

Wonderful World of Reasonable Accommodations: **ADA/PWFA/Title VII (Religion)**

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The Laws

The Laws:

The Americans with Disabilities Act (ADA)

The Pregnant Workers Fairness Act (PWFA)

Title VII of the Civil Rights Act of 1964 (Religion)



So, they are all the same, right?

Focus and Approaches

Fundamentally, the laws address reasonable accommodations in the same way. All three require employers to reasonably accommodate employees, all three utilize the interactive process, and all three use the same terminology.

However, there are some basic differences between them that impact our focus and approach in considering possible accommodations.



How are they the same?

Basic Concepts and Terminology

- ▶ Employers have an affirmative responsibility to reasonably accommodate **covered** employees (with disabilities, who are pregnant, and who hold sincerely held beliefs)
 - ▶ Engage in the **interactive process** with the employee
 - ▶ Process starts when the need is apparent
 - ▶ Accommodation should not cause the employer an **undue hardship**
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When Does the Interactive Process Begin?

- ▶ **When the need becomes apparent**
 - ▶ Either because the applicant/employee requests an accommodation, or
 - ▶ The need for an accommodation is obvious
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How are they different?



Coverage



ADA Coverage

- ▶ A physical or mental impairment
 - ▶ Is the person more impaired than **most** people?
 - ▶ Also includes bodily functions: ex) the employee's endocrine system doesn't work as well as **most** people's (Diabetes) = covered
 - ▶ No duration requirement
 - ▶ **Employer can verify the need for the accommodation**
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PWFA Coverage

- ▶ An applicant or an employee who has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions
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PWFA Coverage

- ▶ Very similar to the ADA in that when it comes to possible accommodations, the focus is on the limitation and job, and not on the condition itself, other than that it be connected to pregnancy or childbirth.
 - ▶ Qualified: Can perform the essential functions of the job with or without a reasonable accommodation.
 - ▶ **Employer can verify need for the accommodation**
 - ▶ **There will be situations that fall under both the PWFA and ADA (conditions related to pregnancy)**
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PWFA Coverage

▶ **Qualified:**

- ▶ “...An employee or applicant who, **with or without reasonable accommodation**, can perform the essential functions of the position. Additionally, the proposed rule also states that an employee or applicant shall be considered qualified if:
- ▶ **(1)** any inability to perform an essential function is for a temporary period;
 - ▶ **(2)** the essential function could be performed in the near future (40 weeks – each instance); and
 - ▶ **(3)** the inability to perform the essential function can be reasonably accommodated.”
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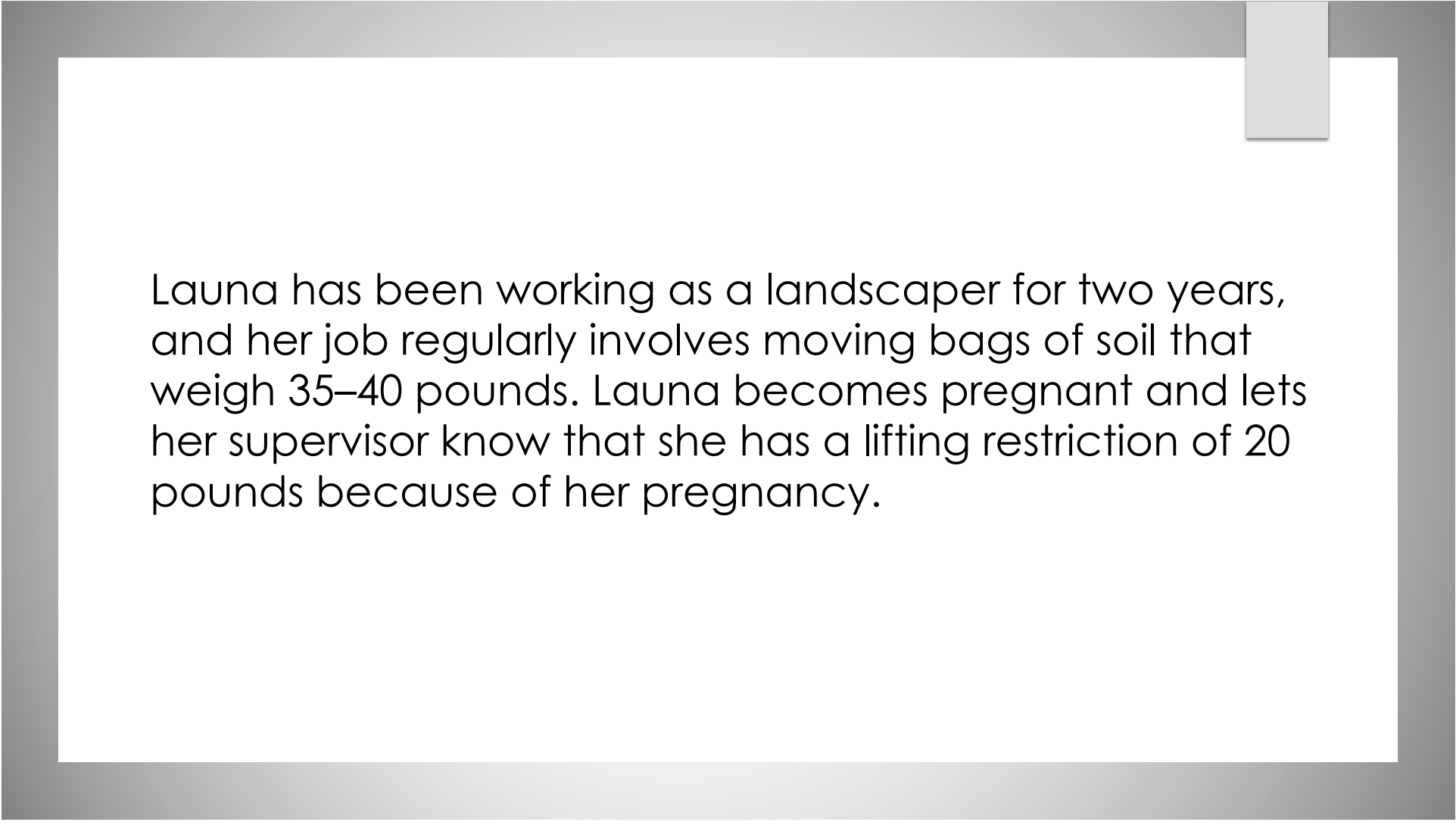
PWFA Coverage

