

# LEGAL BRIEFINGS

ADA & IT  
TECHNICAL ASSISTANCE  
CENTERS

## Disability Harassment in the Workplace: An Emerging Theory Under the ADA

### Introduction

Imagine returning to work after brain surgery and having your supervisors and co-workers call you “platehead;” imagine having your co-workers call you “nuts” and “crazy” and ask if you’ve “gone off your medication;” imagine your supervisor, once a close friend, now sabotaging your job because she found out that you are HIV-positive. Unfortunately, plaintiffs in disability harassment cases have had to endure exactly this type of conduct.

Disability harassment under Title I of the Americans with Disabilities Act (ADA) is a developing area of law, and this cause of action is being explicitly or implicitly recognized by a growing number of courts. The U.S. Supreme Court and the lower federal courts have previously recognized a cause of action for workplace harassment under Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C. §2000e-2(a)(1)

A review of Title VII harassment cases reveals that there is no exact science to determining what conduct rises to the level of actionable harassment. The courts,

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however, have set a high bar for what conduct constitutes harassment under Title VII. Courts that have recognized a disability harassment claim under Title I of the ADA have analogized such a claim to a Title VII harassment claim.

As more and more individuals with disabilities enter the workforce, the more important this issue will become for employers. Training and anti-harassment policies that address other forms of harassment, based on race and sex, for example, should be modified to include disability.

The purpose of this Legal Briefing is to explain the standard that federal courts use in evaluating a claim for disability harassment under Title I of the ADA and summarize the relevant disability harassment case law. This paper also provides brief guidance to both employees and employers in addressing disability harassment issues.

## **Disability Harassment Claims Under Title I of the ADA**

Title I of the ADA prohibits discrimination in employment, and provides employees with disabilities with broad protections in the workplace. The statute states: “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.” *See* 42 U.S.C. §12112 (a)

Courts that have recognized a cause of action for disability harassment have focused on the similarities between this provision of the ADA and Title VII. Although harassment is not expressly prohibited in Title VII, the U.S. Supreme Court has recognized that harassment based on a protected status is implicitly prohibited by Title VII. Both Title I of the ADA and Title VII use the language “terms, conditions, and privileges of employment.” Courts have interpreted this to be the relevant portion of the statutes from which to draw a harassment claim. The courts have established that, should conduct rise to a level that is severe and pervasive, and creates an abusive work environment that interferes with an employee’s ability to perform the job, it is a form of discrimination, because it effects the “terms and conditions” of that individual’s employment.

The U.S. Supreme Court has not yet addressed harassment under the ADA, but lower federal courts have either expressly recognized or presumed that the ADA also includes a cause of action for harassment based on disability since Congress was aware of the Supreme Court’s interpretation of “terms, conditions, and privileges of employment” under Title VII when it enacted the ADA. Four federal circuit courts of appeal have ruled that disability harassment/hostile work environment claims are actionable under Title I of the ADA. Many other circuits have presumed that the cause of action exists, but have not yet explicitly issued a ruling that a disability harassment claim is actionable under the ADA. Further, numerous federal trial courts have either recognized the claim or presumed that the claim exists. Significantly, no federal court has ruled that a disability harassment claim is not actionable under Title I of the ADA.

## The Legal Standard for Disability Harassment

Courts recognizing a claim for disability harassment have adopted the Title VII analysis for harassment or hostile work environment claims, slightly modified to reflect that the claimed harassment is based on disability. Courts have held that, to establish a hostile work environment claim under the ADA, a plaintiff must prove that:

1. Plaintiff is a qualified individual with a disability;
2. Plaintiff was subjected to unwelcome harassment;
3. The harassment was based on plaintiff's disability;
4. The harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment; and
5. Some factual basis exists to impute liability for the harassment to the employer (i.e. the employer knew or should have known of the harassment and failed to take prompt, remedial action)

In disability harassment cases, as in sexual harassment cases under Title VII, plaintiffs have had difficulty establishing the fourth element, that the harassment was severe or pervasive enough to alter a term, condition, or privilege of employment.

