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Many more people can sue for disability discrimination

The number of people who can sue for disability discrimination under the Americans With Disabilities Act has greatly increased.

That's because the federal government has issued new rules that explain when someone is "disabled." And under these rules, a lot more people qualify than in the past.

Previously, when an employee brought a lawsuit under the ADA, it was very common for there to be a lengthy dispute about whether he or she was in fact disabled. However, as a result of the new rules, it will be much easier for employees to prove that they're disabled – so more lawsuits will focus instead on whether the employer reasonably accommodated the worker.

The new rules were published by the federal Equal Employment Opportunity Commission.

Here's an explanation of the changes. To understand how they work, it's important to know that the ADA defines a disability as an impairment that substantially limits a person with regard to a major life activity. The new rules make it easier for workers to prove that they have an impairment, *and* they make it easier to show that their impairment limits a major life activity.

Impairments. As for impairments, the new rules say that a worker can have an impairment even if the worker can ordinarily do something to "fix" it. For instance, bad eyesight can be an impairment even if a person can easily compensate for it by wearing glasses. Similarly, diabetes is an impairment even if the diabetic controls the problem with insulin.

The rules also say that you can have an impairment even if it only happens occasionally, or if it happened in the past and *might* happen again in the future. For instance, epilepsy is an impairment even if a worker only rarely has seizures. A worker whose cancer is in remission might have an impairment if there's still a chance it will recur.

With these types of impairments, the new rules say that a person is disabled if these conditions would substantially limit a major life activ-

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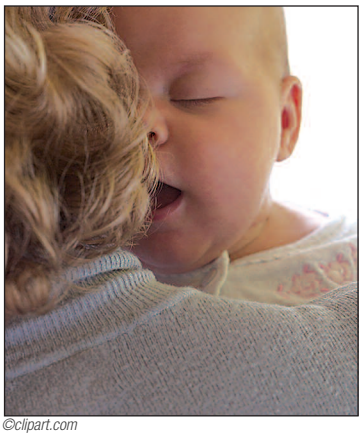
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New mother can sue for pregnancy discrimination

A woman who was fired shortly after she returned from maternity leave can file a pregnancy discrimination lawsuit against her employer, says the Iowa Supreme Court.

Although the woman obviously was no longer pregnant at the time she was fired, the court said this didn't matter, because pregnancy discrimination includes discrimination against "women affected by pregnancy, childbirth and other related conditions," so it includes a new mother.

The woman was the marketing director at a small company that made natural body care products. A few weeks after she was hired, she announced that she was pregnant. She claims that at the time, the company's chairman asked her if she was going to "be like all those other women who find it's this life-altering experience and decide to stay home."

After her maternity leave, she returned to work part-time, and then a month later returned to work full-time. She was fired seven days later.

She claims company officials told her she wasn't catching up fast enough, and that they had begun to doubt whether she was still committed to the job.

The woman sued under an Iowa law, but the Iowa law is very similar to the federal pregnancy discrimination law. Several federal appeals courts have ruled that discrimination against a new mother can qualify as pregnancy discrimination under the federal law.

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ity *when they occur*. It doesn't matter whether they are limiting a major life activity at the present time.

Major life activities. Some people have impairments that don't interfere with most major life activities, such as sleeping or eating, but do get in the way of performing a particular job. These have been the situations that have typically led to disputes about whether the employee is actually "disabled," as opposed to merely unable to do a specific task.

The new rules make it much easier to prove that such an employee is disabled. For one thing, the rules say that "working" is a major life activity. For another, they say that the issue is whether the employee can do the particular job at hand, not whether the employee can do a broad range of jobs within a large sector of the economy.

Separately, under the new rules, "interacting with others" is a major life activity. This could make it easier for people with certain types of mental illness or autism to qualify as disabled.

Finally, the rules make clear that many conditions should automatically be considered to be disabilities. These include multiple sclerosis, HIV/AIDS, epilepsy, diabetes and bipolar disorder.

'Regarded' as disabled. Under the ADA, workers don't have to actually be disabled to sue – all they have to prove is that the employer "regarded" them as disabled. And the new rules make it much easier for workers to prove this.

Previously, in order to show that an employer regarded them as disabled, workers had to establish that the employer mistakenly believed that they had an impairment that substantially limited them in a major life activity. In practice, it was usually fairly difficult to show this in court.

Under the new rules, though, employees merely have to prove that the employer thought they couldn't do the job in question.

For instance, suppose an employer refuses to hire someone who has a nervous tic. In the past, the applicant would have to somehow show that the employer assumed that the tic was evidence of a larger nervous system disorder that limited a major life activity such as sleeping or walking. Now, the applicant merely has to prove that because of the tic the employer didn't think he or she could do the job.

