WORKPLACE SCENT ALLERGIES AND THE ADA: TIPS FOR SNIFFING OUT YOUR COMPLIANCE OBLIGATIONS

Presented by:

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True Story

- Employee Joan comes to Executive Director of small human service agency and complains that her co-worker’s perfume is making her cough
- Joan doesn’t get along with co-worker, Marsha
- Joan refuses to be in meetings with Marsha
- Marsha says she doesn’t even wear perfume!
True Story

• Complications arise:
  – Joan has previously asked to move to another floor with a bigger office and more windows, but her request was denied
  – Joan’s position is slated for elimination but she doesn’t know it yet
  – Joan’s job duties require her to meet with Marsha

What is Fragrance Sensitivity?

• Fragrances are composed of many different chemicals
• Fragrance sensitivity may be an actual allergic reaction or simple irritation to a particular chemical or combination of chemicals
• Fragrances can enter the body through inhalation, ingestion, or absorption
What is Fragrance Sensitivity?

• Once a person has developed fragrance irritation, sensitivity can increase over time and with repeated exposure
• Certain chemicals may be sensitizers at high levels of exposure and can result in sensitivity to the chemical at much lower levels after initial exposure

What is Fragrance Sensitivity?

• Reactions to fragrances may include:
  – Difficulty breathing or breathing problems
  – Asthma attacks or asthma-like symptoms
  – Contact dermatitis (an itchy and inflamed skin rash)
  – Hives
  – Nausea
  – Dizziness
  – Headache
What is Fragrance Sensitivity?

• The severity of symptoms varies from one individual to another
• Symptoms can show up over a wide time range from a few minutes to seven to ten days

What is Fragrance Sensitivity?

• Persons with respiratory impairments may have heightened sensitivity to ordinary substances and chemicals
• Medical conditions that may result in respiratory impairments include the following:
  – Allergies
  – Asthma
  – Chemical Sensitivity (MCS)
  – Chronic Obstructive Pulmonary Disease
  – Cystic Fibrosis
  – Environmental Illness (EI)
  – Fragrance Sensitivity
  – Lung Cancer
  – Pulmonary Sarcoidosis
  – Tuberculosis
  – Emphysema
  – Pulmonary Hypertension
Perfume “Allergy”? 

- 19% of general population report adverse health effects from air fresheners  
- Not usually a true “allergy” but instead a chemical sensitivity and irritation of air passages by volatile chemicals  
- Common symptoms: headaches, sinus pressure and pain, runny nose, burning eyes, wheezing or asthma attack, shortness of breath, itchy skin, dry mouth, feeling groggy or dull  

Prior to ADAAA  

- Employee had to show substantially impaired in major life activity to be covered under ADA  
- Narrow definition  
- Conditions that were not permanent were generally not considered disabilities  
- Substantial limitation in life activity of “working” required inability to work in class of jobs, not specific job  
- If an employee could manage his/her reaction through medication, not considered disabled
Pre-ADAAA Example

- Cynthia worked for Honda
- Transferred to plastics department
- Odors aggravated her asthma
- Doctor note requesting transfer because of “environmental irritants”
- Company evaluated air: “exceptionally clean and well ventilated”
- Provided paper mask – inadequate to prevent asthma attacks
- Employee could not wear respirator (claustrophobic)

Pre-ADAAA Example

- Cynthia went on leave, ultimately terminated, sued
- Court: “Asthma does not substantially limit MLA”!
- Not “severe, long-term, or permanent”
- Controllable with medication
- Flare-ups not “debilitating”
- Case dismissed
But in Another Pre-ADAAA Example

- Former DJ sued Detroit radio station, claiming her exposure to “toxic chemicals” created sensitivity to *Tresor* perfume
- Claimed allergy caused her to lose her voice and resulted in absences from work
- Station terminated DJ for excessive absences
- Jury awarded DJ $10.6 million
- Award reduced to $814,000