- ▶ **Perform essential functions with or without RA**
 - ▶ A pregnant cashier who needs a stool to perform the job will be qualified with the reasonable accommodation of a stool.
 - ▶ A teacher recovering from childbirth who needs additional bathroom breaks will be qualified with a reasonable accommodation that allows such breaks.
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PWFA Coverage

- ▶ **1) Temporary inability 2) Can be performed in near future 3) Inability can be reasonably accommodated**
 - ▶ A pregnant police officer is unable to perform patrol duties during the third through ninth months of the pregnancy, patrol duties are an essential function of the job, and there is not a reasonable accommodation that will allow the worker to perform the essential functions of the patrol position.
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Launa has been working as a landscaper for two years, and her job regularly involves moving bags of soil that weigh 35–40 pounds. Launa becomes pregnant and lets her supervisor know that she has a lifting restriction of 20 pounds because of her pregnancy.



One month into a pregnancy, Akira, a worker in a paint manufacturing plant, is told by her health care provider that she should avoid certain chemicals for the remainder of the pregnancy. One of the essential functions of this job involves regular exposure to these chemicals. Akira talks to her supervisor, explains her limitation, and asks that she be allowed to switch duties with another worker whose job does not require the same exposure but otherwise involves the same functions. There are numerous other tasks that Akira could accomplish while not being exposed to the chemicals.



Religion Coverage under Title VII?

- ▶ Maybe not be what you think
 - ▶ Defined more along the lines of how we define personal faith
 - ▶ Has an explanatory quality:
 - ▶ Life
 - ▶ Death
 - ▶ Purpose
 - ▶ Deistic/non-Deistic/non-faith (**Sincerely held**)
 - ▶ Sincere beliefs held with the strength of traditional religious views
 - ▶ May have two people of same “religion” who hold different beliefs
 - ▶ **Protected even if you are the only person in the world to hold those beliefs**
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Religion Coverage under Title VII?

- ▶ Protected even if you are the only person in the world to hold those beliefs
 - ▶ Title VII and the Courts have not offered a way to verify a sincerely held belief
 - ▶ **Employers should assume the stated belief is sincerely held unless it has objective evidence showing the belief is not sincere.**
 - ▶ This is unlike the ADA and PWFA, which allow employers to verify conditions
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The Interactive Process



ADA Interactive Process

- ▶ The employer brings information to the table about the job, and the employee brings information to the table about their disability
 - ▶ Employer can request:
 - ▶ Information on whether the accommodation requested works
 - ▶ Whether there are other possible accommodations which work equally well as the one requested
 - ▶ Whether the accommodation needed creates an undue hardship
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ADA Interactive Process

- ▶ If two or more accommodations work equally well, the employer decides which accommodation it will provide
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PWFA Interactive Process

- ▶ For the most part, the interactive process under the PWFA works identically to the ADA. The PWFA was modeled on the ADA. However, there are some noteworthy stipulations and exceptions that address longstanding issues of pregnancy discrimination.
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PWFA - The Interactive Process

Employer cannot require an employee to accept an accommodation other than one arrived at through the interactive process.

Windy way of saying, must go through the interactive process.



Why?

- ▶ Pregnant women are protected from employment discrimination through Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act (PDA)
 - ▶ PDA states that the pregnant woman and her physician are the sole authorities on what the pregnant woman can and cannot do, not the employer
 - ▶ **PWFA provision guarantees that this protection remains in place**
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PWFA - Cannot Deny Employment Opportunities

Employer cannot deny employment opportunities to the employee if the denial is based on the pregnant employee's need for a reasonable accommodation.



Why?

- ▶ Pregnant women are protected from employment discrimination through Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act (PDA)
 - ▶ The PDA states that pregnant women should not be denied employment opportunities because they are pregnant.
 - ▶ **PWFA extends this protection so that employers cannot deny employment opportunities because the pregnant employee needs an accommodation.**
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PWFA - Cannot Force Leave

Employer cannot require the employee to take leave, whether paid or unpaid, if another accommodation can be applied to the known limitation.



Why?

- ▶ Pregnant women are protected from employment discrimination through Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act (PDA)
 - ▶ Common form of pregnancy discrimination prohibited by the PDA is forcing the pregnant employee to take leave even when her physician clears her for work.
 - ▶ ADA states that if two or more accommodations work equally well, the employer decides which one it will provide.
 - ▶ **PWFA makes sure employers don't discriminate against the pregnant employee through the ADA**
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Question Break:

The difference between the PWFA and the ADA



Undue Hardship



ADA Undue Hardship

An employer is not obligated to provide an accommodation if doing so is cost prohibitive to its on-going operation or overly disruptive.



Undue Hardship Considerations (ADA)

- i. the nature and cost of the accommodation;
 - ii. the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
 - iii. the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
 - iv. the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.
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Undue Hardship Considerations (ADA)

- v. “[t]he Impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business.” 29 C.F.R. § 1630.2(P)(2)(v).
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PWFA Undue Hardship

Undue hardship standard is the same as the ADA's



Religion Undue Hardship

- **Groff v DeJoy – US Supreme Court, 06/23**
 - Opinion addressed the concept of undue hardship under Title VII
 - Before Groff, the standard was more than a *de minimus*
 - This was widely interpreted as a very low standard – barely any
 - Groff opinion raised the standard
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Religion Undue Hardship

- **Groff v DeJoy – US Supreme Court, 06/23**
 - Groff held a sincerely held religious belief that he could not work on Sundays.
 - His employer allowed an accommodation that did not create more than a *de minimus* hardship – the voluntary shift swap. But this proved unworkable.
 - His employer would not adopt an involuntary shift swap because forcing other employees to work Sundays for Groff would impose more than a *de minimus* hardship
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Religion Undue Hardship

- **Groff v DeJoy – US Supreme Court, 06/23**
 - SCOTUS says undue hardship is something more than mere burden
 - Doesn't say how much more
 - Not as high as the ADA, though
 - **Substantial increased costs in relation to the conduct of its particular business**
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Religion Undue Hardship

- **Groff v DeJoy – US Supreme Court, 06/23**
 - “Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business.”
 - “Hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice, cannot be considered ‘undue.’”
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Question Break:

How does *Groff* define undue hardship for religious accommodations?



