



**ADMINISTRATIVE INSTRUCTION**

Subject::	<b>Procedures for Providing Reasonable Accommodation and Engaging in an Interactive Process Pursuant to the Fair Employment and Housing Act and the Americans with Disabilities Act</b>	Number:	139 (revised)
Reference:	AI 71	Effective:	April ____, 2008
Supersedes:	AI 139		

**I. PURPOSE OF POLICY**

This Policy has two purposes: (1) to outline procedures for providing reasonable accommodation to job applicants and employees who are qualified individuals with disabilities, and (2) to ensure uniform application of City procedures.

**II. POLICY**

The City of Oakland is committed to equal employment opportunity and to providing reasonable accommodation for disabled individuals who are employees or applicants for employment. The City will not tolerate discrimination against qualified individuals with disabilities in any aspect of employment, including but not limited to recruitment, application procedures, termination, promotion, compensation or any other term or condition of employment. Reasonable accommodation will be provided in a timely and cost-effective manner. Employment opportunities shall not be denied because of the need to make reasonable accommodation for an individual's disability.

**III. DEFINITIONS AND APPLICATIONS**

Unless a different meaning clearly appears from the context, terms used in this policy are defined by reference to California Government Code § 12926. A copy of the definitions that pertain to this policy is attached as Appendix A.

This Policy applies to all employees and job applicants, whether classified or unclassified, and is in addition to all federal, state, and local laws.

#### **IV. PROCEDURE FOR REQUESTING AN ACCOMMODATION**

##### **A. Applicants for Employment**

All applicants who are invited to interview or to take an employment examination by the City will be informed at the time of the invitation that the City will provide reasonable accommodation for applicants and employees with disabilities.

Applicants must request accommodations for the examination process at least five business (5) days prior to the final filing date for receipt of applications. The request should be sent to the individual responsible for the exam in the Office of Personnel, 150 Frank H. Ogawa Plaza, 2<sup>nd</sup> Floor, Oakland, CA 94612-2019 or by phone at (510) 238-3112 or TDD (510) 238-6930. If accommodations are requested, the applicant shall document the accommodation request by filling out a Voluntary Disability Accommodation Request Form along with a doctor's note verifying the need for an accommodation. If the Office of Personnel receives such requests, it must either grant the request or confer with both the Disability Coordinator in the Equal Opportunity Programs Division (EOPD) and the Office of the City Attorney (OCA).

##### **B. Interviews**

Applicants may be asked questions regarding their ability to perform specific job duties. These questions shall be prefaced with a statement regarding the City's willingness to provide reasonable accommodation. Applicants may not be asked whether they have a disability, or any other questions related to their health, physical condition, or disabilities.

After describing the functions and duties of the job, an applicant may be asked questions about his or her ability to perform job-related functions, such as, "Do you have the ability to perform all the duties of this job?" or, "This job requires the ability to \_\_\_\_\_. Can you perform that function?"

If an applicant indicates in the interview process that the applicant has a disability or that the applicant may need an accommodation, follow-up questions regarding the job-related impact of any such disability or the any proposed accommodation may be asked. No questions may be asked regarding the identity of the disability.

##### **C. Offers of Employment**

The City may make a job offer that is conditioned upon the applicant's ability to pass a medical or psychological examination designed to determine if the applicant can perform job related functions if the following criteria are met: 1) the examination is job-related and consistent with business necessity; and 2) all entering employees in the same job classification are subject to the same examination. The City may also require a medical or psychological examination in order to determine whether a requested accommodation is

medically necessary. An individual with a disability who is an applicant for a position will not be denied employment solely on the basis of a disability or the need for reasonable accommodation.

If an individual with a disability has been given a conditional job offer, the notice from the Personnel Department to the selected candidate may state:

“It is the policy of the City to comply with state and federal law regarding employees and applicants for employment with disabilities. A physical or mental disability does not constitute a bar to employment and will be considered only as it relates to your ability to perform the job in question.

Employment opportunities will not be denied because of the need to make a reasonable accommodation.”

All requests for workplace accommodations shall be made in writing through submission of a Voluntary Disability Accommodation Request Form to EOPD that includes a portion which must be completed by a physician, verifying the medical need for accommodation.

An applicant may be rejected due to disability only if:

1. The applicant is unable to perform the essential job functions even with a reasonable accommodation; OR
2. The applicant cannot perform essential duties without endangering the applicant’s health or safety or the health or safety of others, even with reasonable accommodation; AND
3. The City has considered all information that the applicant has submitted.

#### D. Employees

As part of the employee hiring and orientation process, employees will be asked to sign a written notice acknowledging receipt of this policy and their right to request reasonable accommodation.

All requests for workplace accommodations shall be made in writing using a Voluntary Disability Accommodation Request Form that includes a portion that must be completed by a physician, verifying the medical need for accommodation. All requests must be submitted to EOPD.

