



2019 ANNUAL CONFERENCE



Glory Gervacio Saure,
Director, EEOC Honolulu Local Office





LEAVE, REASONABLE ACCOMMODATI ONS & THE ADA

Glory Gervacio Saure,
Director
EEOC Honolulu Local Office

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

- **The EEOC's Vision is:**
 - *Respectful and inclusive workplaces with equal employment opportunity for all.*
- **The EEOC's Mission is to:**
 - *Prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace.*



A large group of people, many of whom are using wheelchairs, are gathered in a parking lot. They are arranged in a large circle, with some individuals standing and others seated. The background shows a parking lot filled with cars and a building in the distance. The text "THE AMERICANS WITH DISABILITIES ACT—A CLOSER LOOK" is overlaid in large white letters.

THE AMERICANS WITH DISABILITIES ACT—A CLOSER LOOK



Passed by Congress in 1990, the Americans with Disabilities Act (ADA) is the nation's first comprehensive civil rights law addressing the needs of people with disabilities, prohibiting discrimination in employment, public services, public accommodations, and telecommunications.



- “The definition of disability ... shall be construed in favor of broad coverage of individuals under this chapter, the maximum extent permitted by the terms of this chapter.”
Section 12102 (4)(A).





WHAT IS A DISABILITY?

A physical or mental
condition that substantially
limits a major life activity



- Some examples include: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking
- Functions of the immune system, normal cell growth; brain, respiratory, circulatory & cardiovascular system



MAJOR LIFE ACTIVITIES CONSTRUED BROADLY

Individual can show substantial limitation (or record of) in just one major life activity from either category.

In determining other examples of major life activities, “**the term ‘major’ shall not be interpreted strictly to create a demanding standard** for disability.”

Whether something is a major life activity is **not** determined by reference to whether it is of “central importance to daily life.”





ALSO
COVERED...

Record of a disability
(example: cancer in
remission)

Being regarded as having
a physical or mental
impairment

Association to a person
with a disability



- The **primary goal of the ADA** should be whether employers **have complied with their obligations** and **whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity.**
- The threshold issue of whether an impairment 'substantially limits' a major life **activity** ***should not demand extensive analysis.***



REQUIRES “INDIVIDUALIZED ASSESSMENT”

Whether an impairment substantially limits a major life activity requires an **individualized assessment** for each individual.





A reasonable accommodation is any change in the work environment or in the way a job is performed that enables a person with a disability to enjoy equal employment opportunities.



3 CATEGORIES OF REASONABLE ACCOMMODATION

Changes to a job
application process

Changes to the work
environment, or the way
a job is usually done

Changes that enable an
employee with a
disability to enjoy equal
benefits & privileges of
employment (such as
access to training)





INTERACTIVE PROCESS

- The employer and the individual with a disability should **engage** in an **informal process** to clarify what the individual needs and identify the appropriate reasonable accommodation.
- The employer may **ask the individual relevant questions** that will enable it to make an informed decision about the request.
- This includes asking **what type of reasonable accommodation is needed.**



EMPLOYEE OBLIGATIONS

- Employees open the door when they:
 - Inform employer of need for accommodation
 - Provide relevant information about their disability
 - Explain why their disability requires a reasonable accommodation

Employees are not required to propose specific accommodations or modifications to their work environment



EMPLOYER OBLIGATIONS

Review and verify work restrictions

Review essential and marginal functions

Identify work restrictions that affect employee's ability to perform essential functions

Discuss possible modifications that would effectively accommodate work restrictions so that employee can perform essential functions

Research and collaborate

Document...

Keep the employee informed





UNDUE HARDSHIP

- Significant difficulty or expense
- Refers not only to the cost, but to reasonable accommodations that would be disruptive or fundamentally alter the operation of the business
- An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship.





