

Labor and Employment Law

JANUARY 2005

VOLUME XII, ISSUE 1

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Employment Discrimination

Illinois Forbids Discrimination Based On Sexual Orientation

In its typical flurry of activity at the end of the legislative session, the Illinois legislature passed a number of new laws and amendments to existing laws. One of the most controversial changes—passed on the last day of the legislative session—was a bill amending the Illinois Human Rights Act to prohibit discrimination on the basis of sexual orientation, in both employment and housing.

SB 3186, which has already been signed into law by Governor Blagojevich, adds a new category of “sexual orientation” to the IHRA. Sexual orientation is defined as:

Actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth. “Sexual orientation” does not include a physical or sexual attraction to a minor by an adult.

This amendment to the IHRA specifically states that it does not require preferential treat-

ment or affirmative action, but simply requires employers to refrain from discrimination (including harassment) on the basis of sexual orientation.

It should be noted that Cook County, Chicago and a number of other Illinois cities already include sexual orientation in their discrimination laws. But

this new bill will cover *all* Illinois employers with 15 or more employees. Applicants and employees who believe that the law has been violated can file a

charge of discrimination with the Illinois Department of Human Rights, and it will be investigated in the same manner as charges alleging discrimination on the basis of other protected characteristics (e.g., race, sex, age, disability, etc.).

...this new bill will cover all Illinois employers with 15 or more employees.

Kathryn Montgomery Moran | 312.443.1749 |

kmoran@lordbissell.com

EEOC Issues Guidance On ADA And Foodborne Illnesses

On October 28, 2004, the EEOC issued a Guide for Restaurants and Other Food Service Employers on how to comply with the Americans with Disabilities Act (“ADA”). The Guide is divided into three parts:

- (1) basic ADA information;
- (2) an explanation of the interaction between the ADA and the FDA's Food Code; and
- (3) ADA rules preventing discrimination against persons with disabilities.

The first part of the guidance addresses the basic questions of who is covered by the ADA, how a disability is defined, what are the considerations in assessing reasonable accommodations, and the fact that an employer can deny employment to a person who would pose a “direct threat” to the health or safety of himself or others in the workplace.

The second part begins with an explanation of the fact that the FDA Food Code addresses the issue of employee health for those employ-

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Court Finds That Drooling Cook Can Proceed With ADA Case

Those who might think that the EEOC's Guide on food handling and the ADA goes too far may want to read a recent Minnesota case involving a Fuddruckers restaurant. The restaurant terminated one of its cooks allegedly because she "drooled and spit into food that she prepared and served to customers." The employee, who suffers from a stuttering disorder that sometimes causes excessive salivation, sued for disability discrimination—and a federal district court decided that she has enough evidence to take her case to a jury. *Andresen v. Fuddruckers, Inc.*, No. 03-3294.

The plaintiff, Barbara Andresen, worked for Fuddruckers in a food service role for a total of 16 years. Andresen apparently suffered from a lifelong stuttering disorder. Up until 2001, she had no job performance issues. However, in 2001, Fuddruckers assigned two new managers to her location in order to improve a public image of the location

as being "unsanitary." The new managers began highlighting performance problems with Andresen, including reports that she sometimes drooled into the food. As part of their plan of corrective action, the managers required Andresen to wear a surgical mask while working in food preparation. Andresen

...Andresen's stuttering was severe enough that it could substantially limit her ability to speak—and thus could be considered a disability under the ADA.

and Fuddruckers disagreed as to whether she was in compliance with the performance plan. Andresen claimed to have complied with all of Fuddruckers' requests, but the restaurant contended that she failed to wear the surgical mask

and failed to meet other job performance requirements.

