

ADA AMENDMENTS JUST SIGNED INTO LAW

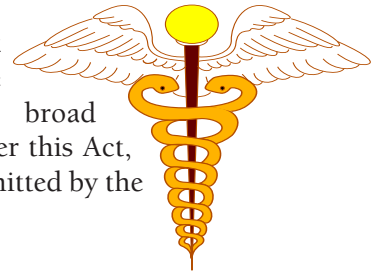
Amendments to the Americans with Disabilities Act (ADA) have just been signed into law by President Bush. This sets the stage for the first significant reform of this important federal law in many years.

The ADA Amendments Act is a dramatic response to an extensive series of decisions from the United States Supreme Court and the lower courts that have systematically narrowed the applicability and sweep of the law.

Two decisions in particular appear to have been legislated away. The first is *Sutton v. United Airlines Inc.*, a landmark Supreme Court decision that removed the ADA's protection from those persons whose limitations could be corrected by medication, treatment or assistive devices. The second is *Toyota Motor Manufacturing, Ky, Inc. v. Williams*, which rejected ADA claims when employees' limitations prevented them from performing only a narrow range of jobs.

The new amendments state that the term "substantially limits" must be interpreted consistently with the "findings and purposes" of the ADA Amendments Act. Those findings and purposes are listed at the beginning of the Act, and announce the intention that a less restrictive definition of a covered disability be applied under the ADA.

The amendments also assert that the Act is to be construed "in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."



The amendments have other significant effects, including an expanded definition of what type of "major life activity" must be limited in order for the medical condition to be included as a disability; a limitation on the number of major life activities that must be limited to just one, explanation that impairments that are episodic or in remission are disabilities if they would substantially limit a major life activity when active; and providing that an individual doesn't have to establish that his impairment limits or is perceived to limit a major life activity to be "regarded as being disabled."

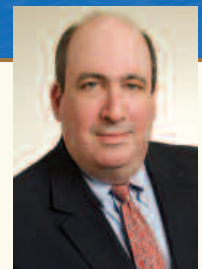
The amendments will become effective on January 1, 2009, to permit the Equal Employment Opportunity Commission (EEOC) to issue new regulations and allow employers to digest and adjust to the changes before having to implement them.

Labor & Employment Report

All articles were written by Dennis J. Merley, who has served as editor of this newsletter for 7 years. To learn more about the attorneys in Felhaber's labor & employment practice section, log on to www.felhaber.com.

The Labor & Employment Report is an update on legal developments. It is not intended to be legal advice and should not be relied upon without consulting counsel.

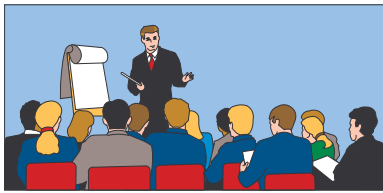
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NEW GUIDANCE ON RELIGIOUS DISCRIMINATION



Requests to accommodate employee religious practices continue to challenge employers, and religious discrimination cases are piling up at government fair employment agencies. In an effort to combine all of the judicial decisions and agency pronouncements on these matters into a single useful source, the Equal Employment Opportunity Commission (EEOC) has recently issued a new compliance manual. While this manual does not break much new ground in EEOC's take on the law, it is an excellent compendium and should greatly assist employers in addressing these difficult cases.

The new compliance manual is divided into five major areas: coverage, disparate treatment, harassment, reasonable accommodation, and related forms of discrimination. It addresses such critical issues as:

- What religion is and how to determine the sincerity of the employee's belief.
- Religious dress and grooming issues.
- Use of employer time and facilities for prayer.
- Analyzing the "undue hardship" defense.

Among the more interesting insights offered in the new manual is the recognition that "religion" is more than the traditionally recognized religions (e.g. Christianity, Judaism, Islam, Hinduism, and Buddhism).

New, uncommon, and even non-theistic "moral or ethical beliefs as to what is right and wrong" may qualify, providing that they are sincerely held with the "strength of traditional religious views."

The EEOC also issued two summary documents entitled "Questions and Answers: Religious Discrimination in the Workplace" and "Best Practices for Eradicating Religious Discrimination in the Workplace." The latter document provides practical guidance on avoiding possible religious discrimination claims, including the following:

- Inform employees that reasonable efforts will be made to accommodate employees' religious practices.
- Develop an internal procedure for identifying and processing religious accommodation requests.
- Avoid assumptions or stereotypes about what constitutes a religious belief or what accommodation is appropriate.
- Consider alternatives if the requested accommodation is not feasible or constitutes an undue hardship.
- Consider flexible leave and schedule policies and procedures that allow employees to meet their religious and personal needs without requesting a religious accommodation, e.g. granting a defined number of "floating holiday days".

