

Welcome to the 2008 Legal Issues Webinar Series



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Harassment, Retaliation and Discipline: Three Emerging ADA Issues

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Equip for Equality

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Topics To Be Discussed

Disability Harassment

- Disability Harassment Claims Under Title I of the ADA
- Legal Standard for Harassment
- The First Two Major Cases Recognizing a Claim for Disability Harassment
- Cases Allowing Disability Harassment Cases to Proceed
- Cases Dismissing Disability Harassment Claims
- Potential Claim For Disability Harassment Under Title V of the ADA
- Tips for Employees and Employers

Topics To Be Discussed

Retaliation

- Who can bring suit?
- What Constitutes an Adverse Employment Action?
- Was There a Non-Retaliatory Cause for the Adverse Action?
- Was the Employee Engaged in a Protected Activity?
- Causal Connection Between the Employee's Exercise of Protected Activity and the Employer's Adverse Action?
- Are Retaliation Claims Limited to Current Employers?
- Are Damages Available in ADA Retaliation Cases?

Topics To Be Discussed

Discipline

- Knowledge of Disability Prior to Instituting Discipline
- Workplace Conduct Rules
- Consistent Enforcement of Discipline
- Rescinding Discipline as a Policy Modification

DISABILITY HARASSMENT

Terms, Conditions, and Privileges of Employment



Disability Harassment Claims Under Title I of the ADA

- **ADA Language:** No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other **terms, conditions, and privileges of employment.**” See 42 U.S.C. § 12112 (a)
- **Analogy from Title VII:** Supreme Court has recognized harassment under Title VII relying on “terms, conditions, and privileges of employment” language that is also found in the ADA.

The Legal Standard for Disability Harassment

5 Factors in Disability Harassment Claims:

1. Plaintiff is a qualified individual with a disability
2. Plaintiff was subjected to unwelcome harassment
3. The harassment was based on plaintiff's disability
4. The harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment, and
5. Some factual basis exists to impute liability for the harassment to the employer (i.e. the employer knew or should have known of the harassment and failed to take prompt, remedial action)

DISABILITY HARASSMENT

Court Decisions



First Two Major Cases Recognizing a Claim for Disability Harassment

- In 2001, two circuit courts of appeals recognized a cause of action of disability harassment:
 - ❖ ***Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001)**
 - ❖ ***Flowers v. Southern Regional Physician Services, Inc.*, 247 F.3d 229 (5th Cir. 2001)**
- These two cases, which ended up providing very different results to the plaintiffs, formed the basis for the development of ADA disability harassment case law.

Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001)

Facts:

- Fox sustained back injury and had light-duty work restrictions.
- Foreman and other employees verbally abused Fox.
- Foreman instructed employees not to speak to Fox, ostracize him, and not bring him supplies.
- Foreman made Fox work at a table that was too low, which re-aggravated Fox's back injury.
- Foreman refused to allow Fox to apply for a truck driver position, which met Fox's medical restrictions and for which he was otherwise qualified.

Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001) (cont'd)

Damages:

- Harassment caused Fox both physical and emotional injuries.
- Fox filed ADA lawsuit alleging that GM subjected him to a hostile work environment.
- The jury awarded Fox \$200,000 in compensatory damages, \$3,000 for medical expenses, and \$4,000 for lost overtime. The Fourth Circuit affirmed the jury's verdict.

Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001) (cont'd)

Analysis:

- 4th Circuit recognized disability harassment as a cause of action under the ADA
- Adopted Title VII's 5 factor test
- Relied on EEOC regulations reference to harassment
- Found harassment was severe and pervasive
- Testimony of experts about physical and emotional injuries critical to plaintiff's success

Flowers v. Southern Regional Physician Services, 247 F.3d 229 (5th Cir. 2001)

Facts:

- Flowers worked as a medical assistant
- Supervisor stopped socializing with Flowers and refused to shake her hand after her HIV status was revealed
- Work evaluations changed dramatically
- Flowers required to submit to multiple drug tests
- Derogatory language from company president
- Ultimately Flowers was discharged

Flowers v. Southern Regional Physician Services, 247 F.3d 229 (5th Cir. 2001)

Analysis:

