NACUA

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Employment Law

Accommodations, They are a Changin' - *Groff*, Mental Health and Beyond

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Speaker: Scott Schneider, *Founding Partner*, Schneider Education and Employment Law PLLC

Speaker: Tom Kent, *Associate General Counsel*, University of Michigan

Overview

- *Groff v. DeJoy* - how the standard changed
- Cases decided post *Groff* and their implications
- Emerging Issues including remote work, disciplinary issues, AI, gender
- Practical tips and best practices for assessing accommodations

Title VII of the Civil Rights Act of 1964

- Title VII prohibits employers with at least 15 employees from discriminating against employees and applicants on the basis of religion, as well as race, color, sex, and national origin.

- Religious discrimination includes the failure to reasonably accommodate an employee or job applicant's religious observance or practice, unless the employer can show that accommodation imposes an **"undue hardship on the conduct of the employer's business."**

- An "accommodation" is a change in the employer's policies, practices, or the work environment to allow an employee to engage in a religious practice or observance.

- Congress did not define "undue hardship" or "conduct of the business" in Title VII. It has not amended this portion of the statute since it enacted the religious accommodation provision in 1972.

Trans World Airlines, Inc. v. Hardison (1977)

Prior to *Groff,* the Supreme Court addressed the Title VII undue hardship standard once. The question in *Hardison* was whether Title VII requires employers to violate collective bargaining agreements as part of an accommodation.

While acknowledging that Title VII broadly allows an employer to implement non-discriminatory seniority or merit systems, the *Hardison* Court held that violating a collectively bargained seniority system would be an undue hardship.

The *Hardison* Court devoted little analysis to when financial costs cause undue hardship but stated that requiring the employer to *"bear more than a de minimis cost"* in making a religious accommodation would create an undue hardship. The Court accepted findings that the employer in *Hardison* would have to incur "substantial costs" to accommodate the plaintiff.

The *Hardison* majority reasoned that the accommodation requested—**to be excused from working during his Saturday Sabbath**—would have distributed the benefit of preferred shifts on the basis of religion, an outcome the Court characterized as discriminatory because the accommodation would have come **"***at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends." "Title VII does not contemplate such unequal treatment."*

Pre *Groff v. DeJoy* Standard (1977-2023)

- When an employee's sincere religious observances or practices conflict with workplace requirements, Title VII of the Civil Rights Act of 1964 requires the employer to provide a reasonable accommodation unless doing so would impose an "undue hardship on the conduct of the employer's business."

- An accommodation creates an undue hardship when it imposes **"more than a de minimis cost."**

Trans World Airlines, Inc. v. Hardison (1977)

Groff v. DeJoy (2023)

- *Groff* involved an employee seeking to be excused from shifts during his Sabbath. Groff worked as a rural carrier associate for the U.S. Postal Service, a position responsible for covering for absent employees.
- In 2017, the Postal Service began requiring Groff to work certain Sundays in accordance with a memorandum of understanding (MOU) with Groff's union. Groff observed a Sunday Sabbath and, as a result, missed over 20 Sunday shifts. He was disciplined and resigned in 2019.
- Groff sued, alleging that the Postal Service violated Title VII by failing to accommodate him. The district court and Third Circuit ruled for the Postal Service. The lower courts found that exempting Groff from Sunday work caused an **undue hardship**, because doing so violated the MOU and unfairly burdened other employees. The courts indicated that Groff's absences forced the station postmaster to deliver mail and that other employees had quit, transferred, or filed a union grievance as a result of the situation.

New Rule

Groff v. DeJoy (2023)

To deny a religious accommodation, an employer must show that the burden of accommodation **"is substantial in the overall context of an employer's business."**

The *Groff* Holding

- In a unanimous opinion authored by Justice Samuel Alito, *Groff* disavowed *Hardison's* language suggesting an employer can avoid accommodating a religious employee by showing anything more than a trivial burden.