ADA Amendments

- Amendments January 2009
- Regulations March 2011
- Court cases still percolating through system but some things are clear
- Many more MLA, including bodily functions
- Substantial limitation is “something less than significantly restricted”
- Employees’ use of medication no longer relevant
- Chronic conditions such as asthma are disabilities if substantially limiting when active
Impact of ADA Amendments and Regulations

• New construction guidelines for determining whether or not individual is “disabled”
  – Definition of disability is to be “construed broadly”
  – An impairment that limits one major life activity need not limit other major life activities to be considered a disability
  – Impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active
    • *E.g.*, asthma, major depression, epilepsy, bipolar disorder

Impact of ADA Amendments and Regulations

• Many more employees covered
• Claims for perceived disability easier to make and prove
• Employees evaluated without medication or other mitigating measures
• Conditions that are not truly “temporary” or “minor” will be considered disabilities
• No minimum duration?
Recent Caselaw

• *Troxler v. MAPCO Exp.* (M.D. Tenn. 2012)
  – Specific directions to employee whose fragrance is causing medical reaction
  – Repeated e-mails to department employees re: fragrance-free environment
  – Permitted employee to go home when asthma was aggravated
  – Moved location
  – Court found accommodations reasonable

• *Core v. Champaign Cty. Bd. of Comm’rs* (S.D. Ohio 2012)
  – Core could only work in an environment “free of perfume” or “without fumes that she is allergic to”
  – Allergic to Japanese Cherry Blossom Perfume
  – “Multiple chemical sensitivity disorder”
  – BUT sold jewelry at craft shows open to public without problem!
Recent Caselaw

• Core v. Champaign Cty. Bd. of Comm’rs (S.D. Ohio 2012)
  – Applied for FMLA leave – granted
  – Offered
    • Shorter work days, her own office, private bathroom facilities (ignored)
    • Use of inhaler and breaks to go outside into fresh air (rejected)
    • To instruct staff to refrain from wearing Japanese Cherry Blossom perfume (rejected)
    • To post a notice requesting that individuals refrain from wearing Cherry Blossom perfume (rejected)
Recent Caselaw

  – City employee sued claiming that employer failed to take action after she complained about co-workers perfume and room deodorizer
  – Employee asked co-worker to refrain, but she continued to wear the perfume
  – Employee complained to supervisor but was not relocated

Recent Caselaw

  – HR Department rejected department-wide scent policy
  – Employee took multiple sick days and FMLA leave
  – Case settled for $100,000 and city adopted policy requesting (but not requiring) employees to refrain from heavily scented products, whether personal care or room deodorizers
So Where Does That Leave Us?

• Is allergy to fragrances a disability?
  – Depends upon the facts and circumstances, but under ADAAA, if it aggravates a chronic condition, likely the answer is yes
  – Note: courts have not weighed in on whether transient adverse reaction when exposed to a specific noxious irritant in the workplace is a disability
  – Stay tuned

What About Other Allergies?

• Multiple Chemical Sensitivity Disorder
  – Environmental exposures that make people sick
  – Immune response, similar to allergies
  – Extreme sensitivity to certain smells or chemicals
  – Wide ranging symptoms, not specific
  – Controversial: not always recognized as a clinical syndrome
  – Applies to low levels of chemicals
High Levels of Chemicals Can Trigger Serious Medical Conditions

  - Janitor developed extreme sensitivity to cleaning chemicals
  - Doctor restrictions: “no exposure to cleaning solutions”
  - Janitor could not perform essential functions of position because company could not eliminate exposure to chemical and respirator would only eliminate breathing exposure, not physical contact

Employer’s Obligations Under ADAAA

- No discrimination
- Reasonable accommodation
  - Engage in the interactive process to determine if there are any reasonable accommodations that will allow the employee to perform the essential functions of his/her position
  - Remember: employee need not use any “magic words” to request accommodation
  - If employer had enough information to identify disability as issue, obligation to inquire further
### Failure to Engage in Interactive Process

- May be separate cause of action if an accommodation would have been possible
- Work with employee to identify possible solutions
- Obtain medical documentation of physical condition and impact on employee’s abilities to perform essential functions

### Failure to Engage in Interactive Process

- Document your conversations!
- Enlist the assistance of employee’s physician if necessary
- Will proposed solution be effective?
- Don’t assume that it won’t --- offer to try it out!
Questions to Consider

• What limitations is the employee experiencing?
• How do limitations affect the employee and job performance?
• What specific job tasks are problematic as a result of limitations?

