Employer’s Obligations under the New York State Human Rights Law

The New York State Human Rights Law (NYSHRL) prohibits discrimination against persons with disabilities in the employment context.

The NYSHRL covers employers with four (4) or more employees and applies to employment agencies, labor organizations and apprentice programs.

The NYSHRL provides broader coverage than the Americans with Disabilities Act (ADA), which applies to employers with fifteen (15) or more employees.
The Americans with Disabilities Act [(42 U.S.C.A 12102(2)(A))] defines “disability” as:

- “a physical or mental impairment that substantially limits one or more major life activities of such individual;
- a record of such an impairment; or
- being regarded as having such an impairment.”
Definition of “Disability”

The New York State Human Rights Law defines “disability” as:

- 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 techniques, or

- a record of such an impairment, or

- a condition regarded by others as having such an impairment.
NYSHRL vs. ADA

- The ADA requires a “substantial limitation of one or more major life activities” for an individual to be considered disabled and protected under the law.

- No such qualifier under the NYSHRL, and no mention of “major life activities.”

- Essentially, NYSHRL requires a physical, medical or mental impairment that prevents the exercise of a normal bodily function.
Temporary Disabilities

- A current employee experiencing a temporary disability is protected by the NYSHRL, where the individual will be able to satisfactorily perform the duties of the job after accommodation in the form of a reasonable time for recovery.

- The NYSHRL requires no more than de minimis accommodations for temporary disabilities in the areas of worksite accessibility, acquisition or modification of equipment, job restructuring or support services for persons with temporarily impaired hearing or vision.
Must be Qualified

- Under the NYSHRL, an employee with a disability must be qualified for the job, and be able to satisfactorily perform the “essential functions” of the job with or without reasonable accommodation.
“Essential Functions” of the Job

- The “essential functions” of the job are defined as those fundamental to the position.

- Evidence for determining the “essential functions” of a particular position include:
  - the employer’s judgment as to which functions are essential, particularly where so indicated in a pre-existing written job description;
  - how often the function is actually performed by other employees in the position;
  - the direct and specific consequences to the employer’s business if the function is not performed by the particular disabled individual.
Unlawful Discriminatory Practices

- Refusal to hire, interview, promote on account of disability.
- Termination on account of disability.
- Diminishing compensation, conditions, or privileges of employment on account of disability.
- Refusal to reasonably accommodate the known disability of a qualified employee, or prospective employee.
- Employers can not inquire about an employee’s OR job applicant’s disability UNLESS an employee has made a request for reasonable accommodation.
Reasonable Accommodations

- It shall be an unlawful discriminatory practice for an employer to refuse to provide a reasonable accommodation to the known disabilities of an employee, or prospective employee in connection with a job or occupation sought, provided however, that such actions do not impose an undue hardship on the business.
Undue Hardship

Factors to be taken into consideration to determine “undue hardship” include:

- the overall size of the business and its budget;

- the benefit provided by the accommodation toward removing the impediment to performance caused by the disability;

- the hardship, costs or problems it will cause for the employer, including those that may be caused for other employees.
Reasonable accommodations include:

- provision of an accessible worksite;
- acquisition or modification of equipment;
- support services for persons with hearing or vision impairments; and
- job restructuring and modified work schedules.
Reasonable Accommodations do NOT include:

- providing non-work related aids, such as a personal hearing aid or wheelchair, which are the employee’s own responsibility;

- the creation of a completely unique position with either qualifications or functions tailored to the disabled individual’s abilities.
Circumstances that give rise to the requirement that the employer consider reasonable accommodation include:

- where the disability and need for accommodation are known to the employer;

- when a qualified applicant or employee with a disability informs the employer of the disability (if the employer does not already know of its existence) and requests accommodation.

- when a current employee with a disability informs the employer of the disability (if the employer does not already know of its existence) and requests an accommodation, even if there has been no change in the employee’s medical condition.
Making the Case

In order to establish a prima facie case of failure to provide a reasonable accommodation pursuant to the NYSHRL an employee must establish that:

(1) s/he is an individual with a disability as defined by the statute;

(2) employer had notice of his/her disability;

(3) s/he could perform the essential functions of his/her job with reasonable accommodation; and

(4) employer failed to make such accommodations.
Burden on Employee

- Employee must make at least a facial showing that an accommodation is possible.

