

Combatting Disability Discrimination



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Stewards faced with the challenge of helping injured co-workers with disability discrimination grievances — problems revolving around getting back to work, promotions, demotions, transfers and the like — would do well to brush up on developments in disability discrimination law.

In the U.S. there's the Americans with Disabilities Act (ADA), while in Canada it's the Federal Employment Equity Act and related provincial/territorial legislation. Both countries generally prohibit disability discrimination in employment regardless of whether the disability happened at work or away from work.

In 2008 the ADA was amended making it easier for injured workers to qualify for coverage. The changes came in reaction to court cases that took away workers' rights by narrowly defining what constitutes a disability. Definition of the term now has been expanded.

When Are You Disabled?

The ADA defines a disability as (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such impairment; or (3) being regarded as having such impairment. Generally this means if a worker has an injury or health condition that is long lasting or permanent and it substantially interferes with his or her ability to function in life or work, then it's probably a disability under the law.

The new law expands major life activities to include not only activities like seeing, hearing, eating, walking, and standing, but also "major bodily functions," such as digestive, bladder, bowel, neurological, circulatory, respiratory, musculoskeletal, sense organs and skin. To be protected by the ADA you must show that the worker's life is limited in some significant way by the injury or

health condition. Congress made this easier by adopting a new "common sense" standard that asks whether the effect of a worker's impairment substantially limits the worker's life "as compared to most people in the general population."

Kinds of Injuries

The injury does not have to prevent or even severely limit the life activities. Moreover, even impairments that are in remission or episodic, such as asthma or diabetes, may be considered disabilities, if they substantially affect the worker's life.

Congress rejected prior Supreme Court decisions that held that mitigating (corrective) measures should be considered in assessing whether a person has a disability. The new rule is any *positive* effects of mitigating measures (e.g., medication or a prosthetic device) are not considered — except the corrective benefits of ordinary eyeglasses or contact lenses. But *negative* effects of mitigating measures, such as side effects from medication, can be considered.

Work as a major life activity is substantially limited if an injured worker cannot perform a "type of work." Type of work means job categories like commercial truck driving; assembly line, food service, clerical, and law enforcement jobs; or generalized job tasks like repetitive bending, reaching or manual activities, frequent or heavy lifting, or prolonged sitting or standing. But remember, it is not enough that the injured worker cannot perform just her old job; she must be substantially limited in an entire "type of work."

Reasonable Accommodation

Like all workers, disabled workers must be qualified for the job. Employers get to decide (subject to challenge) the job qualifications, performance standards, and essential job functions. A disabled worker who can't perform her job may request a

reasonable accommodation that will make her qualified. The worker must request accommodation and provide the employer with some specific, realistic suggestions. If there is more than one effective reasonable accommodation, the employer can pick the one it prefers.

Unreasonable accommodations create an undue hardship — significant difficulty or expense — for the employer. But the more resources an employer has the more it is expected to expend to achieve the accommodation. Mere inconvenience is not an undue hardship. Conflict with a collective bargaining agreement, however, may be. For example, the ADA would not require an employer to award a less senior qualified disabled worker a vacant position if a more senior qualified worker had contract rights to the job — even though it might be the only job the disabled worker could do. Employers may also exclude persons who pose an immediate, serious and direct threat to the health and safety of themselves or others in the workplace where no reasonable accommodation can eliminate the threat.

What Are Your Options?

Try to get the employer to voluntarily accommodate the injured worker so she can return to work, preferably at her old job. Have some realistic suggestions about possible accommodations. Reassignment to another vacant position may be necessary, but remember that the ADA doesn't require the employer to create a job, or bump someone out of a job, nor does it require the new position be to be comparable in wages or benefits. If the employer is reluctant to accommodate, then build pressure by bolstering your claim of disability with good medical and vocational evidence. Employers would rather settle a grievance than go to court.

— Neill DeClerq. The writer is a professor at the School for Workers, University of Wisconsin-Extension.

Five Grounds for a Grievance

Grievances can flow from a lot of things. New stewards, especially, tend to focus only on the contract and its guarantees. But to do that is to short-change your members. Workers have a lot of rights on the job, and they don't all flow from the collective bargaining agreement.