What Accommodations Are Generally Reasonable?

• Reduced work schedule
• Regular time off for treatment
• Change in work location
• Flexible start time
• Transfer to another vacant position for which employee is qualified
• Leave of absence for definite period, if leave will allow employee to return to work and perform essential functions of position
### What Accommodations Are Generally Unreasonable?

- Eliminating essential functions
- Irregular, erratic, unreliable attendance
- Leave of absence for an indefinite period of time
- Anything that would be “undue hardship,” considering
  - Nature and cost of accommodation?
  - Overall financial resources of facility and company
  - Number of employees
  - Effect on expenses and resources
  - Significant difficulty or expense
- Economic hardship on company as to threaten continued viability

### What Accommodations Can You Offer?

- Ask the employee!
- Fragrance Policy
  - Regulates the type and nature of perfumes
  - Request or requirement?
  - Is total ban practical given nature of employee’s work?
  - Total ban? Odorless workplace?
    - Perfumes, aftershave, cologne, air fresheners, deodorants, lotions, candles
    - Scent-free versions of personal care products permissible
What Accommodation Can You Offer?

• Fragrance policy
  – Postings prohibiting scents
  – Training
  – Group and individual communications
• Consequences for violations
  – Wash, change clothes, leave
  – Failure to comply -> discipline

Is a Fragrance-Free Workplace Feasible?

• Recommended steps to ensure success
  – Needs assessment
  – Organizational chemical assessment, including “personal use” chemicals
  – Search for guidelines, causes and effects
  – Understand obligations under ADA and State law
## Is a Fragrance-Free Workplace Feasible?

- **Recommended steps**
  - Develop and implement policy, including employee input
  - Ensure executive level and safety officer support prior to introduction
  - Develop discipline process in advance of implementation
  - Develop strategies for communication and exceptions where necessary for business reasons

## What Other Accommodations Can You Offer?

- Provide air purification system or private air purifier
- Testing of air quality (although testing may not show levels to which employee has sensitivity)
- Discontinue the use of fragranced cleaning products
- Provide scent-free meeting rooms and restrooms
- Allow for fresh air breaks
What Other Accommodations Can You Offer?

- Fans
- Maintain/test good indoor air quality
- Change work station
- Modify work schedule
- Telecommuting
- Respirator or paper mask
- Does employee have any other suggestions?
- Office or work space with open windows or closed door
- Modified communications (e-mail, IM, memos)

Significance of Job Descriptions

- Key to defending charges of failure to accommodate
- Must list all required activities (contact with public, travel, off-site work)
- Must list all physical requirements
- Must list activities that would require presence at work
Disciplining the Complaining Employee

• Retaliation is biggest cause of action at EEOC
• Employees who ask for accommodations because of fragrance allergies have engaged in protected conduct, even if it turns out that allergy is not a disability

Disciplining the Complaining Employee

• Fair
• Consistent
• Business-Based Reason
• Documentation
Other Workplace Statutes

• Workers Compensation
  – Did fragrance allergy aggravate a previous condition?
  – State laws differ: does hazard have to be unique to the workplace and not common to the general environment? (South Carolina)

• OSHA
  – Air quality standards
  – Chemical spills that might trigger future severe reactions to otherwise innocuous fragrances

True Story

• How did agency solve the problem?
• Installed air purifier
• Told Marsha not to wear scented products
• Executive Director wore the same personal care products (hair spray, shampoo, deodorant, hand lotion) and Joan had no problem
• Eliminated her position (supported by documentation)
Sample Policies

• Attached

Questions?
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SAMPLE POLICIES

- This is a fragrance free office. Please help us to accommodate our co-workers and clients who are chemically sensitive to fragrances and other scented products. Thank you for not wearing perfume, aftershave, scented hand lotion, fragranced hair products, and or similar products.