The case summaries below contain several examples of factual scenarios where employees asserted harassing conduct by

co-workers and supervisors. Yet, in analyzing the facts and applying them to the legal standards, even in the few cases that led to a decision for the plaintiff, courts have differed in the requisite severity or pervasiveness necessary to conclude that there was a hostile environment or actionable harassment. Where the harassment causes tangible injury, however, the courts find it easier to hold that severe harassment occurred. In many cases, verbal insults, intimidation, or threats alone have not been sufficient to support a harassment claim. It has taken years to set the parameters of harassment claims under Title VII, so this is clearly a developing area of law under the ADA.

It should be noted that Section 504 of the Rehabilitation Act of 1973 (Rehab Act), which prohibits discrimination by entities that receive federal funding, applies in the employment context. Because the ADA incorporates by reference many of the terms of the Rehab Act, courts have held that the standard for proving a disability harassment claim under the Rehab Act is parallel to that established under Title I of the ADA. The only additional element a plaintiff must show is that the employer is a recipient of federal funds. Therefore, references to cases that involve



federal employees are discussed below with the understanding that the standards are the same under both disability discrimination laws for purposes of identifying and describing disability harassment claims.

## Four Circuit Courts of Appeal Explicitly Recognize a Cause of Action for Disability Harassment Under Title I of the ADA

The Fourth, Fifth, Eighth, and Tenth Circuits have explicitly recognized a cause of action for disability harassment under Title I of the ADA. A brief summary of cases from each of these circuits is provided below. All of these circuits have used the five-element test based on harassment under Title VII. Because harassment is a fact intensive inquiry, the facts of each case will be discussed in detail.

**Fourth Circuit: *Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001).** (The Fourth Circuit Court of Appeals covers the following jurisdictions: Maryland, North Carolina, South Carolina, Virginia, and West Virginia)

### a. Facts

Robert Fox worked for General Motors (“GM”) in different jobs for many years. Fox sustained back injuries and, upon his return to work, had light-duty work restrictions. Although Fox was assigned to a light duty table, his foreman asked him to perform tasks that he was unable to do because of his injury. When Fox refused to perform the tasks, his foreman

verbally abused Fox, often using profanity, and some other officials made fun of Fox and other workers with disabilities, calling them “handicapped people,” “hospital people,” “handicapped MFs,” and “911 hospital people.” The foreman instructed other employees not to speak to those with disabilities, encouraging them to ostracize workers with disabilities and not to bring supplies to the light-duty table. The foreman eventually made Fox work in a hazardous area at a table that was too low, which re-aggravated Fox’s back injury. The foreman also refused to allow Fox to take the physical required to apply for a truck driver position, which met Fox’s medical restrictions and for which he was otherwise qualified.

Fox testified that the harassment he endured caused him both physical and emotional injury. His psychiatrist ordered that Fox take leave for a few weeks because of the harassment. His physician concluded that, although Fox was physically capable of performing light-duty work, the constant harassment caused depression and anxiety, which in turn led to a worsening of Fox’s physical condition, and ultimately meant that Fox could no longer work at the plant.

Fox filed a lawsuit alleging that GM discriminated against him and subjected him to a hostile work environment in violation of the ADA. A jury in the federal district court awarded Fox \$200,000 in compensatory damages, \$3,000 for medical expenses, and \$4,000 for lost overtime.

### b. Legal Analysis

The Fourth Circuit Court of Appeals affirmed the jury’s verdict for Fox (except for the \$4000 dollars in overtime pay). The



Fourth Circuit first addressed whether a claim for disability harassment was cognizable under the ADA. Because the ADA uses similar language to Title VII and the Supreme Court had previously recognized harassment claims under Title VII, the court concluded that a claim for disability harassment was cognizable under the ADA. The court also noted that the two statutes have the same purpose, the prohibition of illegal discrimination in employment, and that the EEOC regulations implementing the ADA mentioned harassment. (29 C.F.R. §1630.12(b) states “[i]t is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of any right granted or protected by” the employment provisions of the ADA.) (*emphasis added*).