- Title VII focuses on **"hardship,"** the *Groff* Court emphasized, a word choice that does not mean any mere burden. The Court reasoned that the fact that any hardship must be **"undue"** under Title VII further indicated Congress's intent that employers may have to bear meaningful costs to accommodate a religious employee. Title VII, the Court held, therefore requires that an employer seeking to deny an accommodation demonstrate that the accommodation will **substantially increase costs to its business.**

The *Groff* Holding continued…

- *Groff* offered limited guidance on how to apply this new test and instructed lower courts to adopt a case-by-case approach, assessing the **"practical impact"** of accommodation requests in light of all the facts at hand (such as the size and nature of the employer's business), in a **"common-sense manner"**.
- The Court also clarified that employers may take into account the burdens an accommodation imposes on other employees, as long as those burdens affect the employer's operations, a point emphasized in Justice Sotomayor's concurrence.
- Employers **may not**, however, justify a refusal to accommodate based on other employees' hostility toward religion or religious accommodations

Note: Justice Sonia Sotomayor explained in a short concurrence that the Court's decision interpreted *Hardison* in light of the full context of that case, rather than overruled it.

Moving Forward After *Groff*

Case Illustrations and Procedural Recommendations

- ***Kluge v. Brownsburg Community School Corp.***

U.S. Court of Appeals for the Sixth Circuit (July 28, 2023)

Order to Vacate and Remand o apply *Groff v DeJoy*

- ***MacDonald v. Oregon Health and Science University,***

U.S. District Court, D. Oregon (August 28, 2023)

- ***DeVore v. University of Kentucky***

U.S. District Court, E.D. Kentucky, Central Division (Sept. 20, 2023)

Kluge v. Brownsburg Community School Corp.
U.S. Court of Appeals for the Sixth Circuit (July 28, 2023)

- Suit brought by an orchestra teacher in Indiana, John Kluge, who argued that he required a religious accommodation in order to not have to call transgender students by their names. He stated that his religion opposed "transgenderism" and that he only wanted to call students by their legal names. Plaintiff claimed he was forced to resign rather than comply with the school's Name Policy. The school initially permitted him to refer to all students by their last names only, but it withdrew the accommodation, asserting that it was harming students and disrupting the learning environment.

Kluge continued….

- The district court granted summary judgment in favor of Brownsburg. Initially, the Seventh Circuit affirmed, finding the school had sufficiently demonstrated that continuing the accommodation posed an undue burden on its mission of educating students according to its established theory and practice.

- However, "[i]n light of the Supreme Court's clarification in *Groff v. DeJoy* … of the standard to be applied in Title VII cases for religious accommodation," the Seventh Circuit vacated its Opinion and Judgment and "remanded for the district court to apply the clarified standard to the religious accommodation claim in the first instance."

MacDonald v. Oregon Health and Science University
U.S. District Court, D. Oregon (August 28, 2023)

- Defendant University brought a Motion to Dismiss under FRCP 12(b)(6).

- Plaintiff worked as a registered nurse in OHSU's Mother and Baby Unit. She was a practicing, non-denominational Christian who opposed abortion on religious grounds. As such, Plaintiff objected to receiving a COVID-19 vaccination, partly on the basis that she believed the vaccine manufacturers used cells from aborted fetuses in the testing and development of vaccines or in the vaccines themselves. On or about September 19, 2021, Plaintiff submitted a religious exemption request to OHSU and attached a five-page explanation to her exemption request which outlined her objections to receiving the COVID-19 vaccine.

McDonald continued….

- Plaintiff's objections included that she "firmly believe[s] [she] [has] a clear moral duty to refuse the use of medical products, including certain vaccines, that are created using human cell lines derived from abortion during any stage of the vaccine's development, including the testing phase of development of a medical product." Plaintiff further objected to receiving the vaccine based on her belief that "[her] body is the Temple of the Holy Spirit" and "as a Christian, [she] [is] compelled to protect it from defilement."

