"Open Sesame": Must an Employer Hear Magic Words to Have a Duty to Provide a Reasonable Accommodation?

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Both the Americans With Disabilities Act ("ADA") and the New Jersey Law Against Discrimination ("LAD") require employers to "reasonably accommodate" their employees' disabilities. *Tynan v. Vicinage 13 of Superior Court*, 351 N.J. Super. 385, 396-397, (App. Div. 2002). This requirement to provide reasonable accommodation is rooted in the elements of a prima facie case of disability discrimination.

It is well-established that, "in order for a plaintiff to establish a prima facie case of discrimination under the ADA, the plaintiff must show that, "(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306, (3d Cir. Pa. 1999) (internal citations omitted). Likewise, an employee who alleges disability discrimination under the LAD must show, "that he or she was disabled, that he or she performed or could have performed the job with or without an accommodation, and that there was an adverse consequence." *Victor v. State*, 203 N.J. 383, 411-412, (N.J. 2010)

Once an employee has demonstrated both the disability and the ability to do the job with a reasonable accommodation, the employer is required to engage in an interactive process to find such an accommodation. *Tynan* 351 N.J. Super. at 400.. The *Tynan* Court, citing *Taylor v. Phoenixville School District*, 184 F.3d 296, 313 (1999), held that, "[o]nce a handicapped employee has requested assistance, it is the employer who must make the reasonable effort to determine the appropriate accommodation." *Ibid*.

Employees are not required to use any "magic words," or mention the legal basis for the request, so long as they make clear their desire for accommodation. *Ibid.*

In fact, despite the *Tynan* Court's references to employees "requesting assistance," employees do not always need to specifically request an accommodation at all. The Second Circuit Court of Appeals has held that, "an employer has a duty reasonably to accommodate an employee's disability if the disability is obvious--which is to say, if the employer knew or reasonably should have known that the employee was disabled." *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135, (2d Cir. N.Y. 2008). Likewise, in a public accommodation case, New Jersey's Appellate Division has held that plaintiffs do not have to request an accommodation where the need for accommodation is obvious. Lasky v. Borough of Hightstown, 426 N.J. Super. 68, 78, (App.Div. 2012).

The requirement for employers to provide reasonable accommodations when they are aware of the need for accommodation – even without a request by the employee – stems from the language of the ADA itself, which defines disability discrimination in employment as including, "not making reasonable accommodations to the **known** physical or mental limitations of an otherwise qualified individual." 42 *U.S.C.A.* § 12112(b)(5)(A) (emphasis added). The EEOC follows this principle in its Guidelines on Requesting Reasonable Accommodation under Title I of the ADA. While Guideline No. 1 discusses how an individual "must" request an accommodation, Guideline Nos. 40 and 41 allow that there are times when an employer may -- or even must -- ask an employee who has not requested an accommodation, whether an accommodation is needed:

> 40. …an employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. If the individual with a disability states that s/he does not need a reasonable accommodation, the employer will have fulfilled its obligation.
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> 41. …An employer may ask an employee with a known disability whether s/he needs a reasonable accommodation when it reasonably believes that the employee may need an accommodation.
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> *EEOC Enforcement Guidance,* No. 915.002 (October 17, 2002)

Finally, New Jersey Model Civil Jury Charge 2.26, Failure to Accommodate Employee with Disability under the New Jersey Law Against Discrimination, makes clear that an employee does not

have to specifically request a reasonable accommodation to trigger the employer's duty to provide one. Under this model charge, the third element a plaintiff must prove by a preponderance of the evidence is, "that defendant was aware of his/her need for a reasonable accommodation." Further, the charge makes clear that a, "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." Model Jury Charge (Civil) 2.26. This, again, leads back to the language of the ADA. Of course, it is also common sense that an employer who knows that an employee needs the door opened has no ground to demand that the employee must first say, "open sesame," before reasonably accommodating that employee by opening the door.

Conclusion: The ADA and the LAD both require employers to reasonably accommodate their employees' known disabilities. An employer's awareness of the need for accommodation triggers the duty to provide a reasonable accommodation: employees are not required to speak any "magic words" to request a reasonable accommodation and, in some circumstances, the employee is not required to request an accommodation at all.