- ❖ 5th Circuit recognized disability harassment as a cause of action under the ADA
- ❖ Adopted Title VII's 5 factor test
- ❖ Found harassment was severe and pervasive, but physical impact of harassment only arose after termination
- ❖ Must prove "actual injury" resulting from the harassment – can't presume emotional harm from discrimination
- ❖ Appellate court vacated jury's award of damages

Examples of Cases Allowing Disability Harassment Cases to Proceed

- ***EEOC v. BobRich Enterprises***: \$165,000 to a hard of hearing employee finding that she had been harassed and forced to resign because of her disability
- ***Arrieta-Colon v. Wal-Mart Stores***: \$230,000 jury verdict for employee harassed about penile implant
- ***EEOC v. Luby's, Inc.***: employee with mental impairment stated harassment claim after being subjected to repeated name-calling, barking, and threats of violence
- ***Quiles-Quiles v. Henderson***: court rejected argument that harassment is acceptable in “blue collar” workplaces.

Examples of Cases Dismissing Disability Harassment Claims

- ***Shaver v. Independent Stave Co.***: despite being subjected to constant name calling (“platehead”), no harassment claim for person who had brain surgery
- ***Meszes v. Potter***: derogatory comments about employee with AIDS did not meet harassment standard
- ***Rozier-Thompson v. Burlington Coat Factory Warehouse***: comments were not “physically threatening” nor “deeply repugnant” enough to be harassment
- ***Mason v. Wyeth, Inc.***: actions against employee with hearing impairment were simply pranks not harassment.

Potential Claim For Disability Harassment Under Title V of the ADA

- **Title V:** “unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this chapter.”
- **Standard of Proof:** Title V would require a lower standard of proof than the current “severe or pervasive” standard
- **Proof of Disability:** Title V would *not* require proof of disability
- **Case Law:** Limited case law under this provision of Title V

Tips for Employees With Disabilities

- Address harasser's conduct and complain to supervisor
- Keep good documentation of harassment
- Be aware of statute of limitations
- Provide proof of any physical injury arising from harassment that was incurred during employment

Tips For Employers

- Modify any anti-discrimination or anti-harassment training to include disability training
- Put in place disability harassment policies and appropriate grievance procedures to report workplace harassment
- Train supervisors to respond promptly to an employee's internal complaint of harassment

RETALIATION

Engaging in Protected Activities



Overview of Retaliation under the ADA

- **Title V:** “No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.”
- **Rationale:** provides protection for employees who exercise their civil rights

Who Can Bring Retaliation Claims?

Not limited to people with disabilities: the majority of courts have found that proving disability is not required in retaliation cases because the retaliation section of the ADA refers to “person” instead of “qualified individual with a disability.”

Shellenberger v. Summit Bancorp, Inc. - employee with allergies claimed she was terminated because she filed an ADA charge with the EEOC. **Court:** language of Title V does not require proof of ADA disability to bring retaliation case.

What Constitutes an Adverse Employment Action?

- **Termination Required?** Courts were split whether termination was required to bring retaliation case.
- **Supreme Court Establishes Standard:** In *Burlington Northern & Santa Fe Railway Co.*, Supreme Court resolved lower court split by finding that any action that materially injures or harms an employee who has complained of discrimination and would dissuade a reasonable worker from making a charge of discrimination could be the basis for a retaliation claim.

What Constitutes an Adverse Employment Action? (cont'd)

- ***Norden v. Samper*** – employee required to waive right to file EEO complaints in order to return to work. Court: this was adverse action to support retaliation claim.
- ***Gilmore v. Potter*** – after filing EEO complaint, employee was isolated in small room, threatened with termination, called “worthless”, and told not to talk to her coworkers. Court: not an adverse action for retaliation.
- ***Serino v. U.S. Postal Service*** – transfer was not an adverse action, but effort to accommodate employee.

Was There A Non-Retaliatory Cause for the Adverse Action?

- ***Ozlek v. Potter*** – employer provided non-retaliatory reason for termination to defeat retaliation claim – need to resolve inconsistency between plaintiff’s medical status of his inappropriate behavior
- ***Hughes v. City of Bethlehem*** - retaliation claim failed when employer had legitimate reason for termination (called in sick when really in Las Vegas)
- ***Mitchell v. GE Healthcare*** – employer had valid reason for referral to Employee Assistance Program for employee who was disruptive and intimidating

Was the Employee Engaged in a Protected Activity?

