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WORKPLACE ACCOMMODATIONS POLICY HIGHLIGHTS 1.7

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Overview

The seventh edition of the Workplace Accommodations Policy Highlights describes recent efforts by U.S. regulatory agencies such as the Equal Employment Opportunity Commission (EEOC) and the Department of Labor (DOL) to assist employers in making accommodations for people with disabilities. The EEOC has created a fact sheet for employers, along with applicants and employees, on how the Americans with Disabilities Act (ADA) applies to employment situations involving diabetes. The EEOC also held a Public Commission Meeting on the benefits of workplace mediation, which could help settle disputes between employers and employees with disabilities. The DOL designed a seminar for employers on the development, implementation, and maintenance of emergency preparedness plans that are disability-friendly.

Several judicial cases are also examined this month, including *Gallegos v. Elite Model Management Corp.* In this case, a state court jury in Manhattan awarded \$5.2 million to a former employee, Victoria Gallegos, of Elite Model Management who sued because the company denied her the job accommodation of a smoke-free workplace. It is interesting to note that Gallegos and her attorney opted to bring charges under the New York City Human Rights Law and Smoke-Free Air Act instead of the Americans with Disabilities Act (ADA). The reason why Gallegos declined to sue under Title I of the ADA is in part due to the difficulties that plaintiffs have encountered in proving their conditions to be "disabilities" under the statute.

Another case of note is that of *General Dynamics Land Systems Inc. v. Cline*, where nearly 200 General Dynamics factory workers claim that they were victims of age discrimination when the company ended retiree health benefits for all workers under the age of 50 after the implementation of a new union contract on July 1, 1997. The issue brought before the Supreme Court is whether or not age discrimination, made illegal by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 et seq., includes so-called reverse age discrimination against younger workers within the protected class (e.g., those 40-49 years of age) in favor of older workers within the protected class (e.g., those 50 years of age and older). The larger question embedded within the context of the case is whether, if the Supreme Court decides that reverse-discrimination has occurred, the effects of the decision could carry over to people who receive accommodations for challenges unrelated to their age (e.g. people with disabilities).

Equal Employment Opportunity Commission (EEOC) Addresses Diabetes in the Workplace

10.29.03: The rising number of individuals with diabetes in the workplace (nearly 17 million Americans age 20 years or older have diabetes; <http://www.cdc.gov/diabetes/pubs/estimates.html>), along with an increase in discrimination charges filed by individuals with the disease, has led the EEOC to create a fact sheet designed to provide information to employers, as well as job applicants and employees with diabetes, on their rights and responsibilities. According to Commission Chair Cari M. Dominguez, employers and employees often inquire about how the Americans with Disabilities Act (ADA) applies to employment situations involving diabetes. "The fact sheet covers such topics as: when diabetes is considered to be a disability under the ADA; when an employer is permitted to ask an applicant or employee questions about his or her diabetes; types of reasonable accommodations employees with diabetes may need on the job; and how an employer should handle safety concerns about people with diabetes in the workplace." The new fact sheet is the first in a series to address specific types of disabilities, and is available at <http://www.eeoc.gov/facts/diabetes.html>.
[<http://www.eeoc.gov/press/10-29-03.html>]

Equal Employment Opportunity Commission (EEOC) to Examine Benefits of Workplace Mediation at Next Public Commission Meeting