After the court recognized that a cause of action existed, then the court adopted the five-element test discussed above. The court reasoned that, to recover on a hostile work environment claim, the plaintiff must demonstrate not only that the plaintiff subjectively perceived the workplace as hostile, but also that a reasonable person would perceive the workplace as hostile. The court explained that the factors to

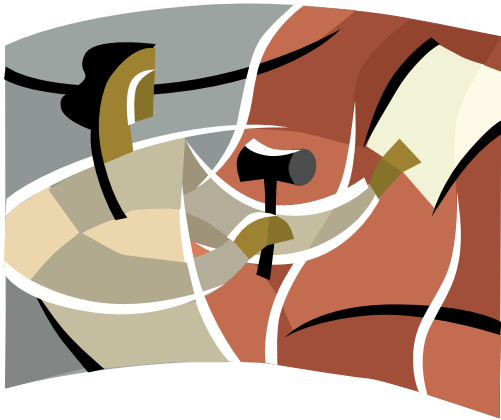
consider when determining the objectively hostile component of the claim include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”

The court then applied this test to the evidence presented at trial and held that the harassment was severe and pervasive. Although not necessary to the success of his claim, the court also found that Fox had suffered both physical and emotional injury. Medical witness testimony showed that the worsening of Fox’s back injury, which led to increased pain and suffering, may have been triggered solely by the harassment Fox experienced at work.

### c. Damages

The nature and type of harm or injury a plaintiff presents and the amount plaintiff is able to prove is attributable to disability-based harassment will directly affect the amount of damages plaintiff may receive. In *Fox*, the plaintiff had medical experts, his treating psychiatrist and neurologist, to support his claim that he sustained emotional injury as a result of the workplace harassment. He was able to establish he had physical and mental symptoms caused by the harassment at work. More significantly, one of his medical experts testified that Fox’s physical disability was likely further aggravated by the harassment including the physical tasks that Fox’s supervisors forced him to do.

**Fifth Circuit: *Flowers v. Southern Regional Physician Services, Inc.*, 247 F.3d 229 (5th Cir. 2001).** (The Fifth Circuit Court of Appeals covers



the following jurisdictions: Louisiana, Mississippi, and Texas)

#### **a. Facts**

Sandra Flowers worked for Southern Regional Physician Services, Inc. (“Southern Regional”) for over two years (and its predecessor company for four years prior to that) as a medical assistant to a physician. Although Flowers had previously been good friends with her supervisor, almost immediately after the supervisor discovered that Flowers was HIV-positive, the supervisor stopped socializing with Flowers and refused to even shake her hand. The supervisor also began intercepting Flowers’ telephone calls, eavesdropping on her conversations, and hovering around her desk.

Although the employer had previously required Flowers to submit to only one random drug test, after the supervisor discovered Flowers’ HIV status, Flowers underwent four random drug tests within a one-week period. Additionally, before Flowers’ HIV status was known, she received good performance evaluations, obtaining a score of thirty-eight out of a possible forty and a ten percent raise. Within a month after informing her employer of her HIV status, Flowers was written up, and one month later, the

supervisor wrote-up Flowers again and placed her on a ninety-day probation. Just days before the ninety-day probation ended, Flowers was again written up and put on another ninety-day probation. This time, the president of Southern Regional was present at the meeting. Flowers testified that the president called her a “bitch” and said that he was “tired of her crap.” Ultimately, Southern Regional discharged Flowers.

The jury found that Flowers was subjected to unwelcome harassment based on her HIV-positive status and that the harassment was so severe and pervasive that it unreasonably interfered with her job performance.

#### **b. Legal Analysis**

Like the Fourth Circuit, the Fifth Circuit held that, because Title VII covers hostile work environment claims, claims for disability harassment are actionable under the ADA. The court adopted the same five-element test discussed above. Under this test, the court concluded that the jury could have reasonably found that the supervisor’s and the president’s conduct was sufficiently severe or pervasive to create a hostile work environment and unreasonably interfered with Flowers’ work performance. Furthermore, Southern Regional did not contest that it was aware of the harassment, and the evidence showed that Southern Regional failed to take prompt action to remedy the harassment.

