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EEOC Expands the ADA!

By Fiona W. Ong on December 13, 2016

POSTED IN EMPLOYMENT DISCRIMINATION, LAWS & REGULATIONS, REASONABLE ACCOMMODATION

In a prior blog post, “**EEOC Says Sexual Orientation Is Protected Under Title VII!!**,” I noted that the Equal Employment Opportunity Commission can be sneaky in seeking to expand the scope of the laws it enforces. It will drop bombshells in the middle of otherwise pretty innocuous guidance or resource documents, as if hoping no one notices. The latest example of this is in its **just-announced** (December 12, 2016) publication on the rights of job applicants and employees with mental health conditions, in which the EEOC oh-so-casually expands the reach of the American with Disabilities Act!



The EEOC states that “**Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights**” is a resource document that explains workplace rights for individuals with mental health conditions. The document describes how the ADA protects individuals with mental disabilities from discrimination and also requires employers to provide them with reasonable accommodations to enable them to perform the essential functions of their jobs. While most of the document is a pretty routine summary of the ADA, the EEOC does make a few extreme statements that seem to cross over into new territory!

(As a brief refresher, the ADA provides employment protections for qualified individuals with disabilities, meaning that they (1) have a mental or physical health impairment that “substantially limits” a “major life activity,” (2) are regarded as having such an impairment, or (3) have a record of such an impairment.)

First, the EEOC discusses the fact that individuals are entitled to reasonable accommodations for any mental health conditions that would limit a “major life activity” and provides examples of major life activities that come directly from the regulations: the ability to concentrate, interact with others, communicate, eat, and care for yourself. But then it slides a new “major life activity” in there – “regulate your thoughts or emotions”!!! That is not in the law or the regulations! The EEOC would say that the list in the regulations is not intended to be exclusive, and that there are other major life activities that are not listed. OK, I get that, but they just slipped this one into the list without any explanation. And what does it mean, anyway? If someone has a bad temper or anger management issues, are they now considered to be disabled?

Next, the EEOC defined “substantially limiting” as including activities that are not only more difficult or time-consuming to perform (which is set forth in the regulations), but also “uncomfortable” (which is not set forth in the regulations!!!) as compared with most people. “Uncomfortable”?!?! That’s a new and apparently much lower standard than what is set forth in the regulations. The regulations actually state: “An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a ‘disability’ within the meaning of

this section.” Um, doesn’t an impairment necessarily mean that there is some level of discomfort in the performance of the major life activity in question? By setting the standard at “uncomfortable,” it appears that the EEOC has made every impairment a disability. (If I get a blister from my new shoes, it makes the major life activity of walking uncomfortable…)


Also, under the ADA, if someone requests an accommodation for a disability, the employer is entitled to request medical documentation regarding the disability and need for accommodation. In the document, however, the EEOC instructs employees that, “If you do not want the employer to know your specific diagnosis, it may be enough to provide documentation that describes your condition more generally.” That position does not seem consistent with other EEOC guidance. For example, in the EEOC’s “**Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act**,” the EEOC specifically states that, “The employer may ask the employee for documentation describing the impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee’s ability to perform the activity or activities.” That certainly is more than a general description of the condition! And realistically, “general” information is not going to suffice when an employer is exploring what is a reasonable accommodation.

I understand that the EEOC is trying to educate applicants and employees as to their rights. What I don’t appreciate, however, is the fact that the EEOC’s characterization of those rights appears to expand the law beyond its actual limits. And that the EEOC has done it in a seemingly underhanded way.

As I’ve said before – sneaky!

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