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EEOC STEPS UP ENFORCEMENT OF ADA AND AMENDMENTS ACT OF 2009



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On January 1, 2009, the Americans with Disabilities Act (“ADA”) was amended by the ADA Amendments Act (“ADAAA”), which significantly enlarged the types of conditions which might constitute a disability. Moreover, it is clear from the Equal Employment Opportunity Commission’s (“EEOC”) regulations interpreting the ADAAA that an employer’s duty to provide reasonable accommodation to a disabled employee has been broadened.


There was a 17.3% increase in disability discrimination claims filed in fiscal year 2010, as compared to the previous year. Of the discrimination charges filed with

the EEOC in 2010, 25.2% represented charges of disability discrimination. The EEOC has been aggressively enforcing the ADAAA and corresponding regulations, particularly in terms of an employer’s duty to provide reasonable accommodation to employees returning from medical leave, but also in terms of hiring and promotion. As part of providing reasonable accommodation, an employer must engage in a dialogue with the employee through an interactive process. The EEOC has emphasized that many reasonable accommodations would not cost an employer a dime, and would be minor and easily facilitated. It would appear employers will now have a harder time proving the defense that an applicant or employee would be a direct threat to the employer’s operation such that reasonable accommodation would not be required. Finally, the EEOC has made it clear that it plans to enforce the ADAAA so that applicants

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EEOC STEPS UP ENFORCEMENT OF ADA AND AMENDMENTS ACT OF 2009

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and employees are not denied the opportunity to work and be productive members of society due to “myths, fears and stereotypes.”

The EEOC has taken the position that many employers’ leave of absence policies violate the ADAAA. For example, in September of this year, the EEOC entered into a consent decree with a Minnesota employer, in part enjoining the employer from instituting any policy that requires an employee with a disability to be free from restrictions before returning to work after a medical leave of absence. Further, subsequent to the enactment of the ADAAA, the EEOC sued three large employers (Sears, Roebuck & Co., Supervalu, Inc. and Verizon) for maintaining policies that an employee will be terminated after one year’s absence due to a work-related injury or other type of medical leave. In 2011, Sears paid over \$6 million to employees terminated under that policy; Supervalu paid \$2 million to such plaintiffs, and Verizon settled a nationwide class action suit for \$20 million. According to the EEOC, these employers, after ascertaining that employees on leave had or may have had a disability, failed to explore reasonable accommodations for those employees such as reassignment, reduced work hours or an assistive device.

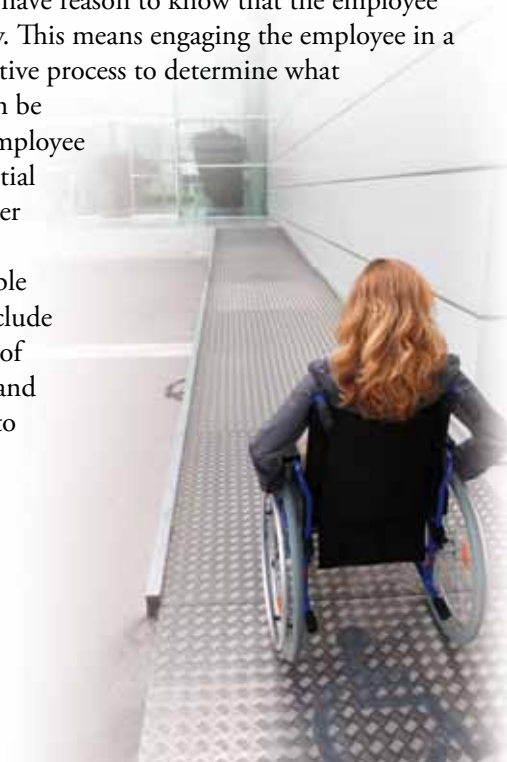
In the Minnesota case, a consent decree was approved by Minnesota Federal District Court between the EEOC and Maxim Healthcare Services, Inc., where the EEOC alleged Maxim had failed to provide reasonable accommodations to, and ultimately discharged, the director of clinical services, because she had brain cancer. The EEOC alleged Maxim failed to engage in the interactive process with the employee to determine how she could be reasonably accommodated to perform the essential functions of her position when she sought to return to work after disability leave. As part of the consent decree, Maxim agreed to evaluate whether individuals seeking to return to work after a medical leave posed a direct threat to themselves or others based on “objective evidence and information” as opposed to mere speculation.

The EEOC recently sued California and Mississippi employers who failed to engage in the interactive process and provide reasonable accommodations to employees with epilepsy who had each had an isolated seizure, and were then off for a short period of time before being released to return to work. Both employees

were terminated instead of being brought back to work, one employer claiming that the employee’s seizures made her a “liability” to the company. In suing these two employers, the EEOC counseled against allowing “speculation and fears” over an employee’s disability to prevent an otherwise productive and valued employee from returning to his or her job.

