

As the Professoriate Ages, Will Colleges Face More Legal Landmines?

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Last summer marked the 15th anniversary of when Title I of the Americans With Disabilities Act took effect, and throughout that time, colleges have been wrestling with how and to what extent they must accommodate their employees with disabilities. Today, especially as the average age of faculty members continues to rise, institutions are seeing an increasing number of requests from faculty members who claim to have a disability and who require an accommodation in order to do their jobs. Such requests will raise legal challenges for any college that tries to evaluate and respond to them in a manner that is both lawful and mindful of the needs of the institution.

Should a faculty member who is disabled be granted a reduced teaching load, a preferred teaching schedule, or dispensation from certain otherwise-required activities — attending departmental meetings, advising students, or participating in commencement? Will that open the floodgates to other requests that the college will then have to grant? What would be the implications of an institution's decision to deny the accommodation?

In answering those questions, colleges must be aware of the potential for lawsuits: Employees who sue their institutions tend to allege either that they were excluded or removed from a job because of disability discrimination or that their employer refused to accommodate their disability, making it impossible to perform the job. To avoid disability claims, institutions must make sure that they comply with federal and state antidiscrimination laws, including the ADA.

To be entitled to an accommodation, a person must show that his or her impairment meets the ADA's definition of "disability" and that he or she can perform the "essential functions of the job." The employer and employee must also engage in an interactive process to determine an appropriate accommodation. If the requested accommodation poses an "undue hardship" to the employer, defined as "an action requiring significant difficulty or expense," the employer need not provide it.

Many lawsuits have revolved around the issue of whether a request for a particular accommodation is reasonable or not. The law and regulations do not define "reasonable accommodation" but provide a number of examples, like making facilities more accessible to employees, restructuring the position, allowing an employee to work a part-time or modified schedule, or reassigning him or her to a vacant position. Traditionally courts have been reluctant to exercise their judicial authority in ways that would interfere with academic freedom and colleges' pedagogical interests, yet in many respects, accommodating faculty members is no different from accommodating any other employees. The deference that courts have accorded institutions of higher education does not give colleges the right to violate statutes that apply to all employers.

For example, making existing facilities accessible to people with disabilities would most likely be seen as a reasonable accommodation. A faculty member may request, for example, a variety of physical adaptations to the classroom, such as a higher podium or a classroom on a different floor to avoid having to navigate crowded stairways. That is the same as a corporate employee's requesting an ergonomic desk and chair or an office closer to the parking lot to limit the walking distance. Similarly, while transportation to and from work is usually the responsibility of employees, providing handicapped parking is generally considered by law to be the obligation of employers, including higher-education institutions.

Moreover, college officials must always consider their institution's general personnel policies. A faculty member with a physical disability that limits mobility might request an assistant to help with class demonstrations. If a college provides assistants to faculty members for other reasons, that is a reasonable request, unless the institution can show otherwise.

The law does not, however, require a college to reduce, eliminate, or modify the essential functions of a job to accommodate a faculty member with a disability. For example, in *Hong v. Temple University* (2000), a professor of anesthesiology could not perform his duties as an anesthesiologist after undergoing laser eye surgery because of continued severe eye pain. While the faculty member was trying to get relief from his medical issues, he was given less-demanding duties. He did not administer anesthesia in the operating room, perform any invasive procedures, or perform any on-call duty. At the end of his term, his contract was not renewed. He suggested that he be allowed to remain in the restructured position indefinitely. Because such a restructuring eliminated many of the central aspects of his position, the court held that such an accommodation was not reasonable.

Yet to make such a case, an institution must be able to describe what, in fact, the essential functions of a faculty member's job are. That is why each college should identify and distribute a list of the essential functions that a faculty member at the institution must perform, preferably in some official policy document like a faculty handbook, individual employment contract, or collective-bargaining agreement. Establishing a clear set of essential functions will notify faculty members of what they are expected to do, provide a guideline for administrators who are asked to provide reasonable accommodations for faculty members who can't perform certain parts of their jobs, and justify a college's agreement or refusal to grant a particular accommodation.

Cataloging the essential functions of a faculty member's job is not an easy task, particularly when, at most institutions, professors not only teach but also serve on committees, advise students, conduct research, write grant proposals, act as mentors to graduate students, consult, and perform service to their disciplines and institutions. For guidance administrators may wish to consult the American Association of University Professors' "Statement on Professional Ethics," which federal courts have deemed to be an appropriate standard of professional conduct.

