



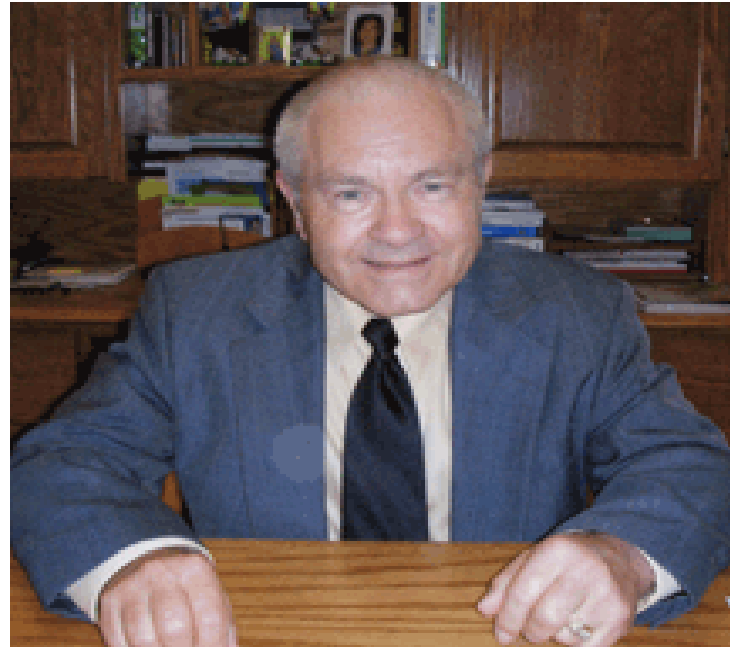
# Practical Strategies for Reasonable Accommodation of Disabled Employees *Stories from the Trenches*

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February 2, 2017 Meeting

Do you know my hero?



# Fred Riggers Disability Awareness Day

February 21, 2017

9:00 am - 2:00 pm

Idaho State Capital

First Floor Rotunda

# When Does Your Client Call You?

- ▶ To discuss improving workplace diversity by a reasonable accommodation policy?
- ▶ To run their ADA and FMLA management training curriculum by you?

# Really, when does your client call you?

- ▶ When an employee asks for “another” leave of absence?
- ▶ To provide a legal review of a notice to an employee for a DHR Rule 190(c) dismissal or a DHR Rule 241.02 layoff?
- ▶ When a manager becomes so frustrated with an employee’s performance problems that he wants to terminate the employment right now?
- ▶ After an employee files a Charge of Discrimination with the IHRC or EEOC?

What do you do?



No really, what do you do?



# OK, no really, what do you do?

- ▶ What laws apply?
  - ▶ EEO laws -- IHRA, ADA, Rehabilitation Act of 1973
  - ▶ Idaho Personnel Systems Act and DHR Rules (classified employees)
  - ▶ Local laws (county or city employees)
- ▶ What agency policies apply?
  - ▶ Reasonable accommodation policy
  - ▶ Leave policies
- ▶ Who are the players and what is their experience level?
  - ▶ HR
  - ▶ Management
  - ▶ You



# State Classified Employees

## IC § 67-5309(n) and DHR Rule 190

- ▶ DHR Rule 190: Cause for dismissal or discipline includes:
  - ▶ b. Inefficiency, incompetency, or negligence in performing duties, or job performance that fails to meet established performance standards.
  - ▶ c. Physical or mental incapability for performing assigned duties, if a reasonable accommodation cannot be made for the disabling condition.
  - ...
  - ▶ f. Intoxication or being under the influence of alcohol, or the misuse of medications or controlled substances, while on duty.
  - .....

# *State Classified Employees*

## *DHR Rule 241.02*

- ▶ DHR Rule 241.02 - Layoff After Twelve Weeks' Disability.
  - ▶ If a disabled employee is unable to fully return to work after 12 weeks of absences during a 52-week period or when sick leave is exhausted (whichever is longer)
  - ▶ The employee's position may be declared vacant
  - ▶ ***Unless otherwise prohibited by state or federal law.***
  - ▶ The 12 weeks of absences need not occur consecutively.
  - ▶ After layoff, the employee's name is certified to a reemployment preference register when a physician notifies DHR that the employee is able to return to work.
  - ▶ Conditional releases are considered in accordance with the ADA.

