and about their desire for an accommodation, and isn't it common sense, then, that if we're having this conversation, we don't look at the reasonable accommodation request in isolation? We don't look at just kind of the four corners of that conversation, but we really have to take into account an employer's past knowledge about the employee's disability and about prior communications, and here, you know, the employer was aware of the employee's condition, the employee had explained that she was going to be able to take this test in about four months, and the court reiterated and confirmed that, you know, as we know, the employee's not required to formally invoke the magic words "reasonable accommodation" to transform a notification into a request for accommodation.

Again, here, the employer was aware of her condition, and the employer was aware on -- that she had previously had this surgery and that she was experiencing this ongoing pain.

So this case settled after this decision, but, again, a good reminder, I think for us all, to kind of use our common sense and practical hats that when we have a conversation, we need to take the past knowledge that we have about somebody's disability and

make sure that we're using that to make some decisions.

Moving on to Slide 23. So let's do a quick recap before we move on to Step 2, and let's talk, again, about what we've learned from these different cases.

Employers, we've learned that it's so important to train staff to recognize accommodation requests. This means that there are no magic words that employees need to say, this means that we don't consider reasonable accommodation requests in isolation, this means that it -- that we need to make sure we're acknowledging and using past knowledge of the employee's disability or practical limitations.

The lessons that we've learned is that it's really important to train our staff about how to follow up on requests, so one example that we learned from the Jones case is if we're going to refer an employee to a different -- to a different individual to facilitate that accommodation request, well, wouldn't that be a good idea to follow up ourselves as well and make sure that we're passing along the information and help make sure that we're shepherding that reasonable accommodation request from ourselves as that initial frontline supervisor to the person in HR or the ADA coordinator who's making those decisions?

I think these cases really remind us how important it is to document the employer requests and document any sort of follow-up conversations to make sure that all of the great conversations that we, as employers, are having are documented and clear.

And I'm going to add one more lesson learned, and that is I encourage everyone that before terminating an employee to consider whether they're -- whether the employee has a known disability and a known disability-related need that's not being met because, really, that's what happened in the Kowitz case; right?

This individual was terminated because she couldn't do a requirement, but the employer knew of her disability and knew that she had a disability-related need that wasn't being met, and that should be enough to trigger this interactive process and start this conversation.

Okay. Best practices for employees. So, you know, these two cases that I've talked about really talk about, you know, what employees legally have to and don't have to say, but, of course, it's no one's goal to have a lawsuit, it's no one's goal to ultimately win in this lawsuit. Our goal is to get the reasonable accommodation that we need to do our jobs, and so my strong recommendation for employees is that even if it isn't legally required, definitely use those employer-created processes, use those employer-created specific forms, use those magic words, that I am requesting a reasonable accommodation under the ADA, and say those words and say those phrases when you're making a reasonable accommodation request. I think that will really make sure that the accommodation request is transferred over to the right person if the frontline supervisor that we make it to isn't necessarily the right one.

Same advice, employees need to confirm the request in writing. And, again, all of these things are best practices and best strategies and lessons learned so that we can avoid litigation and avoid these lawsuits and get the accommodations that we need.

Okay. Moving on to Slide 24. And here we're going to look at the process. Once the interactive process has been triggered, let's look at what courts are saying about the requirements to engage in the interactive process.

So as a little bit of background, of course, under this step, it's important to remember that both parties have obligations to engage in the interactive process. I'll say that this is something that I frequently counsel my own clients about. Employees, just like

employers, have obligations to engage in this process.

During this process, parties need to exchange reasonable information. Through this exchange, they need to discuss the employee's limitation and our current work issue. Employers, at that point, can request limited medical support if the individual's disability is not obvious or if their need for an accommodation is not obvious. It's during this process that we're exploring accommodation ideas, we're considering the individual's preference, and it's really important to remember that we don't need to do this in isolation, we should consult with others, as appropriate, including the employee's supervisor, Human Resources, doctors, computer experts, vocational rehabilitation experts. There are so many great resources out there, that there's no reason for employees or employers to do this on their own.