- It is enough for the employee to suggest the existence of a plausible accommodation, the costs of which, facially, do not exceed its benefits.
Once Complainant has made prima facia case of employer discrimination based upon unlawful failure to reasonably accommodate, the burden shifts to Employer to show:

- That Employer had legitimate, non-discriminatory reason for refusing to accommodate.
Once Employer has shown legitimate reason to refuse to accommodate, burden shifts to Employee to show that:

That the reason offered by the Employer is \textit{“pretext”} for discrimination.

\textbf{Pretext} means: something that is put forward to conceal a true purpose.
“Pretext” – What the Division is Looking for…

- Pretext can be found based on (a) statistics, (b) comparators similarly situated, (c) written or oral statement(s) indicating bias, or (d) just plain false reason.
Case Study 1

C. was a food server who was pregnant. C. had difficulties bending over and picking up heavy objects due to complications related to her pregnancy.
Pregnancy & Disability

- An employer cannot compel an employee who is pregnant to take a leave of absence, UNLESS the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.

- Complications resulting from pregnancy may result in a person meeting the definition of "disability" under the NYSHRL.

- An employer is obligated to provide reasonable accommodations to employees with disabilities to perform their jobs.
Case Study 1

- C. provided medical documentation to Employer regarding her need for light duty, and was assigned to the cash register.

- Management change = new manager requesting additional medical documentation re: C.’s need to work at cash register. Accommodation rescinded until C. could produce documentation.
Case Study 1

- C. unable to get additional medical documentation. Dr. told her that the first letter, “should suffice.”

- Employer’s response was, “we do not provide light duty, and we can’t accommodate you without further documentation. Don’t come back to work without it.”

- Employer had no written “Reasonable Accommodation” policy.
“Light Duty”

Reasonable accommodation does not include:

- the creation of a completely unique position with either qualifications or functions tailored to the disabled individual’s abilities. 9 NYCRR 466.11(f)(6)-(7).
Case Study 1

- Employer directed C. to seek medical documentation prior to returning to work and then failed to accommodate her request for a reasonable accommodation on the basis that more medical information was necessary.

- While C. discussed ways for her to accomplish her work tasks when assigned to the cash register within the “light duty” limitations of her doctor’s note, and indeed did so successfully for the time she was assigned to that work station, Employer failed to consider this information when it terminated Complainant on the pretext that she failed to provide more medical information on the limits of her physical activities.
Case 1 Holding

- C. awarded back pay + interest + $15k compensatory damages.
Case Study 2

- C. is a salesperson with psychological disabilities.
- Employer re-assigned C. to work at a different office.
- C. requested that he be allowed to stay at his current office as a reasonable accommodation for his disability.
- C. provided Employer with medical documentation, indicating that it would not be appropriate to have sudden changes in C.’s work environment.
Case Study 2

- Employer rejected C.’s request to remain at his present office.
- Employer further contended that, based on the fact that Complainant was advised in May that the change would be effective September, there were no sudden changes taking place because there was “lots of time for adjustment, lots of time for support.”
Case Study 2

- At the hearing, C. did not articulate how remaining at his office would constitute a necessary accommodation related to his disability, other than it was where he preferred to work.

- The only accommodation that C. sought was not to be transferred from his office.
The law does not require that an employer provide the disabled employee with the accommodation that the employee “requests or prefers.” *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996).

Case Study 2

- In the instant complaint, Employer proved that it engaged in the required interactive process.

- C. requested the accommodation of remaining at his current office based on his medical advise to avoid sudden changes.

- Employer determined that the transfer to another office was not a sudden change because it notified C. of the transfer four months before it was to occur.
Case Study 2

- In addition, in August, before the transfer, Employer invited C. to meet to discuss accommodations at the new office.

- Again, the only accommodation that C. sought was remaining at the office where he worked.

- Therefore, C. was responsible for the breakdown of the interactive process, by insisting on only one particular accommodation and not providing any medical evidence to support the accommodation requested.

- Holding – for the Employer.
Case Study 3

- C. was an attorney working for Employer’s law firm.

- C. has Asperger’s condition, which is a disability under the NYSHRL.
Prior to taking leave, C. had submitted two letters to Employer. Employer shared letters with psych professionals and all agreed that the letters were disturbing.

Employer was not sure what C. was talking about, but they felt that he seemed to be angry at those above him. They were concerned about C.’s safety and that of other employees. They discussed a previous incident when C. was out of work for several weeks because of stress, and his wife called expressing concern.
Misconduct & Direct Threat

- The NYSHRL does not require accommodation of behaviors that do not meet the employer’s workplace behavior standards that are consistently applied to all similarly situated employees, even if these are caused by a disability.
This would include, but not be limited to:

- dress codes, grooming standards and time and attendance policy, though reasonable and necessary deviations must be allowed as accommodations;

- conduct standards, including those which prohibit aggressive or threatening behavior;

- discipline for intoxication or impairment on the job by an alcoholic.
Direct Threat

- Reasonable accommodation is not required where the disability or the accommodation itself poses a “direct threat”.