COMMON MISTAKES

- Blanket policies that limit the amount of leave employees can take
- Blanket policies that require employees return from leave without limitations
- Failing to engage in the interactive process
- Use of direct threat as an excuse to not provide an accommodation and end employment



EEOC STRATEGIC ENFORCEMENT PLAN #3: ADDRESSING EMERGING & DEVELOPING EMPLOYMENT DISCRIMINATION ISSUES

**Inflexible Leave
Policies Under the
ADAAA**

- **Individualized
Assessment**

**Qualification
Standards v.
Essential Functions**

- **Job Analysis v. Job
Description**





SCENARIO #1 – GONE TO THE DOGS



- During her first week working for Caught-In-the-Middle, Inc. (CIM), a large employer with an office setting, Sandra had a severe allergy attack. A co-worker was eating buffalo wings containing 'donne' (or Guam boonie pepper), a pepper to which Sandra has a potentially fatal reaction, including trips to the emergency room. Afraid of future incidents, Sandra went to CIM HR, explaining she would like to bring a service dog to work who alerted to the trace presence of 'donne'. CIM agreed. Sandra paid \$10,000 for the dog, Sniffer, who was trained-up a few months later.
- The day Sniffer first came to work with Sandra, a co-worker, and long-time CIM employee, Maria, had an unexpected severe asthma attack due to Sniffer's dander. CIM placed Sandra on leave, explaining she could either return to work without Sniffer, or remain home on leave.



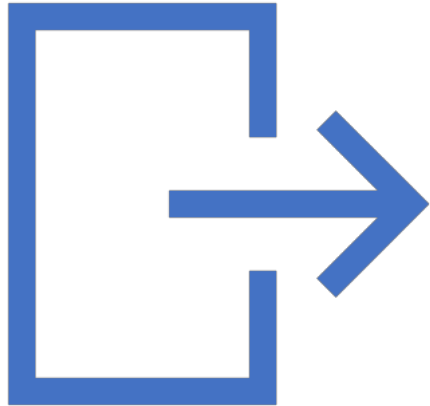
SCENARIO #1 – GONE TO THE DOGS



- ***Did CIM properly sniff out the issues?***
- ***Is a “donne” allergy a “disability”?***
- ***What about a “pet dander” allergy?***
- ***If both employees have a disability, how does CIM determine who gets the reasonable accommodation?***
- ***What else could CIM do?***



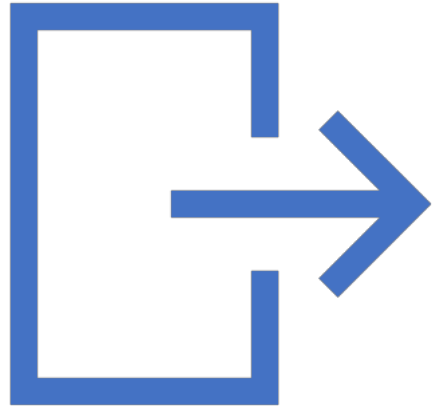
SCENARIO #2 – LEAVE ME BE



- Alan, Faye, and Oscar comprise the three-person Credit Analyst Department at Busy Bank. The unique and highly specialized department deals with confidential borrower information that must remain secure onsite. Alan, who has worked for Busy Bank for nine months, emails HR stating he is experiencing a “fatigue” issue and needs at least a month or so of leave to “recuperate.”
- An hour after Alan’s request, Faye, who has been working at Busy Bank for five years, and has never taken medical leave, provides a doctor’s statement indicating she has a cardiac condition requiring immediate surgery and expects to be out between 9 -13 weeks.
- Oscar hears from Alan and Faye about the leave requests and is angry. Busy Bank expects analysts’ responsibilities to remain steadily busy if not increase as the fluctuating economy has created a need for increased financial documentation when scrutinizing credit-worthiness.



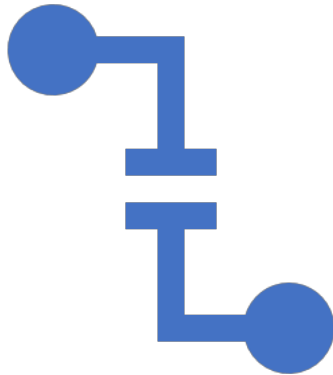
SCENARIO #2 – LEAVE ME BE



- **Who gets to take leave?**
- **Is Alan covered by the ADA?**
- **Does Alan get to take leave because he was the first to make a request?**
- **Must Busy Bank provide leave as a reasonable accommodation?**
- **Other possible accommodations (e.g., reassignment)?**
- **Will granting leave be an undue hardship under the ADA?**
- **Are there Family and Medical Leave Act (FMLA) implications?**