So let's look at some case law lessons, where -- let's look at why things go wrong and what lessons we have learned.

Okay. Well, sometimes things go wrong -- I'm sorry, moving on to Slide 25. So one -- sometimes things go wrong because parties withhold information, and so the lesson that we learned is that we need to share information with each other, and this is especially true when one party has more information or the information is more readily available to one party than the other.

So one example of an employer failing to provide this information is the Suvada case, and what happened here is that the -- Ms. Suvada worked at a print shop position. It was a pretty physical job, and she was diagnosed with Stage IV cervical cancer, so she has a meeting with her supervisor, and in this meeting, she expresses her concern that she, you know, is already having some trouble lifting boxes, and she really didn't know what her cancer treatments would be, so she asked her supervisor if her supervisor knew of any easier jobs.

So, again, in the context of this conversation, she's talking about her disability-related needs, she's asking if she knows of any reasonable jobs, so as we know, that's enough to trigger the interactive process. That's an accommodation request. But what her supervisor did is the supervisor said that, you know, she didn't because all of the jobs in her own division were jobs that had similar physical work, and what her supervisor did not do is connect her with Human Resources or explain how she could have gone about finding possible jobs, and so instead, the supervisor just asked this employee, Ms. Suvada, if she was going resign. Ms. Suvada felt like she had no other option, and she said she didn't want to screw over her coworkers because she wasn't able to do some of the physical parts of her job, so she ultimately resigned, but then she brought an ADA lawsuit.

So moving on to Slide 26. And in Ms. -- when analyzing the lawsuit, the court did exactly what it was supposed to do. It looks at the interactive process, and it considered which of the parties was the party that broke down the interactive process and prevented Ms. Suvada from being able to figure out if reassignment was an option, and the court ultimately said, you know, the employer was the one that had a lot of information that they should have and didn't pass along to the employee.

Here, the supervisor didn't tell Ms. Suvada to check the company website for a comprehensive list of job openings, she didn't tell Ms. Suvada to contact Human Resources to consider whether or not there were any other job openings, but, instead, the only thing that the supervisor did was asked about resignation, and that led Ms. Suvada to believe that resignation was the only option.

And the court said, and I quote, Suvada needed direction from her supervisor about what her options were, and her supervisor failed to provide adequate guidance.

Now, the employer here argued that the employee should have already known how to find out additional jobs because when she had attended an employee orientation, it had included that information. And the court said, you know, that's not enough because the ADA's accommodation requirement imposes an affirmative duty on employers, and, therefore, the employer should have done more to make sure that the information it had was in the hands of the employee.

Now, I want to mention, although this case was specifically about reassignment, this concept of employers having more information than employees can apply to all sorts of accommodation requests, and so it's something that we see over and over again in the case law.

Okay. Moving to Slide 27. But, of course, it's really important to remember that employees are sometimes the ones who hold the information, and in those situations, employees need to make sure that they're providing the information to their employers as part of the interactive process.

In the Ortiz case on Slide 27 is a nice example. Here the employee had worked as a social worker, and she injured her hand while on the job, so she took some leave, and she returned with a number of different diagnoses of all physical limitations. She had a sprained left shoulder, a sprained arm and forearm, and she also had hand and bilateral carpal tunnel syndrome, so she gave her employer some information about her diagnoses and some general information about her restrictions, so, for instance, she said that she had some difficulty with repetitive tasks, lifting, holding, and manipulating heavy and large objects.

So the employer launched the interactive process, exactly like they should have, and as part of the interactive process asked for some additional clarification because the information was relatively

general. So, for instance, the employer said, okay, I understand that you have some weight limitations, but how much weight can you lift? And I understand you have some limitations about repetitive movements, but what kinds of repetitive movements do you need to avoid?