In late September, the EEOC sued an Atlanta, Georgia, property management company when it refused to return a property manager to work after a leave of absence due to a heart attack, although she had received medical clearance. In initiating this lawsuit, the EEOC reminded employers that “the ADA was amended by Congress to clarify the broad range of protections afforded to persons with actual or perceived disabilities,” and stated that the employer made employment decisions based on presumptions that violated the letter and spirit of the ADAAA. The EEOC similarly made this point in suing a Dallas silk screening company that selected a senior employee for layoff because of his diabetes and kidney disease, when he sought to return to work after a brief hospital stay. It was noted the employee’s conditions were subject to control and treatment that would allow him to continue to work.

These EEOC actions demonstrate that a prudent employer would be wise to make a good faith attempt to reasonably accommodate an employee returning from a medical leave where they know or have reason to know that the employee may have a disability. This means engaging the employee in a dialogue and interactive process to determine what accommodations can be made to allow the employee to perform the essential functions of his or her position. Additional examples of reasonable accommodations include telecommuting, use of computer software, and ergonomic changes to the work space.



Responding to a Charge from the Minnesota Department of Human Rights



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Some days, opening the mail can be a harrowing experience. In particular, a thick envelope from the Minnesota Department of Human Rights, marked “URGENT,” can make one want to take a spontaneous sick day. If you have the fortitude to open the envelope and read the Charge of Discrimination inside, you’ll have a busy few weeks in your future. This article will talk you through them.

Keep in mind that no two Charges are the same. Some employers, at some times, choose to go through this process without an attorney. In other cases you will want to retain counsel to assist you. Whether you are represented or not, these steps will need to be followed.

Step 1. Remain Calm.

The Minnesota Department of Human Rights is responsible for dealing with charges of discrimination under the Minnesota Human Rights Act (“MHRA”). If you’ve received a Charge, someone (usually an employee) has made a Charge which, if it were proven true, would be a violation of the MHRA. Obviously, the Department has only heard one side of the story, so at this point it is not a matter of guilt, or even believability of the charges.

Step 2. Make a Plan.

The letter from the Department will basically demand two things. First, the Department will demand information relating to the Charge. Second, the Department will invite an Answer to the Charge. Both of these things will

require collecting information, compiling documents, pulling valuable employees away from other duties, and forming a coherent position. All of this needs to be done in short order; typically the information and Answer are due in 20 days.

Your plan should first communicate to all players the importance of the response and make their work a clear priority. You will need to divide tasks. The compilation of paperwork often should come first, since your Answer, and management’s position, should incorporate the documents which the Department thinks are important.

Step 3. Investigate.

The purpose of an investigation is to find out what happened; not to prove the other side wrong. Bad news doesn’t get better with age. If your company has made some mistakes, and the Charge is true, or may be proven true, it’s better to know that sooner than later.

Sit down with the individuals who have knowledge of the facts alleged in the Charge. Don’t just ask them what they did; ask them why they did what they did. Most importantly, for every answer they give, ask them, and ask yourself, “How can we prove that?”

In many cases, the investigation is already started because the employee was terminated, and the Charge is one of retaliation. If you’ve fired this person, there should be some documentation as to why. In that case, there is a temptation to focus on proving how bad the employee was. That’s important, but don’t forget to look into the claims of wrongdoing and look for ways to disprove them as well.

Step 4. Compile the Documents.

Usually the documents demanded by the Department consist of documents related to the employee making the Charge and any facts surrounding the Charge. You can,



and should, provide additional documents that put things in context and put your company’s actions in a better light. Make sure that your documents are delivered to the Department in an organized and usable format. Remember, you want the Department to see things your way. Having tabs and cover sheets for their convenience will help your case. Sending a disorganized mess will discourage the Department from thoroughly reading what you’ve disclosed and hurt your credibility.

Step 5. Draft the Answer.

The Answer is your opportunity to present your company’s position and to tell your side of the story. Most importantly, your answer must be honest. Even honest exaggeration should be avoided. Because the standard of proof is probable cause, you should know that simply disagreeing with the employee, or calling her a liar, will have little effect. You should point out how the evidence you’ve provided disproves the Charge or puts your actions into an innocent context. Finally, you should avoid dwelling on irrelevant facts. This is where a solid understanding of employment law is important. Knowing where to concede a point, and where to fight tooth and nail, depends on understanding what are legally significant facts and what are unimportant details.

Conclusion.

Responding to the Department of Human Rights is a time-consuming and intimidating process. However, getting it right can make the difference between a quick dismissal and years of litigation.

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