Labor and Employment Law Section
'Sniffing' Out an ADA Claim:
Chemical, Fragrance and Scent Sensitivities in the Workplace

By Kimberly Lambert Love and J. Miles McFadden

Virtually everyone has encountered perfumes, colognes, candles, room scents or cleaners that are annoying or irritating. But what happens when an employee is so sensitive to these fragrances or chemicals in the workplace that breathing becomes difficult or the employee experiences debilitating headaches, leading to medical treatment and missed work? Could this employee be "disabled" for purposes of the Americans with Disabilities Act (ADA), thereby triggering an employer's duty to reasonably accommodate the employee's sensitivity? Depending on the circumstances, the answer may very well be yes.

ARE INDIVIDUALS WITH SCENT SENSITIVITIES DISABLED FOR PURPOSES OF THE ADA?

Like all disability claims, each employee's claim of a fragrance, scent or chemical sensitivity must be analyzed on a case by case basis. No general rule necessarily holds true for all cases since the severity of one employee's condition and the proof the employee offers with respect to that condition varies from case to case. Prior to the ADA Amendments Act[1] (ADAAA) becoming effective in 2009, employers frequently argued, with success, that an employee with a fragrance, chemical or scent sensitivity was not disabled under the ADA.[2] In cases where a plaintiff managed to survive summary judgment, the plaintiff was often able to show he or she had particularly severe allergic reactions to workplace chemicals, such as formaldehyde, phenol or chemical isopropyl alcohol, which required medical treatment.[3]

However, since the ADAAA has gone into effect, courts now instead focus on whether the employer has met its obligation to reasonably accommodate the employee. For example, the District of Colorado in 2013 denied an employer's summary judgment motion involving an employee's alleged fragrance sensitivity by focusing on a post-ADAAA regulation stating that "the primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity."[4] The plaintiff's condition was not described in detail by the Colorado court, which stated only that the plaintiff was "sensitive to certain fragrances" which "causes headaches and a loss of focus and concentration."[5]

ACCOMMODATING EMPLOYEES WITH FRAGRANCE SENSITIVITIES

Even if an employee can demonstrate a disability based on a fragrance, scent or chemical sensitivity, employers can successfully defend a failure to accommodate lawsuit if the employer can show it engaged the employee in an interactive process to accommodate the disability and the employer and employee worked together to identify the employee's precise limitations and discuss options that would allow an employee to keep working.[6] Employers are required only to offer a *reasonable* accommodation to an employee, and a plaintiff bringing an ADA claim must in turn show a reasonable accommodation was possible.[7] Indeed, even in some cases where an employee

with a fragrance, chemical or scent sensitivity has successfully convinced a court there is an issue of fact as to whether they are disabled, several courts have still granted summary judgment in favor of the employer when the employer has shown it engaged in the interactive process but the requested accommodations were unreasonable. For example, in *Whillock v. Delta Air Lines, Inc.*,[8] the court granted summary judgment to an employer because the employee's requested accommodation of working entirely from home was unreasonable as a matter of law.

While the interactive process will vary from case to case, there are steps employers can take in trying to reasonably accommodate an employee with a scent sensitivity. First, if the offensive fragrances or scents are coming from cleaning products or other items over which the employer has direct control, the employer should consider discontinuing use of those products.[9] If an employee has a sensitivity to a particular fragrance used by a coworker, or a particular chemical or scent in a specific location of the workplace, relocating the employee to a separate part of the work environment where he or she would not come in contact with the fragrance would be appropriate.[10] Employers have used air testing in various worksites to find one in which an employee could work.[11] If shared spaces continue to irritate the employee's condition, then an employer may consider providing a private office for the individual, as well as installing air filtration devices and assigning restricted use restrooms.[12] Personal protective equipment, such as respirators, may also be appropriate.[13]

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Many employees have requested scent-free work environments, and some employers have attempted to have a scent-free workplace policy to accommodate that request. However, courts have recognized that a scent-free policy imposes an undue burden on an employer and is not a reasonable accommodation.[14] These courts have found scent-free policies pose too great of a financial and administrative burden for the employer, since such a policy is often difficult to enforce.[15] As one court has stated, "enforcing a scent-free policy requires a closer inspection than may be considered suitable in the workplace," which makes a scent-free policy different than a dress code, for example.[16] While a scent-free policy may not be required, other courts have recognized further reasonable accommodations, such as leave supplementing regular sick leave or personal days, might be necessary.[17]

CONCLUSION

At first blush, an employer may not recognize an employee with a fragrance, chemical or scent sensitivity as potentially having a covered disability under the ADA that would require accommodation. However, more courts are finding an employee with such sensitivities meets the definition of disabled. Accordingly, employers must now focus more on determining if a reasonable accommodation can be made for the individual's condition and considering what measures can be implemented to allow the employee to continue working.

1. In 2009, several substantive modifications to the Americans with Disabilities Act became effective through the ADAAA. Of particular note, the ADAAA specifically rejected a narrow definition of "disability" that had been crafted by the federal courts. While the statutory definition of "disability" did not change, Congress instructed federal courts to construe the term "disability" broadly and "to the maximum extent permitted." 42 U.S.C. §12102(4)(A).