Religious discrimination and accommodation issues likely will generate a fair amount of litigation, and such cases often catch the eyes of the media. The most recent example is Gold 'n Plump's settlement of a case involving Muslim employees seeking prayer time and permission not to handle pork products. Reviewing EEOC's newest resource on religious discrimination may be a good start on preventing such cases in your organization. The compliance manual and best practices document can be accessed at <http://eoc.gov/policy/docs/religion.html> and http://eoc.gov/policy/docs/best_practices_religion.html respectively.



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NEW LIABILITY STANDARD FOR SUPERVISOR'S HARASSMENT



In the recent case of *Judy Frieler v. Carlson Marketing Group, Inc.*, the Minnesota Supreme Court adopted a new liability standard in cases of sexual harassment by a supervisor.

In that case, Frieler claimed that her supervisor sexually harassed her by luring her to a back room and then molesting her. She did not invoke the company's sexual harassment policy at first because she feared losing a sought-after promotion and perhaps even her job. When she finally did report the harassment, the supervisor denied the allegations (although he did quit a few days later for "health issues") and witnesses could not verify any sexually oriented behavior.

After the investigation, Frieler claimed that co-workers gossiped about her and shunned her. At her psychologist's recommendation, she quit and then sued for sexual harassment under the Minnesota Human Rights Act. She also claimed that the company caused her post-traumatic stress disorder and major depression. The trial court dismissed the claims and the Court of Appeals agreed, finding no evidence that the company knew or should have known about the harassment, which was the Minnesota test for proving sexual harassment.

The Minnesota Supreme Court reviewed the case to decide the proper standard of liability for harassment by a supervisor under the Human Rights Act. The answer depended on the Minnesota legislature's intent in 2001 when they removed the "knew or should have known" language from the Act's definition of harassment. Frieler argued that this created strict liability for the harassment so that subsequent investigation and corrective action would not absolve the employer. The company countered that this was just a technical change to match language in other parts of the statute, and that the "knew or should have known" standard remained in place.

The Minnesota Supreme Court rejected both arguments, adopting instead the federal standard from a 1998 United States Supreme Court case ruling that where a supervisor creates a hostile environment without tangible employment action (e.g. termination,

denial of promotion), the employer wins if they prove that (a) they exercised reasonable care to prevent and correct sexually harassing behavior, and (b) the employee unreasonably failed to utilize preventive or corrective opportunities provided by the employer.

They ruled this way because:

- The Minnesota Department of Human Rights specifically sought this particular amendment to implement the federal standard for cases brought under the state law.
- The Department has interpreted the law consistently with the federal standard, and administrative agencies are entitled to great deference in such interpretations.
- The federal standard appropriately balances the respective rights of the parties and best effectuates the purposes of the Human Rights Act.

The Minnesota court agreed with the U.S. Supreme Court in concluding that where a supervisor's harassment does have a tangible effect on the victim's employment, the defenses described above are not available.

This decision is a ringing endorsement for maintaining and enforcing effective policies against sexual harassment. It also highlights the need to insure that everybody in the workforce understands and abides by those policies.

Make sure that employees understand their right to seek assistance if they feel victimized by harassment, and address all complaints of sexual harassment in a timely and appropriate manner. In so doing, you will give yourself the best chance to prevail under this new liability standard and defeat claims of harassment directed at the behaviors of supervisors.

Felhaber Hires Four Attorneys

Jessica M. Marsh will focus her practice on labor and employment and general litigation. She previously worked as a judicial law clerk at the Minnesota Court of Appeals.

Patricia R. Monson practiced for 28 years in Fargo, North Dakota prior to joining Felhaber. She practices in the area of employment law, health law, railroad defense and construction law.

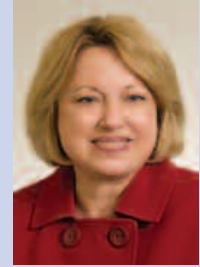
Penelope (Penny) J. Phillips has rejoined the firm. She practiced labor and employment law with Felhaber for 16 years. Recently, she served as Labor & Employment counsel for SUPERVALU INC., handling labor and employment matters for its 190,000 local and national employees.

Alyssa M. Toft will practice in the areas of labor and employment and litigation. She previously worked as a judicial law clerk at the Minnesota Court of Appeals.

We are delighted to introduce you to our new attorneys, who are a welcome addition to our firm. Log on to www.felhaber.com to view their individual biographies.



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