Taken together, these new rules are likely to have a major effect. Employees will find it easier to sue, and employers will want to exercise much more caution when dealing with employees who have an impairment.

We welcome your referrals.

We value all our clients. And while we're a busy firm, we welcome all referrals. If you refer someone to us, we promise to answer their questions and provide them with first-rate, attentive service. And if you've already referred someone to our firm, thank you!

Employers sued for discrimination by independent contractors

Two new cases show that an employer can be sued for discrimination even if the person who was discriminated against – or for that matter, the person who did the discriminating – was an independent contractor.

In a case in Pittsburgh, a black woman was terminated as a sales representative for a company that made adjustable beds. She claimed this was because of racism.

A federal appeals court said that the woman couldn't sue under Title VII, the most well-known employment discrimination law, because she was a contractor, not an employee. However, she *could* sue under a different law. The other law was passed by Congress during the Civil War era and prohibits race discrimination in contracts – including employment contracts.

In another case, a company that rented apartments in Manhattan hired an independent contractor to interview people to become sales agents. An applicant sued the company after claiming that the contractor rejected him as "too old."

The company argued that it shouldn't be liable because it didn't do anything wrong – if anyone engaged in age discrimination, it was merely the contractor, not the company.

But a federal appeals court ruled that the company could be sued for age discrimination committed by its agent – even if the agent was a contractor.

The court noted that there was a close relationship between the company and the agent, since the job interview took place in the company's offices and since the agent allegedly stated that it was the company itself that was looking for someone younger.

U.S. steps up pressure on companies that hire illegal workers

The Obama administration has announced that it intends to focus its immigration enforcement efforts on companies that knowingly hire illegal immigrants, by stepping up audits of I-9 forms – the employment eligibility documents that employers must fill out for every worker.

This appears to be a change from the Bush administration, which had placed more emphasis on arresting illegal workers as opposed to going after employers.

On one single day in 2009, Immigration officials served "Notices of Inspection" on 652 businesses around the country. That compares to 503 such notices issued during the entire year of 2008.

Employers often complain that the I-9 requirements are difficult for them, because it can be hard to determine whether identity documents are authentic and because they fear that questioning the documents too closely could open them up to discrimination claims.

'Fear' didn't justify late sex harassment complaint

A worker who waited five months to complain to her employer that a co-worker was sexually harassing her can't sue the company, even though she said she waited so long because she was afraid of retaliation.

That's the result of a federal appeals court ruling from Washington, D.C.

The employer's sex harassment policy told employees to report harassment immediately to an EEO manager.

But instead of complaining right away, the worker simply posted the company's sex harassment policy on her door. She says the co-worker warned her that if she complained about him to management, no one would believe her, and people would think that she was the problem.

However, the court said that the worker's fear of reporting the harassment wasn't reasonable. It said the only person who discouraged her from reporting it was the co-worker, and he wasn't her supervisor, didn't threaten her with any adverse employment action, and had no other leverage with which to intimidate her.

Get the new EEOC workplace poster

The Equal Employment Opportunity Commission has revised the poster that employers are required to display in the workplace to reflect new federal employment discrimination laws, including the Genetic Information Nondiscrimination Act and recent changes to the Americans With Disabilities Act.

The revised poster also includes updates from the Department of Labor. It is available in English, Spanish, Chinese and Arabic.

To view or print the poster, go to **www.eeoc.gov/self_print_poster.pdf**

To request the poster from the EEOC, go to **www.eeoc.gov/posterform.html**


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Physical exam for employee returning to work may be illegal

Can an employee who is returning to work after surgery be given an exam to make sure he or she is up to the job?

The answer is yes…although this is a very tricky area, because these exams can also violate the Americans With Disabilities Act.

In a recent case, a mill worker underwent knee surgery. Before she could come back to work, her employer made her take a "physical capacity evaluation." An occupational therapist evaluated the employee and recommended that she not return to work, and she was terminated.

She sued under the ADA.

The ADA says that employers can require workers to undergo physical capacity evaluations, but they can't make them take "medical exams" except under certain circumstances. So the question was whether the mill worker's test really amounted to a "medical exam."

In this case, the therapist didn't just test the employee's muscle strength and range of motion. The therapist also measured her heart rate and tested her breathing after working out on a treadmill. The court said the heart and breathing tests weren't necessary to determine if the employee could return to work, and might have amounted to an illegal medical exam that violated the ADA.

We'd be happy to help if you're concerned about what's allowed in this difficult area.

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