- OHSU's exemption review committee conducted two independent assessments of Plaintiff's application and denied her request, finding her application insufficient to establish that she had a sincerely held religious belief that conflicted with OHSU's employee-wide vaccination requirement. Plaintiff remained unvaccinated, in contravention of OHSU's vaccination policy and the Mandate. OHSU ultimately terminated Plaintiff's employment on or about December 3, 2021.

McDonald Holding

- "Unlike motions for preliminary injunctions or motions for summary judgment, this Court is limited in the materials it may consider on a motion to dismiss." Accordingly, this Court finds that, at this stage, it is unable to properly consider the extrinsic evidence on which Defendants rely to show either that there were no other viable accommodations to Plaintiff's vaccination, or that any accommodations would have created an undue hardship consistent with Groff."

- However, "on a more robust record, Defendants may very well be able to meet their burden to show that Defendants reasonably relied on the most up-to-date available information in formulating their vaccine policy, or that the efficacy of the COVID-19 vaccine was such that any other possible accommodation would have put the vulnerable patients with whom Plaintiff interacted daily, as well as Plaintiff's coworkers, at risk. But on the limited record before this Court, Defendants have not met that burden."

DeVore v. University of Kentucky

U.S. District Court, E.D. Kentucky, Central Division (Sept. 20, 2023)

- Defendant University brought a Motion to Dismiss under FRCP 56(c)

- DeVore was a department manager, responsible for clerical and logistical support of her department. When COVID-19 struck, the university mandated remote work for approximately eighteen months. After the university directed employees to return to work, DeVore requested an exemption from returning to in-person work at the facility. The university denied her request, and placed her on unpaid administrative leave. Ultimately, DeVore retired in lieu of termination of employment.

- DeVore stated that she believed "it would be an affront to God for her to involuntarily subject herself to medical testing without informed consent" and that the university's COVID-19 policy had removed her ability "to choose what shall or shall not happen to [her] person" by using weekly testing as a penalty for not taking the vaccine.

DeVore continued….

- Summary Judgment granted on two grounds:

1. No *Prima Facie* case

The court concluded this basis was not religious in nature, finding that such broad objections represent an "'isolated moral teaching,'" rather than protected religious belief.

DeVore continued….

