

Take That! EEOC Says Stealing May Be a 'Reasonable' Disability Accommodation

We all understand that granting reasonable accommodations under the Americans with Disabilities Act (ADA) may include providing employees with a new chair, changing work schedules or granting more flexible breaks. But a new case this month says employers may have to allow a worker to *steal their own merchandise* as a reasonable accommodation. Really? What's reasonable about that? Grab a bag of chips and read on ...



Case in Point: Long-time Walgreens employee Josephina Hernandez had diabetes, so store managers gave her permission to bring candy to work in case of low blood sugar or a hypoglycemic attack.

One day Hernandez had such an attack while stocking shelves, but she didn't have any candy on her. So, she grabbed a bag of chips off the shelf and started eating them to raise her blood sugar. She allegedly tried to pay for the \$1.39 chips soon after eating them, but nobody was at the counter where employees paid for store merchandise.

Walgreens has a strict "anti-grazing" policy so it fired Hernandez for taking merchandise before paying for it. The EEOC took up the cause and sued on behalf of Hernandez, claiming Walgreens had a duty under the ADA to provide a reasonable accommodation "which may require an employer to be flexible and open-minded." That, the EEOC said, should include allowing the employee to take a \$1.39 bag of chips before paying for it.

Walgreens defended the claim by saying it loses more than \$350 million per year because of worker theft and, therefore, the company applies its anti-grazing policy uniformly. Employees are consistently fired for theft, regardless of their rank, employment history or the value of the items taken.

Result: The court denied Walgreen's request for summary judgment and sent the case to a jury, saying employee misconduct resulting from a disability could be considered to be part of the disability. The court noted that, "whether Walgreens should have been required to 'accommodate' (the employee's) stealing as a 'reasonable' accommodation is for the jury to determine." ([EEOC v. Walgreen Co.](#), N.D. Cal., No. 3:11-cv-04470, 4/11/14)

When it filed the suit, the EEOC issued a [press release](#) saying that, "accommodating disability does not have to be expensive, but it may require an employer to be flexible and open-minded. One wonders whether a long-term, experienced employee is worth less than a bag of chips to Walgreens."

3 Lessons Learned ... Without Going To Court

1. **Take.** Take a lesson from this case and consult your legal team before terminating any employee with a disability.

2. **Loot.** Business records showing you consistently terminate all employees for violating policies may be good loot for defending employment lawsuits.
3. **Pinch.** Pinch yourself. Stealing may join the list of reasonable accommodations.