#### **c. Damages**

The court found that Flowers’ claims of emotional harm were based on emotional and physical symptoms that she experienced after her termination from

employment. Flowers presented evidence that after her discharge from Southern Regional she started losing weight, had diarrhea and nausea, had trouble sleeping, and became ill. However, because she did not provide sufficient evidence that she was experiencing distress or other injury during the months she was being harassed on the job, the court found she was only entitled to nominal damages. The court explained that to recover more than nominal damages for emotional harm, a plaintiff must prove “actual injury” resulting from the harassment, and the court will not presume emotional harm just because discrimination occurred. Therefore, the court vacated the jury’s award of damages.

For subsequent 5<sup>th</sup> Circuit cases see: *Gowesky v. Singing River Hospital Systems*, 321 F.3d 503, 509-11 (5th Cir. 2003) (holding that offensive comments were not sufficiently severe or pervasive to constitute disability harassment and entering judgment for defendant); *Soledad v. U.S. Dept. of Treasury*, 304 F.3d 500, 506 (5th Cir. 2002) (recognizing that a claim for hostile work environment exists under the ADA, but declining to decide if such a claim also exists under the Rehabilitation Act).

**Eighth Circuit: *Shaver v. Independent Stave Co.*, 350 F.3d 716 (8th Cir. 2003).** (The Eighth Circuit Court of Appeals covers the following jurisdictions: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota)

#### a. Facts

Christopher Shaver had nocturnal epilepsy, and had an operation in which part of his brain was removed and a metal

plate was inserted. Shaver’s supervisor disclosed these facts to Shaver’s co-workers without his permission. Both Shaver’s co-workers and supervisors called Shaver “platehead” as a nickname for a period of over two years.

When Shaver asked his co-workers to stop calling him “platehead,” some of the co-workers and supervisors stopped, but others did not. The employer defended the name-calling by claiming it was not related to Shaver’s disability, but merely a nickname, and many employees had nicknames at that workplace. Some co-workers made offensive comments about Shaver, calling him “stupid” or saying that he was “not playing with a full deck.” Nonetheless, the district court entered judgment in favor of the employer on Shaver’s disability harassment claim.

#### b. Legal Analysis

The Eighth Circuit first held that a hostile work environment claim based on disability harassment is actionable under Title I of the ADA. The court adopted the same five-element test discussed above, but the court held that Shaver did not present sufficient evidence that the harassment he experienced was severe or pervasive. Although a co-worker said that Shaver “pissed in his pants when the microwave was on,” the court discounted the statement because it occurred outside Shaver’s presence. The employer also claimed the name “platehead” only referred to the fact Shaver had a metal plate in his head, not that he had an impairment. The court was somewhat skeptical of the employer’s distinction, and found this dispute was a factual one for a jury. The court, however, ultimately found that “[c]onduct that is merely rude, abrasive, unkind, or insensitive does not come within the scope of

the law.” The court considered the environment in which Shaver worked, and found, that like many work environments, rude, name-calling ridicule and horseplay were standard, and the court’s proper role was not to act as an arbiter of human resources issues. The court also found that the supervisor’s unauthorized disclosure of Shaver’s medical condition might be a separate violation of the ADA, but did not support Shaver’s claim for hostile work environment under the ADA.

**Tenth Circuit: *Lanman v. Johnson County, Kansas*, 393 F.3d 1151 (10th Cir. 2004).** (The Tenth Circuit Court of Appeals covers the following jurisdictions: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming)

#### a. Facts

While working as a deputy sheriff, some of Susan Lanman’s co-workers began treating her as if she were mentally ill. They called her “nuts” and “crazy.” She claimed that, when someone “hyped up on drugs” or “hostile” would be placed in a special holding cell, another deputy would tell her, “Lanman, there is someone like you. Go get your relative out of 1A4. They

act just like you.” Another deputy made comments on a weekly basis stating, “Oh Lanman, you are going off the deep end again,” and “Let’s give her some chocolate and let’s see her go off the deep end,” and “Are you off your medication?,” and “Why don’t you try a different medication?”

