2.26 FAILURE TO ACCOMMODATE EMPLOYEE WITH DISABILITY UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION (Approved 02/2013; Revised 01/2025)

NOTE TO JUDGE

The instructions set forth herein apply to claims of failure to accommodate a disability within the context of a past or present employment relationship. In *Players Place II Condo. Ass'n, Inc. v. K.P.*, 256 *N.J.* 472 (2024), the Supreme Court held that requests for reasonable accommodation(s) in housing under New Jersey's Law Against Discrimination ("LAD") should be evaluated using a similar, albeit abridged, framework.

Specifically, "[i]ndividuals who seek an accommodation must show that they have a disability under the LAD and demonstrate that the requested accommodation may be necessary to afford them an 'equal opportunity to use and enjoy a dwelling.' N.J.A.C. 13:13-3.4(f)(2). Housing providers then have the burden to prove the requested accommodation is unreasonable." *Players Place II*, 256 *N.J. at* 493. In a collaborative and interactive process, similar to that required of employers and employees, parties should engage in a good-faith exchange of information relative to the accommodation request. If the process fails, a fact-finder will be required to determine the reasonableness of the accommodation by balancing the need for, and benefits of, the requested accommodation to the resident against its costs and burdens to the housing provider. *Id. (*citing *Oras v. Hous. Auth. of Bayonne*, 373 *N.J. Super.* 302, 316-17 (App. Div. 2004)).

Accordingly, this charge can be modified as needed to address the specific facts of a failure to accommodate claim asserted against a housing provider – keeping in mind that a plaintiff resident must establish (1) diagnosis of a disability and (2) necessity of the accommodation. *Players Place II,* 256 *N.J.* at 494-95. If a resident makes such a showing, the burden shifts to the housing provider to prove that the accommodation "would fundamentally alter the housing provider's operations or impose an undue financial or administrative burden on the housing provider." *Id.* at 497 (citing DCR Guidance materials regarding emotional support animals). If either side fails to

meet its burden, the jury should be instructed to enter a verdict in favor of the adverse party.

However, the interactive process described in this charge does not apply to individuals who use service animals, which are not subject to a balancing test. N.J.A.C. 13:13-3.4(c) ("It is unlawful for any person to fail or refuse to show, rent or lease any real property to a person because he or she is a person with a disability who is accompanied by a guide or service dog or animal"). "Service dog[s]" are "trained to the requirements of a person with a disability including … minimal protection work, rescue work, pulling a wheelchair or retrieving dropped items." N.J.S.A. 10:5-5(dd). Therefore, this charge should not be used in connection with such a claim.

Plaintiff claims that defendant unlawfully failed to accommodate plaintiff's disability. Specifically, plaintiff argues that defendant should have *[insert description of accommodation at issue, such as "modified plaintiff's job duties" or "modified plaintiff's work schedule" or "granted plaintiff a leave of absence" or "transferred plaintiff to another open position for which plaintiff was qualified", etc.]*. Defendant argues that *[insert description of defendant's position, such as "plaintiff did not have a disability" or "no accommodation would have enabled plaintiff to perform the essential functions of plaintiff's job" or "it was not aware that plaintiff needed an accommodation" or "the accommodation plaintiff sought was not reasonable" or "the accommodation it provided to plaintiff was adequate", etc.]*.

To win plaintiff's case, plaintiff must prove each of the following elements by a preponderance of the evidence. First, plaintiff must prove that plaintiff had a

disability. Second, plaintiff must prove that plaintiff was able to perform all of the essential functions of the job, either with or without a reasonable accommodation. Third, plaintiff must prove that defendant was aware of plaintiff's need for a reasonable accommodation. Fourth, plaintiff must prove that there was an accommodation that would have allowed plaintiff to perform the essential functions of plaintiff's job. Fifth, plaintiff must prove that defendant denied plaintiff accommodation. A plaintiff does not have to prove an adverse employment action separate and apart from the failure to accommodate itself to prove a failure to accommodate claim.[1]

To prove the first element of plaintiff's claim, which is that plaintiff had a disability, plaintiff must show that plaintiff had either (a) a physical condition caused by injury, birth defect, or illness or (b) a mental, psychological, or developmental condition that either (i) prevents the normal exercise of any bodily or mental functions or (ii) can be demonstrated medically or psychologically by accepted clinical or laboratory diagnostic techniques.[2] Plaintiff's disability need not be particularly serious or permanent to qualify under the law.[3]

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[1] *Richter v. Oakland Board of Education*, 246 *N.J.* 507, 529-32 (2021).