- ***Bloch v. Rockwell Lime Company*** - employee who was fired after opposing employer's request for health info was not engaged in protected activity
- ***Mosley v. Potter*** - court found that filing for workers' compensation is not a protected activity (May be protected under State Law)
- ***Sanchez v. City of Chicago*** – employee who was terminated after requesting reasonable accommodation was engaged in protected activity for retaliation claim

Causal Connection Between the Protected Activity and the Employer's Adverse Action?

- **Background:** In order to prove a retaliation claim, plaintiffs must demonstrate a causal connection between their exercise of a protected activity (e.g. filing an EEOC claim) and the employer's adverse action (e.g. termination).
- **Temporal Proximity:** In many of these cases, the court will look at the "temporal proximity" of the two events to determine if there was a causal connection.

Causal Connection - Case Law

- ***Satchel v. School Bd. of Hillsborough Co.*** – no retaliation when plaintiff was terminated two years after requesting an accommodation
- ***Erbel v. Dept. of Agriculture*** – claim for retaliation allowed to proceed when supervisors behavior changed after plaintiff filed with EEOC.
- ***Travis v. U.S.P.S.*** – Employee was disciplined for attendance problems & altercations with co-workers. No causal connection because discipline occurred before filing with EEOC.

Are Retaliation Claims Limited to Current Employers?

Background: In almost all retaliation claims, the alleged retaliation occurs while plaintiff is still an employee. Can a retaliation claim be brought by a former employee?

Carr v. Morgan County School Dist. – Teacher settled ADA claim after filing with the EEOC. School administrator revealed problem with employee during reference check. The court refused to dismiss the claim finding that an adverse action for retaliation purposes would include harm to a former employee's future employment prospects.

Are Damages Available in ADA Retaliation Cases?

Courts Split: Courts have differed on whether plaintiffs can recover money damages in an ADA retaliation claim.

Analysis: Historically, monetary damages were not recoverable in civil rights cases. However, the Civil Rights Act of 1991 provides for monetary damages when the defendant has engaged in “unlawful intentional discrimination.” Some courts have held that this provision is broad enough to encompass retaliation

Additional Implication: Plaintiffs may also be denied access to a jury trial if there are no claims in which damages can be awarded.

DISCIPLINE

Enforcing Workplace Conduct Rules



Knowledge of Disability Prior to Instituting Discipline

- **Standard:** When a disability is known prior to instituting discipline, reasonable accommodations should be considered to enable an employee to comply with reasonable workplace and conduct rules.
- ***Bultemeyer v. Fort Wayne Community Schools*** – Janitor with mental illness had taken leave from work. When he did not report for fitness for duty examination he was fired.
 - ❖ **Court:** employer's implementation of discipline was inappropriate given its past knowledge of plaintiff's disability and needed accommodations

Knowledge of Disability Prior to Instituting Discipline (cont'd)

Taylor v. Phoenixville School District –

- **Facts:** Teacher who had worked at school for 20 years was hospitalized for bipolar disorder. She sought accommodations, which were denied. Instead, her work was closely scrutinized and she was disciplined routinely, even though she had never been disciplined in the previous 20 years. She was subsequently terminated.
- **Court:** Employer's actions in disciplining and terminating plaintiff while denying her any reasonable accommodations may constitute ADA discrimination.

Workplace Conduct Rules

Standard: It is permissible for employers to have workplace conduct rules on a variety of issues including drug and alcohol use, workplace safety, workplace violence and attendance.

EEOC: Employers may hold all employees, disabled and nondisabled, to the same performance and conduct standards. EEOC Compliance Manual, 902.2(c)(4) nn. 11&12.

Supreme Court: Upheld workplace conduct rule in *Raytheon Co. v. Hernandez*, 124 S. Ct. 513 (2003)

Cases Upholding Workplace Conduct Rules

- ***Sever v. Henderson*** – Postal worker with PTSD made threats of violence in the workplace and was terminated.
 - ❖ **Court:** an employer is not prohibited from discharging employee for violating workplace conduct rule, even if that misconduct is related to his disability.
- ***Fullman v. Henderson*** - ADA was not violated when employee was discharged for filing a false workers' compensation claim.