# What is your agency's EEO duty to the employee?

- ▶ Do not *intentionally* discriminate
- ▶ To provide *reasonable accommodation*
  - ▶ To a *qualified* employee
  - ▶ With a *disability*
  - ▶ That allows the employee to perform the *essential functions* of the position
  - ▶ Where no undue hardship to the employer

# *Scenario*

Joe, a state agency project manager, did not disclose his learning disability or ask for any accommodations during his job application process three years ago or once he began working.

Due to a recent restructuring at the agency, Joe is now required to review and analyze complicated reports. Performance problems in meeting work deadlines soon arise, and Joe's supervisor brings them to Joe's attention during weekly meetings. Joe tries to solve the performance problems on his own, but is unsuccessful.

The supervisor follows the corrective action policy for counseling employees, but these efforts are unsuccessful. The supervisor meets with Joe to issue him a notice of disciplinary action for a 2-day suspension and informs him that immediate improvement is needed to keep his job.

Joe responds by explaining for the first time that his learning disability is causing him problems with his new job duties.

*Do you back away from the edge?*



# Separate performance management from reasonable accommodation discussions

- ▶ *Stop, evaluate and re-set if needed.*
- ▶ Who will do what?
  - ▶ Who will manage performance
  - ▶ Who will take the lead on discussions about reasonable accommodation
- ▶ What should the agency do about the notice of disciplinary action?
- ▶ Determine the essential functions of the job
- ▶ The interactive process - Meet with Joe
  - ▶ Ask Joe about difficulties performing the job and ideas on accommodations
  - ▶ JAN Network <https://askjan.org/>
  - ▶ Vocational Rehabilitation
- ▶ Come up with a plan, implement it and check back with Joe

# Scenario

- ▶ Maria is a 20-year county employee. As the agency's receptionist, she sits at the front desk, answers phones, and processes paperwork for customers who come to the office.
- ▶ Maria has an autoimmune disease. Her pain varies according to the time of day, weather, and stress level. Sometimes, the pain is debilitating. Over the past 8 months, she has missed 4-8 days of work each month and she is regularly tardy to work due to effects of her morning medications.
- ▶ Over the past year, Maria has experienced increasing cognitive and memory problems, fatigue, and headaches. Recently, she was diagnosed and treated for depression.
- ▶ Maria's job performance is getting worse and her stress is increasing. Other employees have been covering for her by helping with job duties so that she won't get in trouble.
- ▶ Maria has been open about her medical conditions. Her manager has not addressed her attendance or work performance issues but now wants to transfer her to a job in another department because he needs staffing for the front desk from 8-5 each day.

*Can more be done?*





# *What accommodations are reasonable?*

- ▶ What are the essential functions of the position?
- ▶ What marginal functions can be reassigned?
- ▶ What is the status of the interactive process and past accommodations?
  - ▶ What documentation does the agency have?
- ▶ What reasonable accommodations might be available?
  - ▶ What are Maria's ideas?
  - ▶ What ideas do her health care providers have?
  - ▶ JAN Network <https://askjan.org/>
  - ▶ Vocational Rehabilitation

# *Scenario*

- ▶ Mike is a police officer, which requires him to be physically able to engage in pursuits on foot, restrain suspects, and make arrests.
- ▶ Mike was hired 2 years ago. Five months ago, Mike had a heart attack and emergency heart surgery.
- ▶ Mike has been on leave since his heart attack. He has exhausted his 12 weeks of FMLA and since then the agency has twice extended his leave of absence.
- ▶ This week, Mike's doctor submitted a note to HR stating that Mike needs 8 more weeks of leave and may need another surgery.

# How much leave is reasonable?

## 2017



# *Reasonable accommodation of absence*

- ▶ When is a leave of absence no longer a reasonable accommodation?
  - ▶ DHR Rule 241.02 - layoff after 12 weeks of absence?
  - ▶ DHR Rule 190 - Cause for termination based upon a “[p]hysical or mental incapability for performing assigned duties, if a reasonable accommodation cannot be made for the disabling condition”?
  - ▶ 12 weeks? 6 months? 12 months? 18 months? Indefinite?

*Fred would say don't take today for granted*

We are born in one  
day. We die in one  
day. We can change  
in one day. And we  
can fall in love in  
one day. Anything  
can happen in just  
**one day**

*-Gayle Forman*

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