[2] *N.J.S.A.* 10:5-5(q).

[3] *See, e.g., Viscik v. Fowler Equip. Co.*, 173 *N.J.* 1, 16 (2002) (noting that "the term 'handicapped' in LAD is not restricted to 'severe' or 'immutable' disabilities"); *Enriquez v. West Jersey Health Systems*, 342 *N.J. Super.* 501, 519 (App. Div. 2001) (observing that LAD "is very broad and does not require that a disability restrict any major life activities to any degree"); *Soules v. Mount*

In determining whether plaintiff has proven the second element of plaintiff's claim, which is that plaintiff was able to perform all of the essential functions of plaintiff's job, you must consider which job functions were truly essential. Whereas plaintiff bears the burden of proving that plaintiff could perform the essential functions of plaintiff's job with or without reasonable accommodation, if there is a dispute between the parties about whether a particular job function is essential, defendant bears the burden of proving that the function is essential.[4]

In determining whether a job function is essential, you should consider the following principles:

a) A function may be essential because the reason the position exists is to perform the function;

b) A function may be essential because of the limited number of employees among whom that work can be distributed; and

c) A function may be essential because it is highly specialized and the person doing the job is chosen because of the person's expertise.

Holiness Memorial Park, 354 *N.J. Super.* 569 (App. Div. 2002) (holding that plaintiff employee with cancer who needed eight months off from work to recuperate from surgical removal of kidney was "handicapped" for purposes of LAD despite fact that disability was temporary).

[4] *Sturm v. UAL Corp.*, Civil Action No. 98-264, 2000 U.S. Dist. LEXIS 13331 (D.N.J. Sept. 5, 2000) (holding under LAD that "employer bears the burden of establishing the necessity of certain functions to the job in question").

In deciding whether a job function is essential, you should consider written job descriptions, the amount of time that the person doing the job spends performing that particular function, the consequences of not requiring the person doing the job to perform that particular function, the terms of any union collective bargaining agreement that applies to the job, and whether other employees doing that job or similar jobs are required to perform that particular function.[5]

The third element that the plaintiff must prove is that defendant was aware of plaintiff's need for an accommodation. In many cases, plaintiff will do so by offering evidence that plaintiff requested an accommodation from defendant. It is not necessary that requests for accommodation be in writing or even use the phrase "reasonable accommodation".[6] An employee may use plain English and need not mention any law requiring accommodation.[7] Although there are no magic words that the employee must use, the employee must make clear to the employer that the employee needs some assistance in performing the job because of the employee's disability.[8] However, plaintiff need not prove that plaintiff requested an

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[5] These principles are drawn directly from 29 *C.F.R.* §1630.2(n), which is the federal regulation defining "essential functions" under the federal Americans with Disabilities Act. There is no definition of "essential functions" in the LAD, the New Jersey regulations promulgated under the statute, or New Jersey state court case law interpreting the statute.

[6] *Tynan v. Vicinage 13 of Superior Court of New Jersey*, 351 *N.J. Super*. 385, 400 (App. Div. 2002), *certif. denied*, 183 *N.J*. 215 (2005).