Generally, you may have grounds for a grievance where there is a violation of one of the following:

1 The Contract: In your workplace it may be called something else, like the agreement or the memorandum of understanding, but a violation of contract language is often the easiest to prove. Nothing in life is easy, though, so be prepared to encounter conflicting clauses or an employer who decides that the clause in question can be interpreted differently. One thing that may help is to check out past practices (see point 5, below).

2 The Law: No matter what the contract says, or doesn't, the law is a higher authority — federal, state, provincial or local. No employer can pay less than a legislated minimum wage, no matter what the contract language says. Thanks to OSHA, no employer can put his workers in obviously life-endangering situations, regardless of what the union contract says or doesn't say about safety. An employer who claims the contract doesn't set procedures or say anything about a particular issue can sometimes be made to see reason by pointing out a relevant law. A sensible employer may decide to do the right thing by the worker rather than risk ending up in a courtroom.

3 Company or Agency Regulations: Management generally can't violate its own rules to harm its workers: to do so is to set itself

up for a grievance. For example, it can't ignore a supervisor getting drunk on the job, then fire a worker for doing the same thing. Nor can a supervisor routinely come in late, or smoke on the job or take an extended lunch break, if workers are disciplined for doing the same thing. Uneven enforcement of internal regulations, as well as management disregard for its own rules, can give the union ammunition for a grievance.

Public employers at all levels of government tend to have lots of rules and regulations, and those volumes of material can be a goldmine for a union. If you can document how management has been violating the same rule that they're busting a worker for, you've got a good grievance. Just pointing out management's own violation of the rules when a worker is threatened with discipline can put things quickly to rest.

4 Basic Worker's Rights: You don't need contract language declaring that a supervisor can't assault or otherwise abuse an employee. It's discrimination and it's wrong.

Discrimination occurs when two people are treated differently under the same circumstances, in a way that harms or treats unequally one of them. It doesn't have to be race or sex discrimination: it can include age, personality, looks, past

incidents and experiences — and union activity. Such discrimination violates the rights of the individual. It can be hard to prove, though, so you'll need good documentation of what happened, when, who witnessed it. In other words, you need a record. The best thing to do is have the party in question keep a diary of what's going on. And nothing's better than eye-witnesses.

5 Past Practices: If there's a sudden change in rules that works against the interest of your members, you may have a past practice grievance. Example: the employer had always allowed a 15-minute wash-up at the end of a shift, but all of a sudden fires someone for leaving his station 15 minutes before clock-out. Or, paychecks had always been available the very first thing on payday — allowing workers to hit their banks over the lunch hour — but one day they start being handed out at the very end of the workday.

Be aware that past practice cases can be hard to win, though, in part because any small deviation in the practice over the years may be considered to have broken the pattern. Be sure to check with more senior stewards and officers about their experience with the rule in question. There may well be paperwork on file somewhere that will back up your case.

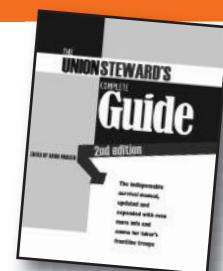
So, just remember that as important as your union contract is, it's just one of many resources you have to protect and defend your co-workers.

— Adapted with thanks from "Solidarity in Action: A Guide for Union Stewards," published by the Labor Center, University of Iowa, Iowa City, Iowa.

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Creative Problem Solving

A man goes to a psychiatrist and complains, “I can’t sleep. When I’m in bed I worry someone is under the bed. When I sleep under the bed I worry that someone is on the bed.” The psychiatrist responds, “Visit me twice a week for three years at \$150 per visit, and you will be cured.”

Later the doctor sees him and says, “Why didn’t you call me?” The man answers, “A bartender solved my problem. He told me to cut the legs off my bed.”

Sometimes solutions to difficult problems are simple, if you think creatively. Here are four true stories of how stewards used their creativity to resolve workplace problems.

Put the Boss in Focus

A steward in a union representing camera operators for a TV station was defending a member who management said was doing below average work. The steward believed management just didn’t like this one operator and that the cameraman’s work was fine. Rather than keep arguing about it the steward had a better idea.