After experiencing a variety of problems in the workplace and being reassigned, Lanman submitted her resignation and stated that she “felt the need to voluntarily resign due to the extreme hostile conditions she faced.” Following her resignation, Lanman sued her former employer for disability harassment under the ADA.

#### b. Legal Analysis

In its opinion, the Tenth Circuit Court of Appeals first joined its sister circuits and held that hostile work environment claims are actionable under the ADA. However, unlike the previous cases, which turned on the fourth element – whether the harassment was severe and pervasive – the court in *Lanham* held that plaintiff could not meet the first element of the test – that she was a qualified individual with a disability. Therefore, the court did not analyze the other elements of a hostile work environment claim.



## Other Circuit Courts of Appeal

Other Circuit Courts of Appeals either have yet to address the issue or have presumed without deciding that a cause of action exists for disability harassment under the ADA. Below is a selection of cases that highlight whether a claim for disability harassment has been addressed in each Appellate Circuit, as well as trial

courts that have addressed this issue. This list is not intended to be exhaustive, and further research is suggested to identify other rulings in each Appellate Circuit.

**First Circuit:**

**Assumed but not Recognized**

(The First Circuit Court of Appeals covers the following jurisdictions: Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island)

*Rocafort v. IBM Corp.*, 334 F.3d 115, 121 (1st Cir. 2003) (declining to decide whether cause of action for hostile work environment can be maintained under the ADA); see also *Rodriguez v. Loctite Puerto Rico, Inc.*, 967 F. Supp. 653, 662-67 (D.P.R. 1997) (trial court decision finding that there is a cause of action for hostile work environment under the ADA, but granting summary judgment for defendant because plaintiff failed to show that a hostile work environment existed).

**Second Circuit:**

**Not Yet Addressed by Circuit**

(The Second Circuit Court of Appeals covers the following jurisdictions: Connecticut, New York, and Vermont)

*Hendler v. Intelcom USA, Inc.*, 963 F. Supp. 200 (E.D.N.Y. 1997) (trial court decision denying summary judgment for defendant on plaintiff's disability harassment claim because a reasonable jury could find that defendant's jokes about plaintiff's inability to tolerate second-hand smoke — because of asthma — created a hostile work environment)

**Third Circuit:**

**Assumed but not Recognized**

(The Third Circuit Court of Appeals covers the following jurisdictions: Delaware,

New Jersey, Pennsylvania, and the Virgin Islands)

*Walton v. Mental Health Association of Southeastern Pennsylvania*, 168 F.3d 661, 666-67 (3d Cir. 1999) (assuming that a cause of action for harassment exists under the ADA, but declining to decide because plaintiff failed to state a claim for harassment)

**Sixth Circuit:**

**Likely Recognized**

(The Sixth Circuit Court of Appeals covers the following jurisdictions: Kentucky, Michigan, Ohio, and Tennessee)

*Keever v. City of Middletown*, 145 F.3d 809, 813 (6th Cir. 1998) (affirming the lower court's judgment against plaintiff's disability harassment claim because plaintiff failed to show that defendant's actions created "an objectively hostile work environment")

**Seventh Circuit:**

**Assumed but not Recognized**

(The Seventh Circuit Court of Appeals covers the following jurisdictions: Illinois, Indiana, and Wisconsin)

*Mannie v. Potter*, 394 F.3d 977, 882 (7th Cir. 2005) (assuming that a claim for hostile work environment exists under the ADA and the Rehabilitation Act, but not expressly recognizing such a claim); *Silk v. City of Chicago*, 194 F.3d 788, 803-04 (7th Cir. 1999) (assuming that a claim for hostile work environment exists under the ADA, but declining to expressly recognize such a claim)