Some of the key questions that colleges must ask include: Must all faculty members teach, and is there a standard teaching load? (Without an established standard teaching load, it will be difficult to determine if a request for a lighter teaching load is a reasonable

accommodation.) Must all faculty members conduct research, advise students, or engage in committee work? Would a faculty member's inability to perform a specific task mean that he or she is not "qualified" under the ADA's definition?

If it is to hold up to scrutiny during litigation, the essential-functions list should be prepared *before* a faculty member discloses a disability and requests an accommodation. A case in point is *Henry Kingsbury v. Brown University* (2003), when a professor asked to return from medical leave after brain surgery. His colleagues collaborated in developing a list of essential functions for his position, and after the university refused to renew his contract, the professor claimed that the list had been manipulated to create a set of functions that applied only to him. The court rejected the university's motion for summary judgment, in part because of concern that the list was not objective — a concern based on evidence that faculty members involved in drafting the list apparently did not want the professor to return.

If a college wants to deny an accommodation on the ground that it eliminates one or more of the essential functions of the position, the institution will have to be able to prove that the accommodation would disrupt its educational efforts and that the institution has actually treated that function as essential for *all* faculty members. For example, if a teaching position encompasses both classroom lectures and clinical demonstrations, a disabled faculty member who cannot lift heavy equipment may ask for fewer clinical assignments and more classroom teaching. It would not be enough for an institution simply to claim that it required all teachers to engage in both lectures and clinical work to keep up to date. The faculty member could undercut that argument, for example, by a showing that other, nondisabled colleagues had purely classroom rather than clinical responsibilities, or that, before being disabled, he had mainly classroom duties with only occasional clinical responsibilities.

In cases where the request for assistance is administrative or clerical, a college may still have to provide an accommodation, even if it believes that a function is central to the professor's obligation, as long as the institution's educational interests remain protected. For example, in *Cleveland v. Prairie State College* (2002), the court found that engaging an assistant to transfer grades to a grade book would be a reasonable accommodation, despite the college's policy of prohibiting anyone but the professor from doing that. The court suggested that, to protect the institution's interest in the accurate recording of grades, the college could have engaged an assistant to make the transfer under the supervision of the professor or required the professor to check the grade book after the marks had been entered.

College administrators must consider whether granting a particular accommodation would create an "undue hardship" for the institution. Would more part-time faculty members have to be hired, or would the institution ask other faculty members to cover those teaching responsibilities? Would the long-term absence of a teacher make it difficult for advanced undergraduates or graduate students to complete their degrees or significant projects? Would important administrative responsibilities be neglected, or would faculty colleagues have to pick up those responsibilities?

From a legal standpoint, undue hardship is a difficult threshold to cross. Many accommodations may be inconvenient for other faculty members or the institution in

general. But courts have ruled that diminished flexibility in scheduling and dissension within the department do not rise to the level of undue hardship.

In *Smith v. Henderson* (2004), for example, the court rejected an employer's argument that permitting a supervisor who suffered from rheumatoid arthritis to delegate accounting duties constituted an undue hardship. Although the court acknowledged that the delegation decreased productivity and raised costs, it stated that "it is not clear from the record that the lower production and increased costs amounted to significant difficulty or expense."

A case that involved the Los Angeles Community College District is also illuminating. A tenured math professor, who had worked at an institution for 23 years, crushed his right heel and severely damaged his right ankle in a car accident. As his pain worsened, he requested a transfer to a campus closer to his home on the ground that his commute to work was debilitating. He supplied documentation from his doctor supporting his request, but the college denied it, stating: "The requirement to provide a reasonable accommodation applies when an employee arrives at work. Traveling to and from work is the responsibility of the employee."

Because the faculty member was subject to a collective-bargaining agreement, an arbitrator heard his disability claims and ruled that a transfer to shorten the commute would be a reasonable accommodation. The college then argued that there was no full-time position available at the other campus. But the professor noted that the other campus made use of many temporary positions, and full-time faculty members had the right to "bump" temporary or part-time faculty members. In response, among other defenses, the institution claimed undue hardship. It said that allowing the professor to cobble together a full-time schedule from many temporary assignments would impair the college's ability to schedule classes to meet student demands, displace hourly rate employees, and cause dissension and disruption within the department. Despite such assertions, however, the arbitrator sided with the professor.

In contrast, a college succeeded with its undue-hardship defense in *Schall v. Wichita State University* (2000). It demonstrated an actual negative impact on its faculty and programs, not just a possible theoretical consequence, as a result of the proposed accommodations.

