



The EEOC's Guidance for Employees with HIV – A Balanced Approach?

Insights

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On December 1, 2015, the Equal Employment Opportunity Commission ("EEOC") provided significant guidance on workplace protections for individuals with human immunodeficiency virus ("HIV"). This guidance came at the end of a year in which the EEOC resolved over 200 charges of discrimination based on claimants' status as HIV positive. The EEOC also recovered over \$825,000 for job applicants and employees who are HIV positive and were allegedly denied employment and/or reasonable accommodation as required under the Americans With Disabilities Act ("ADA").

The EEOC's guidance is particularly helpful in Pennsylvania given that, for example, each year the AIDS Law Project of Pennsylvania alone brings a significant number of cases claiming disability discrimination on behalf of individuals who are HIV positive (72 in 2014). Moreover, the EEOC's guidance is relevant because courts in Pennsylvania largely follow the same analytical approach under the Pennsylvania Human Relations Act ("PHRA") as they do under the ADA. It is worth noting, however, that, in the wake of the amendments to the ADA, some courts have held that the PHRA does not follow the ADA's reduced standards for determining whether a disability exists. *Wilson v. Iron Tiger Logistics, Inc.*, 62 F. Supp. 3d 412, 417 (E.D. Pa. 2014). Nevertheless, one's status as HIV positive would almost certainly qualify as a disability under both the ADA and PHRA.

The EEOC's guidance came in the form of two publications: (1) "Living with HIV Infection: Your Legal Rights in the Workplace Under the ADA" (the "first publication"); and (2) "Helping Patients with HIV Infection Who Need Accommodations at Work" (the "second publication").

The first publication is a reminder to applicants and employees that they have workplace privacy rights, they are protected against discrimination and harassment at work because of their condition, and that they may be entitled to reasonable accommodations. While this publication has been perceived by some to offer too much hand holding by the EEOC, the guidance attempts to balance the need to remind employees and applicants of their rights under the ADA, while, at the same time, reminding employees of their corresponding obligations to the employer under the ADA and that the employees' rights are not unlimited under the ADA.

The first publication outlines what a reasonable accommodation is and suggests potential reasonable accommodations which may allow an employee who is HIV positive to perform the essential functions of his or her job (e.g., altered break and work schedules, changes in supervisory methods, accommodations for visual impairments, etc.). The EEOC cautions, however, that an

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"employer does not have to excuse poor job performance" and that "it may be better to ask for an accommodation before any problems occur or become worse."

The first publication also reminds employees that the employer must give the employee a reasonable accommodation if it would allow him or her to do his or her job, but it states that "if more than one accommodation would work, your employer can choose which one to give you."

Finally, the first publication states that "[h]arassment based on a disability is not allowed under the ADA." The guidance goes on to say that the employee should tell the employer "about any harassment if [he or she] want[s] the employer to stop the problem," and to "[f]ollow [his or her] employer's reporting procedures if there are any."

The second publication, "Helping Patients with HIV Infection Who Need Accommodations at Work," is a reminder to doctors that patients with HIV may be entitled to reasonable accommodations at work and provides guidance on how doctors can assist patients through the accommodation process.

The second publication mirrors the approach taken in the first publication. It outlines the same explanation of what a reasonable accommodation is and provides similar examples of what a reasonable accommodation is. Again, it reminds doctors that "an employer does not have to excuse poor work performance, even if it was caused by a health condition." It also states that "[a]n accommodation may help to prevent discipline or even termination by enabling your patient to perform his or her job successfully, and by preventing future problems."

Perhaps most helpful for employers, the second publication goes on to outline the required documentation necessary for an employee to submit when requesting a reasonable accommodation and reminds doctors to use "plain language" and to explain certain things that will make it easier for the employer and employee to engage in the accommodation process. The documentation a doctor submits to an employer should explain the following:

1. A brief statement of the doctor's professional qualifications and the nature and length of his or her relationship with the patient.
2. The nature of the patient's condition.
3. The patient's functional limitations in the absence of treatment.
4. The need for a reasonable accommodation.
5. Suggested accommodation(s).

Overall, the two publications serve as beneficial reminders for both Pennsylvania employees and employers of the rights and obligations of both parties. Pennsylvania employers, however, should be acutely aware of the likelihood of increased focus on accommodating employees who are HIV positive in the wake of these publications.

