



ABUSIVE REMARKS DO NOT HAVE TO BE SEXUAL to Create Sex-Based Hostile Environment



Judith DePrisco
The court stated there is no requirement that sex discrimination claims include sexual content.

Many employers wrongly assume that a sex-based hostile work environment can only be based upon statements or conduct of a sexual nature. Unfortunately, an employer found out otherwise in a situation involving a labor union that

was sued by one of its own employees. EEOC v. National Education Association, Alaska, 96 FEP Cases 556 (C.A. 9, 9/2/05).

Various witnesses testified that a supervisor regularly shouted “in a loud and hostile manner” at female employees, generally without any provocation. On one occasion there was physically intimidating action when the supervisor accused an employee of taking breaks with other employees in order to talk behind his back and shook his fist at her. Both the physical intimidation and verbal abuse allegations were supported by testimony from other witnesses, including male employees. Various women testified that they feared the supervisor. However, “no one testified that [the supervisor] made sexual overtures or lewd comments, that he referred to women employees in gender-specific terms, or that he imposed gender-specific requirements upon women employees.”

The appeals court reversed the lower court’s granting of summary judgment without trial to the employer, holding that there were factual issues necessary for jury determination. The court stated there is no requirement that sex

discrimination claims include sexual content. The Ninth Circuit summarized “the ultimate question” in sex discrimination claims as “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” In short, the court recognized the theory that the plaintiffs could show that the supervisor’s behavior affected women more adversely than it affected men. The plaintiffs alleged that the supervisor was more abusive toward female employees because he subjected them to more frequent, more severe, and more physically threatening abuse. The employer, in this case the labor union, argued that the alleged disproportionate conduct toward female employees was simply an artifact of the larger proportion of women working at the employer. However, the Ninth Circuit rejected this rationale as a basis for avoiding liability: “An unbalanced distribution of men and women in relevant employment positions, and the fact that some men were also harassed, does not automatically defeat a showing of differential treatment.”

Editor’s Note - This case, while admittedly from the pro-plaintiff Ninth Circuit, stands for the proposition that a hostile environment can be created by conduct that is not necessarily sexual in content if it has a differential impact on female employees. It also stands for the proposition that the disproportionate presence of one sex in a workplace does not serve as an excuse for conduct that is aimed disproportionately towards one sex.

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KNOW YOUR ATTORNEY

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Because of these type cases, as well as good workplace practices, many employers are promoting a corporate culture of civil behavior. That is, some companies have taken policies against discrimination and harassment a step further by promoting the concept that an appropriate code of conduct should include a requirement of courteous behavior. Although such policies might distinguish between what is considered inappropriate behavior from more violent or illegal behavior, such as discrimination or harassment, such companies nevertheless make a public stand against profanity or abusive language, threatening or intimidating others, and treating others in a discourteous manner. One thought is by dealing with uncivil behavior in the workplace early, it may prevent more dangerous incidents occurring in the future. Even if companies do not put such policies in their work rules, they certainly should promote appropriate behavior and deal with allegations of inappropriate behavior of any type.

MANAGER HAS REPEATED SEIZURES, REQUESTS EMPLOYER PROVIDE TRANSPORTATION - What To Do



Stacye Choate
The first question was the type of questions the employer is allowed to ask the employee's physician after the employee had experienced repeated seizures at work.

In August, the EEOC issued an interesting opinion letter involving a project manager involved in construction who had repeated seizures and who requested the employer for assistance in getting from the office to various construction sites. EEOC Advisory Letter, 8/31/05. The first question was the type of questions the employer is allowed to ask the employee's physician after the employee had experienced repeated seizures at work.

The opinion indicates that the employer was entitled to seek disability-related information after the employee experienced a seizure while at work and that most of the questions were permissible because they focused on the effect of the medical condition and its symptoms on the employee's ability to perform job responsibilities. Under the Americans with Disabilities Act (ADA), an employer may seek "disability-related" information from an employee, if the inquiry is "job-related and consistent with business necessity." Such inquiries and medical examinations are "job-related and consistent with business necessity," the EEOC said, when an employer "has a reasonable belief, based on objective evidence, that:

- an employee's ability to perform essential job functions will be impaired by a medical condition; or
- an employee will pose a "direct threat" due to a medical condition.

The purpose of this standard is to require that employers have legitimate reasons for seeking medical information while insuring their ability to obtain relevant information necessary to make informed employment decisions. Given the circumstances, the employer could reasonably believe that a seizure might impair the employee's ability to work and that there might be certain hazards in the work site that could create a significant risk of substantial harm to the employee or others if a seizure occurred. But certain questions may be problematic because an employer is entitled only to the information necessary to determine whether the employee can do the essential functions of the job or work without posing a direct threat, the EEOC advised. Questions that focus primarily on the nature and adequacy of treatment rather than the ability to perform job duties safely and effectively "would not appear to be permitted," the advisory letter said. However, under the circumstances of this situation, "Your employer does not appear to have objective evidence to support a blanket requirement that you provide a medical release after each seizure," the EEOC stated. The employer's request for a medical release might be valid under the ADA if the manager experienced

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more frequent serious seizures “or if the nature of the seizures changed,” the EEOC said. A release requirement might also be justified if the employee sustained an injury as a result of the seizure, or if the employer had reason to believe that he was not complying with his medication regimen, the EEOC noted.