After Fuddruckers terminated her employment, Andresen sued under the Americans with Disabilities Act ("ADA"). She claimed that her termination was actually due to her stuttering disorder. Fuddruckers countered by arguing: (a) the stuttering was not an ADA-cognizable "disability;" and (b) Andresen was terminated because her drooling into food caused a health hazard. In denying summary judgment to the restaurant, the court first concluded that Andresen's stuttering was severe enough that it could substantially limit her ability to speak—and thus could be considered a disability under the ADA. It then considered whether the termination was due to Andresen creating a health hazard. In support of its position, Fuddruckers had cited sworn testimony that at least three customers had complained about Andresen's drooling,

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ees who work around food, in an attempt to protect the public from diseases transmissible through food. The FDA Food Code discusses the following four pathogens (the "Big 4 pathogens") which are considered communicable diseases by the Center for Disease Control ("CDC"):

- (1) *Salmonella* Typhi;
- (2) *Shigella* spp;
- (3) Shiga toxin-producing *Escherichia coli*; and
- (4) Hepatitis A virus.

The FDA Food Code provides that employees who have been diagnosed with a disease due to one of the Big 4 pathogens should not work in food service. It also states that employees with certain symptoms (diarrhea, fever, vomiting, jaundice, or sore throat with fever) should be restricted from food handling duties. Not every person who has such symptoms is covered by the ADA, but, when a person is disabled by one of the diseases caused by a Big 4 pathogen, the employer must consider the ADA in addition to the provisions of the FDA Food Code. According to the Guide, this means that, if the employee is disabled by one of the diseases listed in the Food Code, the employee should be excluded from the food establishment only if the employer determines that:

- (1) there is no reasonable accommodation that would

eliminate the risk of transmitting the disease while allowing the employee to remain in her food handling position; or

- (2) all reasonable accommodations are too difficult or expensive and there is no vacant position not involving food handling to which the employee can be reassigned.

The third part of the EEOC's guidance notes that employers must also comply with ADA rules restricting medical inquiries to employees, including questions about diseases transmissible through food. For instance, employers may not ask medical questions of applicants until a conditional offer of employment has been made. Once a conditional job offer is made, they may ask medical questions and require medical exams, as long as they treat all applicants for the same type of job in the same way. According to the guidance, an employer may ask current employees medical questions only when there are concrete reasons to believe that the employee cannot perform the job or poses a risk to workplace safety due to a medical condition.

It is recommended that employers involved in the food industry review the Guide in its entirety. It is available at http://www.eeoc.gov/facts/restaurant_guide.html.

Kathryn Montgomery Moran | 312.443.1749 | kmoran@lordbissell.com

Kidney Failure May Be Disability Within Meaning Of ADA

Although the Americans with Disabilities Act (“ADA”) has now been in effect for more than a dozen years, the courts continue to wrestle with the question of what constitutes an impairment that “substantially limits major life activities.” In *Fiscus v. Wal-Mart Stores*, the plaintiff was diagnosed with renal (kidney) failure. As a result of medical restrictions related to her condition, Fiscus went on disability leave. While on disability leave, Fiscus had a kidney transplant. Although she expected to return to work on March 30, 2000, Fiscus was discharged on March 15, 2000 for failing to return to work within the one year maximum leave of absence available under Wal-Mart’s policies. After filing a charge with the EEOC, Fiscus brought suit in federal court in Pittsburgh, Pennsylvania.

The lower court granted summary judgment in favor of Wal-Mart, finding that the activities of processing bodily waste and cleansing blood were merely “kidney functions” and do not constitute a “major life activity” under the ADA. Fiscus appealed, and the Third Circuit Court of Appeals reversed. *Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378.

In analyzing the claims of Fiscus, the Court of Appeals

rejected the lower court’s finding that impaired elimination of bodily waste and the inability to clean the blood were simply characteristics of kidney failure. Instead, the court stated that such conditions are the “effect of kidney failure in the same way that impaired thinking is the effect of organic brain disease.” The court went on to explain that kidney function was an activity “central to the life process” and, therefore, a major life activity. The court therefore remanded the case for the lower court to determine “whether dialysis eliminated any substantial limitation on the major life activities of cleansing blood and caring for oneself, bearing in mind collateral and side effects.”

