
Modified Work Schedules under the ADA

By Joyce E. Smithey and Betina Miranda

Modified work schedules are receiving increasing attention as a reasonable accommodation for employees with disabilities. On May 15, 2013, the Equal Employment Opportunity Commission (EEOC) issued four new “Question and Answer” guidance documents (available at www.eeoc.gov/laws/types/disability.cfm) which highlight specific types of reasonable accommodations for persons with cancer, diabetes, epilepsy, and intellectual disabilities. All four documents listed a modified work schedule as a suggested accommodation. But what exactly is a modified work schedule? And when is a modified schedule reasonable or unreasonable, regardless of the impairment at issue? The questions present complex, fact-intensive problems. Fortunately, recent case law across the country provides some practical guidance for employers and employees alike.

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against a “qualified individual with a disability” because of a disability. 42 U.S.C. § 12112; 29 C.F.R. § 1630.4. The ADA also requires employers to grant a reasonable accommodation if it would enable an individual to perform the essential functions of the job, unless the employer demonstrates that the accommodation would impose undue hardship to its business. 42 U.S.C. § 12112; 29 C.F.R. § 1630.9. A reasonable accommodation is any change in the work environment or to work practices that allows the disabled individual to enjoy equal employment opportunity. For example, time off for medical appointments and ergonomic office equipment can be reasonable accommodations.

Under the ADA, a modified work schedule can be a reasonable accommodation. According to informal guidance from the EEOC, a modified work schedule can involve adjusting arrival or departure times, changing shift assignments, providing periodic breaks, altering when certain work functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave. See EEOC Enforcement Guidance No. 915.002 (Oct. 17, 2002) (available at www.eeoc.gov/policy/docs/accommodation.html).

Assignment to a “less active” shift can be a reasonable accommodation. In *Christmas v. The Arc of the Piedmont, Inc.*, 2012 U.S. Dist. LEXIS 98385 (W.D.Va. July 16, 2012), the employee, Regina Christmas, suffered from Ehlers-Danlos Syndrome, a connective tissue disorder that limited her ability to walk, bend, lift, and stoop. Her employer, an assisted living facility, assigned her to work the overnight shift as an accommodation as the shift required significantly less physical activity. Ms. Christmas found that she was able to perform her job duties successfully in the overnight shift. However, after Ms. Christmas reported patient abuse to her supervisor, she was re-assigned to day shifts and ultimately terminated. Ruling on the employer’s motion to dismiss, the court found that Ms. Christmas stated a plausible failure to accommodate claim. Assignment to the overnight shift would be a reasonable accommodation for her impairment under the facts that she alleged.

A “work when you want” schedule is not a reasonable accommodation. A request for a flexible schedule is not reasonable if the employee requests to work whenever he wants. In *Solomon v. Vilsacks*, 845 F. Supp. 2d 61 (D.D.C. 2012), the employee, Linda Solomon, began missing work after her pre-existing depression worsened. Her regular schedule was 7:30 am to 6 pm, four days a week. Within ten weeks, she used more than 110 hours of leave time by deviating from her normal schedule. Ms. Solomon claimed that she still did all her work and met her deadlines by arriving at work early some days and working late other days, as her condition permitted. She made a request for a “maxiflex” schedule, which Ms. Solomon described as allowing her to work as many or as few hours per day as she wanted, as long as she met her weekly requirement of 40 hours. The employer eventually denied her request. At summary judgment, the court determined that this request was unreasonable as a matter of law, pointing to the fact that Ms. Solomon’s job involved meeting frequent deadlines, which she admitted at her deposition. Even if she had “fortuitously” met her deadlines in the past despite her erratic hours, this was not a predictor of future success. The employer was entitled to some predictability given the deadline-driven nature of the position.