If a department becomes aware that an employee may have a disability that interferes with the employee's ability to perform the essential functions of the job, it must make the employee aware that the City would like to engage in an interactive process with the employee directed at ascertaining whether the employee would like accommodation.

## **V. THE INTERACTIVE AND DECISION-MAKING PROCESS**

### **A. The Interactive Process**

After EOPD reviews a Disability Accommodation Request Form, it may ask an employee to supply additional information, such as further documentation of the existence of a disability. The City will consider all information the employee or applicant may submit.

EOPD and the department shall jointly engage in an interactive process with the employee. EOPD and the Department of Personnel shall engage in an interactive process with an applicant for employment. An interactive process requires direct (in-person, if feasible) contact with the employee or applicant. The City will consult with anyone else who may have pertinent knowledge, and/or it may send the employee to a physician retained by the City to independently determine if accommodation is medically necessary and will enable the employee to perform the essential functions of the employee's job.

The interactive process meeting(s) will be conducted in good faith in order to determine effective reasonable accommodations. More than one meeting with an employee may be required in order to determine whether reasonable accommodation is appropriate and possible, and/or to determine the particular accommodation(s) that the City will offer.

### **B. The Decision Making Process**

#### **1. Factors Used in Decision Making Process**

The following, non-exclusive factors will be considered in determining the necessity for accommodation and the reasonableness of particular accommodations:

- a. Has the condition been medically substantiated?
- b. Is there verification that the accommodation is medically necessary?
- c. Are the job functions for which the accommodation is requested essential: are they frequently performed or critical to City operations or necessary for the safety of employees or the public?

- d. Does the accommodation involve delegation of non-essential functions?
- e. Is the applicant or employee otherwise qualified to perform the essential job functions?
- f. Does the requested accommodation achieve the desired result of allowing the individual to perform the essential functions of the job?
- g. Will the accommodation endanger the health or safety of the employee or other employees?
- h. What will the accommodation cost?
- i. Are there other, more cost-effective options or accommodations that will also allow the individual to perform the essential functions of the job?
- j. If the request is for equipment, will the request for equipment principally benefit job performance, or is it primarily something of a personal nature that an individual could be expected to provide?

## 2. Examples of Reasonable Accommodation.

Reasonable accommodation may, but does not necessarily include, nor is it limited to, the following measures:

- a. **Accessibility.** Making existing facilities used by employees readily accessible and usable by individuals with disabilities.
- b. **Job or Examination Process Restructuring.** Job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions.

## 3. Factors Used to Evaluate Whether a Reasonable Accommodation May Impose an Undue Hardship on the City and Need Not Be Provided

“Undue Hardship” means an action requiring significant difficulty or expense, when considered in light of the following factors:

- a. Nature and cost of the accommodation
  - b. Overall financial resources of the City
  - c. Impact of the accommodation on resources and/or efficient operations
4. Procedure for Accepting or Rejecting Accommodation:
- a. Acceptance: If EOPD and the department agree to an accommodation, EOPD and the Department shall maintain a record of that decision. The record shall include any time restrictions placed on the accommodation and the expected date of the accommodation’s implementation.
  - b. Rejection: If EOPD and the department contemplate denial of a request or do not have sufficient funding to grant it, EOPD and the department must obtain approval from the Office of the City Attorney before rejecting the request for accommodation.
5. Notice to the City that An Employee May Require Accommodation
- Should the City acquire knowledge that an individual may require accommodation, such as through observation of an employee or from the City’s workers’ compensation administrator, EOPD will contact the employee to ascertain whether the employee desires reasonable accommodation. The City will not presume that an employee can not be returned to or accommodated in the position the employee holds based solely on information received from its workers’ compensation administrator or other third party. The City does not require that employees be fully healed from prior injuries to be returned to their jobs. Rather, they must be able to perform the essential functions of their jobs, with or without accommodation. If any uncertainty exists as to whether an employee can perform the essential functions of the employee’s job, with or without accommodation, the employee will be sent for a fitness-for duty exam.
6. If an employee has a disability and if the employee can not be accommodated in the position the employee holds, the employee will be informed that the employee is eligible to be considered for an alternative placement in the City, as described below. The Office of the City

Attorney must approve any determination that an employee can not be accommodated in the position the employee currently holds.

7. The employee will be informed of any decision regarding an accommodation request in writing, within ten days, although this deadline may be extended if necessary to explore effective or alternate accommodations.
8. Employees may be given the opportunity to provide for their own accommodations. An employee who wishes to do so may inform either the employee's department or EOPD, which shall confer about the request.
9. In all cases, the Disability Accommodation Request Form and associated documents will be distributed, with copies to the employee, EOPD and the department. Documents containing medical information will be kept in a separate, confidential, locked file. Supervisors, managers, first aid and safety personnel, and government officials who are investigating the City's compliance with ADA/FEHA requirements may have access to this information.
10. Each department must designate an individual who will be responsible for ensuring that an accommodation that is granted has been implemented in a timely fashion. EOPD will contact the department to monitor implementation of reasonable accommodations.
11. Once an accommodation is implemented, the department will periodically monitor it over the next six months to determine if it is still the most reasonable and effective accommodation. It shall be the employee's responsibility to comply with the terms and limitations, if any, for the accommodation.
12. Departments shall take special care to separate performance and/or discipline issues from issues arising out of a disability or accommodation and shall consult with both EOPD and the Office of the City Attorney if questions arise concerning this determination. It is understood that misconduct and/or performance problems unrelated to the disability shall be dealt with in accordance with the City's disciplinary process. Any changes in an accommodation shall first be cleared with EOPD and the Office of the City Attorney.