Focus and Approach



ADA Focus and Approach

- Many conditions are covered, but the need for the accommodation can be verified, if needed
 - Focus on the essential functions of the position
 - Remember, undue hardship standard is high, but most accommodations don't cost much
 - Changes in the disability or the job may change the accommodation
 - **Good faith counts for a lot**
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Focus on the Job, Not the Disability

- **Focus on the job**


- Focusing on the disability will make the process more difficult for you – You're not a doctor
- You are promised a productive employee
- Employee must perform essential functions of the job
- Employee must meet performance and conduct standards

- **This is how you measure possible accommodation options**



Good Rules of Thumb

- When in doubt, go through the interactive process
 - Don't draw arbitrary lines in the sand
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Focus on the Job
(The Legal Parameters of RA)
Things That Are Not Accommodations

- Eliminate essential job functions
 - Lower productivity or quality standards
 - Provide new supervisor
 - Excuse bad behavior (generally)
 - Monitor medications
 - Most light duty requests
 - Most indefinite leaves of absence
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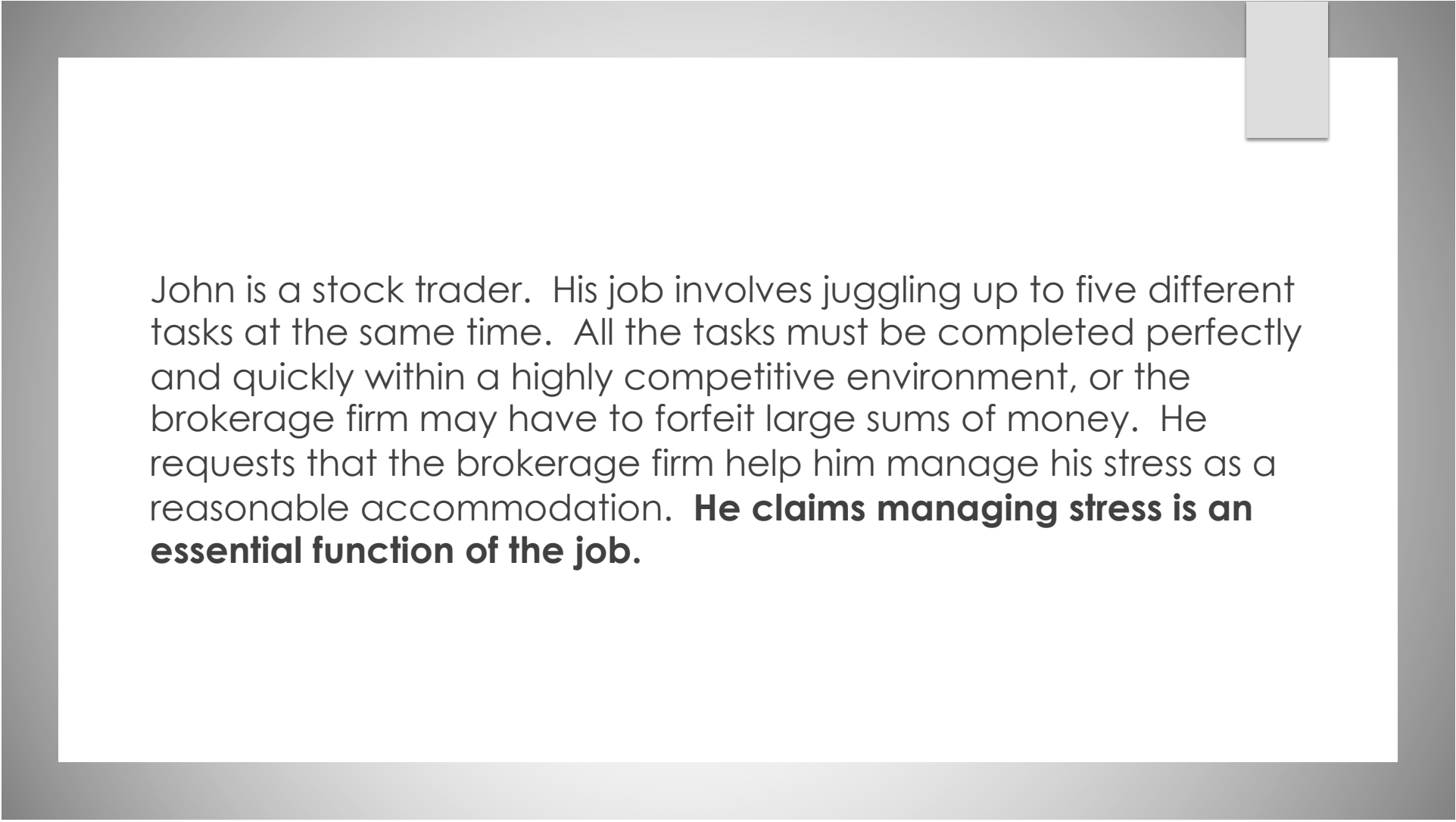
Key Resource

- **Job Accommodation Network (JAN)**
 - askjan.org
 - Helps identify possible accommodation options
 - Great if you and employee are stumped
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Focus on the Job (Essential Job Function)

- The position exists to perform the function
 - There are a limited number of other employees available to perform the function, or among whom the function can be distributed
 - A function is highly specialized, and the person in the position is hired for special expertise or ability to perform it.
 - **Focus on the “whats” not the “hows”**
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John is a stock trader. His job involves juggling up to five different tasks at the same time. All the tasks must be completed perfectly and quickly within a highly competitive environment, or the brokerage firm may have to forfeit large sums of money. He requests that the brokerage firm help him manage his stress as a reasonable accommodation. **He claims managing stress is an essential function of the job.**



Whats and Hows

Poorly prepared and worded job descriptions can quickly take your focus off the job and lead you and the employee down many unproductive rabbit holes.

Spend some time constructing accurate job descriptions.