Facilitating the employee’s commute may be reasonable. Even if an employee does not need an accommodation to perform his job duties, he may need an accommodation to get to work. In *Livingston v. Fred Meyer Stores, Inc.*, 388 Fed. Appx. 738; 2010 U.S. App. LEXIS 15044 (9th Cir. July 21, 2010), the employee, Michelle Livingston, requested an earlier shift so that she would not have to drive home at the end of her shift in the dark. Ms. Livingston had a vision impairment which prevented her from driving and walking outside safely after dark. In fall and winter 2005, her supervisor had modified Ms. Livingston’s schedule at her request to minimize driving after dark. However, in fall 2006, the employer refused to make the same accommodation. The court found that because the employer had not experienced any hardship during Ms. Livingston’s modified schedule in 2005 (and, in fact, Ms. Livingston had increased sales during that time), her requested accommodation was reasonable and should have been granted.

A modified work schedule may include a part-time work schedule. However, changing a full-time position to a part-time position is not reasonable if the change would require the elimination of an essential job function. Factors that are important in determining whether a function is essential include: the employer’s judgment; whether the functions are listed as essential in a job description; whether other employees in the same job position have been required to perform these duties; the number of other employees who are available to perform the function if the disabled employee is not; the amount of time spent performing the function; and whether the function is the purpose of the job. 29 C.F.R. § 1630.2(n); EEOC Opinion Letter dated Feb. 3, 2005, available at www.eeoc.gov/eeoc/foia/letters/2005/ada_reas_accomm.html.

Recent cases indicate that a reasonable part-time modification is likely to be temporary. In *White v. The Standard Insurance Company, Inc.*, 895 F. Supp. 2d 817 (E.D. Mich. 2012), the plaintiff employee, Darla Kay White, worked as a commercial insurance agent in the trucking lines department. She and the other agents worked full-time and had specific customers assigned to them. After an injury to her back and a related medical leave, Ms. White's doctor released her to return to work on a part-time basis with the belief that she would be able to resume full-time work in a couple months. The employer had never employed a part-time agent before, but it agreed to allow her to work part-time for a six-week period as a trial. During this period, Ms. White's supervisor and co-workers observed that the accounts that she was exclusively assigned to were suffering. At her deposition, Ms. White admitted that her not being available full-time was detrimental to her clients. After a few weeks of part-time work, Ms. White's doctor extended her part-time restriction by another month. Ultimately, the employer terminated her employment when she was unable to return to full-time work. At summary judgment, Ms. White argued that she should have been given a part-time schedule on an indefinite basis. The court determined that this was a request that an essential function of her position be eliminated or, at the very least, that she be allowed to perform only some of her responsibilities. The court ruled that this would not be a reasonable accommodation.

Another court came to a similar conclusion in *West v. New Mexico Taxation and Revenue Department*, 757 F. Supp. 2d 1065 (D.N.M. 2010). The employee, Ulrike West, was diagnosed with Relapsing Remitting Multiple Sclerosis. She requested several accommodations, including 20 hours of leave without pay per week and the permanent reclassification of her job from full-time to part-time status. Her employer granted the request for leave but declined to reclassify her position on a permanent basis; it was concerned that, once it abolished the full-time position, it would be difficult to

obtain funding for it again in the future. The court found that Ms. West was reasonably accommodated with the grant of 20 hours of leave per week and that the employer was not required to permanently reclassify the position.

Likewise, in *Konspore v. Friends of Animals, Inc.*, 2012 U.S. Dist. LEXIS 38334 (D. Conn. Mar. 20, 2012), the plaintiff, Sharon Konspore, was the accountant and controller for a non-profit organization. She requested a permanent change from full-time to part-time status because of the symptoms of her chronic Lyme disease. Ms. Konspore argued at summary judgment that the job could be done in 20 hours per week. However, she testified at her deposition that she often worked more than 40 hours per week in order to "get the job done." The court found this determinative of the fact that full-time status was an essential function of her job.

As the above cases illustrate, determining a reasonable modified work schedule is not a simple question: it requires a thorough, detailed assessment of the individual circumstances. This assessment, however, is necessary, as modified work schedules continue to be requested by employees. ■



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FBA L&E Section Co-Sponsors Affordable Care Act CLE Program with the New Orleans Chapter of the FBA

On Dec. 19, 2013, the L&E Section joined with the New Orleans Chapter of the Federal Bar Association to present a 1-hour CLE on "Understanding the Affordable Care Act." L&E Section Chair Karleen Green of Phelps Dunbar and Layna Suzanne Cook of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC addressed the Affordable Care Act from both the employment and health care law perspectives. ■