2. Undue Hardship Under *Groff*

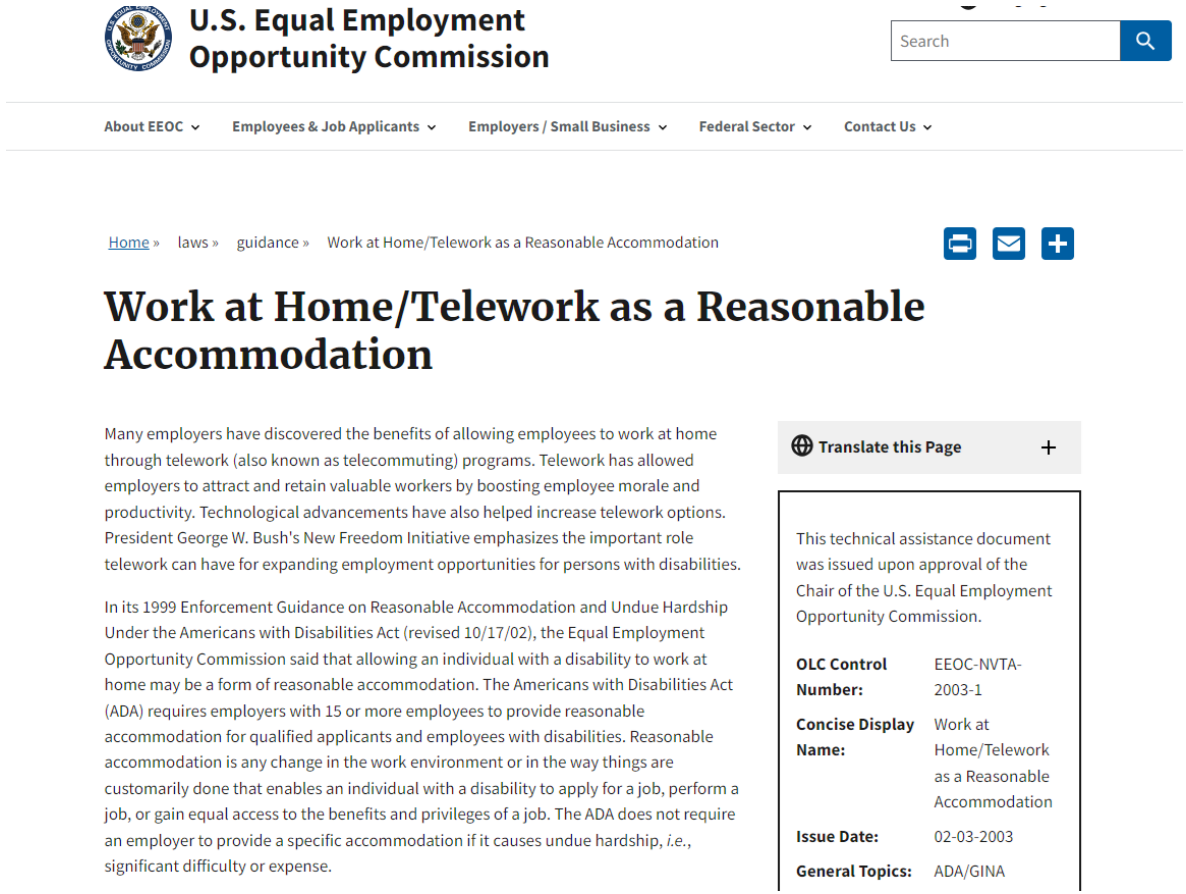
The court also found that DeVore's claims failed because the university had demonstrated it could not accommodate her beliefs without an undue hardship. The court noted that as department manager, DeVore was the face of her department, and she interacted daily with faculty, staff, and students. Notably, the university had previously denied a request for DeVore to work from home two days per week for reasons unrelated to her religious beliefs, finding that a "fundamental aspect of the Department Manager job is to be present in the department to welcome students and visitors, support faculty, and answer questions as needed."

Thus, the accommodation DeVore requested would have permitted her to have not performed a function that the university deemed essential, and it would have imposed a substantial burden on the university's business. The court also rejected as unreasonable DeVore's alternative proposal that the university hire a part-time employee, finding it would result in "an indefinite payment of an entire salary for duplicative work," which would amount to a "substantial burden."

Note: UNIT SPECIFIC ANALYSIS, DEVELOPED RECORD ON 56(C) MOTION


Emerging
Issues

Remote Work



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Work at Home/Telework as a Reasonable Accommodation

Many employers have discovered the benefits of allowing employees to work at home through telework (also known as telecommuting) programs. Telework has allowed employers to attract and retain valuable workers by boosting employee morale and productivity. Technological advancements have also helped increase telework options. President George W. Bush's New Freedom Initiative emphasizes the important role telework can have for expanding employment opportunities for persons with disabilities.

In its 1999 Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (revised 10/17/02), the Equal Employment Opportunity Commission said that allowing an individual with a disability to work at home may be a form of reasonable accommodation. The Americans with Disabilities Act (ADA) requires employers with 15 or more employees to provide reasonable accommodation for qualified applicants and employees with disabilities. Reasonable accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job, or gain equal access to the benefits and privileges of a job. The ADA does not require an employer to provide a specific accommodation if it causes undue hardship, *i.e.*, significant difficulty or expense.

