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Employment Law – Week #5 Lecture 1

Accommodation

As discussed earlier, there are four primary kinds of non-discrimination causes of action. This week we will discuss the fourth cause of action: accommodation. An employer’s obligation to accommodate is limited to the protected classes of disability and religion. However, even between these two classes the obligation to accommodate differs. The obligation to accommodate the disabled is more extensive than the obligation to accommodate religion, though an entitlement to obligation is easier to establish in the case of religion.

The Americans with Disability Act (for private employers) and the Rehabilitation Act (for public ones) govern an employer’s obligation to accommodate disability.  To establish failure to reasonably accommodate disability, the plaintiff must prove that:

·         He or she has a disability--a physical or mental impairment that substantially limits the performance of one or more major life activities.

·         He or she is qualified for the job in question:

·         Meets all of the neutral, job-related requirements for the position; and,

·         Is able to perform the essential functions of the job with or without reasonable accommodation; and,

·         Is not a direct threat to his or her own health and safety or that of others

·         The employee’s need for accommodation was made known, or should have been known, to the employer

·         One or more accommodations exist that are reasonable that the employer did not provide.

Once these criteria are established, the burden shifts to the employer to show that accommodation would pose an undue hardship.

**Disability is the first element that must be established**. Actual disability is the first way this element can be met. This includes both physical and mental impairments, and the EEOC has provided a list of some conditions that will qualify. However, a disability determination depends on an individualized assessment of the effects on a person: a person qualifies for disability if their condition substantially limits one or more major life activities (please note that some conditions, such as drunkenness, are specifically excluded from this treatment).  Record of disability is the second way the disability element can be proven. This protects people that qualified as actually disabled in the past though the person is not currently disabled. The final way to establish disability is by being mistakenly regarded as being disabled. This protects individuals who are disabled because of an actual or perceived physical or mental impairment even if the perceived impairment does not limit a major life activity.

**Being qualified for the position is the second element that must be established**. Qualification in this context means having the necessary skills, education and experience. Furthermore, the person must be able to perform the essential functions of the job. Please note that not every function of a job will be proven “essential.” As a receptionist, it is likely essential that there person be able to answer the phone. However, getting coffee for people may be a non-essential function even if the job requires it.  A function is more likely to be deemed essential if the position exists to perform this function, few others are available to perform the function, and/or the function is highly specialized.

**Reasonable accommodation should be a collaborative process between the employee and employer**.  The accommodation may take many forms, such as restructuring a job or making facilities accessible. During this process, the employer’s good faith in making efforts will be critical.  However, an accommodation is not required if it would impose an undue hardship (if the action would involve significant difficulty or expense, in relation to the size of the firm and its resources).

**Title VII also requires employers to accommodate religion unless doing so would impose undue hardship on the business**. The process for establishing the employee is entitled to an accommodation is easier than with disability. However, establishing undue hardship is much easier thereby limiting the responsibility to accommodate religion. Religion is defined broadly, and the courts are reluctant to judge something as not qualifying as a religion.

To establish the prima facie case for failure to reasonably accommodate religion, the plaintiff must show:

·         The existence of sincere religious belief or practice that conflicts with an employment requirement

·         The employer was informed of the conflicting belief or practice

·         The employee or applicant suffered an adverse employment outcome because of adhering to the religious belief or practice.

Once this is established, the employer must then show that either a reasonable accommodation was offered but not accepted or that there was not reasonable accommodation possible without undue hardship. However, this obligation to accommodate religion has been described as de minimis by the Supreme Court with such efforts as allowing private schedule swaps or the use of personal time to have holidays off. Religious advocacy may require accommodation, but employers must be careful to ensure this doesn’t cross over into religious harassment (severe and pervasive harassment of others on the basis of religion).

References

Chapter 10 of Walsh, D. (2015). Employment Law for Human Resource Practice. (5th ed.). Mason: South-Western.

Most of the material is derived, with some editing, from the Instructor material from the book.