Well, the employee was the one who had access to this information, right, but she didn't provide any of that. She didn't provide it from her doctor, she didn't provide it from herself, but, instead, she filed this ADA case, and perhaps unsurprisingly, when this case was considered by the court, the court looked at who and which party broke down the interactive process and found that here Ms. Ortiz-Martinez was the one who caused the breakdown because the employer had requested some additional details, and those weren't unreasonable.

So, again, this is kind of a common fact pattern we see where it's really the employee who's the one who breaks down the process by withholding the information that they need to provide to their employer.

Okay. Moving to Slide 28. Another problem we see with the breakdown of the interactive process is when parties, they go through the motions of the interactive process, but they don't truly engage in good faith, and one example of that is when a party really has already made up their minds before they go in to the accommodation on interactive process, and an example of this and the lesson we learned from this case is the Mosby-Meachem vs. Memphis Light case. Here the employee worked as an in-house attorney for a utility company, and she was experiencing some pregnancy-related complications and had asked if she would be able to telework or work from home for ten weeks when she was having -- when she was on bed rest.

So the employer did -- started to do what you would think is

important in this type of situation. They held a telephonic process meeting with an ADA committee, so these things all sound good, right. And in that telephonic process meeting with this ADA committee, the employee went through each of her job responsibilities and explained exactly how she'd be able to do each of them from home, but the request was still denied.

This was an interesting case because it actually went to a jury, and the jury found for the employee, and that jury decision was appealed all the way up to the appellate court, and the appellate court upheld the jury's decision, and in its decision, the court explained that the employer didn't engage in this interactive process in good faith because, truly, it had already made up the decision even before having this telephonic process meeting, and as evidence of that, the court pointed out that the employer said things like, hey, nobody can telecommute, just, you know, general policy, we're never going to make any exceptions, and also made comments like, we said no already, you know, so we're not going to change our mind, we're not listening to what you have to say, and we're not considering it. And so based on that, the court upheld this case.

Okay. Slide 29. Remember, as part of the interactive process, it's really important for parties to consider alternative accommodations, not just the accommodation that's specifically requested by the employee. And courts confirm in the lessons that we've learned from the case law that when parties don't really engage in the interactive process in good faith, they're not considering alternative accommodations.

And a couple good examples of that on this slide. The first is the Romero case, and what happened here is that the employee was out on a medical leave. He needed one extension and then he needed a second extension and then he needed a third

extension. All of those were approved by his employer. But, then, when he needed a fourth extension, his employer said, well, you know, instead of giving you an additional medical leave, let's talk about whether there's anything else that we can provide, you know, any sort of alternative accommodation other than medical leave, and the employee just pretty much shut down that conversation. He refused absolutely to discuss anything other than the medical leave, and then he even called his employer's attempt to initiate this discussion harassment.

So, again, a good example of when a party just fails to discuss alternative accommodations, which we know we need to be doing as part of the interactive process, so unsurprisingly in this case, the court found for the employer and found that the employee, Mr. Romero, was the one who was responsible for breaking down the interactive process.

And then the second slide -- second case on this slide is the *Lafata vs. Church of Christ Home for Aged* case, and this is an example of when an employer kind of engaged in that similar shutdown of the conversation. Here the employer came up with its proposed accommodations, it was another possible position, and then essentially just told the employee, who was trying to engage in this interactive process, hey, you can take it or leave it, and that was it. You know, no further discussion, just take it or leave it.

Well, I'm here to tell you if you're ever saying phrases like "take it or leave it" or "take it or nothing else," you're probably not engaging in the interactive process. So good reminder in the case law is we need to be really open-minded when considering alternative accommodations.

Okay. Our final lesson on this topic is that we need to let other parties respond to our concerns. We need to disclose what our concerns are as part of the interactive process and let the other

side respond. And I'm sorry, I'm on Slide 30. And this principle was discussed in the Keith vs. County of Oakland case. In this case, there was a deaf individual who had applied to work as a lifeguard, and he was given a conditional job offer to do that. He was -- but it was subject to a medical clearance. So the county doctor does clear him for work, but solely because he's deaf says he's going to need constant accommodation and ultimately concluded that Mr. Keith could not safely do his job.