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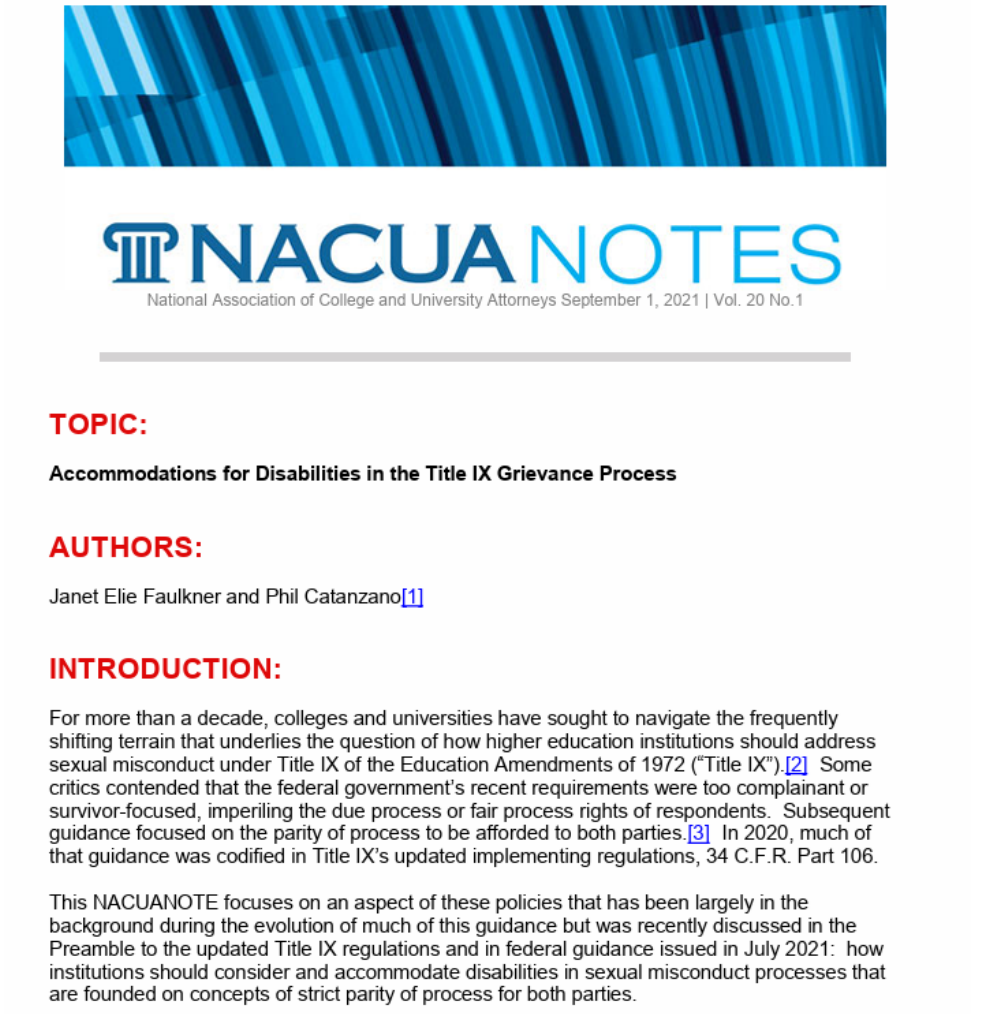
OLC Control Number:	EEOC-NVTA-2003-1
Concise Display Name:	Work at Home/Telework as a Reasonable Accommodation
Issue Date:	02-03-2003
General Topics:	ADA/GINA

- *Cetin v. Kan. City Cmty. Coll.* (D. Kan. Dec. 18, 2023)
- *Narayanan v. Midwestern State Univ.* (N.D. Tex. Oct. 24, 2022)
- *Montague v. United States Postal Service* (5th Cir. June 28, 2023)

Robust Disciplinary Processes



NACUA NOTES

National Association of College and University Attorneys September 1, 2021 | Vol. 20 No.1

TOPIC:

Accommodations for Disabilities in the Title IX Grievance Process

AUTHORS:

Janet Elie Faulkner and Phil Catanzano[1]

INTRODUCTION:

For more than a decade, colleges and universities have sought to navigate the frequently shifting terrain that underlies the question of how higher education institutions should address sexual misconduct under Title IX of the Education Amendments of 1972 ("Title IX").[2] Some critics contended that the federal government's recent requirements were too complainant or survivor-focused, imperiling the due process or fair process rights of respondents. Subsequent guidance focused on the parity of process to be afforded to both parties.[3] In 2020, much of that guidance was codified in Title IX's updated implementing regulations, 34 C.F.R. Part 106.