## **VI. TRANSFER TO A VACANT POSITION IN THE CITY AS A REASONABLE ACCOMMODATION**

- A. An individual will be considered for transfer to a vacant position in the City if the City has been unable to accommodate the employee in the employee's current job. An individual will be considered for vacancies that arise during the six months after it has been determined that the employee can not be accommodated in the employee's current job.
- B. An individual is deemed qualified for a new position if he or she demonstrates that he or she has the minimum skills, knowledge and abilities to perform the duties of the job and the new job would not be a promotion.
- C. In order to ascertain the individual's skills, knowledge and abilities, the Personnel Department's reassignment coordinator will ask the individual to submit a current resume as well as all information relevant to such an assessment. Each individual will be requested to attend a meeting with the coordinator to review his or her qualifications. Individuals will also be sent a list of vacancies that arise during the six month period. If individual circumstances change, such as through changes in the employee's disability, the individual must alert both EOPD and the reassignment coordinator to the change in circumstances.
- D. If an individual is placed into a new position as an accommodation, the employee will be placed in the salary range that is appropriate according to City policy.

## **VII. REFUSAL OF ACCOMMODATION**

An employee who needs accommodation to perform essential job functions, but rejects the City's offer of an effective reasonable accommodation will not be further considered for reasonable accommodation.

## **VII. RETALIATION AGAINST A PERSON BECAUSE OF REQUEST FOR REASONABLE ACCOMMODATION**

The City strictly prohibits retaliation against anyone who has engaged in protected activity, which includes the following: (1) requesting or expressing a need for a reasonable accommodation of a disability; (2) filing a complaint regarding the City's failure to provide a reasonable accommodation; (3) participating in an investigation or proceeding related to such a complaint; (4) opposing any practice or conduct that violates this Policy. Retaliation includes, but is not limited to, as any adverse action, including discharge, discipline, demotion or transfer that would deter a reasonable employee from engaging in protected activity.

## **IX. POLICY WILL BE INTERPRETED IN ACCORDANCE WITH FEDERAL AND STATE LAW**

This Policy will be interpreted in a manner that is consistent with state and federal law regarding discrimination against qualified individuals with disabilities, such as California's Fair Employment and Housing Act, and the Americans with Disabilities Act.

## **X. RESPONSIBILITIES OF MANAGERS AND SUPERVISORS**

City managers and supervisors are responsible for conducting themselves appropriately and for complying with this Policy, participating in the City's training program, and ensuring that staff members receive training. Managers and supervisors are also responsible for monitoring the environment to ensure that it is free of conduct that violates this Policy, making subordinates aware of the City's reasonable accommodation policy, explaining the complaint procedure available to employees and reporting all complaints and violations of this Policy of which they become aware. Failure to report complaints or violations of this Policy may result in disciplinary action up to and including termination.

## **XI. DISSEMINATION OF POLICY**

All agency and/or department directors and managers are responsible for making sure a copy of this Policy is provided to all current employees and newly hired employees.

### **XIII. FILING WITH EXTERNAL AGENCIES**

All employees and applicants have the right to file complaints with an external agency. The location and telephone numbers of the California Fair Employment and Housing (DFEH) and the Equal Employment Opportunity Commission (EEOC) are listed in the telephone book and are available through the Equal Opportunity Programs Division.

**APPENDIX A TO PROTOCOL FOR PROVIDING REASONABLE ACCOMMODATIONS AND ENGAGING IN INTERACTIVE PROCESS REGARDING REASONABLE ACCOMMODATIONS UNDER THE AMERICANS WITH DISABILITIES ACT AND CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT**

"Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

(B) Written job descriptions prepared before advertising or interviewing applicants for the job.

(C) The amount of time spent on the job performing the function.

(D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(b) "Medical condition" means either of the following:

(1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer.

(2) Genetic characteristics. For purposes of this section, "genetic characteristics" means either of the following:

(A) Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or his or her offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder.

(B) Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or his or her offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

(c) "Mental disability" includes, but is not limited to, all of the following:

(1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:

(A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.

(C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

"Mental disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(c) "Physical disability" includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

"Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) "Physical disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(d) Notwithstanding the definitions above, if the definition of "disability" used in the Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined above, or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions above.

(e) "Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(f) "Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(g) "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) The nature and cost of the accommodation needed.

(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.

(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity.

(5) The geographic separateness, administrative, or fiscal relationship of the facility or facilities.