- “Direct threat” means a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.
Direct Threat

In determining whether a “direct threat” exists, the employer must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge, or the best available objective information to ascertain:

- the nature, duration and severity of the risk;

- the probability that the potential injury will actually occur; and

- whether reasonable accommodations, such as modification of policies, practices or procedures will mitigate the risk.
Case Study 3

- Employer discussed the letter with a psychiatrist, a psychologist, and the Employee Assistance Program ("EAP"). Everyone consulted said that the letter was very troubling, that C. should be removed from the workplace, and that he should be referred to counseling.
Employer met with C. and placed him on temporary administrative leave. Employer told C. that he could return to work when EAP felt he was able to.

C. asked if he could consult with his own treating psychologist instead of EAP, which Employer agreed to.
Subsequently, C.’s doctor wrote employer, stating that C. was ready to return to work so long as a number of RAs were granted. The requested accommodations included assignment of a secretary/receptionist to screen C.’s telephone calls and walk-ins; modifications to C.’s work space and computer; maintenance in the hallway and men’s room; clearer direction in work assignments; and limitation in working hours if possible.
Case Study 3

- Employer asked C.’s doctor for more information about how C’s medical conditions affected him in the workplace and how the proposed accommodations would address those effects. While Employer waited for a response, it took steps to investigate the feasibility of the proposed accommodations.
Case Study 3

C. did not respond to Employer’s letter for more than ten weeks. Neither C., nor his doctor offered any reason for this delay.

Moreover, although Employer kept C. and his doctor informed that C.’s leave would be exhausted, C. offered no evidence that he sought additional time to respond to Employer’s letter or that he asked to be retained as an employee after he exhausted his leave time.
Case Study 3

The Interactive Process

- New York State regulations set forth the obligations of both the employer and employee to engage interactively in the reasonable accommodation process.
Employer’s Obligations in the Interactive Process

- Employer’s obligations include:

- providing information to applicants and new employees as to their rights with regard to reasonable accommodation of disability, and as to procedures to be followed in requesting reasonable accommodation;

- the duty to move forward to consider accommodation once the need for accommodation is known or requested. Once the accommodation is under consideration, the employer has the right to medical or other information that is necessary to verify the existence of the disability, or that is necessary for consideration of the accommodation. The employer must maintain the confidentiality of individual’s medical information;

- the right to select which reasonable accommodation will be provided, so long as it is effective in meeting the need.
Employee’s Obligations in the Interactive Process

Employees requesting accommodation for disability must:

- make the disability and need for accommodation known to the employer, and has the right to request an accommodation at any time, even if his or her medical condition has not changed;

- cooperate with the employer in the consideration and implementation of the requested reasonable accommodation;

- cooperate in providing medical or other information that is necessary to verify the existence of the disability or what is necessary for consideration of the accommodation.
Drug & Alcohol Use

- No protections offered to persons for current illegal drug use, or current alcohol use under the NYSHRL.

- Persons who are recovered alcoholics or drug users, or are in a rehabilitation program ARE CONSIDERED persons with disabilities, and are afforded protection under the law.

- Adjustments to the work schedule, where needed to allow for ongoing treatment, must be allowed as an accommodation where reasonable, if the individual is still able to perform the essential functions of the job including predictable and regular attendance.
Testing

- While employers are prohibited from making inquiries about an employee or job applicant’s disability, they are permitted to conduct drug testing of employees.

- The recovered/recovering alcoholic or drug user should be expected to perform job tasks just as anyone else with similar skills, experience and background. An alcoholic may be fired for violation of workplace rules against drinking or being drunk on the job.
Victims of Domestic Violence

The New York State Human Rights Law was amended, effective July 7, 2009, to provide protection from employment discrimination for victims of domestic violence.
Victims of Domestic Violence

- The term "domestic violence victim", means an individual who is a victim of an act which would constitute a family offense pursuant to the NYS Family Court Act.
Victims of Domestic Violence

- It is unlawful to treat an employee differently with regard to any term, condition or privilege of employment because the employee is a victim of domestic violence.

- It is also unlawful for an employer to take an action in retaliation for filing a complaint of discrimination.
Victims of Domestic Violence

- A domestic violence victim may not be terminated because the employer learns that of the domestic violence. This includes having an order of protection, or the perpetrator coming to the workplace.