How to Have the Conversation (Performance and Reasonable Accommodations)

- Most employers are reluctant to talk to persons with disabilities about their impairments.
 - When a person with a disability has a performance problem, most employers assume the problem has something to do with the disability.
 - **Learn how to play “Disability Poker” (Richard Pimentel)**
 - Brings focus back to the job
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Question Break:

ADA Reasonable Accommodations Q and A



PWFA Focus and Approach

- Much like the ADA, but don't use the interactive process to discriminate against the pregnant employee
 - **Remember the differences between the ADA and PWFA**
 - Must go through interactive process with employee
 - Cannot deny employment opportunities because of the accommodation need
 - Cannot force the employee to take leave if another accommodation works equally well
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Religion Focus and Approach

- Take sincerely held belief at face value, unless you have objective evidence that the belief is not sincere.
Remember, though, that we frequently change our beliefs
 - Focus on resolving the conflict between the belief and the job
 - Religious expression that is sincerely held must be considered
 - Undue Hardship = Substantial Costs
 - Not a lot is defined
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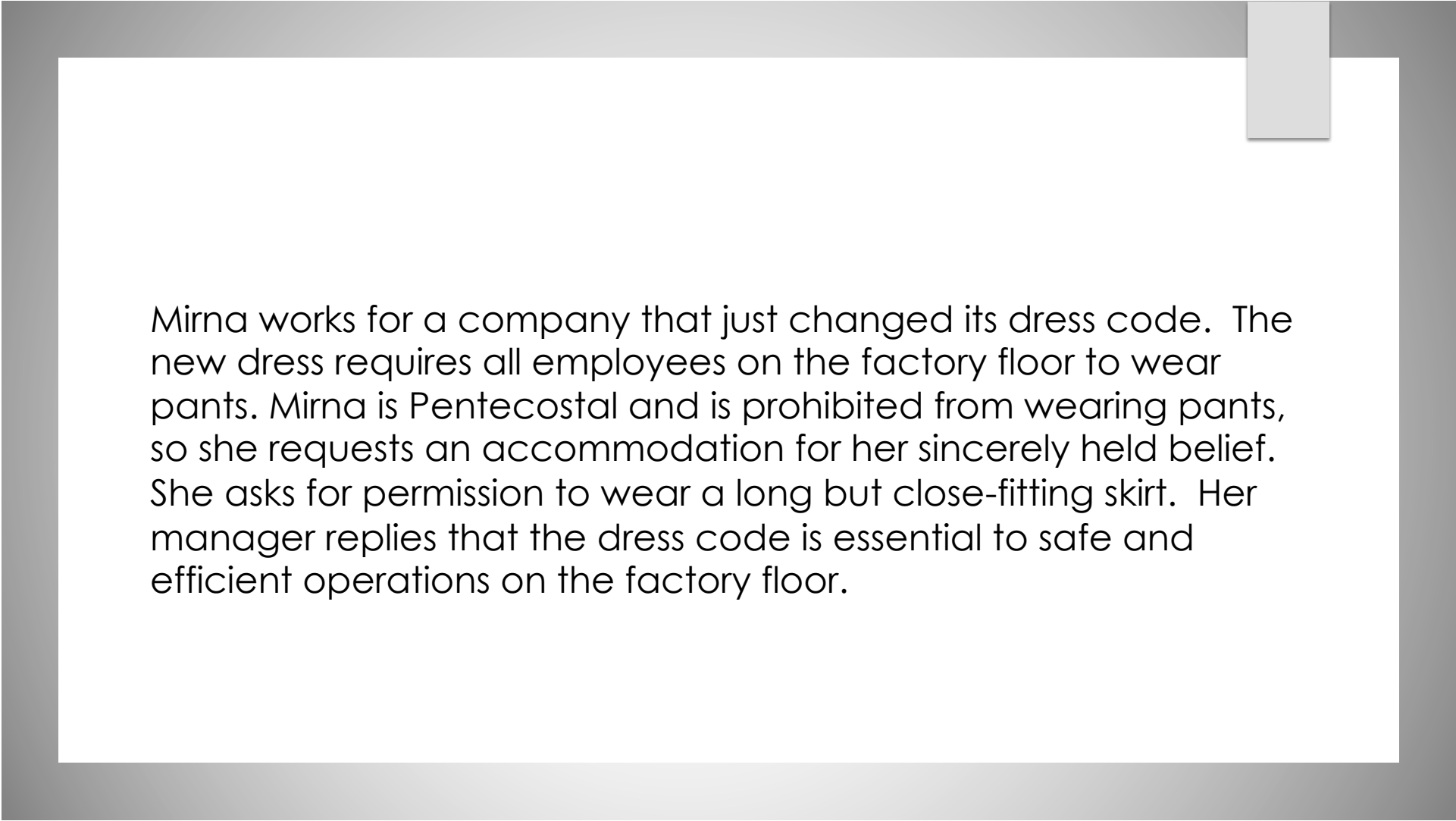


Religion Focus and Approach

- SCOTUS is allowing the lower courts to better define undue hardship
 - So, you should consult your attorneys when you receive requests for religious accommodation
 - Also, pay attention to all lower court cases concerning undue hardship under Title VII
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Scenarios - Religion



