

Leave Me Alone: Avoiding ADA Retaliation Claims Based on Reasonable Accommodation Requests

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As a prudent employer, you know that an employee who complains of discrimination cannot be retaliated against. You have policies that prohibit retaliation against individuals who complain of discrimination or harassment. You train your managers on these policies and you enforce them consistently. So, you may be thinking to yourself that, when it comes to avoiding retaliation claims, we've got it covered.

But, did you know that retaliation claims can arise absent complaints about discrimination or harassment? The federal and state statutes that prohibit retaliation generally state that an employee cannot be retaliated against for having engaged in protected activity. Of course, protected activity includes activities such as complaining of discrimination or harassment and filing a charge of discrimination with the Equal Employment Opportunity Commission (to name a few). But, protected activity can also arise when an employee requests a reasonable accommodation under the Americans With Disabilities Act (ADA). That means there's at least a potential risk to employers whenever it becomes necessary to discipline, terminate, or otherwise take an adverse job action against an employee who has requested a reasonable accommodation. The risk is that this employee may have a viable ADA retaliation claim.

Real World Examples of Viable ADA Retaliation Claims Based on an Employee's Request for an Accommodation

Employers are not always successful in avoiding the risk of an ADA retaliation claim where the employee's allegedly protected activity is a request for a reasonable accommodation. Below are some real world examples to illustrate this point:

An Employee with Depression Requests Accommodations and Her Position is Later Eliminated: In a recent case pending before a federal court in Minnesota, an employee took a leave of absence for depression. Toward the end of the leave, the employee called her boss to discuss a reduced work schedule upon her return. The employee's boss indicated that he would look into her question. A few days later, however, the employee's boss informed her that her position had been eliminated. Several months later, the employer, having recently received additional funds, decided to hire a replacement. The employee applied for her former position, but delayed in submitting her work history, and was not selected for this position.

The employee sued her employer claiming, among other things, that she had been discriminated against on the

basis of her disability and retaliated against. The court concluded that the employee could not show she was disabled (because she was not substantially limited in a major life activity). Nonetheless, the court concluded that a non-disabled employee could pursue an ADA retaliation claim, as long as she had a good faith belief that the requested accommodation was appropriate (which this employee did because no evidence showed her request was made in bad faith). The court also reasoned that the employee's request for a reduced work schedule was a request for a reasonable accommodation, which constituted protected activity under the ADA. Further, the employee's termination appeared to be causally connected to her request because these events were closely related in time. The employer claimed that the employee's termination was justified due to a decreased workload. The court, however, found contrary evidence in the record, plus evidence that the employer had ignored her application for the new position. Accordingly, the court permitted the employee to proceed to a jury trial on her ADA retaliation claim.

An Employee with ADD Requests a Leave of Absence and is Later Terminated for Insubordination: In a case arising in Massachusetts, an employee who suffered from Attention Deficient Disorder (ADD), stress, and anxiety requested several accommodations, including a short leave of absence, which was granted. Shortly after the employee returned from leave, the employee's manager gave him some work-related instructions, which the employee attempted to follow, but was unsuccessful in doing so. The manager then fired the employee for insubordination. The employee sued in federal court claiming retaliation under the ADA. Ultimately, the court concluded that the employee's request for a reasonable accommodation was protected activity, which appeared causally connected to his termination because these events were close in time. The court determined that the record did not (in its view) paint a picture of insubordination by the employee and, therefore, the court determined a triable issue of fact remained as to whether the employee was fired in retaliation for his request for a reasonable accommodation.

An Employee Requests Possible Accommodations for Hypersensitivity to Chemicals and Is Later Terminated: In a case arising in Pennsylvania, an employee suffered from hypersensitivity to common chemicals (e.g., scented hand creams, deodorants, White-out, furniture polish). The employee met with her supervisor to discuss possible accommodations, including the possibility of adopting a perfume-free workplace policy or installing a special air filtration device in her workspace. The meeting, however, went awry. The employee became confrontational. Accusations were made. Later, the employee was terminated. The employee then sued claiming that the employer terminated her in violation of the ADA because she requested an accommodation. The court agreed that the employee had a viable ADA retaliation claim, even though the employee never established that she was disabled.

What Should Employers Do?

In light of the cases discussed above, employers would be wise to take the following steps to minimize the risk of a retaliation claim based on requests for accommodations:

Check for Protected Activity (Including a Request for a Reasonable Accommodation) Before Approving a Discipline or Termination Decision: To minimize the risk of a retaliation claim, you should always check to confirm that the employee has not recently engaged in protected activity. Employers should recognize requests for accommodation as protected activity to evaluate the risk of a retaliation claim based on this activity.

Be Sensitive to Appearances and Timing: As with any retaliation claim, employers are well-advised to consider the timing between an employee's request for an accommodation and any discipline or termination that's being proposed. Where discipline or termination follows on the heels of an employee's accommodation request, an ADA retaliation claim could follow.

Train Your Managers: Employers must train their managers to understand that requests for reasonable accommodations can constitute protected activity (regardless of whether they are granted or denied). Managers work on your organization's front-lines daily. These managers need to understand that requests for reasonable accommodations can constitute protected activity so they know to call the Company's Human Resources Department and/or the Legal Department if discipline, termination, or other adverse actions are necessary.

Understand That Even Non-Disabled Employees Can Pursue ADA Retaliation Claims: Do not confuse the requirements to establish an ADA discrimination claim with a retaliation claim. It matters for an ADA discrimination claim whether the employee can establish that he or she has a disability or is perceived as having a disability as defined under the ADA. Whether an employee has an ADA disability generally does not matter with respect to his or her retaliation claim (provided the accommodation request is made in good faith). So, do not assume that an employee's ADA retaliation claim will fail if his or her impairment does not rise to the level of a disability. As the cases discussed above indicate, even non-disabled employees can sometimes prevail on ADA retaliation claims.

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