
Minnesota Independent School Forum 2019 School Leadership Conference

September 25, 2019

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Affirmative Action

Voluntary Affirmative Action Plan

A voluntary affirmative action plan is one which is not imposed by court order or in response to federal or state statutory requirements.

Affirmative Action

Voluntary Affirmative Action Plan

A voluntary affirmative action plan for a private employer will survive a Title VII challenge if its purpose is to break down past patterns of racial or sexual segregation in order to provide new opportunities to women and minorities and if it does not trammel unnecessarily on the interests of white males.

Affirmative Action

Voluntary Affirmative Action Plan

Nothing in Title VII requires employers to adopt and implement affirmative action plans. If, however, an employer wishes to adopt such a plan, both the Equal Employment Opportunity Commission and caselaw have set certain requirements.

Affirmative Action

Voluntary Affirmative Action Plan

- Imbalance in the Workplace
- Reasonable Self-Analysis
- Reasonable Basis
- Reasonable Action to Remedy Discrimination
- Timetables
- Temporary

Affirmative Action

Involuntary Affirmative Action Plan

Involuntary affirmative action plans are those imposed by a court as a remedy for a proven claim of discrimination or those adopted by employers in order to comply with state or federal law.

There are several federal laws which require affirmative action. Under certain circumstances, these federal laws may apply to a private institution.

Dealing with Mental Illness in the Workplace

- Definition of mental impairment – any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
- To be a “disability”, the mental impairment must substantially limit one or more major life activities

Dealing with Mental Illness in the Workplace

Major life activities include:

- Sleeping
- Speaking
- Learning
- Concentrating
- Thinking
- Communicating
- Interacting with others

Dealing with Mental Illness in the Workplace

- An Employer has an obligation to reasonably accommodate the known physical or mental limitations of a disabled individual unless it would be an undue hardship.

Dealing with Mental Illness in the Workplace

- The term *reasonable accommodation* includes: making existing facilities readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Dealing with Mental Illness in the Workplace

- The burden is generally on the employee to make known a disability because accommodations are only required for “known” conditions.
- Depending on the impairment, the employee can be requested to provide documentation of the disability and the medical professional’s instruction about the accommodation.

Dealing with Mental Illness in the Workplace

- Once an employer receives a request for reasonable accommodation, the employer may find it necessary to initiate an interactive process to discuss the requested accommodation, the specific reasons for the accommodation and whether it can be provided.
- It is the employee's responsibility to request a reasonable accommodation which would allow the employee to perform the essential functions of the job.

Dealing with Mental Illness in the Workplace

- An employer does not have to provide the specific accommodation requested by the employee, but instead, must provide an effective accommodation.
- An *undue hardship* means that there will be significant difficulty or expense to provide the accommodation.

Dealing with Mental Illness in the Workplace

In determining whether an accommodation imposes an undue hardship, factors to be considered include:

- Nature and cost of the accommodation
- Overall financial resources available to the employer
- Number of persons employed
- Overall effect on the expenses and resources
- Type of operation (including the composition, structure and functions of the work force, geographic separateness and administrative or fiscal relationship of the employer)
- Impact of the operation of the employer, including the impact on the employees and the ability of the employer to conduct business.

Dealing with Mental Illness in the Workplace

- Employees with disabilities, particularly mental disabilities, can have performance or behavioral problems
- Employers are not required to accommodate employees who did not meet work performance standards
- A disabled employee must meet the same production standards as a non-disabled employee in the same job
- An employer can evaluate the job performance of an employee with a disability the same way it evaluates any other employee's performance.

Dealing with Mental Illness in the Workplace

- When an employee engages in behavioral problems related to his or her disability, addressing such problems is complicated by the ADA
- In some cases, an employee's behavioral problems can result in a determination that the employee is not a *qualified* person with a disability under the ADA. To be considered "otherwise qualified" a person with a disability must be able to perform the essential functions of his or her job without endangering the health and safety of him or herself or others.

Dealing with Mental Illness in the Workplace

- Endangering the health and safety of the employee or others can constitute a defense under an allegation of disability discrimination or failure to accommodate. The employee poses a “direct threat” to the health and safety of others, thereby making that individual not qualified for the job.

Dealing with Mental Illness in the Workplace

There are four factors which are used to determine whether an employee presents a direct threat:

- The nature of the harm;
- The duration of the risk;
- The severity of the potential harm; and
- The probability that the potential harm will occur

Dealing with Mental Illness in the Workplace

- Direct threat determinations must be made on a case by case evaluation of the employee's ability to perform the essential functions of the job.
- An employer can use its own physician's assessment of risk even if it conflicts with the employee's treating physician
- The employer needs only to make the determination that the employee was not fit for duty based on reasonable and objective medical opinion.

Dealing with Mental Illness in the Workplace

- The fact that the employee claims that her disability is the reason for the disruptive or inappropriate behavior does not mean that the institution must tolerate the disruptive behavior
- An employer is permitted to require that all employees, regardless of disability, meet the same conduct and behavioral standards. This would include rules prohibiting violence or the threat of violence in the workplace.