11.25.03: An open meeting of the EEOC took place on December 2nd at the EEOC agency headquarters in Washington, D.C. The Public Commission Meeting examined the EEOC's National Mediation Program, the workplace benefits of mediation, and employer participation in EEOC mediation - one of the largest employment-related Alternative Dispute Resolution (ADR) programs of its kind. The Commission heard from a range of speakers including: representatives of the private bar; employer representatives from Safeway Inc., ConAgra Foods, Inc., Johns Hopkins Health System Corporation, and the Equal Employment Advisory Council (which represents Fortune 500 companies); professionals in dispute resolution and human resources, including members of the Society for Human Resource Management and the CPR Institute for Dispute Resolution; and EEOC mediation staff from agency headquarters and the field. During the meeting, employer representatives hailed the benefits of workplace mediation in general and EEOC mediation in particular, including: increased productivity, enhanced communications, positive employee relations, cost reductions, and faster settlements of disputes. The Commission also issued and discussed the results of a new report by Professor E. Patrick McDermott of the Franklin P. Perdue School of Business, Salisbury University, entitled, "An Investigation of the Reasons for the Lack of Employer Participation in the EEOC Mediation Program," and explored ideas for enhancing and expanding the program. Further information about the Commission and the EEOC's National Mediation Program is available on its web site at <http://www.eeoc.gov>.
[<http://www.eeoc.gov/press/11-25-03a.html>];
<http://www.eeoc.gov/press/12-2-03.html>]

U.S. Department of Labor (DOL) Announces Seminar on Emergency Preparedness for People with Disabilities

The U.S. DOL Office of Disability Employment Policy (ODEP) held a seminar, *Emergency Preparedness for Employees with Disabilities: An Interagency Seminar of Exchange for Federal Managers*, on December 2-3, 2003, in Washington, DC. Given the changes that have occurred both domestically and internationally, the federal government has designed enhanced measures to ensure the safety of both employees and customers of the federal government. Emergency preparedness, which often includes finding shelter and evacuating a building, can be a difficult task for employees with disabilities and their employers. At this seminar, participants from within the Metro area and the 10 federal regions had a chance to learn about effective practices used by various federal agencies, as well as an opportunity to exchange information regarding the development, implementation, and maintenance of emergency preparedness plans that are disability-friendly. [http://www.dol.gov/odep/registration/combined_form.htm]

Judicial Activities

Employee Awarded \$5.2 Million on Second-hand Smoke Claims

05.27.2003: In *Gallegos v. Elite Model Management Corp.*, No. 23459, a state court jury in Manhattan awarded \$5.2 million to a former employee of Elite Model Management who sued because the company denied her the job accommodation of a smoke-free workplace. Victoria Gallegos, who has asthma and smoke sensitivity, worked for a little over six weeks, beginning in August 1999, at Elite Model Management. Gallegos said that, before accepting the job offer, she was promised that the agency would work to rid the office of second-hand smoke. When she began developing symptoms such as shortness of breath, sinusitis and nausea, she complained about the poor breathing conditions. In response to her request for a smoke-free workplace, Elite terminated her employment. Gallegos filed suit under the New York City Human Rights Law and Smoke-Free Air Act. The New York Smoke Free Air Act entitled her to the accommodation of a smoke-free workplace. Gallegos' attorney said she and her client declined to sue under Title I of the Americans with Disabilities Act (ADA) in part because of the difficulties that plaintiffs have encountered in proving their conditions to be "disabilities" under the statute. The jury found in favor of Gallegos, and she was awarded nearly \$300,000 in back pay and almost \$376,000 in lost future pay. "The remainder of the award consists of 2 million for pain and suffering and 2.6 million in punitive damages - figures that plaintiffs' attorneys could not hope to recover on claims raised under Title I of the ADA, which caps damages at 300,000." [CTDNEWS Workplace Solutions for Repetitive Stress Injuries, 11/19/2003, Vol. 12, No. 11; Employment Litigation Reporter, 05/27/2003, Vol. 17; No. 21; Pg. 3]

Home Depot Sued By Equal Employment Opportunity Commission (EEOC)

