

Lupus and Employment

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ABOUT ME

- Senior Counsel at Gruber Hurst Johansen Hail Shank LLP in Dallas, Texas
- Board Certified in Labor & Employment Law by Texas Board of Legal Specialization
- Diagnosed with Lupus in November 2011

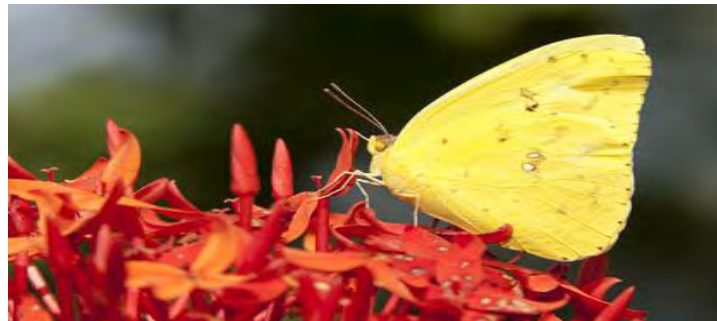
WHAT WE WILL DO TODAY

- Learn about the laws applicable to workplace accommodations and medical leave
- Learn how those laws could affect you



DISABILITY DISCRIMINATION ADA (as amended by ADAA)

- Prohibits employment discrimination against qualified persons with disabilities
- Title I of the ADA applies to all private employers with 15 or more employees
- Rehabilitation Act applies to public employers (but analysis generally same)
- Most states also prohibit employment discrimination based on disability



ADA

- Prohibits discrimination in employment based on disability
 1. Hiring
 2. Firing
 3. Pay
 4. Job assignments
 5. Promotions
 6. Layoffs
 7. Training
 8. Other terms or conditions of employment



DISABILITY HARASSMENT

- It is illegal to harass an applicant or employee because she/he has a disability.
- Harassment is offensive conduct based on disability.
- Includes:
 - Offensive remarks
 - Jokes
 - Emails
- Does not include:
 - Simple teasing
 - Offhand comments
 - Isolated remarks that are not serious



REASONABLE ACCOMMODATION

The law requires an employer to provide reasonable accommodations to a job applicant or employee with a disability, unless doing so may cause significant difficulty or expense to employer.



WHAT IS A DISABILITY?



- An impairment that substantially limits one or more major life activities;
- A record of such an impairment; or,
- Being regarded as having such an impairment (those “regarded as” disabled not entitled to reasonable accommodations)

THE ADA “SUBSTANTIALLY LIMITS”



- Broadly construed in favor of coverage
- An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.
- An impairment need not prevent or significantly restrict the individual from performing a major life activity in order to be substantially limiting.

THE ADA “SUBSTANTIALLY LIMITS” (cont.)



- An impairment that is episodic or in remission is a disability if it would substantially limit when active.
- Ameliorative effects of mitigating measures are not to be considered. (glasses and contact lenses do not count)

PHYSICAL OR MENTAL IMPAIRMENT

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss
- Affecting one or more body system

- Neurological
- Musculoskeletal
- Special sense organs
- Respiratory
- Cardiovascular
- Reproductive
- Digestive



- Genitourinary
- Immune
- Circulatory
- Hemic
- Lymphatic
- Skin
- Endocrine

MAJOR LIFE ACTIVITIES

1. Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, learning, reading, concentrating, thinking, communicating, interacting with other and working; and
2. The operation of a major bodily function including functions of
 - Immune system
 - Special sense organs and skin
 - Normal cell growth
 - Digestive
 - Neurological
 - Respiratory
 - Circulatory
 - Musculoskeletal, etc.





WHAT ARE REASONABLE ACCOMMODATIONS?

- Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed that enable a qualified individual with a disability to perform essential functions of position.
- Modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without disability.

INTERACTIVE PROCESS



- New focus of ADA under amendments
- Once employer knows or should have known employee needs a workplace accommodation, employer must engage in interactive process.
- Employee also must reasonably engage in interactive process.
- If need for accommodation is not obvious, employer is not required to read employee's mind
- If you need a reasonable accommodation, ask.

