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Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking

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The Federal Employee Advocate is publishing here the EEOC's Guidance for job applicants and employees who experience domestic or dating violence, sexual assault or stalking. The law firm of Josh F. Bowers, P.C. has extensive experience representing Federal employees who suffered sexual harassment and gender discrimination.

Disclaimer

The legal information in this article is intended as a general overview of this issue and is subject to change; it is not meant to serve as legal advice in any particular situation. The law is in a constant state of change as Congress amends statutes; Federal Agencies issue and amend regulations, and the courts issue decisions interpreting the laws and regulations. We recommend you consult a licensed lawyer who is knowledgeable about the area of law in question before you take action to address a legal matter.

Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on race, color, sex, religion, or national origin, and the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability.[1] Because these federal EEO laws do not prohibit discrimination against applicants or employees who experience domestic or dating violence, sexual assault, or stalking as such,[2] potential employment discrimination and retaliation against these individuals may be overlooked. The examples provided in this publication illustrate how Title VII and the ADA may apply to employment situations involving applicants and employees who experience domestic or dating

violence, sexual assault, or stalking. However, whether discrimination has actually occurred in a particular instance must be determined through an investigation of the facts alleged. Information on how to file an employment discrimination claim may be found at the end of this document.

Q: What are some examples of employment decisions that may violate Title VII and involve applicants or employees who experience domestic or dating violence, sexual assault, or stalking?

A: Title VII prohibits disparate treatment based on sex, which may include treatment based on sex-based stereotypes. For example:

- An employer terminates an employee after learning she has been subjected to domestic violence, saying he fears the potential "drama battered women bring to the workplace."
- A hiring manager, believing that only women can be true victims of domestic violence because men should be able to protect themselves, does not select a male applicant when he learns that the applicant obtained a restraining order against a male domestic partner.
- An employer allows a male employee to use unpaid leave for a court appearance in the criminal prosecution of an assault, but does not allow a similarly situated female employee to use equivalent leave to testify in the criminal prosecution of domestic violence she experienced. The employer says that the assault by a stranger is a "real crime," whereas domestic violence is "just a marital problem" and "women think everything is domestic violence."

Title VII prohibits sexual or sex-based harassment. Harassment may violate Title VII if it is sufficiently frequent or severe to create a hostile work environment, or if it results in a "tangible employment action," such as refusal to hire or promote, firing, or demotion.^[3] For example:

- An employee's co-worker sits uncomfortably close to her in meetings, and has made suggestive comments. He waits for her in the dark outside the women's bathroom and in the parking lot outside of work, and blocks her passage in the hallway in a threatening manner. He also repeatedly telephones her after hours, sends personal e-mails, and shows up outside her apartment building at night. She reports these incidents to management and complains that she feels unsafe and afraid working nearby him. In response, management transfers him to another area of the building, but he continues to subject her to sexual advances and stalking.^[4] She notifies management but no further action is taken.
- A seasonal farmworker's supervisor learns that she has recently been subject to domestic abuse, and is now living in a shelter. Viewing her as vulnerable, he makes sexual advances, and when she refuses he terminates her.

Title VII prohibits retaliation for protected activity. Protected activity can include actions such as filing a charge of discrimination, complaining to one's employer about job discrimination, requesting accommodation under the EEO laws, participating in an EEO investigation, or otherwise opposing discrimination. For example:

- An employee files a complaint with her employer's human resources department alleging that she was raped by a prominent company manager while on a business trip. In response, other company managers reassign her to less favorable projects, stop including her in meetings, and tell co-workers not to speak with her.

Q: What are some examples of employment decisions that may violate the Americans with Disabilities Act and involve applicants or employees who experience domestic or dating violence, sexual assault or stalking?

A: The ADA prohibits different treatment or harassment at work based on an actual or perceived impairment, which could include impairments resulting from domestic or dating violence, sexual assault or stalking.[5] For example:

- An employer searches an applicant's name online and learns that she was a complaining witness in a rape prosecution and received counseling for depression. The employer decides not to hire her based on a concern that she may require future time off for continuing symptoms or further treatment of depression.
- An employee has facial scarring from skin grafts, which were necessary after she was badly burned in an attack by a former domestic partner. When she returns to work after a lengthy hospitalization, co-workers subject her to frequent abusive comments about the skin graft scars, and her manager fails to take any action to stop the harassment.

The ADA may require employers to provide reasonable accommodation requested for an actual disability or a "record of" a disability.[6] An actual disability is a physical or mental impairment that substantially limits one or more major life activities (which include major bodily functions). A "record of" a disability is a past history of a substantially limiting impairment. An impairment does not need to result in a high degree of functional limitation in order to be "substantially limiting." [7] A reasonable accommodation is a change in the workplace or in the way things are usually done that an individual needs because of a disability and may include time off for treatment, modified work schedules, and reassignment to a vacant position. For example:

- An employee who has no accrued sick leave and whose employer is not covered by the FMLA requests a schedule change or unpaid leave to get treatment for depression and anxiety following a sexual assault by an intruder in her home. The

employer denies the request because it "applies leave and attendance policies the same way to all employees."

- In the aftermath of stalking by an ex-boyfriend who works in the same building, an employee develops major depression that her doctor states is exacerbated by continuing to work in the same location as the ex-boyfriend. As a reasonable accommodation for her disability, the employee requests reassignment to an available vacant position for which she is qualified at a different location operated by the employer. The employer denies the request, citing its "no transfer" policy.