This NACUANOTE focuses on an aspect of these policies that has been largely in the background during the evolution of much of this guidance but was recently discussed in the Preamble to the updated Title IX regulations and in federal guidance issued in July 2021: how institutions should consider and accommodate disabilities in sexual misconduct processes that are founded on concepts of strict parity of process for both parties.

- *Pierre v. University of Dayton* (S.D. Ohio 2017)
- Doe v. University of Miami (S.D. Fla. 2000)

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Visual Disabilities in the Workplace and the Americans with Disabilities Act

INTRODUCTION

This document, which is one of a series of question-and-answer documents addressing particular disabilities in the workplace,[1] explains how the Americans with Disabilities Act (ADA) applies to job applicants and employees with visual disabilities. In particular, this document addresses:

- when an employer may ask an applicant or employee questions about a vision impairment and how an employer should treat voluntary disclosures;
- what types of reasonable accommodations applicants or employees with visual disabilities may need;
- how an employer should handle safety concerns about applicants and employees with visual disabilities; and
- how an employer can ensure that no employee is harassed because of a visual disability.

Translate this Page

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:	EEOC-NVTA-2023-3
Concise Display Name:	Visual Disabilities in the Workplace and the Americans with Disabilities Act

- Triggers obligation to provide reasonable accommodations for visually impaired
- Accommodation is typically going to be alternative testing format

Gender Dysphoria

July 11, 2023, 7:49 AM CDT

Gender Dysphoria Poised to Be New Disability Rights Battleground

Khorri Atkinson
Senior Labor & Employment Reporter

- Several courts find gender dysphoria covered by ADA
- Employers urged to be proactive on accommodation policies

The legal argument that gender dysphoria is covered by federal disability law is gaining ground, paving the way for broader employment protections for transgender workers.

Nearly a year ago, the US Court of Appeals for the Fourth Circuit became the first federal appeals court to tackle the issue. The court ultimately found that the Americans with Disabilities Act protects transgender people who experience distress caused by their gender identity not matching their sex assigned at birth.

The US Supreme Court last month declined to review the dispute, keeping the ruling in place and allowing federal district courts to continue to grapple with the question.

Related Stories

Transgender Workers' Rights Expanded By Gender Dysphoria Ruling
Aug. 18, 2022, 4:15 AM CDT

Disability Bias Ruling For Transgender Worker: Boon Or Blip?
June 1, 2017, 4:43 PM CDT

Novel Ruling Finds Disability Bias Rights For Transgender Worker
May 19, 2017, 5:36 PM CDT

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The College Kids Are Not OK

ELSEVIER

Journal of Affective Disorders
Volume 306, 1 June 2022, Pages 138-147

Research paper

Trends in college student mental health and help-seeking by race/ethnicity: Findings from the national healthy minds study, 2013–2021

Sarah Ketchen Lipson [a], Sasha Zhou [b], Sara Abelson [c], Justin Heinze [d], Matthew Jirsa [e], Jasmine Morigney [f], Akilah Patterson [d], Meghna Singh [d], Daniel Eisenberg [g]

- 2020–2021: >60% of students met criteria for one or more mental health problems, a nearly 50% increase from 2013

Practice Pointers

- In light of Groff/other court decisions, revisit policies - written/forms/websites - check for consistency!
- Remind HR/other leadership of importance of documentation of the interactive process
- Frame issues properly - i.e. discipline/termination for lack of performance vs. lack of availability

More Practice Pointers

- How to speak to people with disability (“autistic person” vs. “person with autism”
- Avoid backhanded compliments
- Ask people how they want to be addressed

Even More Practice Pointers!

- Ensure position descriptions are accurate, updated, and particular with respect to essential job functions
- Be careful with language such as “other duties as assigned”
- Ask candidates “can you perform the essential functions of the position, with or without reasonable accommodation?”


Questions?

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