The fact the Third Circuit determined that kidney disease could constitute a disability within the meaning of the ADA is not a surprise to most employment lawyers. The principal importance of the case is the analysis that the court went through, demonstrating once again that the courts will generally provide a very broad interpretation to the term “major life activities.”

Steven H. Adelman | 312.443.0405 | sadelman@lordbissell.com

Labor Management

Labor Board Is Short-Handed

The five-member National Labor Relations Board is now down to three members, as both Ronald Meisburg (R) and Dennis Walsh (D) have left the Board. Member Ronald Meisburg, who has more than 20 years of experience as a management attorney, was given a recess appointment in December 2003. When the Senate adjourned its 2004 session on December 8, Member Meisburg’s appointment automatically expired. Meisburg is not eligible for another recess appointment, but he has been re-nominated for a regular term.

On December 16, the regular term for Member Dennis Walsh expired. Walsh, who had been a union attorney before his appointment to the NLRB, would be eligible for a recess appointment. Whether President Bush intends to re-nominate Walsh for a regular term was not known at the time of publication, but the Democrats have been pushing for a re-nomination in return for their approving Meisburg’s nomination.

Steven H. Adelman | 312.443.0405 | sadelman@lordbissell.com

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and both co-workers and supervisors witnessed her drooling into food. But the court found that there were inconsistencies in the reasons given for terminating Andresen, and therefore a jury could conclude that the real reason for Andresen’s termination was her stuttering condition. The court noted that, although Fuddrucker’s contended that it terminated Andresen because of her drooling, company termination documents made no mention of drooling as the reason for termination. Also, the court noted that Fuddrucker’s made no attempt to accommodate Andresen’s condition by placing her in a job that did not involve close contact with food. Accordingly, the court granted Andresen the right to go to trial to prove that

the reason for termination articulated by the restaurant was really a pretext for discrimination.

While this case involves unusual facts, it underscores the importance of engaging in an interactive dialogue with employees who have medical conditions that impact their ability to perform their jobs, and documenting that dialogue. Additionally, Fuddrucker’s ability to defend against Andresen’s claims suffered because of inconsistencies in the documentation of its reasons for terminating her employment, highlighting the need for supervisors to be trained to accurately document both the facts underlying disciplinary decision and the reasons for their actions.

Kevin D. Kelly | 312.443.0217 | kkelly@lordbissell.com

Editors

Steven H. Adelman
sadelman@lordbissell.com
312.443.0405

Kathryn Montgomery Moran
kmoran@lordbissell.com
312.443.1749

Unemployment Taxes Rising

State unemployment taxes in Illinois are rising. As noted by Personnel Planners, Inc., an unemployment cost control company, what was once an insignificant tax is now becoming a critical issue for business profitability. In 2005, Illinois will begin taxing the first \$10,500 of earnings. Tax rates are rising also. Where the minimum and maximum unemployment tax rate in Illinois was .6 percent and 7.2 percent in 2003, the minimum and maximum rates will be 1.2 percent and 9.8 percent in 2005.

In addition to this exposure to higher taxes, weekly unemployment benefits have been rising, making any one claim more expensive. The cost of claims is the principal basis for a company's tax rate. When claimants receive more compen-

sation for longer periods of time, a company's experience rating will rise—and so will its unemployment taxes.

...weekly unemployment benefits have been rising, making any one claim more expensive.

The Illinois legislature has also increased employers' exposure to unemployment claims by amending the Illinois Unemployment Insurance Act to make locked out workers eligible for benefits. Until this new law—which was passed on the last day of the legislative session—unionized workers were generally not eligible for unemployment benefits when their employers locked them out during a labor dispute. But the unions have pushed hard for this change—and they have now won.

