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The Changing Face of Discrimination

Presented by:
Merrily S. Archer, Esq., M.S.W.
 Phone: (303) 218-3656
 Email: marcher@laborlawyers.com

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Who Do Our Anti-Discrimination Laws Protect?



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New Protected Populations

- Invisible Disabled
- ARRA-Whistleblowers
- Protection PLUS
 - Criminal History
 - Poor credit
 - Unemployed status
 - Poor test takers

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The “Invisible Disabled”

- The ADA and recently-issued EEOC regulations have *significantly* expanded ADA coverage to employees with
 - Conditions that previously would not rise to the level of an ADA-protected disability
 - Conditions that may or may not have any bearing on work performance
 - Conditions that you never knew the employee had

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What Changed? More Major Life Activities

- Major Life Activities (Recognized)
 - Performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, **sitting, reaching, interacting with others, caring for oneself**
 - Court decisions concerning numerous other major life activities remain valid
 - Major life activities may now include running, caring for children, driving, and thinking

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What *Really* Changed

- Major Life Activities (Major bodily functions)
 - The operation of a major bodily function, including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, reproductive functions, circulatory system, **special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic and musculoskeletal.**

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What Changed?

- Definition of “substantially limits”
 - EEOC’s regulations state impairment need not severely restrict or significantly restrict major life activity but must be more than a temporary non-chronic impairment with little or no residual effects
- Impairment substantially limits individual in a major life activity as compared to most people in the general population.

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Substantially Limited - Rules of Construction

- Individual is not also required to show he is limited in performing activities of central importance to daily life
- Individual does not have to show substantially limited in more than one major life activity
- Comparison to “most people” should be common sense analysis

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Substantially Limited - Rules of Construction

- Mitigating Measures
 - Positive effects may not be considered
 - Negative effects must be considered
 - Included but not limited to medications, aids, devices, assistive technology, learned-behavioral modifications, surgical intervention that does not eliminate impairment
 - Mitigating measures do not include ordinary eyeglasses and contacts, i.e., fully corrects visual acuity or eliminates refractive errors

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Substantially Limited – Rules of Construction

- Impairment can be substantially limiting even if it lasts less than six months
- Analysis should focus on effect of impairment on individual, not what individual has achieved despite impairment
- Episodic impairment and impairment in remission are disabilities if substantially limiting when active

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“Consistently” Meet Disability Definition Examples

- Deafness
- Blindness
- Missing Limbs or Paralysis
- HIV/AIDS
- Cancer
- Cerebral Palsy
- Multiple Sclerosis
- Muscular Dystrophy

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“Consistently” Meets Disability Definition

- PTSD
- Intellectual Disability
- OCD
- Major Depression
- Diabetes
- Epilepsy
- Autism
 - Asperger’s Syndrome?
- Bipolar Disorder
- Schizophrenia

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“Maybe, Maybe Not” - Examples

- Asthma
- High Blood Pressure
- Learning Disability
- Panic Disorder
- Anxiety Disorder
- Some Form of Depression,
 - Example - Adjustment Disorder
- Carpel tunnel
- Hypothyroidism

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ADA Management

- Do NOT “pathologize” bad behavior or poor performance!
 - The ADA does not excuse bad behavior or poor performance
 - Focus on performance, behavior!

On September 3, 2008, the EEOC issued new Enforcement Guidance entitled “The ADA: Applying Performance and Conduct Standards to Employees with Disabilities”



EEOC's Guidance on Performance/Conduct Standards and the ADA

- Important reminders:
 - An employer may apply the same qualitative/quantitative standards to an employee with a disability
 - An employer should apply the same evaluative criteria to an employee with a disability
 - An employer can enforce the same conduct rules with respect to both disabled and non-disabled employees

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Blame the disability

First disclosure of potential disability in response to discipline or poor evaluation should trigger

- Request for medical documentation
- "Interactive process" to determine reasonable accommodation

Request for reasonable accommodation during discussion of performance problem does NOT require employer to

- Tolerate or excuse performance
- Withhold discipline
- Raise performance rating
- Give "inflated" evaluations

What reasonable accommodation would enable the employee to meet the performance or

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New Whistleblowers under the ARRA



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Is Your Agency At Risk?