11.21.03: The EEOC has sued Atlanta-based retailer Home Depot alleging the company violated the Americans with Disabilities Act (ADA) for firing a worker with a developmental disability. The EEOC claims Home Depot failed to provide reasonable accommodation for New York-based employee Carolyn Pisani. Pisani, who has mental retardation, used a job coach to help her understand her job. Her job coach visited her worksite often to ensure progress and addressed work related problems by communicating with Pisani's managers. The EEOC claims that during three consecutive weeks in September and October 1999, supervisors told Pisani that she did not need to work on weekends. Home Depot disciplined and subsequently fired Pisani for not reporting to work on those weekends. The EEOC says Home Depot failed to involve Pisani's job coach when it disciplined and terminated her. Although the EEOC sought a voluntary pre-litigation settlement, they were unable to reach an agreement with Home Depot and so filed suit against them. The suit seeks back wages, compensatory damages, a change in policy to eliminate future disability-based discrimination, punitive damages, and the re-employment of Pisani with a job coach. [*Successful Job Accommodation Strategies*, Vol. 9 (8)]

Supreme Court Hears Case of Reverse Age Discrimination

11.13.03: Nearly 200 factory workers, ages 40-49, have filed a class action lawsuit against their employer, General Dynamics Land Systems. In the lawsuit, the workers claim that they were victims of age discrimination when the company ended retiree health benefits for all workers under the age of 50 after the implementation of a new union contract on July 1, 1997. The issue, brought before the Supreme Court in *General Dynamics Land Systems Inc. v. Cline, 02-1080*, is whether age discrimination, made illegal by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 et seq., includes so-called reverse age discrimination against younger workers within the protected class (e.g., those 40-49 years of age) in favor of older workers within the protected class (e.g., those 50 years of age and older).

In 1982, General Dynamics acquired three defense production facilities owned by Chrysler Corp. that employed 7,500 employees at the time. Through the acquisition, General Dynamics assumed a collective bargaining agreement with the United Auto Workers (UAW) that covered all employees at the plant. Under the agreement, General Dynamics agreed to provide full health benefits to workers who retired after 30 years of service. Not long after acquiring the facilities, General Dynamics tried to cut costs by eliminating retiree health insurance. Negotiations with the UAW resulted in General Dynamics keeping retiree health benefits and adding a 10% co-payment for active employees through 1997. In 1997, General Dynamics once again raised the issue of eliminating retiree health benefits. This time, bargaining on behalf of only 500 employees, the UAW was compelled to cut a deal with General Dynamics and agreed that the company would no longer be required to provide future retirees with health benefits unless the retirees had been 50 years of age or older on July 1, 1997.

In an attempt to preserve the full retiree health benefits of General Dynamics employees, Dennis Cline filed a class action on behalf of almost 200 employees, ages 40-49, who were no longer eligible for benefits. Cline, along with several other workers in the 40-49 year-old age range, filed charges of age discrimination in violation of the ADEA with the Equal Employment Opportunity Commission (EEOC). Cline and the other General Dynamics employees who brought the suit are maintaining that the ADEA bars employers from discriminating against any worker over age 40 and that employers do not have the right to design benefit programs that favor older workers who are close to retirement.

Two lower courts have had split decisions on the case, and the U.S. Supreme Court seems skeptical of the General Dynamics workers' argument. Several justices, including Stephen G. Breyer, said that the goal of Congress, in passing the 1967 ADEA, was not to prevent employers from giving more generous benefits to workers approaching retirement than to those just over age 40.

The Bush administration, usually noted for siding with business, has taken the side of the General Dynamics workers who sued. Paul Clement, a Bush administration lawyer, said the law is "crystal clear" in protecting people age 40 and older from discrimination. Backing General Dynamics are unions, business groups, the AARP, and other advocacy groups for individuals age 50 and over.