Reductions in Force

- Disparate Treatment claims – the employer intentionally discriminated against an employee
- Disparate Impact claims – a neutral employment decision has a disproportionate impact on members of a protected class

Reductions in Force

- Consider voluntary severance program
- Planning Process – team of people to assess the need for an RIF
 - Clearly state the reason for the RIF
 - Document stated goals with measurable objectives

Reductions in Force

- Selection Criteria
 - Can be by department, job classification or all employees
 - Develop criteria based on business needs and job functions
 - Use objective criteria, such as attendance data, performance evaluations
 - If possible, identify a secondary criteria if 2 employees are ranked equally
 - Rank employees according to the criteria

Reductions in Force

- Conduct a demographic review of all employees in the selected domain, and compare to demographics of employees selected for the RIF
- If disparities exist, review decision making process and decide if adjustments can be made

Reductions in Force

- Consider releases and severance program
- Communication
- Anticipate reactions of remaining employees

Educational Institutions and Transgender Students

- The Minnesota Human Rights Act prohibits discrimination against transgender students in education.
- Discrimination on the basis of sexual orientation includes those who “have or are perceived as having a self-image or identity not traditionally associated with their biological maleness or femaleness.”

Educational Institutions and Transgender Students

- This prohibition applies to public and private schools and includes elementary and secondary schools, kindergarten, academy, college, and the like.
- However, there is an exemption for certain religious educational institutions regarding matters related to sexual orientation.

Educational Institutions and Transgender Students

- How do you know if you are an exempt religious school?
- You must be an institution organized for educational purposes that is “operated, supervised, or controlled” by a religious association that is not organized for private profit.

Educational Institutions and Transgender Students

- For example, the Lutheran High School of Greater Minneapolis was held to be an exempt religious institution in 2005.
- The high school “fosters the mission and ministry of the church, engages in program activity that is in harmony with the programs of the boards of Synod, and respects and does not act contrary to the doctrine and practice of the Synod.”

Educational Institutions and Transgender Students

- Minnesota State High School League (MSHSL) provides that all students may participate in athletics and fine arts in an environment free from discrimination and consistent with their gender identity and expression.
- If a student is denied participation on a team, they may make an appeal to the MSHSL.

Educational Institutions and Transgender Students

- Private religious schools are exempt from compliance.
- However, the scope of the exemption is largely unclear, as is how the exemption will effect religious schools' standing in the League.
- Further, the law surrounding the use of restrooms and locker rooms is unclear. There is an ongoing case from the Anoka County District about a transgender boy's right to use the male locker room.

Educational Institutions and Transgender Students

- The Minnesota Department of Education and the School Safety Technical Assistance Council published *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students*.
- These recommendations are not legally binding, but should be considered by schools hoping to exhibit best practices regarding transgender youth.

Educational Institutions and Transgender Students—Best Practices

- Drafting school policies on creating a “safe, supportive, and welcoming environment” for transgender youth.
- Schools should ask students to provide their requested name and pronouns.
- Schools should not exclude any student from participating in a school-affiliated activity based on gender identity.

Educational Institutions and Transgender Students—Best Practices

- Schools should not prohibit students from attending social (prom, homecoming, etc..) events because they are transgender. Students should be allowed to socialize, dance, and take photos similar to any other students in the school.
- Dress Code:
 - No student should be disciplined for wearing clothes that fail to conform to gender based stereotypes
 - Schools should provide inclusive dress guidelines, and not pressure any student into wearing certain attire over other options provided.

Educational Institutions and Transgender Students—Best Practices

- Students should be afforded the opportunity to use the restroom of their choice. Any student who wishes not to share a restroom with a transgender student can be provided a single-user restroom.
- Students should be given the option to use a private space in a locker room, or to use the locker room consistent with their gender identity.
 - Coaches should consider how to utilize private curtains, restrooms, and separate changing schedules to provide for privacy of all students.

Issues When Dealing with Feuding Parents

- Basic Premise – both parents have the right to receive copies of school records, to attend parent-teacher meetings, and to pick up their children
- The burden is on the parent disputing the other parent's right to access their child or their child's school records to produce a court order giving that parent sole legal custody or containing other restrictions

Issues When Dealing with Feuding Parents

- Exception: if the parents are not married, the mother has full and complete discretion over the child unless the father has a court order
- Any custody order contains the following Notice:

Issues When Dealing with Feuding Parents

NOTICE

EACH PARTY IS GRANTED THE FOLLOWING RIGHTS:

- (1) right of access to, and to receive copies of, school, medical, dental, religious training, police reports, and other important records and information about the minor children;
- (2) right of access to information regarding health or dental insurance available to the minor child;
- (3) right to be informed by the other party as to the name and address of the school of attendance of the minor children;
- (4) right to be informed by school officials about the children's welfare, educational progress and status, and to attend school and parent-teacher conferences. The school is not required to hold a separate conference for each party, unless attending the same conference would result in violation of a court order prohibiting contact with a party;
- (5) right to be notified by the other party of an accident or serious illness of a minor child, including the name of the health care provider and the place of treatment;
- (6) right to be notified by the other party if the minor child is the victim of an alleged crime, including the name of the investigating law enforcement officer or agency. There is no duty to notify if the party to be notified is the alleged perpetrator; and
- (7) right to reasonable access and telephone or other electronic contact with the minor children.

Issues When Dealing with Feuding Parents

- The court can waive any parent's rights if it find it necessary to protect the welfare of a party or child.

Questions?

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