- Recipients of "covered funds" under the ARRA
 - Prohibits retaliation (e.g., discharge, demote, "discriminated against") against an employee for
 - Disclosing to any law enforcement agency, member of Congress, court, federal agency, or supervisor
 - Supervisor must be someone with hiring/firing authority

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Covered ARRA Accusations

- Gross mismanagement of an agency contract or grant related to covered funds
- Gross waste of covered funds
- Substantial and specific danger related to implementation of use of covered funds
- Abuse of authority related to use of covered funds
- Violation of law, rule, or regulation related

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A Regulatory Nightmare and/or a Civil Suit

- The ARRA requires an employee to file a retaliation complaint with the “appropriate” inspector general, who may or may not investigate
- If agency denies relief or if it takes no action within 210 days of the complaint, the employee may file an action in United States District Court

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Ugly Features of ARRA Retaliation Lawsuits

- An extremely relaxed CAUSATION standard
 - Disclosure a “contributing factor” in reprisal
 - Evidence that official undertaking reprisal KNEW of disclosure; OR
 - Evidence that reprisal occurred within a “period of time” following disclosure
- Damages
 - Reinstatement with retroactive backpay,

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Protection PLUS

- The EEOC no longer considers *intentional discrimination* against groups protected by Title VII, the ADEA, the EPA, and the ADA the focus of its enforcement mandate.
- On April 4, 2006, recognizing that the Commission cannot effectively combat discrimination without a strong nationwide systemic program, the EEOC unanimously voted to shift the EEOC's emphasis to the investigation and litigation of *systemic discrimination*.

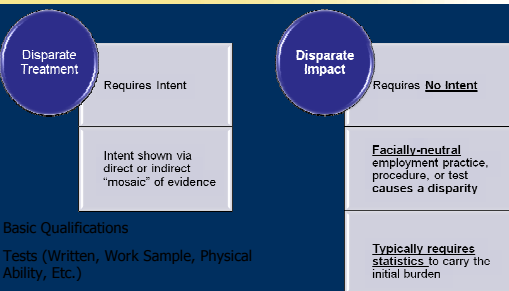
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“While past EEOC focus has primarily been on individual cases of discrimination, the agency has stated its bipartisan desire to shift emphasis to combating systemic discrimination. A strong systemic program is crucial to battling unlawful patterns or practices of discrimination which have a broad impact on an industry, profession, company, or geographic location.”

EEOC FY 2010 Congressional Budget Justification

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Disparate Treatment v. Disparate Impact



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The EEOC's Hot Issues

Employment tests (both pre and post offer)
Credit Reports (credit score criterion)
Criminal background check records
 Criminal background matrices
ADA policies (reassignment)
Educational standards
Pay policies
English proficiency rules
Grooming standards

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Courting Unintended Risk

- Any hiring or layoff criterion that could have an adverse impact on a protected group is FAIR GAME for the EEOC
- If there is statistically adverse impact, the EMPLOYER must establish that the criterion is job-related and consistent with a business necessity.
- These are EXPENSIVE cases to defend.

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Solutions That Work



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The Employment Litigator's Credo

Every good deed will be punished
Truth requires proof

She who has the most paper wins
If it is not written, it did not happen

Effective people management practices, not
employment lawyers – win cases

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Back to Basics

- Manage employee performance
 - Avoid “evaluation inflation”
- DOCUMENT, DOCUMENT, DOCUMENT
- Provide regular training to supervisors and managers
- Audit hiring process for adverse impact
- Have an open door
- Prepare an investigative template/protocol **BEFORE** you need it

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