

2.26 FAILURE TO ACCOMMODATE EMPLOYEE WITH DISABILITY UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION (Approved 02/2013; Revised 02/2018)

Plaintiff claims that defendant unlawfully failed to accommodate his/her disability. Specifically, plaintiff argues that defendant should have [*insert description of accommodation at issue, such as “modified his/her job duties” or “modified his/her work schedule” or “granted him/her a leave of absence” or “transferred him/her to another open position for which he/she was qualified”, etc.*]. Defendant argues that [*insert description of defendant’s position, such as “plaintiff did not have a disability” or “no accommodation would have enabled plaintiff to perform the essential functions of his/her job” or “it was not aware that plaintiff needed an accommodation” or “the accommodation plaintiff sought was not reasonable” or “the accommodation it provided to plaintiff was adequate”, etc.*].

To win his/her case, plaintiff must prove each of the following elements by a preponderance of the evidence. First, plaintiff must prove that he/she had a disability. Second, plaintiff must prove that he/she was able to perform all of the essential functions of his/her job, either with or without a reasonable accommodation. Third, plaintiff must prove that defendant was aware of his/her need for a reasonable accommodation. Fourth, plaintiff must prove that there was an accommodation that would have allowed him/her to perform the essential functions of his/her job. Fifth,

plaintiff must prove that defendant denied him/her accommodation.¹

To prove the first element of his/her claim, which is that he/she had a disability, plaintiff must show that he/she had either (a) a physical condition caused by injury, birth defect, or illness or (b) a mental, psychological, or developmental condition that either (i) prevents the normal exercise of any bodily or mental functions or (ii) can be demonstrated medically or psychologically by accepted clinical or laboratory diagnostic techniques.² Plaintiff's disability need not be particularly serious or permanent to qualify under the law.³

In determining whether plaintiff has proven the second element of his/her claim, which is that he/she was able to perform all of the essential functions of his/her job, you must consider which job functions were truly essential. Whereas plaintiff bears the burden of proving that he/she could perform the essential functions of his/her job

¹ In *Victor v. State*, 203 N.J. 383 (2010), the Supreme Court declined to decide whether a reasonable accommodation plaintiff must prove an adverse employment action separate and apart from the failure to accommodate itself. However, in dictum, the Court noted that “[t]he LAD’s purposes suggest that we chart a course to permit plaintiffs to proceed against employers who have failed to reasonably accommodate their disabilities or who have failed to engage in an interactive process even if they can point to no adverse employment consequence that resulted.” *Id.* at 421.

² N.J.S.A. 10:5-5(q).

³ See, e.g., *Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 16 (2002) (noting that “the term ‘handicapped’ in LAD is not restricted to ‘severe’ or ‘immutable’ disabilities”); *Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501, 519 (App. Div. 2001) (observing that LAD “is very broad and does not require that a disability restrict any major life activities to any degree”); *Soules v. Mount Holiness Memorial Park*, 354 N.J. Super. 569 (App. Div. 2002) (holding that plaintiff employee with cancer who needed eight months off from work to recuperate from surgical removal of kidney was “handicapped” for purposes of LAD despite fact that disability was temporary).

with or without reasonable accommodation, if there is a dispute between the parties about whether a particular job function is essential, defendant bears the burden of proving that the function is essential.⁴

In determining whether a job function is essential, you should consider the following principles:

- a) A function may be essential because the reason the position exists is to perform the function;
- b) A function may be essential because of the limited number of employees among whom that work can be distributed; and
- c) A function may be essential because it is highly specialized and the person doing the job is chosen because of his or her expertise.

In deciding whether a job function is essential, you should consider written job descriptions, the amount of time that the person doing the job spends performing that particular function, the consequences of not requiring the person doing the job to perform that particular function, the terms of any union collective bargaining agreement that applies to the job, and whether other employees doing that job or similar jobs are required to perform that particular function.⁵

⁴ *Sturm v. UAL Corp.*, Civil Action No. 98-264, 2000 U.S. Dist. LEXIS 13331 (D.N.J. Sept. 5, 2000) (holding under LAD that “employer bears the burden of establishing the necessity of certain functions to the job in question”).

⁵ These principles are drawn directly from 29 *C.F.R.* §1630.2(n), which is the federal regulation defining “essential functions” under the federal Americans with Disabilities Act. There is no

The third element that the plaintiff must prove is that defendant was aware of his/her need for an accommodation. In many cases, plaintiff will do so by offering evidence that he/she requested an accommodation from defendant. It is not necessary that requests for accommodation be in writing or even use the phrase “reasonable accommodation”.⁶ An employee may use plain English and need not mention any law requiring accommodation.⁷ Although there are no magic words that the employee must use, he/she must make clear to the employer that he/she needs some assistance in performing his/her job because of his/her disability.⁸ However, plaintiff need not prove that he/she requested an accommodation if he/she can prove that defendant knew about his/her need for accommodation in some other way.⁹

The fourth element that plaintiff must prove is that there was an accommodation that would have allowed him/her to perform the essential functions of his/her job.

definition of “essential functions” in the New Jersey Law Against Discrimination, the New Jersey regulations promulgated under the statute, or New Jersey state court case law interpreting the statute.

