

3. In determining whether an accommodation would impose undue hardship on the operation of an employer's business, factors to be considered include:

- i. The overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget;
- ii. The type of the employer's operations, including the composition and structure of the employer's workforce;
- iii. The nature and cost of the accommodation needed, taking into consideration the availability of tax credits and deductions and/or outside funding; and
- iv. The extent to which accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.

Amended by R.2000 d.273, effective July 3, 2000.
See: 32 N.J.R. 1155(a), 32 N.J.R. 2445(a).

Substituted references to people with disabilities for references to handicapped persons throughout; and in (a), substituted a reference to people who do not have disabilities for a reference to non-handicapped persons.

Amended by R.2006 d.13, effective January 3, 2006.
See: 37 N.J.R. 2607(a), 38 N.J.R. 335(a).

In (b)iii, added "or leaves of absence."
Amended by R.2012 d.039, effective February 21, 2012.
See: 43 N.J.R. 149(a), 44 N.J.R. 505(a).

In (b)3iii, inserted " , taking into consideration the availability of tax credits and deductions and/or outside funding".

Law Review and Journal Commentaries

Discrimination—Collateral Estoppel—Police Officers. Judith Nallin, 138 N.J.L.J. No. 1, 49 (1994).

Overview of the ADA: Legal Protections for Persons with Disabilities. Linds Wong, Johathan J. Schlein, Daniel J. Zirrih, 170 N.J.L.J. 8 (1995).

Disability Discrimination: Failure to Accommodate or Disparate Treatment. Arthur R. Fairbault, Jr., 223 N.J.L.J. 61 (2003).

Case Notes

Under the New Jersey Law Against Discrimination (LAD), an employer was not obligated to accommodate a commuting problem of an employee with epilepsy; a change to day shift sought by the employee was not an "accommodation," that the employer was legally obligated to provide, but was simply a request for an easier, more convenient commute. Laresca v. American Tel. & Tel., D.N.J. 2001, 161 F.Supp.2d 323.

Neither employee's computer illiteracy or difficulty nor his requested transfer suggested to employer that employee was unable to perform his job duties because of dyslexia and absent knowledge of employee's dyslexia disability, employer did not violate New Jersey Law Against Discrimination. Illingworth v. Nestle U.S.A., Inc., D.N.J. 1996, 926 F.Supp. 482.

Federal regulations did not preempt former employee's handicap discrimination and workers' compensation retaliation claims under New Jersey law. Kube v. New Penn Motor Exp., Inc., D.N.J.1994, 865 F.Supp. 221.

Accommodations listed under the ADA and Law Against Discrimination (LAD) are designed to make certain changes in the work

environment or structuring of employees' time that will allow disabled employees to remain at work without their physical handicaps impeding their job performance. Jones v. Aluminum Shapes & Frank Wimmersberger, 772 A.2d 34 (2001).

"Reasonable accommodation" under the ADA and Law Against Discrimination (LAD) refers to the duty of an employer to attempt to accommodate the physical disability of the employee, not to a duty on the part of the employer to acquiesce to the disabled employee's requests for certain benefits or remuneration. Jones v. Aluminum Shapes & Frank Wimmersberger, 772 A.2d 34 (2001).

Employee failed to show that city should have allowed her to work at home in her court clerk position in order to accommodate her epilepsy disability as would show that employer's proffered reason for terminating employee was pretext for discrimination under Law Against Discrimination. Melick v. Township of Oxford, 294 N.J.Super. 386, 683 A.2d 584 (A.D.1996).

Municipality was not required to provide second opportunity for rehabilitation to firefighter who tested positive for cocaine and whose reinstatement after first testing positive was conditioned upon abstaining from use of drugs. Matter of Jackson, 294 N.J.Super 233, 683 A.2d 203 (A.D.1996).

Terminated police officer's handicap discrimination suit was precluded by adverse decision of Merit System Board. Ensslin v. Township of North Bergen, 275 N.J.Super. 352, 646 A.2d 452 (A.D.1994), certification denied 142 N.J. 446, 663 A.2d 1354.

No reasonable accommodation would permit officer to perform essential functions of job; no violation of Law Against Discrimination. Ensslin v. Township of North Bergen, 275 N.J.Super. 352, 646 A.2d 452 (A.D.1994), certification denied 142 N.J. 446, 663 A.2d 1354.

Adequate consideration given provisions of Law Against Discrimination. Ensslin v. Township of North Bergen, 275 N.J.Super. 352, 646 A.2d 452 (A.D.1994), certification denied 142 N.J. 446, 663 A.2d 1354.

Fire fighter who was an alcoholic and drug addict was a "handicapped person" under Law Against Discrimination. Matter of Cahill, 245 N.J.Super. 397, 585 A.2d 977 (A.D.1991).

