# Is There An Unreasonable Accommodation? Is There A Due Hardship?

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Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, **Fla. L. Rev** (forthcoming 2010), available at SSRN.

The ADA Amendments Act of 2008 made significant changes to the Americans with Disabilities Act's definition of "disability." As a result, judges, practicing lawyers, and academics are now trying to figure out what those changes really mean in practice. One aspect of the ADA that Congress left largely untouched, however, is the statutory language concerning the reasonable accommodation and undue hardship requirements. Arguably, this failure to act is unfortunate in light of the fact that more individuals will now be able to claim disability status under the ADA than before, thus forcing courts and employers to consider whether these individuals are entitled to an accommodation and, if so, whether their requested accommodations are reasonable. As it stands now, the statutory language and decisional law are hardly models of clarity.

Professor Mark C. Weber attempts to provide some clarification with his latest article *Unreasonable Accommodation and Due Hardship*. Weber's main argument is that

> [r]easonable accommodation and undue hardship are two sides of the same coin. The statutory duty is accommodation up to the limit of hardship, and reasonable accommodation should not be a separate hurdle for claimants to surmount apart from the undue hardship defense. There is no such thing as "unreasonable accommodation" or "due hardship."

Consistent with that theme, Weber argues that "[t]he duty to accommodate is a substantial obligation, one that may be expensive to satisfy, and one that is not subject to a cost-benefits balance, but rather a cost-resources balance; it is also subject to increase over time."

To some extent, both of these arguments fly in the face of the federal courts' current view of the accommodation requirement. In *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the Supreme Court declared that the reasonable accommodation and undue hardship concepts are distinct. Under *Barnett*, the plaintiff bears the burden of showing that the accommodation is reasonable on its face, that is, ordinarily or in the run of cases. After that, the employer bears the burden of showing "special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." *Id.* at 402.

Weber argues that, at least in this respect, *Barnett* is wrong. The ADA was patterned after Section 504 of the Rehabilitation Act of 1973. Weber reexamines the regulations and decisional law under Section 504; the ADA's legislative history (which generally endorsed the decisional law under Section 504); the statutory text; and the EEOC's original Enforcement Guidance and concludes that the ADA's drafters "recognized that reasonable accommodation and undue hardship are not separate terms but two sides of the same coin." Thus, Weber argues, "reasonable accommodation lacks a meaning other than the absence of undue hardship. The terms should be read together, and the opposite of the one is the other."

I came to this part of the article with some skepticism, and I'm not sure I left persuaded. Ultimately, I think the legislative history and decisional law Weber cites is ambiguous and mixed on the point. Furthermore, I (like the majority in *Barnett*) have a hard time seeing how Weber's interpretation would play out in practice. That said, Weber makes some interesting arguments – and much stronger ones than I would have thought possible going in to the article – that the ADA's text actually supports his suggested reading. And, it's hard to argue against the fact that at least some of the older Section 504 decisional law he cites does support his reading. At a minimum, this part of the article challenges some longstanding assumptions about the reasonable accommodation requirement.

Weber then turns to his second point, that the accommodation requirement is not subject to a cost-benefits balance, but rather a cost-resources balance, and that the obligation on employers was intended to be a substantial one. Here, Weber makes a convincing case. Some courts have indeed adopted a cost-benefits approach toward deciding whether an accommodation is "reasonable," and some have indeed shied away from requiring employers to make meaningful changes to their standard operating procedure when dealing with the accommodation requirement. Although it pales in comparison to the amount of scholarship attacking the courts' interpretation of the ADA's definition of disability, there has been scholarly criticism of the courts' treatment of the accommodation requirement. But Weber's contribution to the debate is his detailed and convincing discussion of the ADA's legislative history and the historical context in which the ADA was first proposed, both of which, he argues, support a more expansive conception of the accommodation requirement than some courts currently have.

Recognizing that the Supreme Court is unlikely to reverse its ruling in *Barnett* that the reasonable accommodation and undue hardship concepts are distinct, Weber argues that *Barnett* should be read narrowly so as to impose only a minimal burden on an ADA plaintiff. Here, Weber argues that *Barnett*'s easy-to-satisfy accommodation standard provides the basis for encouraging lower courts "to think of the reasonableness step as unnecessary altogether." Although this seems unlikely, Weber does persuasively argue that *Barnett* and the other authority he cites can and should be interpreted as imposing a relatively slight burden on plaintiffs.

The article discusses several other accommodation-related issues, such as the requirement's impact on neutral workplace rules and whether the requirement should be viewed as a form of affirmative action. All of this discussion is interesting. However, the article's biggest contributions are its challenge to the traditional understanding of the reasonable accommodation and undue hardship concepts and its suggestion – supported by a variety of sources — for a more faithful application of those concepts by courts. Ultimately, Weber's article is well-researched and thought-provoking and, hence, worth reading.

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