[7] *Ibid.*

[8] *Ibid.*

accommodation if plaintiff can prove that defendant knew about plaintiff's need for accommodation in some other way.[9]

The fourth element that plaintiff must prove is that there was an accommodation that would have allowed plaintiff to perform the essential functions of plaintiff's job. Examples of reasonable accommodation include (a) making facilities used by employees accessible and usable by people with disabilities, (b) job restructuring, (c) part-time or other modified work schedules, (d) leaves of absence, (e) getting or modifying equipment or devices to allow employees with disabilities to do the job, and (f) transfer to another open position for which the employee with a disability is qualified.[10]

The last element that plaintiff must prove is that defendant denied plaintiff accommodation. It is important to note that if more than one accommodation would allow the employee to perform the essential functions of the job, the employer has the final say to choose between those effective accommodations, and may choose

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[9] *See, e.g., Lasky v. Borough of Hightstown*, 426 *N.J. Super*. 68, 78 (App. Div. 2012) (holding that when plaintiff's need for accommodation is obvious, there is no requirement that plaintiff request accommodation before filing suit in order to prevail on failure-to-accommodate claim); *N.J.A.C.* 13:13-2.5(b)(2) (requiring employer to consider reasonable accommodation before firing, demoting, or refusing to hire or promote person with disability on grounds that disability precludes job performance).

[10] This list of potential accommodations is drawn from *N.J.A.C.* 13:13-2.5(b)(1). It is not intended to be exhaustive.

the less expensive or less difficult accommodation.[11] If defendant argues that the accommodation sought by plaintiff would have placed an undue hardship on it, then defendant has the burden of proving that undue hardship.[12] In determining whether an accommodation would impose undue hardship on the operation of an employer's business, you should consider the following factors: (a) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget; (b) the type of the employer's operations, including the make-up and structure of the employer's workforce; (c) the nature and cost of the accommodation needed, taking into consideration the availability of tax credits and deductions and/or outside funding; and (d) the extent to which accommodation would involve taking away an essential function of the job.[13]

NOTE TO JUDGE

> The following charge [in brackets] should be given on the fifth element of the *prima facie* case where the plaintiff alleges that the defendant has failed to engage in the interactive process. The charge should be given in lieu of the preceding paragraph in the standard charge.

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[11] *Victor v. State*, 203 *N.J.* 383, 424 (2010).

[12] *N.J.A.C.* 13:13-2.5(b) (requiring employer to provide reasonable accommodation "unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business").

[13] *N.J.A.C.* 13:13-2.5(b)(3).

[The last element that plaintiff must prove is that the defendant did not make a good faith effort to find a reasonable accommodation, which would have allowed the plaintiff to perform the essential functions of the job. Once the employer has become aware of the employee's need for assistance, an employer must initiate an informal interactive process with the employee to determine what appropriate accommodation is necessary to permit the employee to perform the essential functions of the job.[14] This process must identify the potential reasonable accommodations that could be adopted to overcome the employee's precise limitations resulting from the disability.[15] Engaging in the interactive accommodation process does not dictate that any particular concession must be made by the employer, but instead what it requires is that the employer make a good-faith effort to seek accommodations.[16] "Good faith" means that the employer acted honestly in its attempt to find a reasonable accommodation.

If defendant argues that a particular accommodation would have placed an undue hardship on it, then defendant has the burden of proving that undue hardship.[17]

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[14] *Tynan*, 351 *N.J. Super*. at 400.

[15] *Ibid.*

[16] *Victor*, 203 *N.J*. at 424.

[17] *N.J.A.C.* 13:13-2.5(b) (requiring employer to provide reasonable accommodation "unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business").

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In summary, to win on plaintiff's claim, plaintiff must prove that it is more likely than not that (1) plaintiff had a disability; (2) plaintiff was able to perform all of the essential functions of plaintiff's job, either with or without a reasonable accommodation; (3) defendant was aware of plaintiff's need for a reasonable accommodation; (4) there was an accommodation that would have allowed plaintiff to perform the essential functions of plaintiff's job; and (5) defendant denied plaintiff accommodation. If you find that plaintiff failed to prove any of these elements by a preponderance of the evidence, you must render a verdict in favor of defendant.

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[18] *N.J.A.C.* 13:13-2.5(b)(3).

NOTE TO JUDGE

In cases in which the plaintiff alleges a failure to engage in the interactive process, the fifth prong of the preceding paragraph should be modified as follows:

(5) defendant did not make a good-faith effort to find a reasonable accommodation.