The second question pertained to the manager’s request that his employer provide assistance in getting from the office to the construction sites. The employer’s response was that a shuttle service was available but the manager said that the service requires a minimum of one week’s advance notice and he had to go to a construction site on short notice. In making the request the employee had asked for a “reasonable accommodation,” the EEOC said. After such a request an employer should enter into an “interactive process,” or a discussion with the employee, to explore:

- whether their medical condition is a “disability” under the ADA;
- the nature of the workplace limitations;
- why the requested accommodation is needed; and
- alternative solutions that would address the limitations and enable the employee to perform his or her job duties without imposing an “undue hardship” on the employer.

While the employer is under no obligation to provide the accommodation preferred by the employee, the ADA does require the employer to provide an effective accommodation that enables the individual to perform the essential job duties unless there is an “undue hardship,” the EEOC wrote. The advisory letter went on to say that the employee must explain to the employer why the shuttle service is an ineffective solution. The letter further stated that if the employer believes the employee’s proposed accommodation would be ineffective or would cause undue hardship, the employer should also explain that to the employee. If there are certain situations in which the project manager could make advance reservations on the shuttle, it should do so, the EEOC noted. But the employee should suggest, and the employer should consider, other alternatives such as having the employer pay him for a cab ride, the EEOC stated.

Editor’s Note - This case illustrates the importance of going through the correct procedures in dealing with an employee who may have a disability protected under the ADA. This particular EEOC advisory letter indicates the importance of being careful of the type of medical information sought from the employee and/or the employee’s doctor, as well as the necessity to conduct an appropriate “interactive process” in resolving any requests for accommodations. In sensitive cases the advice of counsel is strongly recommended.

SHOULD I BE CONCERNED ABOUT Avian Flu?



Marty Conway
Imagine the situation if certain rumors are started in a facility and certain workers refuse to come to work because they’re afraid of being infected.

A dangerous form of avian flu that has killed some five dozen people in Asia has arrived in Europe, catching their governments by surprise and setting the stage for great concern over how the world is to handle it. Since this particular virus, now known as the H5N1 virus, first appeared in 1997 among chickens in Hong Kong, there have been approximately 140 confirmed cases of avian flu among humans in Southeast Asia, most of them linked to exposure to infected chickens, according to the World Health Organization. What scares medical experts the most is that over 60 of the human victims died from the disease - a fatality rate of more than 50%.

There was a major outbreak of another form of avian flu, known as Spanish Flu, in 1918-19, that killed some 40 million people, according the World Health Organization. This compares to the much lower combat death toll from World War II, after 4 years of fighting, of some 10 million persons. Also, the Spanish Flu killed a much smaller percentage of its victims than our current experience with this avian flu.

It appears that all influenza viruses - if you trace their origins back far enough - got their start in birds and a great majority of them stay there. Only a small number of flu viruses adapt to the point that they can infect people. So far, the vast majority of those infected have been through close

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Best Wishes for a Happy and Prosperous New Year!

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contact with household birds in Southeast Asia, particularly Vietnam. While it does not appear to have developed the ability to travel easily from human to human, this could become pandemic. Further, it appears that the disease cannot be spread by eating the product. However, the virus has now been identified in other animals including eagles, tigers and pigs.

Countries around the world are responding by attempting to eradicate the disease by destroying any flocks in which pertinent types of viruses are found. Most countries have banned or placed under strict control the importation of birds or bird products from the affected areas.

Antiviral medications like oseltamivir (Tamiflu) have shown promise in treating the disease but must be taken quickly after the first symptoms are apparent. Experimentation is being conducted on vaccines against such flu. There is confusion as to who would have authority in the event of an outbreak but currently most of the authority lies with the states, which are free to call on the Centers for Disease Control for assistance.

There is currently no health risk for avian flu in the U.S. according to virtually all qualified authorities. Nevertheless, employers should consider certain planning steps prior to a crisis or the perception of a crisis or should misinformation occur. Concerns in the workplace might be similar to those created when the HIV virus was identified many years

ago. For example, some employees have already been quoted in the media as wondering why their employers haven't held meetings to tell the workers about the potential risks. The United Food and Commercial Workers Union, citing concerns that poultry industry workers could be the first to risk exposure to the avian flu, urged the Administration on November 29 to take action to add a worker component to the government's bird flu plan. Imagine the situation if certain rumors are started in a facility and certain workers refuse to come to work because they're afraid of being infected. Also, what about the existence of contract provisions that allocate the risk of emergencies during such disease outbreaks? Some employers may want to review their insurance policies to see if they are reimbursed for business interruption in the event a problem arises.

Of course, a broad range of laws may apply to a person with any disease whether infectious or not, including the ADA, HIPAA, ERISA, state privacy laws, and possibly other laws. In some cases, there may be increased pressure on employers to allow or encourage leaves of absence to keep potentially infectious employees from infecting others.

The bottom line at this point is that planning, utilizing current information, is necessary as news and publicity about avian flu continues to spread around the globe.