

Update on Discrimination Law
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Disability Discrimination Claims

The Equal Employment Opportunity Commission (EEOC) has released data showing that filings of discrimination and retaliation claims remained high in 2009 (though slightly lower than the record year in 2008). Disability discrimination claims showed the greatest increase in filings. With the recent amendments to the Americans with Disabilities Act (ADA) that make it easier for an employee to maintain such a lawsuits, this trend is likely to continue. Consequently, the wise employer will take steps now to avoid such claims.

Employers should have a policy that not only addresses discrimination on the basis of disability, but also provides a path for an employee to request a reasonable accommodation of any disability. Too often, employers do not have a clear policy of how an employee can go about requesting a needed accommodation. Such a policy should include who the employee should go to and what documentation an employee is required to provide.

Of course, a policy means nothing if the appropriate people are not properly trained. Supervisors, managers and human resources need to be aware of an employer's obligation under the ADA and have a means of engaging an employee in an interactive process to determine an appropriate accommodation when feasible.

Finally, employers should be wary of blanket policies that may affect people with disabilities. The EEOC recently won a multi-million dollar settlement in a case where the employer had a blanket policy of terminating people who had exhausted their sick leave without attempting to ascertain whether employees were capable of doing some work or whether light duty was an option. Blanket policies such as this one will continue to draw scrutiny from the EEOC and state agencies.

Failure to Conform to Gender Norms

While the New York Human Rights Law (NYHRL) protects employees from discrimination on the basis of sexual orientation, federal law does not. New case law may, however, signal a trend of courts recognizing discrimination on the basis of sexual orientation under the theory of discrimination based on an individual's failure to comply with typical gender behavior.

Last September, the Third Circuit (governing Pennsylvania, Delaware, New Jersey and the U.S. Virgin Islands) upheld a claim brought under federal law by a male machine operator who was admittedly gay and effeminate on the basis that he was discriminated against based upon his co-worker's and manager's perception that he did not "conform" to their view of a typical male. More recently, the Eighth Circuit (governing Arkansas, Iowa, Minnesota, Missouri, Nebraska, North and South Dakota) allowed a claim to go forward against a hotel by a female hotel guest clerk who was characterized by a manager as masculine and not a typical

Midwestern girl. While neither case has advanced beyond the beginning stages, both decisions signal a greater willingness by the courts to consider such claims.

As noted, New York employers are already required to prohibit discrimination on the basis of sexual orientation. The increase in federal claims, which allow for attorney's fees if the plaintiff is successful, should serve as a reminder to all employers to ensure their decisions are based on rational, business related factors, and that their work environments are free from bullying and harassment of any kind.

This article originally appeared in the February 2010 Hinman, Howard and Kattell, LLP newsletter