Work-Life Conflicts and Other Diversity Issues

The personal life of an employee may make it difficult to perform the functions of a job. Sickness may require the employee to stay home for a significant period of time. Military service (especially for reservists) may uproot the employee for months or even years. A diverse upbringing may lead to a multi-lingual workplace. The law often places obligations on employers to adjust to these situations.

The Family and Medical Leave Act (FMLA) is one such law. This law applies to governmental agencies and private employers with 50 or more employees. The FMLA, when it applies, provides minimum standards for the provision of leave.  Violation of the act can lead to legal liability for the employer. The elements of a FMLA claim require the plaintiff to show:

1.    She was eligible for FMLA benefits and protections.

a.    This means the employer worked for at least 12 months.

b.    The employee worked for at least 1,250 hours in the 12 months prior to taking leave.

2.    The employer was covered by FMLA.

a.    In the private sector, this means an employer with 50 or more employees at one location or spread about multiple locations in a 75-mile radius.

b.    All public agencies are covered by the act.

3.    The employee experienced a qualifying event entitling her to FMLA leave.

4.    The employee provided the employer with sufficient notice of intent to take leave.

5.    The employee had not already exhausted her maximum leave entitlement for the relevant twelve-month period.

6.    FMLA benefits to which the employee was entitled were delayed or denied by the employer.

**A qualifying event is defined rather broadly**. It includes, birth, adoption or fostering of a child; caring for a close family member with a serious health condition; and/or a serious health condition contracted by the employer among other events. In this context, a serious health condition is one that leads to a period of incapacity. Notice requires the employee to provide 30 days’ notice if possible and notice “as soon as practicable” if it is not.  If the employee qualifies, the FMLA entitles the employee to up to 12 work weeks of leave over a 12-month period, maintenance of health insurance as if the employee had not left, and restoration to the same position (or an equivalent one) with the same pay, benefits and terms.

The only exception to this restoration is for key employees (those among the top 10% of the firm’s employees) if restoring the employee would cause “substantial and grievous economic injury” to the employer. Furthermore, the Pregnancy Discrimination Act requires employers to treat pregnancy the same as other conditions who are similar in their ability or inability to work as well as preventing pregnancy or childbirth discrimination. Additionally, many states and municipalities also regulate health based leave.

There are various other situations where an employer may be legally obligated to provide leave. The Jury System Improvements Act protects people on federal juries from discharge or coercion by employers, and many states provide similar statutes for jury service.

**The Uniformed Services Employment and Reemployment Rights Act (USERRA)** prevents employers from discriminating against military members. Returning veterans are entitled to reemployment following up to five years of cumulative absence for military service. Under the escalator principle, employers must try to place vets into the positions they would have obtained but for military service.

The elements for a claim brought under this act require the plaintiff to show:

·         The employer was informed that the employee needed leave to fulfill military duties.

·         The employee received an honorable discharge from active military service.

·         The employee made a timely (usually within ninety days) request to be reinstated.

·         The employer delayed, denied or failed to fully reinstate the employee by restoring the employee to the terms and conditions of employment that would have prevailed had the employee not left to engage in military service.

Many employees do not speak English. The law requires employees to be careful before making decisions based on English fluency or accents, as this may constitute national origin discrimination. However, ability to speak English and accents may be considered if communication is a significant part of the job, and the accent or fluency interferes with the ability to perform the job. Employers should be careful when instituting English-only rules. EEOC guidelines treat broad English-only rules applying at all times are presumptively discriminatory though narrowly tailored policies may pass muster if the rules are a business necessity.

The law surrounding discrimination based on sexual orientation or gender identity is currently in flux. Title VII does not prohibit discrimination on the basis of sexual orientation or gender identity. However, many state and municipal laws have been passed that outlaw this practice. Public employees may have a cause of action if they are discriminated against on the basis of sexual orientation or gender identity if the employee can prove there is not rational basis for the discrimination.

References

Chapter 11 of Walsh, D. (2015). Employment Law for Human Resource Practice. (5th ed.). Mason: South-Western.

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