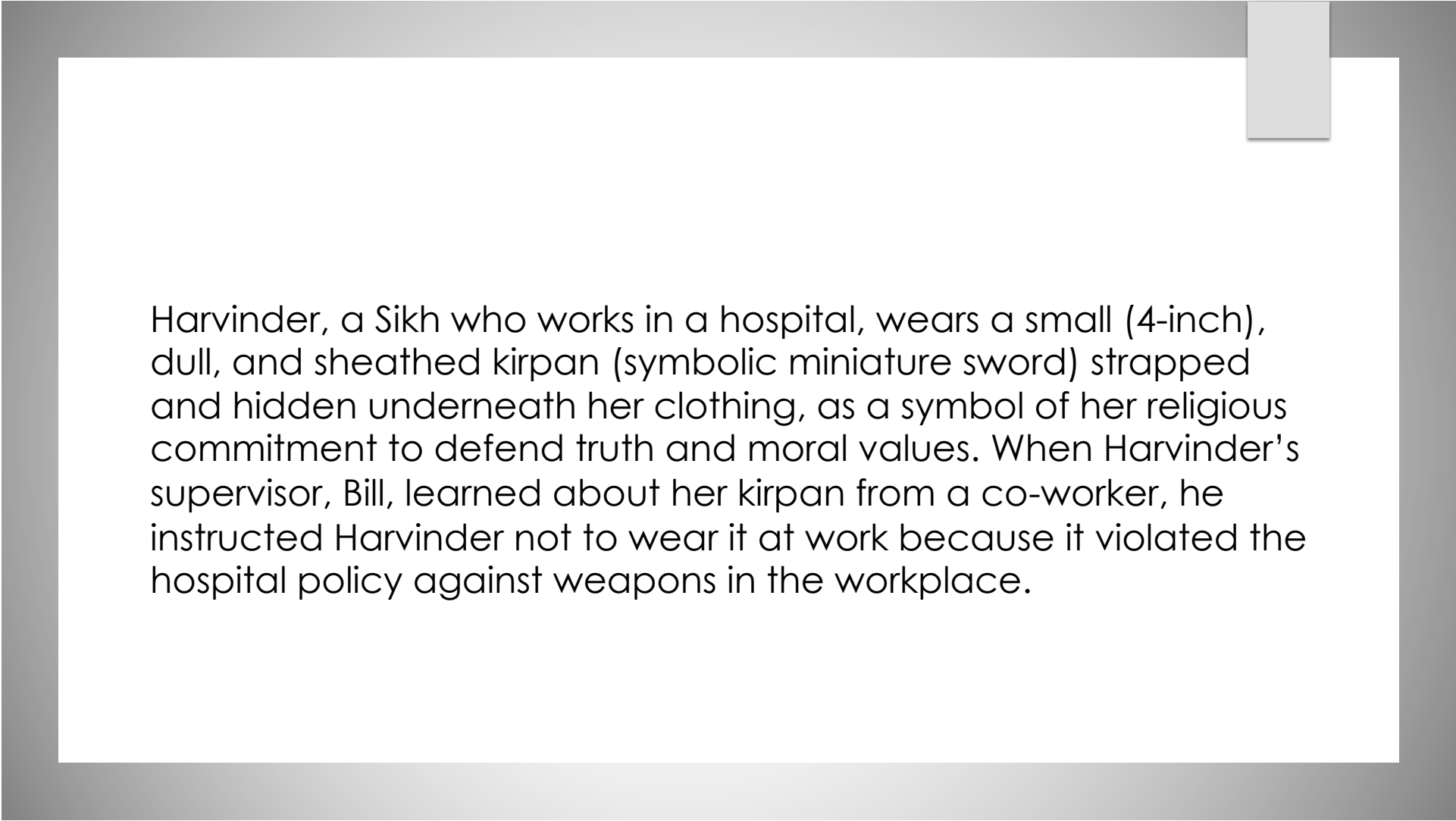
Mirna works for a company that just changed its dress code. The new dress requires all employees on the factory floor to wear pants. Mirna is Pentecostal and is prohibited from wearing pants, so she requests an accommodation for her sincerely held belief. She asks for permission to wear a long but close-fitting skirt. Her manager replies that the dress code is essential to safe and efficient operations on the factory floor.

Policy = Consistency


Accommodations are inconsistent by definition

So, citing policy as a reason for denying an accommodation will always fail.

Can deny a reasonable accommodation only if it creates an undue hardship.

