

## management matters

# On-the-Job Harassment Is Actionable Under the ADA

By Jonathan A. Wexler

Two federal appellate courts recently decided that disability-based harassment claims could be brought under the Americans with Disabilities Act (ADA). These decisions by the Court of Appeals for the Fourth and Fifth Circuits were the first to sustain hostile environment claims under the ADA.

### *Fox v. General Motors Corporation*

Robert Fox worked for General Motors as a tool handler and truck driver. After 12 years with the company, Fox injured his back outside of work and went on an extended disability leave of absence. Upon returning to work, he re-injured his back, and alternated between periods of work and leaves of absence for the next four years. The events underlying this lawsuit occurred during a 10-month period when he was at work at GM. Fox alleged that his supervisors and co-workers subjected him to a "barrage of harassment." He claimed that co-workers complained about and resented accommodations that were made for him, and took pictures of him at work and tried to show that the tasks he refused to do had the same effect on his back as the tasks he was able to do. Fox asserted that supervisors and co-workers berated him and used profanity that specifically referred to his disability, gave him work they knew was beyond his physical capability, and assigned him to a work station that aggravated his back. After a prolonged period of alleged harassment, Fox went out on permanent disability leave.

Fox then initiated his suit against GM, claiming that the company had discriminated against him and subjected him to a hostile work environment in violation of the ADA. After a trial, the jury awarded Fox \$200,000 in compensatory damages on the hostile environment claim, but found in favor of GM on his discrimination claim. GM appealed the verdict to the Court of Appeals for the Fourth Circuit.

GM argued on appeal that a claim for hostile work environment is not available under the ADA because neither the Supreme Court nor any federal appeals court ever recognized such a claim. Noting, conversely, that no case ever held that such a claim was not available, the Fourth Circuit cited the following language from the ADA:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of

such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The court in *Fox* observed that the U.S. Supreme Court has held that very similar language in Title VII of the Civil Rights Act supported hostile environment claims based on sex and race. Because the purpose of both the ADA and Title VII is the prohibition of illegal employment discrimination, and in view of regulations of the Equal Employment Opportunity Commission to the same effect, the Fourth Circuit had "little difficulty" concluding that the ADA supported a claim for creation of a hostile work environment based on harassment on the job. The court also held that, as with a sexual harassment hostile environment claim, an ADA harassment plaintiff must show that his or her work environment was hostile both subjectively (to him or her) and objectively (to the reasonable person).

### *Flowers v. Southern Regional Physician Services, Inc.*

Two weeks before the Fourth Circuit's decision in *Fox*, the Fifth Circuit reached the same result in *Flowers*. The plaintiff in that case was a medical assistant who was infected with human immunodeficiency virus (HIV). *Flowers*, who was discharged eight months after her supervisor found out about her illness, brought an action claiming that she was subjected to harassing conduct designed to force her from her job. As in *Fox*, the jury in *Flowers* found against *Flowers* on her discriminatory discharge claim, but awarded *Flowers* \$350,000 on her hostile environment claim. On appeal, Southern Regional argued, as had GM in *Fox*, that a hostile-environment claim was not cognizable under the ADA.

While the Fifth Circuit acknowledged that no appellate court had affirmatively acknowledged an ADA harassment cause of action, the court reached the same conclusion as the Fourth Circuit in *Fox*, based on the same reasoning. Specifically, the *Flowers* court compared the antidiscrimination language in the ADA with that of Title VII, as well as the statutes' similar remedial objectives, and held that disability-based harassment was a viable claim under the ADA. The Fifth Circuit in *Flowers* held that in order to be actionable, disability-based harass-

ment had to be severe or pervasive. Making this determination requires an examination of the frequency of the harassing conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. The Fifth Circuit affirmed the existence of a hostile work environment claim under the ADA, although the court found that *Flowers* had not presented sufficient evidence of emotional injury to support the jury's compensatory damage award.

### The Implication for Employers

The *Fox* and *Flowers* courts' recognition of a hostile environment under ADA means that it becomes even more important for employers to think of disability-based harassment in the same way as sexual harassment and harassment based on race, religious, national origin, and age. In this regard, companies must have antiharassment policies that must specifically prohibit disability-based harassment, as they do sexual and other

harassment. Disability, of course, is situated somewhat differently from other protected categories in that there may be legitimate reasons to discuss an employee's disability with him or her (e.g., with respect to requests for reasonable accommodation and for leaves of absences, and in connection with workers' compensation matters, etc.), while discussing an employee's race or national origin would be highly suspect. As *Fox* suggests, there may be a fine line between closely supervising a disabled employee and disability-based harassment. On the other hand, employers have a right to expect good performance from disabled individuals. Accordingly, employees, especially supervisors, must be trained and sensitized to respond properly to certain disability-related inquiries, and to interact appropriately with disabled individuals. ▀

*Jonathan A. Wexler, Esq., is an attorney in the New York office of Vedder Price Kaufman & Kamholz, where he practices labor and employment law.*

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