REQUESTING ACCOMMODATION



Do your homework

1. Figure out what accommodation do you need to perform essential functions of your job
2. Determine what are the essential functions
3. Review company policy
 - Make request to correct person (usually supervisor or HR)
 - Are there any forms?
4. Gather information for employer to review
5. Talk to your doctor before you make request

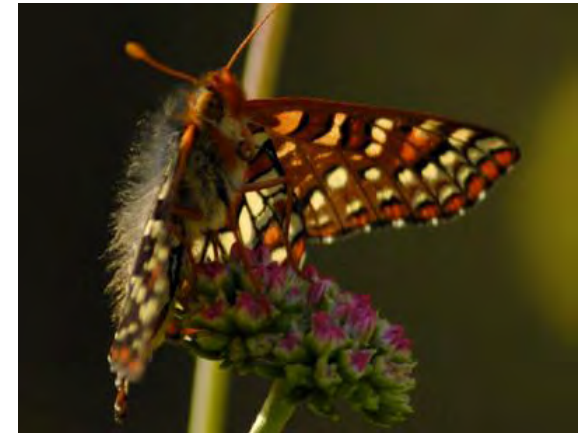
REASONABLE ACCOMMODATION

Accommodation requested must be reasonable

- Employer does not have to give you your requested accommodation -- only a reasonable one

Accommodation can not cause undue burden

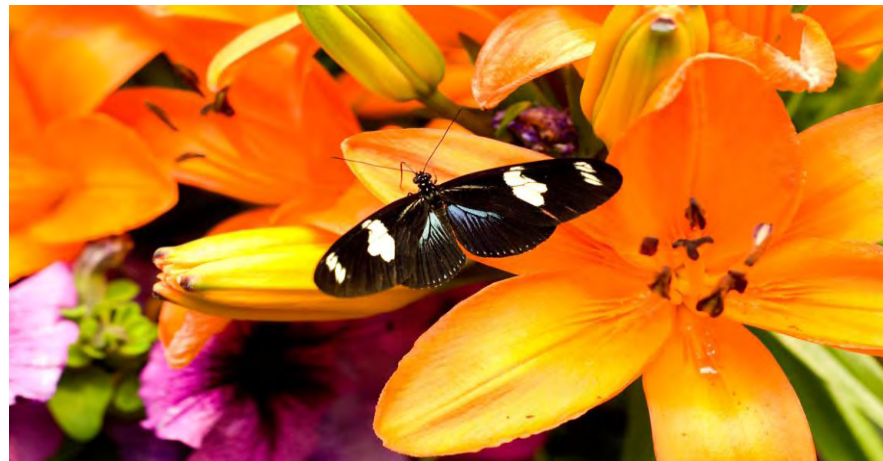
- \$\$\$\$
- Require other employees to do your job regularly (occasionally might be okay depending on circumstances)



REASONABLE ACCOMMODATION (cont.)

Be prepared to talk to employer

- Interactive process is a 2 way street so you must be prepared to share information and be flexible
- May need to provide documentation from doctor (try to help process along if you can)



ATTENDANCE IS AN ESSENTIAL FUNCTION OF JOB



- While modifications to work schedule can be reasonably accommodation, there are limits
- Case by case basis
- Indefinite leave is not a reasonable accommodation
- If you work from 9–5 and you cannot regularly make it there until noon, you may not be considered qualified for the position.

BE PATIENT

- You may be living with lupus, but your employer is not
- Give them a reasonable time to get educated and determine what accommodation is best
- If at first you do not succeed – try again
 - ❑ Just because one accommodation does not work does not mean others will not
 - ❑ Do not give up



KEEP A JOURNAL/DIARY/FOLDER



- Timeline of communications
- Keep all documents (including emails) you receive
- Make a copy of everything you send
- May be evidence later so **ALWAYS BE PROFESSIONAL**