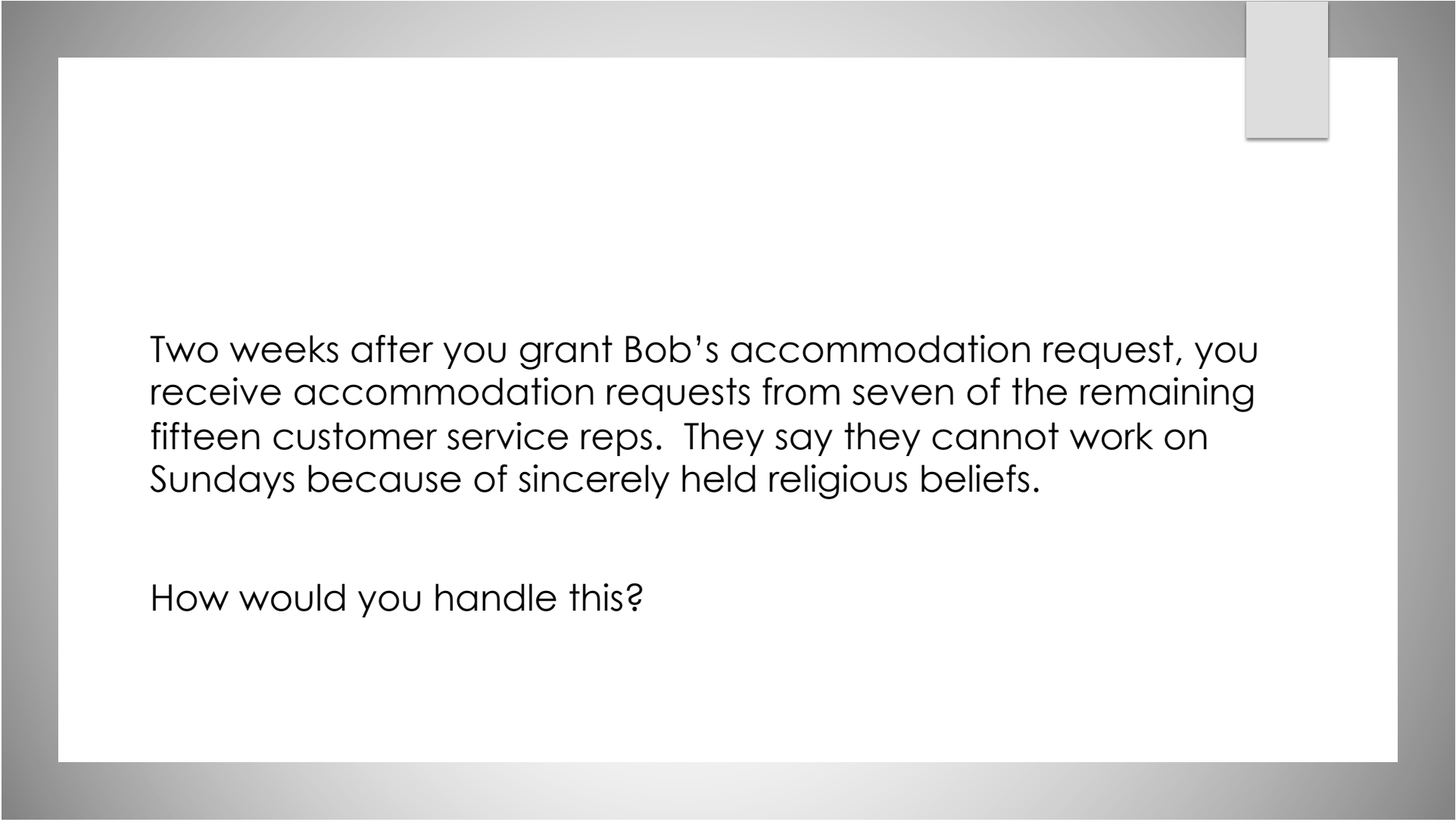


Harvinder, a Sikh who works in a hospital, wears a small (4-inch), dull, and sheathed kirpan (symbolic miniature sword) strapped and hidden underneath her clothing, as a symbol of her religious commitment to defend truth and moral values. When Harvinder's supervisor, Bill, learned about her kirpan from a co-worker, he instructed Harvinder not to wear it at work because it violated the hospital policy against weapons in the workplace.



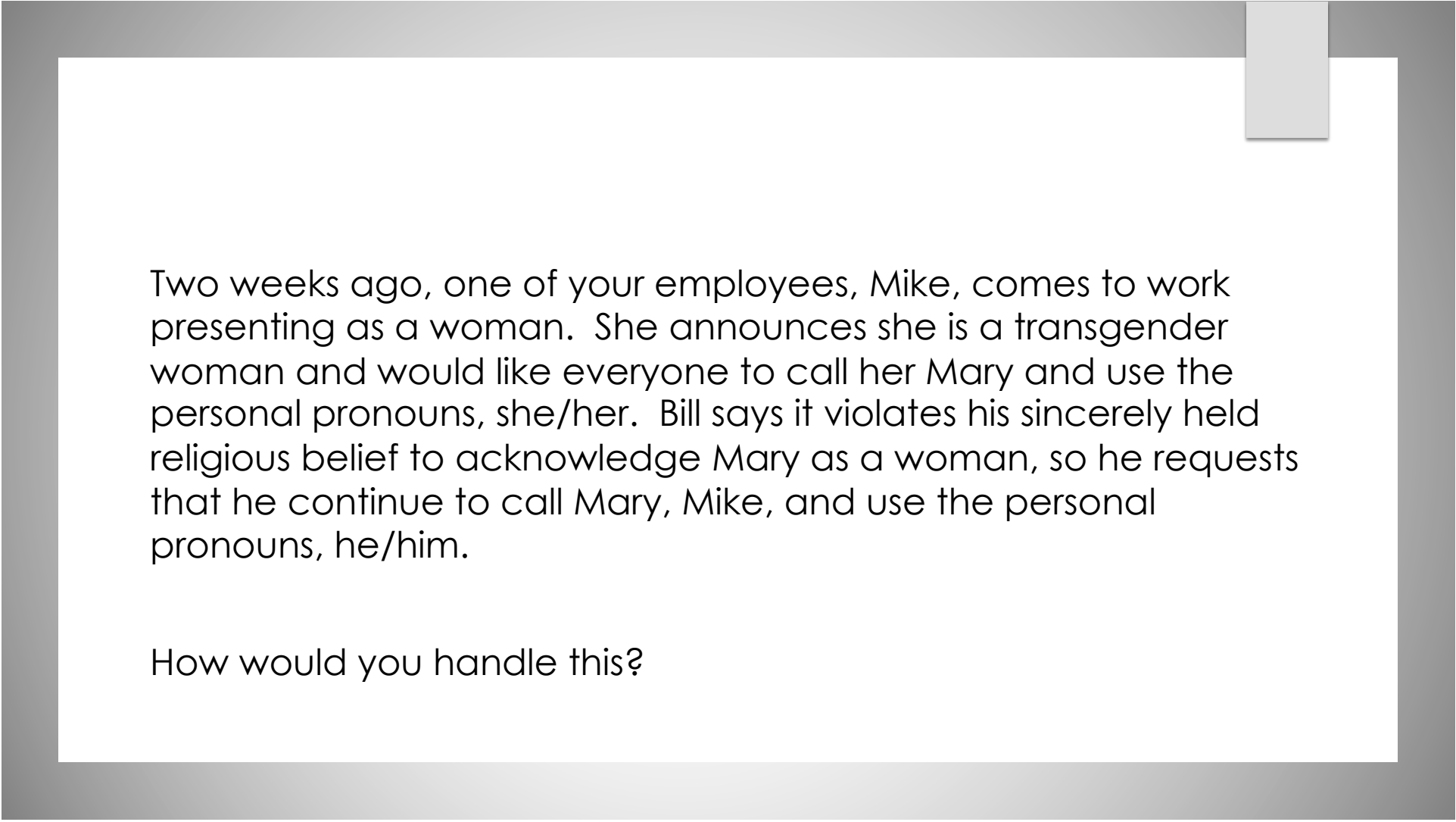
Bob works as a customer service representative for a retail store which is now open on Sundays. There are fifteen other customer service reps. The store instituted a rotating shift schedule that requires each sales rep to work two Sundays each month. Bob requests a reasonable accommodation. He says he has a sincerely held religious belief that prohibits him from working Sundays. He requests that he not be assigned to work any Sunday (involuntary shift swap).

How would you measure undue hardship?



Two weeks after you grant Bob's accommodation request, you receive accommodation requests from seven of the remaining fifteen customer service reps. They say they cannot work on Sundays because of sincerely held religious beliefs.

How would you handle this?