The larger question embedded within the context of the case is whether, if the Supreme Court decides that reverse-discrimination has occurred, the effects of the decision could carry over to people who receive accommodations for challenges unrelated to their age. For example, people with disabilities receive accommodations that people without disabilities do not because they have a disability. If the Supreme Court rules that the General Dynamics case is an instance of reverse discrimination, they might be tempted (using similar reasoning) to rule that accommodation for a disability is an example of reverse discrimination. Therefore, unless some principled way can be discovered to distinguish the General Dynamics case from cases involving other accommodations, legal decisions that sanction treating workplace accommodations for people with disabilities as instances of reverse discrimination could be forthcoming. [*National Law Journal*, 11/03/2003, Vol. 26; No. 10; Pg. 17; *The Associated Press*, 11/10/2003, Business News, Washington Dateline]

**Studies/Reports
/Publications**

Study Reports Government Web Sites Lack Accessibility

10.21.03: Commissioned by the Benton Foundation [<http://www.benton.org>] and the New York State Forum of the Rockefeller Institute of Government, the "Achieving E-Government for All" report provides the latest information on how municipal and state governments, along with the federal government, are responding to the challenge of making their online services accessible to all people regardless of their "abilities, skill, or economic situation." The authors of the study were especially interested in reporting on the challenges faced by persons with disabilities, people who are illiterate, people of color, and persons from poor socioeconomic backgrounds. A key finding of the study is that 63 percent of federal Web sites have a 12th-grade average readability level, while the average American citizen reads at or below the 8th-grade level. According to Darrell West, director of Brown University's Taubman Center for Public Policy [http://www.brown.edu/Departments/Taubman_Center/], this gap limits the utility of federal Web services. West cited a need for federal agencies to recognize the problem and test themselves to ensure proper readability levels.

Accessibility of government Web sites for persons with disabilities is another primary focus of the study. The accessibility of government websites was tested by employing the automated online Bobby service at [<http://www.bobby.watchfire.com>]. The study used two different indicators of website accessibility: compliance with the Priority Level One guidelines recommended by the World Wide Web Consortium (W3C) [<http://www.w3.org/TR/WAI-WEBCONTENT/full-checklist.html>]; and compliance with the legal requirements of Section 508 of the Rehabilitation Act [<http://www.section508.gov/>]. 47 percent of federal sites satisfied the W3C standard of accessibility, as did 33 percent of state sites and 20 percent of city government sites. With the stricter Section 508 guidelines, 22 percent of federal sites were in compliance, compared to 24 percent of state sites and 13 percent of city websites. The authors of the study reported that the wide variance in compliance across levels of governments suggests the need for education and stronger enforcement action in e-government. City governments run considerably behind state and federal sites in making their sites compliant with disability standards. The study authors recommended that the federal government provide resources, such as education and stronger enforcement action in e-government for this policy area. The goal of increasing resources to this policy area is to enhance the ability of all levels of government to provide Web site access for persons with disabilities.
[<http://www.benton.org/publibrary/egov/access2003.html#disability>;
<http://www.fcw.com/fcw/articles/2003/1020/web-web-10-22-03.asp>]



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The Office of Technology Policy and Programs (OTP) produces a monthly newsletter, Workplace Accommodations Policy Highlights, for the purpose of identifying policy, regulatory framework and market factors that can be useful in reducing barriers to integrating people with disabilities into the workforce. These monthly highlights support the Center's other research efforts and provide people with disabilities and industry with a centralized source of information supportive of the principles of the ADA and other regulations whose intent is to promote fairness and equity for people with disabilities.

The primary objectives of the Rehabilitation Engineering Research Center on Workplace Accommodation, a federal program funded by The National Institute on Disability and Rehabilitation Research (NIDRR), U.S. Department of Education, are to identify, design, develop, and promote new assistive devices and universally-designed technologies that will enable all individuals, and particularly those with disabilities, to achieve the greatest degree of independence and integration in the workplace. To accomplish its mission, the RERC engages in a comprehensive program of research, development, training, and information dissemination.

For further information on items summarized in this report, or if you have items of interest that you would like included in future editions, please contact the editor, Lynzee Head (lynzee.head@gcatt.gatech.edu) or Andrew Ward, Ph.D., MPH, Project Co-Director, Workplace Accommodations Policy Initiatives (RERC) (andrew.ward@gcatt.gatech.edu).