The ADA prohibits disclosure of confidential medical information.[8]

- An employee who is being treated for post-traumatic stress disorder (PTSD) resulting from incest requests reasonable accommodation. Her supervisor then tells the employee's co-workers about her medical condition.

The ADA prohibits retaliation or interference with an employee's exercise of his or her rights under the statute.[9]

- In the prior example, the employee tells the supervisor she intends to complain to human resources about his unlawful disclosure of confidential medical information. The supervisor warns that if she complains, he will deny her the pay raise she is due to receive later that year.

Q: What is the legal process for filing claims of discrimination?

A: The process is different depending on the type of employer:

Private Sector Employers and State and Local Government Employers

A private sector or state or local government applicant or employee who believes that his or her Title VII or ADA employment rights have been violated and wants to make a claim against an employer must file a "charge of discrimination" with the EEOC. For a detailed description of the EEOC charge process, including instructions for filing a charge, refer to the EEOC website at www.eeoc.gov/employees/howtofile.cfm or call 1-800-669-4000/ 1-800-669-6820 (TTY).

Federal Government Employers

A federal government applicant or employee who believes that his or her employment rights have been violated under Title VII or the ADA and wants to make a claim against a federal agency must file an "EEO complaint" with that agency. For more information concerning enforcement procedures for federal applicants and employees, visit the EEOC website at www.eeoc.gov/federal/fed_employces/index.cfm.

[1] Title VII and the ADA apply to employers (including employment agencies and unions) with 15 or more employees, and to federal, state, and local governments. An employer may have additional obligations under other federal statutes, such as the Family and Medical Leave Act, or under state or local anti-discrimination laws that contain broader protections than the federal EEO laws. For example, some state and local non-discrimination laws apply to smaller employers, and some states have laws expressly prohibiting discrimination against victims of domestic violence, and requiring employers to provide a certain amount of unpaid leave for related circumstances, including seeking medical care or legal assistance and attending court.

[2] The U.S. Department of Justice defines these terms as follows:

Domestic violence: "◆a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone."

Dating violence: "Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim."

Sexual assault: "Sexual assault is any type of sexual contact or behavior that occurs without the explicit consent of the recipient."

Stalking: "Stalking is a pattern of repeated and unwanted attention, harassment, contact, or any other course of conduct directed at a specific person that would cause a reasonable person to feel fear." Stalking can include: Repeated, unwanted, intrusive, and frightening communications from the perpetrator by phone, mail, and/or email[;] [r]epeatedly leaving or sending victim unwanted items, presents, or flowers[;] [f]ollowing or laying in wait for the victim at places such as home, school, work, or recreation place[;] [m]aking direct or indirect threats to harm the victim, the victim's children, relatives, friends, or pets[;] [d]amaging or threatening to damage the victim's property[;] [h]arassing victim through the internet[;] [p]osting information or spreading rumors about the victim on the internet, in a public place, or by word of mouth[;] [or] [o]btaining personal information about the victim by accessing public records, using internet search services, hiring private investigators, going through the victim's garbage, following the victim, contacting victim's friends, family work, or neighbors, etc."

For more information, see www.ovw.usdoj.gov/domviolence.htm.

[3] An employer is always responsible for harassment by a supervisor that culminated in a tangible employment action, such as discipline or termination. If the supervisor's harassment did not lead to a tangible employment action, the

employer is liable unless it proves that: (1) it exercised reasonable care to prevent and correct promptly any harassment; and (2) the employee unreasonably failed to complain to management or to avoid harm otherwise. An employer is liable for harassment by a co-worker or by a third party over whom the employer has control if the employer knew or should have known of the conduct, unless it can show that it took prompt and appropriate corrective action upon learning of the harassment. For more information, see *Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors*, www.eeoc.gov/policy/docs/harassment-facts.html; *Policy Guidance on Current Issues of Sexual Harassment*, www.eeoc.gov/policy/docs/currentissues.html.

[4] These facts are based on a Title VII sexual harassment case in which EEOC filed an amicus brief. *Crowley v. LL Bean, Inc.*, No. 01-2732 (1st Cir. June 2, 2002) (brief available at www.eeoc.gov/eeoc/litigation/briefs/crowle.txt).

[5] The ADA prohibits discrimination based on an actual, history of, or perceived disability, including disparate treatment or harassment. Under the ADA as amended effective January 1, 2009, applicants and employees are protected if an employer treats them differently or harasses them based on an actual or perceived impairment that is not transitory and minor. Such individuals need not have an impairment that substantially limits a major life activity, or that is perceived to do so, in order to be protected from disparate treatment or harassment under the ADA.

[6] Qualified individuals with an impairment that substantially limits a major life activity or a record thereof may be entitled to requested reasonable accommodation absent undue hardship on the employer. For more information, see *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, www.eeoc.gov/policy/docs/accommodation.html; *Small Employers and Reasonable Accommodation*, www.eeoc.gov/facts/accommodation.html.

[7] Under the ADA, as amended, the term "substantially limits" is to be construed broadly in favor of expansive coverage. For more information, see *Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008*, www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm.

[8] *Enforcement Guidance: Disability-Related Inquiries & Medical Examinations of Employees Under the ADA (7/27/00)*, www.eeoc.gov/policy/docs/guidance-inquiries.html.

[9] The ADA protects all applicants or employees, whether or not they are individuals with a disability, from retaliation for protected activity, interference with the exercise of rights under the ADA, disability-related inquiries and medical examinations that are not job-related and consistent with business necessity, and

improper disclosure of confidential medical information. For more information about these and other provisions of the ADA, go to www.eeoc.gov/laws/types/disability.cfm.