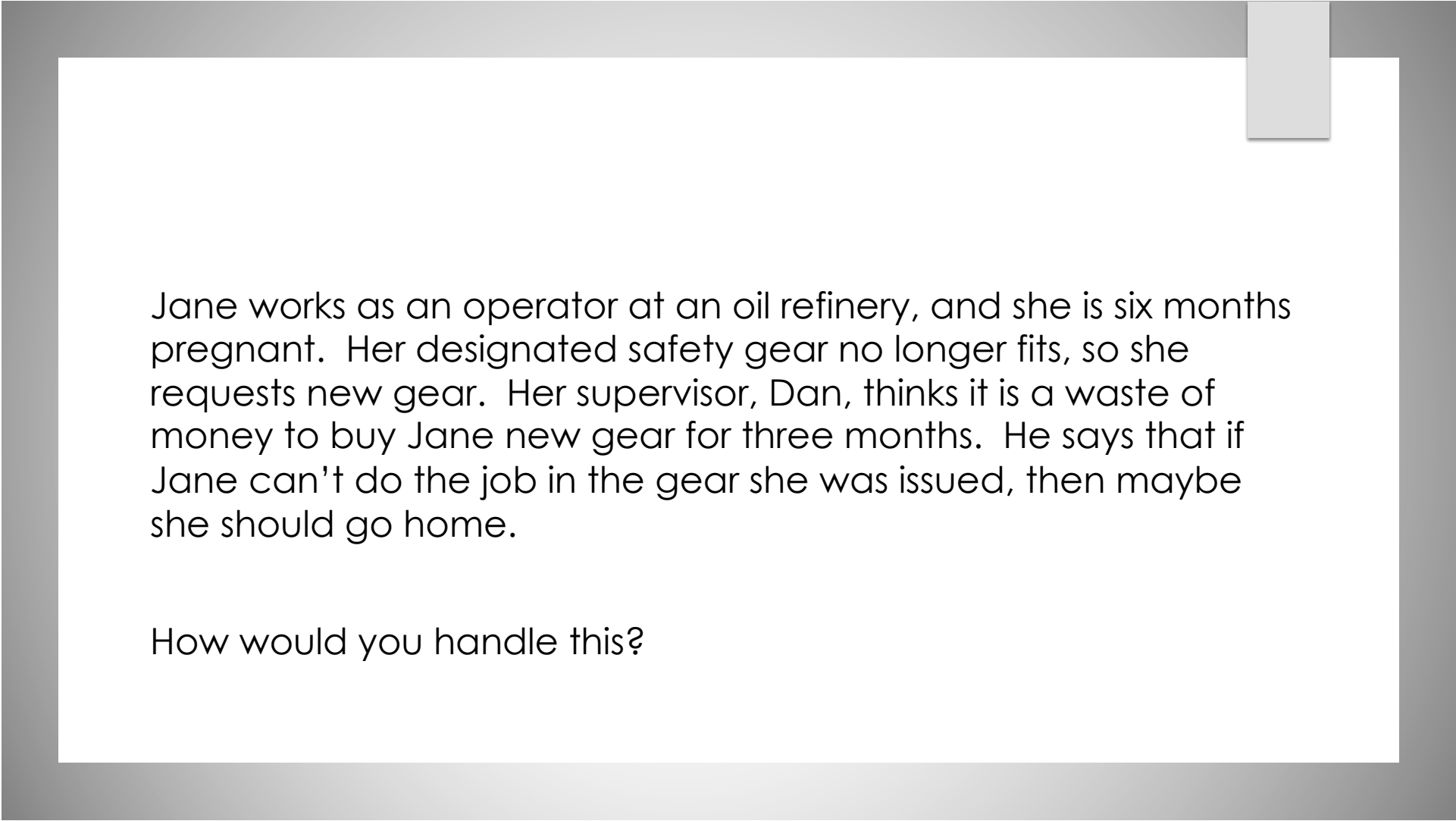


Two weeks ago, one of your employees, Mike, comes to work presenting as a woman. She announces she is a transgender woman and would like everyone to call her Mary and use the personal pronouns, she/her. Bill says it violates his sincerely held religious belief to acknowledge Mary as a woman, so he requests that he continue to call Mary, Mike, and use the personal pronouns, he/him.

How would you handle this?