2. *See, e.g., Robinson v. Morgan Stanley & Co.*, 269 Fed. Appx. 603 (7th Cir. 2008) (affirming summary judgment in employer's favor on basis that employee's sensitivity to perfumes and fragrances did not constitute a "disability" under the ADA); *Chan v. Sprint Corp.*, 351 F. Supp. 2d 1197 (D. Kan. 2005) (finding employee's hypersensitivity to cigarette smoke and other chemicals insufficient to be an actual disability under the ADA); *Farrish v. Carolina Commercial Heat Treating, Inc.*, 225 F. Supp. 2d 632 (M.D.N.C. 2002) (granting summary judgment to employer where employee failed to show breathing problems and chemical sensitivity substantially limited a major life activity); *Gits v. Minnesota Min. and Mfg. Co.*, No. 99—1925 ADM/AJB, 2001 WL 1409961 (D. Minn. June 15, 2001) (finding employee's "multiple chemical sensitivities" condition to workplace chemicals at a 3M plant did not substantially limit a major life opportunity sufficient to constitute a disability within the ADA definition).

3. *See, e.g., Treadwell v. Dow-United Techs.*, 970 F. Supp. 962 (M.D. Ala. 1997) (finding plaintiff had presented enough evidence of an extreme sensitivity to chemicals to take the issue to trial but noting defendant's evidence may strongly counter plaintiff's evidence); *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555 (N.D. Ga. 1995) (noting that plaintiff's violent reaction to fumes from mixture of water and chemical isopropyl alcohol and subsequent reaction to coworker's perfume coupled with evidence from doctors that plaintiff suffered from multiple chemical sensitivity syndrome was sufficient to send the issue to the jury, but granting summary judgment on another basis).

4. *Bouard v. Ramtron Int'l Corp.*, Civil Action No. 12-CV-00494-WYD-MJW, 2013 WL 5445846 (D. Colo. Sept. 29, 2013) (quoting 29 C.F.R. §1630.2(j)(1)(iii)).

5. *Id.* at *1 (noting that the medical term for plaintiff's condition was "chronic rhinitis" or "chronic or recurrent sinusitis"); *Bouard v. Ramtron Int'l Corp.*, 2014 WL 1389959 (D. Colo. Apr. 9, 2014) (denying

employer's motion to reconsider prior ruling denying summary judgment); *see also Brady v. United Refrigeration, Inc.*, Civil Action No. 13-6008, 2015 WL 3500125, at *10-11 (E.D. Pa. June 3, 2015) (applying relaxed standard for disability under ADAAA to find plaintiff sufficiently demonstrated she was disabled due to her "heightened sensitivity to perfumes, fragrant chemicals, and lotions" and multiple chemical sensitivity when she suffered debilitating headaches and inability to concentrate or focus for a number of hours).

6. *Valdez v. McGill*, 462 Fed. Appx. 814, 819 (10th Cir. 2012).

7. *Id*.

8. 926 F. Supp. 1555, 1563-66 (N.D. Ga. 1995

9. *See Hizer v. South Bend Tribune*, 31 F. Supp. 3d 986, 994 (N.D. Ind. 2014).

10. *Id*. at 995.

11. *Morris v. Jackson*, 994 F. Supp. 2d 38, 49 (D.D.C. 2013) (granting summary judgment to federal employer under the Rehabilitation Act, which offers federal employees remedies for disability discrimination as the ADA does for nongovernmental employees, that attempted to accommodate employee with "yeast sensitivity" by using air testing to find a suitable work location, among other measures).

12. *Id*.

13. *See Taylor v. City of Fridley*, 659 F. Supp. 2d 1029, 1047 (D. Minn. 2009) (employer attempted to accommodate employee's wood dust sensitivity by outfitting employee with respirator).

14. *See, e.g., Montanez-Denman v. Slater,* 208 F.3d 214, 2000 WL 263279 (6th Cir. 2000) (affirming summary judgment in favor of the Federal Aviation Administration under the Rehabilitation Act on the basis that it "would be impractical and virtually impossible for the FAA to enforce" the scent-free policy requested by plaintiff and noting that the accommodation is "clearly" not objectively reasonable); *Heaser v. AllianceOne Receivables Mgmt., Inc.*, No. 07-CV-2924 (JMR/FLN), 2009 WL 205209, at *3-4 (D. Minn. Jan. 27, 2009) (collecting similarly held cases).

15. *Id*.

16. *Id*.

17. *See Brady v. United Refrigeration, Inc.*, Civil Action No. 13-6008, 2015 WL 3500125, at *12 (E.D. Pa. June 3, 2015) (suggesting employers may be required to offer additional leave).

ABOUT THE AUTHORS

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Oklahoma County

This vacancy is due to the passing of the Honorable Donald Deason on July 28, 2016.

To be appointed to the office of District Judge of Oklahoma County, Office 3, one must be a legal resident of Oklahoma County Electoral Division 2 at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both, within the State of Oklahoma.

Application forms can be obtained on line at www.oscn.net under the link to Programs, then Judicial Nominating Commission, or by contacting Tammy Reaves, Administrative Office of the Courts, 2100 N. Lincoln, Suite 3, Oklahoma City, Oklahoma 73105, (405) 556-9862. Applications must be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Friday, October 7, 2016. If applications are mailed, they must be postmarked by midnight, October 7, 2016.**

John H. Tucker, Chairman
Oklahoma Judicial Nominating Commission