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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

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A Higher Hurdle Imposed for ADA Plaintiffs in the Second Circuit

It just became a bit more difficult for plaintiffs within the jurisdiction of the Second Circuit Court of Appeals (which includes New York) to succeed on disability discrimination claims brought against their employers under the Americans with Disabilities Act ("ADA").

The ADA prohibits employers from "discriminat[ing] against a qualified individual on the basis of disability in regard to . . . the hiring, advancement, or discharge of employees." An employer also may face liability if it refuses to provide a reasonable accommodation to an employee with a disability and that employee can demonstrate that he or she can perform the essential functions of his or her job if provided with such an accommodation. A plaintiff advancing either type of claim is required to demonstrate a causal connection between his or her disability and the adverse employment action. Until now, the employee litigating his or her claim within the Second Circuit had that causal connection examined under a "mixed motive" analysis.

However, that recently changed in *Natofsky v. City of New York*, decided on April 18, 2019. In that case, the Second Circuit Court of Appeals held that the same standard should be used to analyze disability discrimination claims brought under the Rehabilitation Act of 1973 (which applies to federal employers and employers operating programs or activities that receive federal financial assistance) and disability discrimination claims brought under the ADA. The Court determined that, under both statutes, a plaintiff must prove "that discrimination was the but-for cause of any adverse employment action."

The Court's adoption of the "but-for" standard means that ADA plaintiffs now face the same hurdle that employees advancing ADEA claims and Title VII retaliation claims face.

What's the Difference?

The distinction between "mixed motive" and "but-for" causation is significant. Under the "mixed motive" standard, a plaintiff need only demonstrate that his or her disability was a motivating factor in the employer's adverse employment action, even if other lawful motivations existed. Under the heightened "but-for" standard of causation, a plaintiff must demonstrate that but-for his or her disability, the adverse employment action would not have been taken.

What is the Practical Effect of this Change in the Law?

The bar has undoubtedly been raised for ADA plaintiffs. The increased burden they now face is demonstrated by the clashing majority and dissenting opinions in *Natofsky*. The majority, applying the newly-imposed "but-for" standard, affirmed the District Court's dismissal of the employee's ADA claims based upon documentary evidence that supported the employer's claim that the adverse actions were taken in response to plaintiff's poor job performance. The dissent, citing other evidence that a supervisor visibly mocked the employee after he revealed his disability and ridiculed him for his speech, and that plaintiff was subjected to "inexplicably harsh treatment," would have denied the employer's motion for summary judgment because it appeared the employer's actions "were at least motivated in part by [the plaintiff's] disability."

What Does It Mean to Employers?

Employers should view this change in the law guardedly. While it provides a valuable tool in defending a disability discrimination claim, a District Court Judge may still deem facts like those just discussed sufficient to send the case to a jury. In that case, the employer may still be exposed to the prospect of damages, in addition to substantial litigation and appellate costs.

Thus, regardless of the heavier burden an ADA plaintiff now faces under *Natofsky*, employers must continue to work to mitigate the risk posed by such claims. They should maintain and enforce their anti-discrimination policies; provide anti-discrimination training and guidance to their supervisors and employees; conduct and document dialogue with employees who request accommodations; and ensure that records of poor job performance and/or disciplinary issues are routinely made and maintained. Such documentation will serve as a critical aid in defending prospective claims under the ADA or any other anti-discrimination statute.

If you have any questions about this Information Memo, please contact Richard S. Finkel, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

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