School board failed to meet its obligation to reasonably accommodate high school teacher's mental disability (depression and anxiety) and specifically failed to engage in an interactive process with teacher to explore the feasibility of providing reasonable accommodations that would have permitted teacher to return to work (adopting as modified Initial Decision, 2008 N.J. AGEN LEXIS 187). Ponsi v. Cliffside Park Bd. of Educ., OAL Dkt. No. CRT 10536-06, 2008 N.J. AGEN LEXIS 1237, Final Decision (September 1, 2008).

Jurisdiction of boards of education under N.J.S.A. 18A:16-4, to determine whether an employee who has previously been deemed ineligible for services based on "mental abnormality" has provided sufficient "proof of recovery" to warrant return to work, does not deprive the employee of the right to reasonable accommodations under the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. Ponsi v. Cliffside Park Bd. of Educ., OAL Dkt. No. CRT 10536-06, 2008 N.J. AGEN LEXIS 1237, Final Decision (September 1, 2008).

In a case where respondent technical school failed to appear, the ALJ found that a student had sustained the burden of proving that the school failed to accommodate her dyslexia. Guy v. Southern N.J. Tech. School, OAL Dkt. No. CRT 10486-07, 2008 N.J. AGEN LEXIS 313, Initial Decision (April 28, 2008).

Employer's behavior did not rise to the level of denial of reasonable accommodation for employee's carpal tunnel syndrome, where employee's own recitation of the events demonstrated that employer promptly provided the first set of equipment employee requested, and while the ergonomic keyboard and wrist rest proved to be an ineffective accommodation, employer provided precisely the equipment employee believed would solve the problem. Although the delay in providing the

subsequently requested keyboard tray was unfortunate, the record reflected that employer made sufficient efforts to provide the accommodation to meet its obligations and that it acted in good faith (adopting as modified Initial Decision, 2007 N.J. AGEN LEXIS 796). *Moebis v. Hartford Life Private Placement et al.*, OAL Dkt. No. CRT 6322-06, 2008 N.J. AGEN LEXIS 135, Final Decision (February 6, 2008).

In disability discrimination case, employer failed to demonstrate that accommodating employee's need for a smoke-free work environment in 2003 would have been an undue hardship, where (1) the ALJ found insufficient company president's testimony that banning smoking from the office area would impair productivity, and noted that president dismissed other possible accommodations out of hand after merely discussing them with his partner; and (2) Director found insufficient president's contention that employee could not be trusted to work in a secluded area. If employee had performance deficiencies, employer was free to address them independently, but an employee cannot be denied reasonable accommodations as a form of discipline for failure to comply with an employer's work rules (adopting as modified Initial Decision, 2007 N.J. AGEN LEXIS 430). *Lampley et al. v. Astral Air Parts, Inc.*, OAL Dkt. No. CRT 1307-06, 2007 N.J. AGEN LEXIS 857, Final Decision (August 17, 2007).

In disability discrimination case, the fact that employer had now, in response to the Legislature's 2006 mandate, banned smoking from the same office area in which employee previously worked was sufficient to demonstrate that employee could have been accommodated without undue hardship in 2003 if employer had engaged in a good faith interactive process. *Lampley v. Astral Air Parts, Inc.*, OAL Dkt. No. CRT 1307-06, 2007 N.J. AGEN LEXIS 857, Final Decision (August 17, 2007).

Once an employee has requested assistance due to a disability, it is the employer's obligation to initiate the process of working with the employee to determine the appropriate accommodations, and this interactive process is crucial. *Lampley v. Astral Air Parts, Inc.*, OAL Dkt. No. CRT 1307-06, 2007 N.J. AGEN LEXIS 857, Final Decision (August 17, 2007).

Emotional distress damages of \$50,000 to compensate employee for her pain and humiliation was appropriate; especially in light of the testimony regarding the physical and emotional symptoms employee suffered as a result of employer's refusal to provide reasonable accommodations (smoke-free work environment) and unlawful termination of her employment when she was recuperating from cardiac surgical procedures, there was no merit in employer's contention that the amount of the award was punitive. *Lampley v. Astral Air Parts, Inc.*, OAL Dkt. No. CRT 1307-06, 2007 N.J. AGEN LEXIS 857, Final Decision (August 17, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 188) adopted, which denied a teacher's application for accidental disability benefits. Collateral estoppel applied to prevent the teacher from relitigating whether she was disabled, as it had been previously determined that she was not totally and permanently disabled in the context of N.J.S.A. 43:15A-43 and that she was able to perform the duties in the general area of her employment. The duties in the general area of her employment were to teach and the accommodation offered her after she was injured while assisting a student, pursuant to this section, afforded her the opportunity to perform the general duties of a teacher. *In re Megargee*, OAL DKT No. TYPE 02690-2004S, 2006 N.J. AGEN LEXIS 683, Final Decision (April 20, 2006), *aff'd*, N.J. Sup. Ct., App. Div. (Docket No. A-4866-05T2) (June 14, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 890) adopted, which explained that reasonable accommodation for a disabled employee requires an "interactive process," in which "both employer and employee bear responsibility for communicating with one another to identify the precise limitations resulting from the disability and potential reasonable accommodation that could overcome those limitations." "In general, the interactive process must ordinarily begin with the employee providing notice to the employer of the employee's disability and any resulting limitations, and expressing a desire for reassignment if no reasonable accommodation is possible in the employee's existing job." *Fischbach v.*

