

Disability Harassment Under the Americans with Disabilities Act

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In *Flowers v. Regional Physician Services, Inc.*, the Fifth Circuit Court of Appeals held that a cause of action for disability-based harassment exists under the Americans With Disabilities Act ("ADA"). Several weeks later, in *Fox v. General Motors Corp.*, the Fourth Circuit reached the same conclusion. While the Sixth Circuit Court of Appeals, governing Michigan, implicitly has recognized an ADA hostile environment claim in *Keever v. Middletown*, that case provided no analysis. Thus, the decisions in *Flowers* and *Fox* are the first federal courts of appeals to affirmatively acknowledge that such a cause of action exists.

What type of conduct by an employer or its agent is sufficiently severe or pervasive to rise to the level of a hostile environment based on an employee's disability? In *Flowers*, the employee provided evidence that her superiors treated her markedly different after her immediate supervisor discovered she was infected by the Human Immunodeficiency Virus ("HIV"). This conduct included:

Immediate supervisor no longer went to lunch with the employee and ceased socializing with her.

Immediate supervisor began intercepting the employee's telephone calls, eavesdropping on her conversations, and hovering around the employee's desk.

The company president became very distant, when he and the employee used to get along very well.

The company president refused to shake the employee's hand and would go to great pains to avoid her office.

The employee was required to submit to four random drug tests within a one-week period, when she had previously only had one drug test in her two years of service.

Despite a performance review score of 38 out of 40 and a 10% merit raise the previous year, the employee received three write-ups and was placed on two successive 90-day probations.

Prior to *Flowers* and *Fox*, the Michigan Court of Appeals found that a cause of action exists for disability-based harassment under Michigan's Persons With Disabilities Civil Rights Act. See *Downey v. Charlevoix County Board of Commissioners*, (1998). Consequently, it is reasonable to anticipate that, given the proper facts, the Sixth Circuit will follow the Fifth Circuit and explicitly extend a cause of action for disability-based harassment under the ADA.

Most employers currently have policies prohibiting sexual harassment in the workplace. *Flowers*, *Fox* and *Downey* serve as reminders that illegal harassment can take on other forms, including harassment based on one's disability. Employers should ensure that their anti-harassment policies include language prohibiting harassment based on any immutable characteristic, including one's age, race, gender and disability status. Anti-harassment policies should also be posted, circulated or both. In addition, they should include a clearly spelled out complaint mechanism for employees who believe they are victims of harassment.

Finally, it is critical that managers are properly trained regarding the policy, complaints are promptly investigated, and the appropriate remedial action is taken. An anti-harassment policy ignored by management is worse than having no

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policy at all.