Cases Upholding Workplace Conduct Rules

- ***Darcangelo v. Verizon Maryland***
Employer can enforce a co-worker courtesy rule, even though the employee's abusive behavior may have been related to her bipolar disorder.
- ***Sena v. Weyerhaeuser Co.***
Even if unsatisfactory performance or behavior is related to drug use or alcoholism, employer may hold employee to its regular workplace standards of conduct.

Workplace Conduct Rules – Job Related and Consistent with Business Necessity?

- **EEOC:** If misconduct resulted from a disability, the employer must be prepared to demonstrate the conduct rule is job-related and consistent with business necessity. EEOC Enforcement Guidance on ADA and Psychiatric Disabilities (3/25/97), at p. 29.
- ***Dark v. Curry County*** – Truck driver with epilepsy fired for violating conduct rule when he had accident after having a pre-seizure aura.
 - ❖ **Court:** Must show conduct rule was job related and consistent with business necessity.

Workplace Conduct Rules – Job Related and Consistent with Business Necessity?

- ***Nielsen v. Moroni Feed Company***

Disability-caused misconduct is subject to performance criteria that are job-related and consistent with business necessity, so long as the disabled employee is given the opportunity to meet such performance criteria by a reasonable accommodation.

Workplace Conduct Rules – Is Conduct Related to Employee’s Disability?

- **Disability Related?** If an employee’s misconduct is not related to the disability, discipline may be appropriate.
- ***Davila v. Qwest Corp.*** - Employee with bipolar disorder failed to report an accident.
 - ❖ **Court:** Misconduct was unrelated to employee’s disability so employer did not violate the ADA by disciplining the employee.

Workplace Conduct Rules – Is Conduct Related to Employee’s Disability?

- ***Russell v. TG Missouri Corp.*** - employee with bipolar disorder left work without permission. Employee did not indicate leave was related to her disability. Employer instituted workplace discipline and terminated her.
 - ❖ **Court:** Discipline was warranted as employee failed to request a reasonable accommodation. Employer’s awareness of employee’s disability prior to the discipline did not alter the court’s decision.

Consistent Enforcement of Discipline

- **Tip for Employers:** Employers must enforce conduct rules and impose discipline in consistent manner. If employer imposes a greater degree of discipline against an employee with a disability, the employer may be subject to an ADA disparate treatment claim.
- ***Moore v. County of Cook*** - Plaintiff missed work related to her disability and later was terminated for failing to meet work production standards. A non-disabled employee who failed to meet the same work production standards was only given a 3 day suspension.
 - ❖ **Court:** Sufficient evidence that the harsher discipline for plaintiff arose because she had a disability.

Rescinding Discipline as a Policy Modification – EEOC Position

- **Rule:** Employers not required to excuse past misconduct, as “reasonable accommodation is always proactive.”
- **Rationale:** Employer generally must provide a reasonable accommodation only after it is requested, the employer does not have to rescind any warnings imposed prior to accommodation request.
- **Future:** Employers must make reasonable accommodation to enable employee with a disability to meet such a conduct standard in the future.

EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities (3/25/97), at page 31.

Rescinding Discipline as a Policy Modification – Case Law

- ***Davila v. Qwest Corp., Inc.*** – employer not required to retroactively excuse misconduct once the employer was made aware of the employee’s mental illness.
- ***Hill v. Kansas City Area Transportation Authority*** - employer not required to give a “second chance” to a bus driver who twice fell asleep in her bus, even though she alleged that her drowsiness was caused by her hypertension medication.
- ***Bultemeyer v. Fort Wayne Community Schools*** - employer had duty to rescind termination when it had knowledge of the employee’s disability and his need for reasonable accommodations.



Resources

- **DBTAC: Great Lakes ADA Center**
www.adagreatlakes.org; 800/949 – 4232(V/TTY)
- **Equip For Equality**
www.equipforequality.org; 800/610-2779 (V);
800/610-2779 (TTY)
- **Illinois ADA Project**
www.adagreatlakes.org; 877/ADA-3601 (V); 800/610-
2779 (TTY)



More Resources

- **Job Accommodation Network**
www.jan.wvu.edu
- **Equal Employment Opportunity Commission**
www.eeoc.gov
- **ADA Disability and Business Tech. Asst. Ctr.**
www.adata.org/dbtac.html

Reasonable Accommodations for People with Psychiatric Disabilities

THE END



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**Qualified As Related To Reasonable Accommodations
Such As Leave, Reassignment And Job Modifications**

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