**Ninth Circuit:**

**Assumed but not Recognized**

(The Ninth Circuit Court of Appeals covers the following jurisdictions: Alaska, Ari-

zona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington)

***Brown v. City of Tucson*, 336 F.3d 1181, 1190 (9th Cir. 2003)** (declining to decide whether a cause of action for hostile work environment exists under the ADA); ***Roberts v. Dimension Aviation*, 319 F. Supp. 2d 985 (D. Ariz. 2004)** (trial court decision stating that the Ninth Circuit has not recognized a disability harassment claim, but assuming that such a claim exists); ***Leland v. U.S. Bank Natl. Association*, No. CV-98-454-ST, 1999 WL 778569, at \*7 (D. Or. 1999)** (trial court decision stating that the Ninth Circuit has not recognized a hostile work environment claim under the ADA and assuming, but not deciding that such a claim exists).

#### **Eleventh Circuit:**

##### **Not Yet Addressed by Circuit**

(The Eleventh Circuit Court of Appeals covers the following jurisdictions: Alabama, Florida, and Georgia)

***Mistretta v. Volusia County Dept. of Corrections*, 61 F. Supp. 2d 1255, 1264-65 (M.D. Fla. 1999)** (trial court decision holding that a cause of action for hostile work environment exists under the ADA, but entering judgment in favor of the defendant because non-disabled employees were also subjected to much of the “harassing” behavior); ***Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1106-10 (S.D. Ga. 1995)** (trial court decision holding that a hostile work environment claim is actionable under the ADA and finding that issues of material fact remained that precluded the court from granting summary judgment in favor of the defendant).

#### **D.C. Circuit:**

##### **Assumed but not Recognized**

(The D.C. Circuit Court of Appeals covers the District of Columbia)

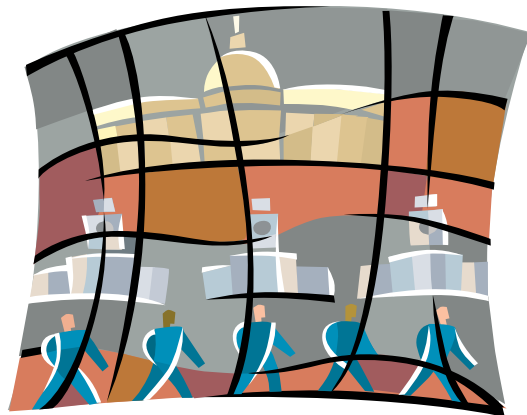
***Kuraner v. Mineta*, No. 00-5416, 2001 WL 936369 (D.C. Cir. July 10, 2001)** (assuming but not deciding that the Rehabilitation Act allows a hostile work environment claim); ***Pantazes v. Jackson*, 366 F. Supp. 2d 57, 71 (D.D.C. 2005)** (trial court decision citing *Kuraner* and assuming that the ADA includes a hostile work environment claim)

## **Potential Claim for Disability Harassment Under Title V of the ADA**

Mark C. Weber, Professor of Law at DePaul University, among other authors, has argued that a claim for disability harassment could be based on provisions found in Title V of the ADA. Mark C. Weber, *Workplace Harassment Claims Under the Americans with Disabilities Act: A New Interpretation*, 14 Stan. L. & Pol’y Rev. 241 (2003). Under 42 U.S.C. § 12203(b) in Title V, it is “unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this chapter.” Professor Weber argues, that this unique and separate provision that focuses on coercion, interference and intimidation under Title V of the ADA, is a separate cause of action from a harassment claim, and therefore does not require the strict and difficult burdens of proof as those in a traditional harassment claim.

A cause of action crafted under this provision of Title V would require a lower standard of proof for plaintiffs because coercion and intimidation could include verbal harassment, insults and threats that might not rise to the level of severe or pervasive currently required by the courts. And, a cause of action under this section of the ADA would not require plaintiff to be a qualified individual with a disability since this section says “any individual” instead of “a qualified individual with a disability.” Therefore, if courts did recognize a cause of action for disability harassment under Title V, plaintiffs would have a higher likelihood of success on those claims, and would not be intimidated or coerced out of a job without recourse.