But what didn't they do before coming to that conclusion? Well, the county and the doctor didn't have a discussion with Mr. Keith about how he could do his job or looking for resources to help understand how a deaf lifeguard could do his job or, really, you know, understanding the breadth of his accommodation needs, and so this case also went up on to the appellate court level, and there were many claims included in this case. I think this was an interesting one for a lot of different reasons, but there's also a really interesting analysis of this discussion about the interactive process.

And the court said, you know, hey, if the county here had discussed with Mr. Keith his -- their concerns, you know, Mr. Keith could have addressed many of their concerns. He could have explained that he had a cochlear implant and he actually was able to detect some loud noises if he wore an external sound transmitter, and maybe that's something that would have made the county feel a little bit more comfortable.

Or the other thing that Mr. Keith could have done is he could have referred the county to people who have expertise with deaf lifeguards. Again, there's -- let's not do this in isolation, let's bring in our experts and let's talk to people about how to do these sorts of things.

And then a really important point is that the county had just kind of assumed that Keith was going to need an American Sign

Language interpreter for almost all of his job, but, again, that was an assumption that they kind of had come to on their own, and the court recognized that had the county talked to Mr. Keith, they would have learned that, no, he really only needed an American Sign Language interpreter for occasional trainings, maybe for large staff meetings, and he could have even explained that when he did his lifeguard certification and training, he was able to pass on his own and only needed an ASL interpreter for some, you know, large classroom settings.

But, again, the county hadn't -- didn't do that and didn't explain their concerns and let the other side respond. So lesson learned, that's another good thing that we all should be doing when engaging in the interactive process.

Okay. So moving on to Slide 31. Now that we've learned these lessons about triggering the process and engaging in the process, the next steps are selecting and implementing the accommodations.

So, of course, after we've done this -- had this conversation, it is the employer who ultimately chooses which accommodation to provide. Some things we learned from the case law are that employers need to give the employee's preference consideration, but the employer can ultimately choose an alternative accommodation, as long as it's effective.

And some of the principles that we've talked about so far today really apply to this step as well. So if an employer rejects an employee's request, courts will really look at, well, what evidence did they have in select -- in selecting the alternative accommodation and how do they know it would work and why did they reject that request?

And on the flip side, if an employee's the one that's insisting on one and only one accommodation, why, and are they explaining

that and giving the other side the opportunity to respond to their concerns?

So once an employer chooses the accommodation, the next step is that the employer and the employee together implement the accommodation, and then moving forward, they need to monitor it and evaluate its effectiveness.

So a few tips. Implementation should occur in a timely fashion. I have no hard-and-fast timeline for you. Of course, in the ADA world, everything is under the reasonableness test, but the employer should certainly follow up to ensure that the accommodation is effective and remember that the duty to accommodate is an ongoing duty because there could be changes needed over time, because maybe someone's disability changes or maybe the job changes, and so it's not a -- kind of a one-time conversation, it really should be an ongoing discussion about what's working and what isn't working.

Okay. Slide 32. So let's recap some of the lessons that we've learned from the case law today.

So first, for employers, let's remember to engage in the interactive process in good faith and let's do that before we make any final decisions.

Remember to share information, especially information that is more readily available for an employer, especially things about employers' own system functioning or equipment, perhaps, job vacancies. These are all things that employers have much more readily -- ready access to.

Employers should identify your concerns and give the employee a chance to respond to them because, you know, it may be that you have a real legitimate concern, but it's something that's easily explainable or something that an employee, because they're the ones who have been living with their disability, are able to kind

of come up with the solution. It may be that there's no solution, but at least having that dialogue is what the ADA requires.

Remember to consider an employee's preferred accommodation, and if you want to use an alternative accommodation, you have to -- the case law teaches us it's really a good practice to explain why and discuss an employee's concerns and, again, work together to find a solution.

