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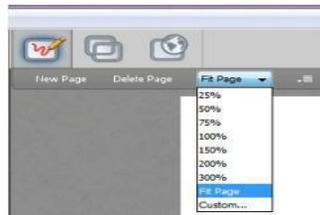
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Workplace Disability Harassment

By
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Illustration



A scheduling manager at a retail store assigns work shifts based on personal bias. The retailer has employees with and without disabilities.

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Consider the Following

- The scheduling manager gives preference to employees without disabilities when assigning preferred day shifts.
- Donna, a hearing-impaired employee, files an HR complaint against manager for favoritism.
- After investigation, HR returns manager back to his position with a warning to stop favoritism.
- Manager now intentionally assigns employees with disabilities the least desirable shifts.

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Title I and Rehabilitation Act

- Title I prohibits disability discrimination in all aspects of employment covering private employers with 15 or more employees and State and local government employers with any number of employees.
- The Rehabilitation Act, as amended by the ADA, gives the same protections to all federal employees and job applicants with disabilities.

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Definition of Disability



- Having a physical or mental impairment that substantially limits one or more major life activities;
- Having a record of such an impairment; OR
- Being regarded as having such an impairment.

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Title I Reasonable Accommodations

- Employers must provide qualified job applicants and employees with disabilities reasonable accommodations -- unless doing so causes undue hardship on business operation.
- Reasonable accommodations are changes made to the work environment or to the ordinary course of business that enable an individual with a disability to perform essential job functions and have equal access to all aspects of employment.

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Undue Hardship Defense

Employers may deny or change nature of accommodation requested based on “undue hardship” – significant difficulty or expense.

Factors to Consider:

- * The nature of employer’s business,
- * Employer’s total financial resources,
- * Size of the business,
- * Cost of the accommodation.
- * Incurring “some cost” DOES NOT rise to “undue hardship” defense.

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Performance Standards

- Individuals with disabilities may be evaluated on the same performance standards as those without disabilities.
- A change in policy may be necessary if disability affects individual's ability to perform essential functions of the job.
- Accommodations may not be withdrawn because of failure to meet standards.
- Business necessity or Direct Threat may defend declining an accommodation or removing employee from workforce.



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Hostile Work Environment and Harassment

- A hostile work environment is created by a boss, coworker, or non-employee whose actions, communication, or behavior make doing your job impossible.
- The Harassing behavior alters the terms, conditions, and/or reasonable expectations of a comfortable work environment for employees.
- The behavior, actions or communication must be discriminatory and pervasive.



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Examples of Hostility

- A coworker who tells sexually explicit jokes and sends around images of nude people, is guilty of sexual harassment and creating a hostile work environment.
- Co-workers or supervisors who make jokes or make fun of someone's disability, whether obvious or hidden (such as a mental or emotional disorder), may be guilty of discrimination based on a disability, or by regarding someone as having a disability even if the person does not have one, in addition to creating a hostile work environment.

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Disability Bullying

- Infrequent targeted observations;
- Occasional rude comments;
- Isolated offhand remarks;
- Are Not explicitly prohibited by law.



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Examples of Bullying

- Teasing a job applicant who uses a wheelchair;
- Making loud noise to aggravate an employee's migraine
- Mocking an employee with a speech impediment
- Excluding a coworker with bipolar disorder from a work outing
- Shouting at a deaf or hard of hearing employee.



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Disability Harassment

- Harassment must be targeted;
- Pervasive in nature;
- Frequent and continuous
- Must pertain to a protected category; e.g., race, disability, gender, sexual orientation , pregnancy, *et al.*



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Examples of Harassment

- Disabling assistive technology based on failure to meet sales goals or meet a production quota;
- Prohibiting a hypoglycemic individual from carrying and/or eating snacks at the workstation;
- Spreading misinformation about employee with severe anxiety disorder to prevent her from modifying work schedule;
- Removal of accommodations by new manager.



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From Bullying to Harassment

- Pervasive and continuous Bullying over time can lead to harassment and/or hostile work environment.
- Harassment and Workplace Hostility are grounds for filing EEOC charges.
- Mere infrequent or occasional “bullying” is not enough to justify EEOC charge.



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Origins of Bullying or Harassment

- Harassing behavior can occur by and between co-workers;
- Supervisors and managers against subordinates; and,
- Non-employees against employees (e.g., customers or patients).

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Who is Affected by Disability Harassment?

- People with disabilities;
- People associated with people with disabilities;
- ADA prohibits “associational discrimination; e.g., a co-worker friend of a person with a disability.



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Differences - Bullying

- Bullying typically occurs infrequently, where an individual will make an off-color comment about an employee with a disability. The overall work environment remains consistent with employer's ordinary course of business.

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Examples of Infrequent Bullying

“what’s the matter? Forgot to take your meds today?”

“Just because you have a disability does not mean you can come to work late everyday...”

“Turn up your hearing aid! You missed everything I said...”

“You are marking all the walls with your cane.”

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Differences -- Harassment



- Harassment occurs regularly, typically where an individual (or group of individuals) target an employee (or group of employees) with disabilities.
- Harassment is pervasive and frequent.

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Retaliation

- Retaliation occurs when an individual punishes an employee for engaging in a “protected action.”
- Retaliation claims survive independently even if all other EEO claims are dismissed, including discrimination and hostile work environment.

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Illustration

Customer at a bit box store complains to manager about the store greeter parking in an accessible space. The greeter has a valid state-issued placard. Customer says that if greeter were “really handicapped,” then she would not be working there. Annoyed manager asks greeter to move her car.



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Case Update

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Recommended Practices for Employers and Employees - I

- Adopt a clear anti-harassment policy that includes multiple avenues for submitting complaints;
- Regularly train leadership and employees on the policy;
- Vigorously follow and enforce the policy in good faith with consistency and fairness.
- Promptly and thoroughly investigate both bullying and harassment complaints.

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Recommended Practices for Employers and Employees - II

- Employees should file complaints in writing;
- Employees should keep record of all evidence that supports disability-related discrimination, harassment, and/or retaliation for reporting incidents.
- Employers should engage all parties involved to carry out investigation – unless a report is “anonymous” and maintain detailed documentation.
- Employers should include a determination letter in the harasser’s file as well as issue a closure letter to the complaining employee when possible.



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Questions?

Thank You!

For additional information or ADA Technical
Assistance please contact us toll-free at:
800-949-4232