There is very little case law under this section of the Title V of the ADA, so it is unclear whether this theory will be a way for people with disabilities to obtain redress for the harassment they experience. There is one case that provides some guidance. See *Brown v. City of Tucson*, 336 F.3d 1181 (9th Cir. 2003) (stating that “the ADA’s anti-interference provision appears to protect a broader class of persons against less clearly defined wrongs, compared to the anti-discrimination provisions from which the hostile environment standard is derived.”)



## Tips for Employees with Disabilities

Under the current standard, an employee suing for disability harassment must first show that she is a qualified individual with a disability, meaning that the employee can perform the essential functions of the job with or without accommodation and that the employee has an impairment that substantially limits one or more major life activities. Additionally, the employee must show that the alleged harassment was severe or pervasive. Thus far, the case law indicates that courts are less likely to find that name-calling alone meets the standard for disability harassment. Although courts say that actual physical harm is not necessary, courts seem more sympathetic to disability harassment claims when the employee actually experienced physical or emotional harm on the job as a direct result of the harassment. If employees suffer these types of injuries, they should make sure to plead them in their claims, and if possible, utilize experts to support their claims.

Since they may face a difficult burden in court, employees should consider addressing the situation directly with their employer before pursuing legal action. This can include informing the harasser that the conduct is unwelcome, informing supervisors about the unwelcome behavior, and utilizing the employer’s internal procedures for reporting and investigating harassment. If an amicable approach is not successful, the employee should keep a record of the unwelcome behavior including the date, time, place, witnesses, and any attempts that were made to remedy the situation with the employer and the employer’s responses to those attempts.

Finally, employees should educate themselves about their rights, remedies and statutes of limitations, should they decide to file a disability discrimination charge. Statutes of limitations will differ depending on the local, state or federal jurisdiction in which an employee intends to file a charge, the size and type of entity the employer is, and the type of claim the employee is bringing. Generally, if the employee is seeking relief by filing a charge of discrimination under Title I of the ADA, she should contact the Equal Employment Opportunity Commission (EEOC). Claims for disability discrimination in employment based on prohibited discrimination defined in Title I must be filed within 180 days of the alleged discriminatory act of the employer, unless the EEOC has a work share agreement with the state human rights commission (as in Illinois), and in those cases, charges must be filed within 300 days. Claims based on hostile work environment require a careful analysis of events in order to determine when the statute of limitations begins to run because these claims can be characterized as an ongoing violation and thus not tied to an incident on a particular date. It is recommended that potential plaintiffs seek legal counsel in order to understand and protect their rights.



## Tips for Employers

Employers should be aware that, as with harassment and hostile work environment claims based on sex, race, religion, ethnicity, age or other protected status under Title VII of the Civil Rights Act, and other employment rights laws, employers can be subject to liability for disability harassment claims under the ADA. To avoid such liability and to promote a positive workplace environment, employers should modify any anti-discrimination or anti-harassment training to include training about disabilities. Additionally, employers should put in place disability harassment policies and appropriate grievance procedures for persons with disabilities to report workplace harassment. Employers should also train supervisors to respond promptly to an employee's internal complaint of harassment. The employer will need to show that it took the claim seriously, investigated the complaint, maintained employee confidentiality to the extent practicable, and took appropriate disciplinary action against any employee or supervisor who was found to be harassing another employee, or who knew the work environment was abusive and did nothing to prevent or stop the harassment.

While plaintiffs typically carry a heavy burden, disability harassment is still an emerging area of law, and the *Fox* and *Flowers* cases demonstrate that plaintiffs can prevail in disability harassment cases. Accordingly, employers should put systems in place that will prevent workers with disabilities from facing disability harassment and provide avenues to promptly address harassment if it occurs. Preventing harassment will ensure a better working environment and also avoid the expense and workplace disruption of any potential litigation.