Ocean County, OAL Dkt. No. CSV 4180-06 (CSV 4698-05 On Remand), 2007 N.J. AGEN LEXIS 93, Final Decision (January 17, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 890) adopted, which concluded that, although the employee, who had hypertension, was unable to claim protection under the Americans with Disabilities Act, the employee was considered "handicapped" under the definition contained in the New Jersey Law Against Discrimination, N.J.S.A. 10:5-5; therefore, the requirement for reasonable accommodation applied. *Fischbach v. Ocean County*, OAL Dkt. No. CSV 4180-06 (CSV 4698-05 On Remand), 2007 N.J. AGEN LEXIS 93, Final Decision (January 17, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 890) adopted, which concluded that the employer reasonably accommodated the employee, who had hypertension and was considered "handicapped" under the New Jersey Law Against Discrimination; in order to both retain the employee, who had been employed as a Senior Recycling Operator, and to accommodate the limitations on his ability to perform certain duties, notably driving trucks, the employer assigned him to a position with a different title that did not require such duties. Merely because the employee's salary and title were diminished from that held previously did not make the accommodation unreasonable. *Fischbach v. Ocean County*, OAL Dkt. No. CSV 4180-06 (CSV 4698-05 On Remand), 2007 N.J. AGEN LEXIS 93, Final Decision (January 17, 2007).

Adopting Initial Decision's conclusion that county employer had reasonably accommodated an employee, who had hypertension, by assigning him to a position with a different title which did not require that he perform certain duties, notably driving trucks, even though the accommodation involved the employee's demotion from "Senior Recycling Operator" to the position of "Recycling Operator." Nonetheless, since the employee asserted that he would not have promotional opportunities to the Assistant Supervisor, Recycling Operations position if he remained in the Recycling Operator title, the Merit System Board recommended that future announcements for Assistant Supervisor, Recycling Operations, be open to employees holding the titles of Senior Recycling Operator and Recycling Operator, pursuant to N.J.A.C. 4A:4-2.4 (adopting 2006 N.J. AGEN LEXIS 890). *Fischbach v. Ocean County*, OAL Dkt. No. CSV 4180-06 (CSV 4698-05 On Remand), 2007 N.J. AGEN LEXIS 93, Final Decision (January 17, 2007).

Employer did not attempt to accommodate driver's disability where record reflected no evidence that employer considered modifying its scheduling procedures to provide driver with assignments or otherwise explored alternative assignments that would address limitations presented by driver's disability (AIDS diagnosis limiting him to part-time work). By conditioning driver's return to work on being able to perform functions his physician had not cleared him to perform, employer denied, or, at best, ignored driver's medical limitations instead of trying to accommodate them. *Williams v. State Shuttle/Top Ten Leasing, Inc.*, OAL Dkt. No. CRT 5188-04, 2006 N.J. AGEN LEXIS 1094, Final Decision (August 17, 2006).

Employer's assertion that there were no bus driver positions available, plus its failure to inform driver that it considered driver's medical clearance deficient, supported the conclusion that employer did not consider reasonable accommodation before deciding to deny re-employment to driver due to his disability. *Williams v. State Shuttle/Top Ten Leasing, Inc.*, OAL Dkt. No. CRT 5188-04, 2006 N.J. AGEN LEXIS 1094, Final Decision (August 17, 2006).

Collection of disability compensation by an employee does not necessarily render a disability-based discrimination claim invalid, and the employee must be given the opportunity to explain the inconsistency; driver's application for disability benefits presented no bar to driver's failure to hire/denial of reasonable accommodation claim. *Williams v. State Shuttle/Top Ten Leasing, Inc.*, OAL Dkt. No. CRT 5188-04, 2006 N.J. AGEN LEXIS 1094, Final Decision (August 17, 2006).

Where city employer considered possible accommodations, offered the accommodation of resignation and re-enrollment, and reasonably arrived at the conclusion that employee's injuries precluded job per-