Remember that all medical requests should be limited to the information that you really need to evaluate the request and to use all available resources, things like, of course, the ADA National Network and the Job Accommodation Network, and, of course, document your process.

I want to just point out a couple of the things that I have noticed, which I seem to -- in my practice, I've seen some of the biggest mistakes that I think employers make. One thing is that sometimes an employee will ask for an accommodation that is an unreasonable accommodation, something like an indefinite medical leave or something that courts generally say is not something that has to be provided.

Well, oftentimes, what I see employers do is just because the initial request is something that's unreasonable, they don't engage and they just stop the conversation there, and, really, that's probably the time where we need to engage the most, and so remember, employers, even if the employee's initial request is unreasonable, you've still got to engage in the interactive process to see if you can identify something that would be reasonable.

Another mistake that I see a lot is that employers will ask an employee to identify the specific reasonable -- or the specific function of their job that they are unable to do without an accommodation, and I find that to be a problematic question because there are so many -- because, remember, reasonable

accommodations aren't just to do the essential functions of your job, they're also so that you have equal access to the benefits and privileges of employment, so there are some accommodations out there that somebody doesn't necessarily need -- they can't pinpoint the specific essential function that they need the accommodation for, but they still need the accommodation, so maybe something like having a service animal at work is a good example of that.

And then the final mistake that I see employers make sometimes is sometimes when employers have good policies, which is good -- I'm a big fan of policies, but sometimes they'll let their policies sometimes get in the way of some common sense, so an example of that would be -- let's say an employee provides a medical note from a doctor and that medical note answers every single question on an employer's reasonable accommodation form. Well, is it really necessary for the employer to then make the employee go back to their doctor and have them fill out the form even though they have all of that information? You know, that's something that's hard for employees to do, so I encourage you to kind of sometimes use your common sense and think about why you're going through the policy that you're going through.

Okay. Slide 33. Employees, remember that the interactive process is a two-way street. Again, this is a big mistake that I see employees forget sometimes.

Remember to respond to a reasonable request for documentation, and if your employer asks for too much, the worst thing to do is just simply refuse. Instead, you've got to have that conversation, explain what's too broad, and propose a solution.

And employees, really be open-minded about alternative accommodations. I've had a lot of clients that come in and say, you know, this is the only one thing that's going to work, but, really, if you have a good interactive process, there may be an alternative

accommodation that would work, so my advice to employees is that if you know an alternative accommodation won't work, explain why, but if you're not sure, give it a shot and agree to give the alternative accommodation a try, and tell your employer you're not sure it's going to work and you'd like to revisit it sometime, and, again, if it doesn't work, follow up with your employer.

Slide 34 takes us to the questions. I know I gave a lot of information today. If anyone has any follow-up questions, my contact information is on the slide. You can feel free to reach out to me at any time, and, again, remember, if you are an attorney looking for CLE credit, please send me an email at rachelw@equipforequality.org.

And with that, I will turn it back over to you, Caleb.

>> CALEB BERKEMEIER: Well, thank you, Rachel, very much for sending this information to us. I think coming at these concepts from the perspective of case law really helps us understand even better.

So, like I said, this is the first part of a three-part series, so the second part will be coming in January, so everyone watch out for that.

So we're at the Mid-Atlantic ADA Center, grant-funded project operated by TransCen, Inc., and you can call our toll free number at 800-949-4232 to be connected to the ADA Center in your region.

If you're in our region, you can call us directly at 301-217-0124. You can send us an email at ADAinfo.org.

-- I'm sorry, the email address is ADAinfo@transcen.org and the website ADAinfo.org, and you'll be receiving session evaluations. We'd love to hear what you thought of this session.

So thank you, everyone, for joining us, and thank you, Rachel.

(Session concluded at 12:15 p.m. CT)

This text, document, or file is based on live transcription. Communication Access Real-time Translation (CART), captioning, and/or live transcription are provided in order to facilitate communication accessibility and may not be a totally verbatim record of the proceedings.