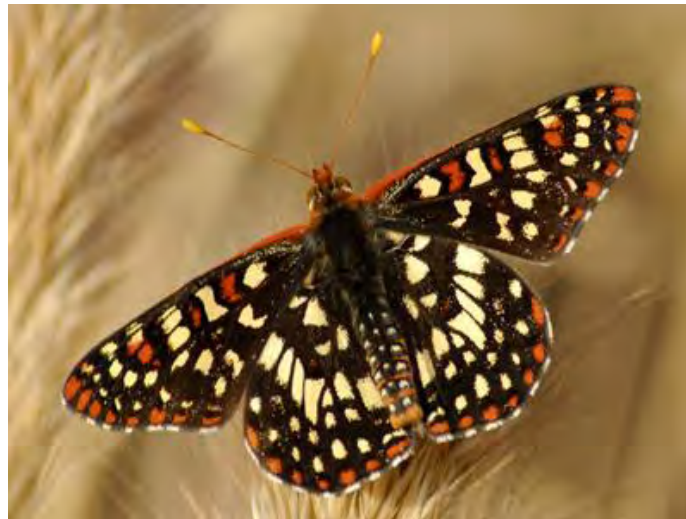
RETALIATION PROHIBITED

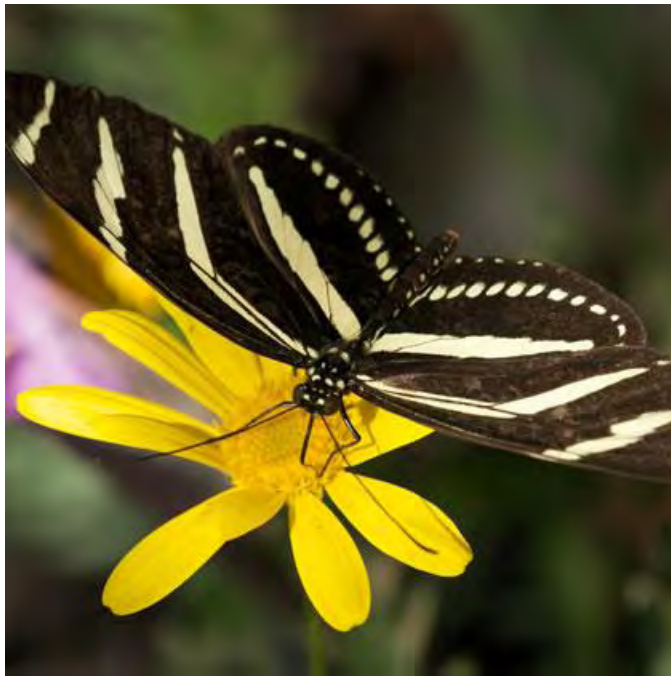


- If you are being ignored or employer is not cooperating, do not be afraid to complain (in writing)
- Retaliation against employee who complains of disability discrimination is prohibited (but proceed with caution)

FAMILY MEDICAL LEAVE ACT (FMLA)

Eligible employees of covered employers may take unpaid, job protected leave for special family and medical reason with continuation of group health insurance coverage under same terms and conditions as if employee had not taken leave.





FMLA (cont.)

- 12 work weeks of leave in a 12 month period:
- To care for the employee's spouse, child or parent who has a serious health condition
 - A serious health condition that makes employee unable to perform essential functions of his or her job.

AM I COVERED?

- Employer must have 50 or more employees within a 75 mile radius
- Employee must have worked at least 12 months
- Employee must have worked at least 1250 hours over previous 12 months
- Some states have own FMLA, others don't
- Even if not FMLA qualified, may be entitled to leave under company policy



SERIOUS HEALTH CONDITION



- Hospitalization
- Continuing treatment by healthcare provider
 - ❑ Period of incapacity lasting 3 consecutive, full calendar days
 - ❑ Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time and requires periodic visits to doctor (at least 2x/year)

CONTINUATION OF HEALTH CARE BENEFITS



- If you have health insurance before leave, employer is required to maintain group health insurance coverage while on leave
- You must pay your portion of health insurance premium

JOB RESTORATION

- Upon return from leave an employee must be restored to the employee's original job or to an equivalent job with equivalent pay, benefits and other terms and conditions of employment
- If a bonus or other payment is based on achievement of a specified goal and the employee has not met the goal due to FMLA leave, payment may be denied **unless** it is paid to similarly situated



EMPLOYEE NOTICE

- Must give 30 days advance notice if leave is foreseeable and notice is practicable
- If leave is not foreseeable, employee must give notice as soon as practicable
- Must provide sufficient information to determine if leave applies





ELIGIBILITY NOTICE

- Employer must notify you if you are eligible for FMLA leave within 5 business days of your first leave request.
- If not eligible, must state why
- If you are eligible, employer must send you notice of your rights and responsibilities under FMLA.

MEDICAL CERTIFICATION

- Employer may require medical certification
- May require 2nd or 3rd medical opinions (at the employer's expense) and periodic recertification
- Upon return, may require fitness for duty



INTERMITTENT LEAVE /REDUCED SCHEDULE



- FMLA permits employees to take a leave on an intermittent basis or to work a reduced schedule under FMLA.
- May be taken when medically necessary to care for seriously ill family member or because of employees serious health condition.
- Only amount of leave taken while on intermittent leave may be charged as FMLA leave.
- Employees may account for FMLA leave in the shortest period of time that their payroll systems use, provided it is 1 hour or less.

INTERMITTENT LEAVE

- If leave is for foreseeable medical treatment, employee must work with employer to schedule leave so not to unduly disrupt the employer's operations.
- In such cases, employer may transfer employee temporarily to an alternative job with equivalent pay and benefits that accommodate incurring periods of leave better than employee's regular job.



SUBSTITUTION OF PAID LEAVE



- Employee may choose, or employer may require, accrued paid leave/vacation, sick time, PTO, etc., to cover some or all of the FMLA taken.
- Review employer's policies.

Thank you.