Steven H. Adelman | 312.443.0405 | sadelman@lordbissell.com

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OSHA Summaries Must Be Posted

From February 1 until April 30, 2005, employers must post a summary of their employees' job-related injuries and illnesses that occurred during 2004. Employers with more than ten workers are required to post the OSHA form 300A in a conspicuous place where notices to employees are customarily posted. Employers must also make a copy of the summary available to workers who move from work site to work site, such as construction workers. Certain industries are exempt from the posting requirement, particu-

larly in the retail, services, finance, and real estate sectors. A complete list of the exempt industries is posted on OSHA's Web site, www.osha.gov/recordkeeping/RKforms.html.

Steven H. Adelman | 312.443.0405 | sadelman@lordbissell.com

EEOC ISSUES FACT SHEET ON INTELLECTUAL DISABILITIES

As part of a series of fact sheets covering particular disabilities, the Equal Employment Opportunity Commission (“EEOC”) recently issued Questions & Answers About Persons with Intellectual Disabilities in the Workplace and the Americans With Disabilities Act (“ADA”). Two previous guidances have already been issued, one covering diabetes in the workplace (Vol. XI, Issue 1) and the other covering epilepsy in the workplace (Vol. XI, Issue 5). Following is a synopsis of some of the highlights of the new fact sheet.

DEFINITION OF INTELLECTUAL DISABILITY

According to the EEOC, an individual is considered to have an intellectual disability when:

- ♦ the person’s intellectual functioning level (IQ) is below 70-75;
- ♦ the person has significant limitations in “adaptive skill areas” as expressed in “conceptual, social, and practical adaptive skills;” and
- ♦ the disability originated before the age of 18.

“Adaptive skill areas” refers to basic skills needed for everyday life. These basic skills include communication, self-care, home living, social skills, leisure, health and safety, self-direction, functional academics (reading, writing, basic math), and work.

The EEOC estimates that 31 percent of individuals with intellectual disabilities are employed, but that many more want to work.

COVERED INTELLECTUAL DISABILITIES

The fact sheet notes that not every person with an intellectual disability is covered by the ADA. The EEOC describes the following types of individuals as being protected by the ADA:

- ♦ a person who has an impairment that substantially limits one or more major life activities (e.g., an individual who lives alone, but frequently gets assistance with cleaning, grocery shopping, getting to doctor’s appointments, cooking, reading mail and paying bills is substantially limited in caring for himself, and has an ADA-covered disability);
- ♦ a person who has a record or history of a substantially limiting intellectual disability (e.g., a person who was erroneously diagnosed as having an intellectual disability in high school); or
- ♦ a person who does not have a substantially limiting intellectual disability, but is treated by an employer as if they do

(e.g., an applicant with a facial deformity that affects speech and who is denied a position as a secretary because the employer believes that she has an intellectual disability and will be unable to communicate with clients effectively).

QUESTIONS ABOUT JOB PERFORMANCE

While employers can ask questions relating to the ability to perform a job (e.g., can you lift 45 lbs? alphabetize files? put items in numerical order), the fact sheet cautions against asking the following:

- ♦ whether or to what extent a person has an intellectual disability;
- ♦ whether the applicant has ever filed for workers’ compensation;
- ♦ whether the applicant takes medication;
- ♦ whether the applicant has been hospitalized in an institution; or
- ♦ whether the applicant is receiving psychiatric treatment.

REQUESTS FOR MEDICAL INFORMATION

The EEOC cautions employers not to routinely ask for medical information from an employee who has an intellectual disability just because the employee has performance problems. Performance problems may be unrelated to the employee’s intellectual disability, and the EEOC indicates that the employer can request medical information only when it “has a reasonable belief, based on objective evidence, that a medical condition may be the cause of the employee’s performance problems.”

CONFIDENTIALITY OF MEDICAL INFORMATION

An employer may disclose the fact that an employee has an intellectual disability in limited circumstances, e.g.:

- ♦ to supervisors and managers where necessary to provide a reasonable accommodation or to meet an employee’s work restrictions;
- ♦ to first aid and safety personnel if the employee would need emergency treatment or other assistance in an emergency;
- ♦ to individuals investigating compliance with ADA and similar state and local laws; and
- ♦ as required for workers’ compensation or insurance purposes, e.g. for claims processing.

