

One Minute Memo[®]



EEOC Issues New Guidance Applying Title VII And ADA To Domestic Violence, Sexual Assault And Stalking

On October 12, 2012, the EEOC issued a new fact sheet: *Questions and Answers: Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault or Stalking*. As the title suggests, the publication addresses how employees and applicants who have experienced domestic or dating violence, sexual assault or stalking could experience conduct made unlawful by Title VII of the Civil Rights Act of 1964 ("Title VII") and/or the Americans With Disabilities Act ("ADA"). While noting that Title VII and the ADA do not expressly prohibit discrimination against applicants and employees based on domestic or dating violence, sexual assault or stalking, the EEOC makes clear that there are numerous possible situations where such employees and applicants can find protections under federal employment non-discrimination laws. Accordingly, while the EEOC's guidance states nothing new with respect to coverage and applicability of the federal non-discrimination statutes, it signals a clear area of focus for the agency.

In this new fact sheet, the EEOC provides an extensive list of questions and answers that provide hypotheticals to guide employers and employees alike. For example, the EEOC opines that terminating a female employee after she is a victim of domestic violence solely because of a potential fear that a battered woman brings "drama" to the workplace could run afoul of Title VII's prohibition of disparate treatment based on "sex." The EEOC also provides more familiar harassment and retaliation scenarios that would implicate Title VII, including hypotheticals discussing how domestic violence based on "sex" that is not investigated and resolved by an employer can be unlawful harassment, and how adverse actions taken against an employee after that employee complained of sexual assault by a manager could form the basis of a retaliation claim.

The EEOC also provides hypotheticals implicating the ADA. As an example, the EEOC explains that the failure to hire an individual because the individual recently received counseling for depression caused by being the victim of domestic abuse could be prohibited conduct, similar to alleged harassment of an individual due to permanent injuries received after a domestic attack. The EEOC also stresses that reasonable accommodations must be provided for a disability caused by domestic violence and/or sexual assault; for example, anxiety caused by a sexual assault.

While the new publication does not explicitly change the law or create a new protected characteristic(s), it does provide insight into the EEOC's focus. Indeed, the EEOC recently published a 2012-2016 Strategic Plan that outlines its four-year strategy for accomplishing the agency's mission to, among other goals, prevent employment discrimination through education and outreach. In that plan, the EEOC outlined a strategy to: (1) target outreach to vulnerable workers and underserved communities; and (2) provide up-to-date and accessible guidance on the requirements of employment anti-discrimination laws. This new guidance appears to be a direct result of the agency's goals set forth in the strategic plan, and demonstrates that the EEOC will stretch existing law to find protection for those who may not otherwise be deemed covered by the statutes.

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In light of the foregoing, employers should consider the following actions:

- Amend equal employment opportunity, harassment prevention and other policies—to the extent that they include hypotheticals—to include examples of what constitutes discrimination or harassment when interacting with employees or applicants who have experienced domestic violence, sexual assault or stalking.
- Deploy and/or revisit workplace training programs (such as EEO or harassment prevention programs) to ensure that front-line managers and HR professionals are acutely aware of the EEOC's broad reading of Title VII and the ADA, and of how all non-discrimination laws can be implicated when dealing with such employees and applicants.
- Become familiar with state and local laws that explicitly provide protection for applicants and employees who are victims of domestic or dating violence, sexual assault or stalking, many of which require employers to provide leave for employees to seek medical care, legal assistance and/or to attend court.
- Understand how the Family Medical Leave Act and state medical leave laws could be implicated by issues arising in the workplace regarding domestic or dating violence, sexual assault or stalking.
- Develop a protocol to ensure a safe workplace when notified of a potential domestic or dating violence situation that could impact an employee and/or that employee's co-workers.

To address these action items, clients of Seyfarth Shaw should note that interactive live courses offered by Seyfarth's training subsidiary, Seyfarth Shaw at Work ("SSAW"), have all been updated to effectively address the areas and protections related to applicants and employees who are victims of domestic or dating violence, sexual assault or stalking. In fact, all of SSAW's key compliance courses have been reviewed and praised by the EEOC's designated monitors and/or the DOJ in the context of specific consent decrees, and several have been identified by name in court decrees due to their impact.

For information regarding a Seyfarth Shaw at Work training demo or course deployment options and pricing, please contact Melissa Walsh at (312) 460-6258 or mwalsh@seyfarth.com.

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