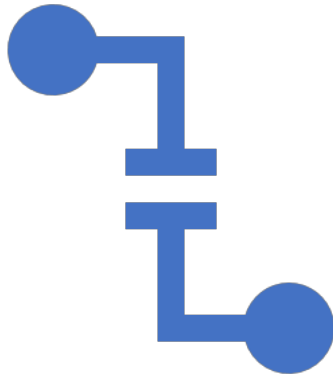
SCENARIO #3 – ESSENTIALLY YOURS



- Long-term employee, John, has a good work record at Moody Blues, Inc. but starts to suffer from intensified depression and cannot maintain a normal work schedule. John misses significant work time; worked unscheduled hours to make up missed time; but completed all work assignments. However, the Supervisor values “face-time” and feels that John needs to be present at work to perform his job so he should “toughen up” and quit complaining. The Supervisor did not allow John to work after 6:00 p.m., denied John’s request to work from home, and denied his request for additional sick leave.
- The Supervisor suggests that John consider finding another job as he is having a difficult time performing his current job.
- Based on his discussion with his Supervisor, John comes to see you at HR.



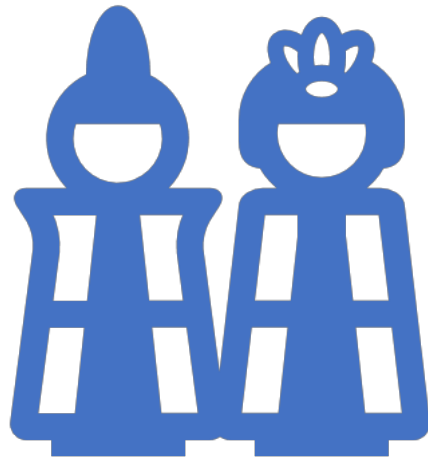
SCENARIO #3 – ESSENTIALLY YOURS



- *What do you tell John?*
- *Can his Supervisor require John to be present to perform his job?*
- *Are John's requests for accommodation reasonable?*
- *Flexible work schedule?*
- *Telecommute from home?*
- *Additional sick leave?*



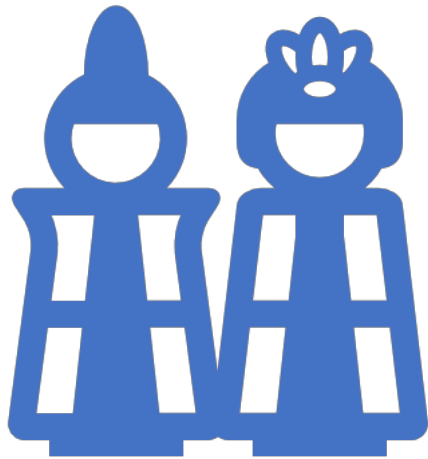
SCENARIO #4 – GENDER JUMBLE



- **Bruce has worked as a sales associate for mega-retailer KardashJenner, Co. for several years. Bruce has always felt different, and a few weeks ago, was diagnosed with “gender dysphoria.”**
- **Eager to express this true identity as a transgender woman, Bruce began making changes, including an informal name-change to “Caitlyn,” and wearing traditional female clothing, makeup, and long hair. Bruce, now Caitlyn, also began using the common multi-stall women’s restroom at KardashJenner, shared by KardashJenner female employees and customers.**
- **In the restroom, Caitlyn repeatedly compliments female co-workers on their hair, or asks about good places to buy pretty undergarments. Several female co-workers complain to KardashJenner HR that they do not want “Caitlyn” in the women’s restroom, and that “he” should use the unisex restroom upstairs at least until any sex-reassignment surgery (something Caitlyn is considering).**
- **Caitlyn responds by requesting to maintain access to the common women’s restroom as a reasonable accommodation for her gender dysphoria even before any sex reassignment surgery.**



SCENARIO #4 – GENDER JUMBLE



- *What are KardashJenner's obligations, if any?*
- *Is Caitlyn entitled to a reasonable accommodation for a disability?*
- *Under the ADA?*
- *Under Guam law?*
- *Do any other laws mandate that KardashJenner "accommodate" Caitlyn?*
- *Do Caitlyn's co-workers' opinions matter?*
- *Is undue hardship relevant?*





QUESTIONS?



- **U.S. Equal Employment Opportunity Commission**
- **Toll-free: 1-800-669-4000**
- **TTY: 1-800-669-6820**
- **Questions?**
- **Glory Gervacio Saure**
- **EEOC Honolulu**
- **808-541-3722**
- **glory.gervacio@eeoc.gov**
- **www.eeoc.gov**