In that case, the plaintiff was a clinical supervisor who worked as part of a team. An essential element of his job was to visit students at various locations throughout the state, but following surgery, he was unable to fulfill those requirements. Other faculty members objected to his returning part time without resuming his travel responsibilities, on the ground that such a revised schedule created a "dysfunctional" department. In particular, they were unable to complete their own work because they had to assume some of his duties and believed that they would have to continue filling in for him if he returned to work on a part-time basis. Furthermore, they could not travel and meet with students off the campus in his stead; consequently, they asserted, the students were not being properly trained. The court agreed with the university's position that requiring other faculty members to perform the plaintiff's traveling duties was not a reasonable accommodation because his own job performance suffered and his students were not being adequately served.

Another common request is for a leave of absence — and, in the case of a tenure-track faculty member, a corresponding extension of the tenure clock to account for lost research time. The Family and Medical Leave Act guarantees leaves for up to 12 weeks in a 12-month period for employees who are unable to work because of serious health conditions. Yet adherence to the requirements of the act or the institution's own leave-of-absence policy will not necessarily fulfill an employer's obligation of a reasonable accommodation. The difficulty comes when a faculty member asks for more than the time lost as a result of the disability.

Suppose, for example, that a faculty member is given a year's leave of absence to undergo treatment for cancer and a corresponding additional year on the tenure clock. The faculty member now asserts that the course of treatment has left him without his predisability energy and stamina, so he will not be able to produce scholarship at the same pace as before his illness. Assume that his doctor will supply a medical recommendation concerning the effects of post-cancer-treatment fatigue. Is a further extension of the tenure clock required or even a wise thing to do? There is no hard-and-fast answer, and institutions must proceed cautiously.

The issue often turns on whether a faculty member's continued absence will be disruptive to the operations of the institution. As one court acknowledged, "Obviously, it is extremely difficult — indeed plausibly impossible — to run college classes when instructors are absent." But because professors usually have no set or core hours during which they have to be in their offices, a faculty member who requests flexibility in scheduling might have a strong argument.

Again, the important question to ask is whether the proposed accommodation would allow the faculty member to meet the requirements of the position. There must be some showing that a reasonable further extension of the tenure clock will permit the faculty member to produce scholarly work at an adequate level and to teach and perform other responsibilities. Otherwise the institution will probably not have to grant the accommodation.

Faculty members, their disabilities, and the impact of those disabilities are not alike. Every situation is somewhat different, but administrators should be prepared to deal with often difficult situations and to prevent them from escalating into litigation. Some general lessons apply:

- Review your institution's policy for dealing with disabled faculty or staff members. If no policy exists, ask the provost or university counsel for assistance in developing one.
- Ensure that faculty-workload policies are clear and consistently followed. Document any exceptions, such as sabbaticals or course releases supported by grants.
- Develop an institutional or departmental policy on how tardiness or absence from class will be handled. Specify the consequences for repeated tardiness or absences from class.

- Respond immediately to all student complaints about faculty behavior, including tardiness, canceled or missed classes, or unprofessional behavior. Document all complaints and the response to the complaints.
- Obtain advice from the university lawyer about the possibility of discussing disability leave or retirement with a disabled faculty member.

Obviously the absence of a faculty member puts a strain on other members of the department as well as the administration. However, colleges should make sure that frustration is not expressed in a way that could be viewed as expressing animus toward the disabled employee. An insensitive comment about an employee's condition or abilities can undermine what might otherwise be a strong legal case for the institution. A key issue in *Henry Kingsbury v. Brown University* was that a faculty member wrote in an e-mail message of the colleague who was requesting continuing accommodations: "Have we not done enough for Henry? When will it end, this generosity to a hostile, irrational, and damaged colleague at the expense of the rest of us. Enough!"

The same faculty member had criticized the disabled faculty member's physical impairments in previous e-mail messages and concluded that he should be replaced the following year. The court ruled, among other things, that the statement of essential functions, created in response to a demand letter requesting reasonable accommodations, was tainted by the involvement of the person who wrote the e-mail messages because he might be biased against the plaintiff.

Perhaps most important, college officials should regularly contact the disabled employee to discuss potential accommodations and their probability of success. There should be continuing communication between the parties. In *Cleveland v. Prairie State College*, the court denied the college's motion for summary judgment because the college had refused the requested accommodation of an assistant to help with transferring grades to a grade book without ever sitting down and talking with the faculty member about whether there was some way that both her needs and the college's concerns could be met.

Faculty members with disabilities may be able to function without any accommodation, may need an accommodation, or may not be able to perform their jobs even with an accommodation. Following these guidelines will not protect against lawsuits or other problems in sorting out the appropriate approach to take. But it can help a college develop a strong defense against a claim of disability discrimination and, most important, be a fair employer to faculty members and other campus employees.

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