Disclosures about an employee’s intellectual disability must be made on a “need to know” basis. The fact sheet states that

employers cannot tell employees that they are making a reasonable accommodation to a worker with an intellectual disability, even if co-workers complain that he or she appears to be receiving special treatment. The EEOC advises that, “Rather than disclosing that the employee is receiving a reasonable accommodation, the employer should focus on the importance of maintaining employee privacy.”

REASONABLE ACCOMMODATION

As with all covered disabilities, employers must “reasonably accommodate” the known physical and mental limitations of persons with intellectual disabilities. They should respond to requests for accommodations from employees and third parties (e.g. relatives, friends and co-workers) who make the request on behalf of a person with a disability. The request may be informal, and need not state the need for “reasonable accommodation.” It can be made at any time during the application process or when the need arises after the individual has been hired. According to the EEOC, even if an accommodation has not been requested, the employer has “a legal obligation to initiate a discussion about the need for a reasonable accommodation and to provide an accommodation if one is available if the employer: (1) knows that the employee has a disability; (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.”

Once an employer receives a request for accommodation, it should engage in “an informal and interactive discussion with the person and/or his representative to determine suitable accommodation.” Employers must accommodate individuals with intellectual disabilities in the application process and at work. Examples of accommodations that may be required include the following:

- ♦ providing someone to read or interpret application materials; demonstrating rather than describing job duties; modifying tests, training materials or policy manuals; or replacing a written test with an “expanded interview;”
- ♦ job restructuring (e.g., exchanging non-essential functions between employees);
- ♦ training modifications, such as giving instructions at a slower pace, giving the employee additional time to finish the training, breaking tasks into sequential steps, and using charts, pictures or colors, and providing detailed schedules;
- ♦ providing a job coach;
- ♦ modifying work schedules;
- ♦ help in understanding job evaluations or disciplinary proceedings;
- ♦ acquisition or modification of equipment or devices; and

- ♦ modifications to the placement of work stations.

An employer need not grant every request for accommodation. “The decision will depend on the individual situation and whether the request may cause undue hardship” (e.g. requires significant difficulty or expense when considered in light of the employer’s size, financial resources and nature and structure of its operation). An employer is not required to reassign an essential job function, lower its production standards, excuse violations of conduct rules that are job-related and consistent with business necessity, or provide personal items to employees (such as eyeglasses, hearing aids or wheelchairs). An employer does not have to make the specific accommodation requested by the employee if an alternative accommodation would also be effective.

An employer may ask for reasonable documentation about an employee’s disability if it is not obvious, to confirm that a reasonable accommodation is needed. An employer cannot request documentation unrelated to the disability at issue or the accommodation requested. In appropriate circumstances, it can request information about an employee’s functional limitations from a physician, appropriate professional or even friends and family members.

SAFETY ISSUES

While some employers may believe that hiring persons with intellectual disabilities creates increased safety risks, the EEOC maintains that an employer can only refuse to hire an employee with an intellectual disability based on safety concerns if that individual poses a “direct threat” to his or her own safety or the safety of others in the workplace. A direct threat is “a significant risk to the health or safety of the individual with a disability or others that cannot be eliminated by reasonable accommodation.”

HARASSMENT AND RETALIATION

Employees with intellectual disabilities are protected from harassment on the basis of their disabilities. Persons who oppose discriminatory employment practices, file charges of discrimination, testify or participate in any way in an investigation, proceeding or litigation are protected from retaliation.

The EEOC fact sheet regarding individuals with intellectual disabilities (as well as the other fact sheets) can be found on the EEOC’s web site, www.eeoc.gov.

Kathryn Montgomery Moran | 312.443.1749 | kmoran@lordbissell.com