- Given that chemically sensitive individuals may react to different products with widely varying degrees of severity, it is very difficult to ensure a consistently comfortable and accommodating work environment under every conceivable set of circumstances. Even so, it is the desire of the (company name) to minimize to the extent possible, the barriers and difficulties experienced in the workplace by both employees and clients subject to chemical/fragrance sensitivities. The (company name) requests that all offices and spaces used by the staff and their visitors remain free of chemical-based scented products.

- Company strives to ensure the comfort and safety of our employees and visitors by encouraging an environment free from smoke, fragrances, or unpleasant smells. These odors are distracting and may trigger allergic reactions or create health problems for sensitive individuals. This policy is meant to cover noticeable odors from any source, including foods, personal items, perfumes, and grooming.

- All employees must observe good habits of grooming and personal hygiene. Body odor, from any cause, should not create distractions. To accommodate sensitive individuals, employees are discouraged from:
  - wearing or applying excessive amounts of perfume, cologne, scented lotions, or body washes in the workplace;
  - using hairsprays, air freshener, or other scented products in the workplace; and
  - eating or keeping fragrant foods or items at your desk.

- Given that sensitive individuals have widely varying degrees of reaction, it’s difficult to guarantee a consistently comfortable and accommodating workplace. Still, the Company desires to minimize the barriers and difficulties experienced in the workplace by employees and clients with chemical or fragrance sensitivities.

- Company has designated the [specify, e.g., rest room or lounge or meeting room, etc.] located at [indicate location] as a “fragrance free” sanctuary for those sensitive to various odors. All scheduled meetings will be conducted in “fragrance-free” meeting rooms. Employees should be given advance notice of meetings so they can take appropriate steps to minimize fragrances.

- Supervisors will provide feedback to employees to ensure compliance with this policy. If an employee is responsible for an unpleasant or distracting odor, a supervisor may ask the employee to leave the workplace until the problem is solved.

- If a problem arises due to a disability, the Company will not discriminate against the individual because of their disability and will accommodate the individual unless it causes an undue hardship.
ATTORNEY SUSAN G. FENTIN IS A PARTNER IN THE LABOR AND EMPLOYMENT FIRM OF SKOLER, ABBOTT & PRESSER, P.C., WHICH HAS REPRESENTED EXCLUSIVELY MANAGEMENT INTERESTS FOR MORE THAN 40 YEARS. SHE IS EXPERIENCED IN TEACHING MASTER CLASSES ON BOTH THE FMLA AND ADA. HER PRACTICE CONCENTRATES ON LABOR AND EMPLOYMENT COUNSELING, ADVISING LARGE AND SMALL EMPLOYERS ON THEIR RESPONSIBILITIES AND OBLIGATIONS UNDER STATE AND FEDERAL EMPLOYMENT LAWS, AND REPRESENTING EMPLOYERS BEFORE STATE AND FEDERAL AGENCIES AND IN COURT. SHE SPEAKS FREQUENTLY ABOUT EMPLOYMENT LAW TOPICS TO INDUSTRY GROUPS AND HUMAN RESOURCE PROFESSIONALS AND IS THE EDITOR OF THE MASSACHUSETTS EMPLOYMENT LAW LETTER. SHE IS ROUTINELY NAMED A MASSACHUSETTS SUPERLAWYER, AND SINCE 2010, SHE HAS BEEN RANKED AS ONE OF THE TOP LABOR AND EMPLOYMENT ATTORNEYS IN MASSACHUSETTS BY THE PRESTIGIOUS CHAMBERS USA RATING AGENCY.