⁶ *Tynan v. Vicinage 13 of Superior Court of New Jersey*, 351 N.J. Super. 385, 400 (App. Div. 2002), *certif. denied*, 183 N.J. 215 (2005).

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *See, e.g., Lasky v. Borough of Hightstown*, 426 N.J. Super. 68, 78 (App. Div. 2012) (holding that when plaintiff’s need for accommodation is obvious, there is no requirement that plaintiff request accommodation before filing suit in order to prevail on failure-to-accommodate claim); *N.J.A.C. 13:13-2.5(b)(2)* (requiring employer to consider reasonable accommodation before firing, demoting, or refusing to hire or promote person with disability on grounds that disability precludes job performance).

Examples of reasonable accommodation include (a) making facilities used by employees accessible and usable by people with disabilities, (b) job restructuring, (c) part-time or other modified work schedules, (d) leaves of absence, (e) getting or modifying equipment or devices to allow employees with disabilities to do the job, and (f) transfer to another open position for which the employee with a disability is qualified.¹⁰

The last element that plaintiff must prove is that defendant denied him/her accommodation. It is important to note that if more than one accommodation would allow the employee to perform the essential functions of the job, the employer has the final say to choose between those effective accommodations, and may choose the less expensive or less difficult accommodation.¹¹ If defendant argues that the accommodation sought by plaintiff would have placed an undue hardship on it, then defendant has the burden of proving that undue hardship.¹² In determining whether an accommodation would impose undue hardship on the operation of an employer's business, you should consider the following factors: (a) the overall size of the employer's business with respect to the number of employees, number and type of

¹⁰ This list of potential accommodations is drawn from *N.J.A.C. 13:13-2.5(b)(1)*. It is not intended to be exhaustive.

¹¹ *Victor v. State*, 203 *N.J.* 383, 424 (2010).

¹² *N.J.A.C. 13:13-2.5(b)* (requiring employer to provide reasonable accommodation “unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business”).

facilities, and size of budget; (b) the type of the employer's operations, including the make-up and structure of the employer's workforce; (c) the nature and cost of the accommodation needed, taking into consideration the availability of tax credits and deductions and/or outside funding; and (d) the extent to which accommodation would involve taking away an essential function of the job.¹³

NOTE TO JUDGE

The following charge [in brackets] should be given on the fifth element of the *prima facie* case where the plaintiff alleges that the defendant has failed to engage in the interactive process. The charge should be given in lieu of the preceding paragraph in the standard charge.

[The last element that plaintiff must prove is that the defendant did not make a good faith effort to find a reasonable accommodation, which would have allowed the plaintiff to perform the essential functions of the job. Once the employer has become aware of the disabled employee's need for assistance, an employer must initiate an informal interactive process with the employee to determine what appropriate accommodation is necessary to permit the employee to perform the essential functions of the job.¹⁴ This process must identify the potential reasonable accommodations that could be adopted to overcome the employee's precise

¹³ *N.J.A.C. 13:13-2.5(b)(3)*.

¹⁴ *Tynan v. Vicinage 13 of Superior Court of New Jersey*, 351 *N.J. Super.* 385, 400 (App. Div. 2002).

limitations resulting from the disability.¹⁵ Engaging in the interactive accommodation process does not dictate that any particular concession must be made by the employer but instead what it requires is that the employer make a good-faith effort to seek accommodations.¹⁶ “Good faith” means that the employer acted honestly in its attempt to find a reasonable accommodation.

If defendant argues that a particular accommodation would have placed an undue hardship on it, then defendant has the burden of proving that undue hardship.¹⁷ In determining whether an accommodation would impose undue hardship on the operation of an employer’s business, you should consider the following factors: (a) the overall size of the employer’s business with respect to the number of employees, number and type of facilities, and size of budget; (b) the type of the employer’s operations, including the make-up and structure of the employer’s workforce; (c) the nature and cost of the accommodation needed, taking into consideration the availability of tax credits and deductions and/or outside funding; and (d) the extent to which accommodation would involve taking away an essential function of the job.^{18]}

In summary, to win on his/her claim, plaintiff must prove that it is more likely

¹⁵ *Ibid.*

¹⁶ *Victor v. State*, 203 N.J. 383, 424 (2010).

¹⁷ *N.J.A.C.* 13:13-2.5(b) (requiring employer to provide reasonable accommodation “unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business”).

¹⁸ *N.J.A.C.* 13:13-2.5(b)(3).

than not that (1) he/she had a disability; (2) he/she was able to perform all of the essential functions of his/her job, either with or without a reasonable accommodation; (3) defendant was aware of his/her need for a reasonable accommodation; (4) there was an accommodation that would have allowed him/her to perform the essential functions of his/her job; and (5) defendant denied him/her accommodation. If you find that plaintiff failed to prove any of these elements by a preponderance of the evidence, you must render a verdict in favor of defendant.

NOTE TO JUDGE

In cases in which the plaintiff alleges a failure to engage in the interactive process, the fifth prong of the preceding paragraph should be modified as follows:

(5) defendant did not make a good-faith effort to find a reasonable accommodation.