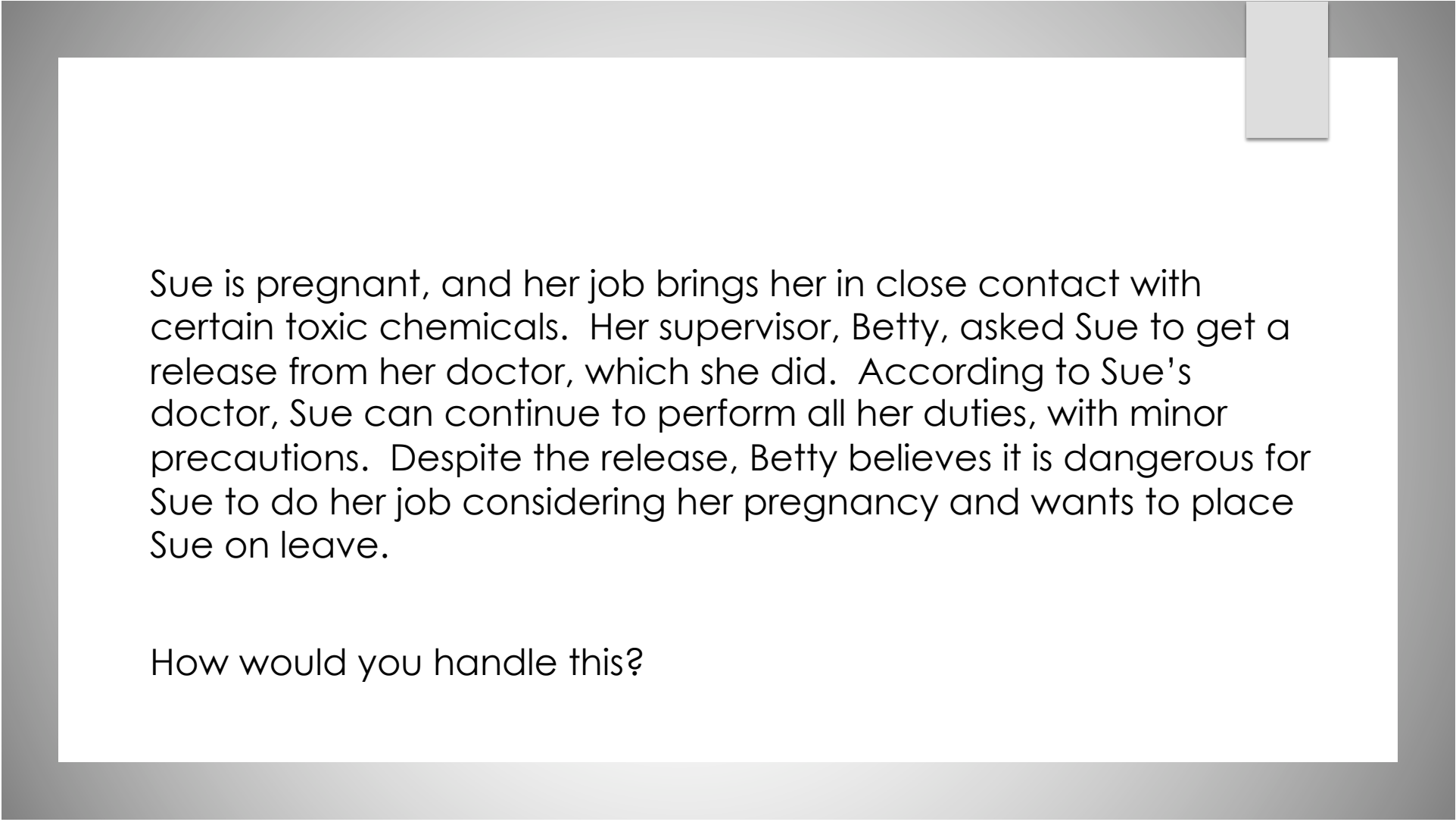


Scenarios - PWFA



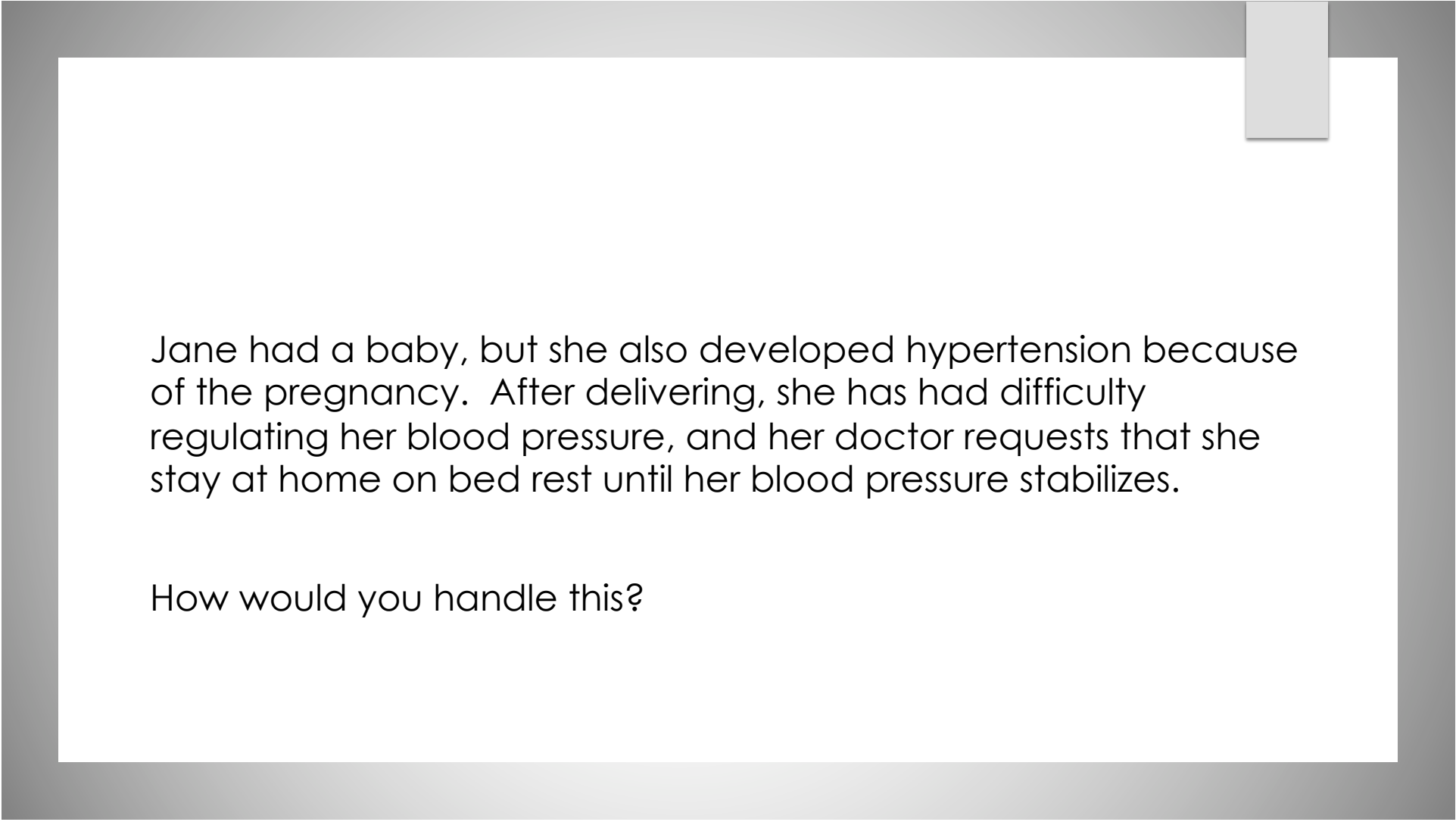
Jane works as an operator at an oil refinery, and she is six months pregnant. Her designated safety gear no longer fits, so she requests new gear. Her supervisor, Dan, thinks it is a waste of money to buy Jane new gear for three months. He says that if Jane can't do the job in the gear she was issued, then maybe she should go home.

How would you handle this?



Sue is pregnant, and her job brings her in close contact with certain toxic chemicals. Her supervisor, Betty, asked Sue to get a release from her doctor, which she did. According to Sue's doctor, Sue can continue to perform all her duties, with minor precautions. Despite the release, Betty believes it is dangerous for Sue to do her job considering her pregnancy and wants to place Sue on leave.

How would you handle this?



Jane had a baby, but she also developed hypertension because of the pregnancy. After delivering, she has had difficulty regulating her blood pressure, and her doctor requests that she stay at home on bed rest until her blood pressure stabilizes.

How would you handle this?

The Wonderful World of Accommodations

- ▶ The ADA, PWFA, and Title VII (Religion) all require employers to consider reasonable accommodations
 - ▶ Even though all three laws require employers to reasonably accommodate and use mostly the same terminology, they have notable differences
 - ▶ Understanding the differences will help you better navigate the interactive process
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