The steward was also a camera operator, and management liked her work. At the next football game the station was broadcasting, both the steward and the other operator were working different cameras. Every camera has a number, like one or two, and the director who is in a control box away from the camera operators gives orders like, “Camera two, close up,” “Camera one, wide shot,” and so forth.

Without telling the director, the two operators switched cameras. After the game, when the director again complained about the work, thinking it had been done by the operator he didn’t like, the steward revealed the switch. Once exposed, the director sheepishly backed off and the problem was solved.

Make Management Go Goofy

A union was trying to solve health and safety problems for its members, who were required to wear heavy, hot cos-

tumes of cartoon characters at a popular amusement park. After much arguing with management about whether the workers were making a big deal over a minor discomfort, the union challenged a manager to spend a workday in costume, just like the members did.

It didn’t take long before the manager conceded that modifications to the costumes were needed and the rules about breaks had to be liberalized.

Tie One On

In another example of creative problem solving, a steward who worked in a supermarket overturned a new, unpopular rule that male employees had to wear ties.

The steward did it by buying a cheap clip-on tie being sold at the store, being careful to select the ugliest, loudest one he could find. He wore it daily until it got worn and ragged, which didn’t take long: it was a really cheap tie. Management was reluctant to criticize the tie once they realized he bought it from their own store.

Eventually, the frustrated store manager ordered the steward to take off the offensive tie. By then the other workers were starting to follow the steward’s lead and management decided to drop the tie program altogether.

Exercise Flight Control

Management at an airline was in the midst of a crackdown on employees when they tried to make an example of a flight attendant. She borrowed magazines from the plane to read in her hotel during an overnight. The next day, she was fired for stealing.

In response, the flight attendants collected hundreds of old magazines, wrapped them up with ribbons and delivered them in a group to company headquarters. They had alerted the media in advance, and the resulting publicity was extremely embarrassing to the airline.

The attendant was restored to her job and

actually got a special free flight to visit her sick mother.

The moral?

The moral of these stories is that a good steward has lots of tools to use when solving grievances and other workplace problems, not the least of which are good

investigations, persuasive arguments, group support, work actions, and knowledge of the contracts. But, as these true stories demonstrate, stewards can be even more effective when they add creativity to their toolboxes.

Come Up with Ideas

How do you come up with ideas like these? Here are some tips:

Look at how similar problems have been solved before. Talk to other stewards, senior members, union representatives and union officers. Look through relevant books and other material. Concentrate on the problem, looking at it from every angle. List all the factors on a wall chart and think hard about possible solutions. Try putting things together that normally don’t fit. Then, once you have really concentrated on the problem, stop thinking about it, clear your mind, and expose yourself to new ideas from unusual sources.

After doing this for a while it’s time to start thinking about the problem again. Get a group of people together and brainstorm: list every idea anyone can think of — no censoring or evaluation until you have exhausted all ideas.

Just looking at the list will likely generate even more ideas. Review each idea, listing the pros and cons. Try different combinations of ideas to create new ones.

Run your ideas by people who were not at the original brainstorming session. Get opinions from people not even involved in the problem. Do a final review of your preliminary solutions and make a decision. Finally, execute your plan — creatively! And have fun!

— Ken Margolies. The writer is on the Labor Extension faculty at Cornell University.

Simple ideas can become creative solutions

Responding to Workplace Bullying

Of all the problems a steward faces, one of the most challenging is dealing with the workplace bully. Few stewards will go through their careers without being confronted with the problem. Although bullying problems are difficult to resolve, it is critically important for stewards to understand and deal with them.

What, exactly, is bullying? It can be defined as the deliberate, hurtful, repeated mistreatment of one person by another that results in harm to the person being bullied.

It's so common a problem that one in five workers is routinely bullied on the job and one in four is a target of bullying at some point in his or her work life. (We use the term "target" here, as advocated by the Campaign Against Workplace Bullying, to reinforce the idea of an innocent bystander and rejecting the concept of victimization.) The consequences of bullying can include physical and psychological health problems, severely strained social relationships, lost income — and lost jobs.

Serious Physical Effects

The physical effects of bullying provide ample reason to combat the problem: in short, the stress associated with bullying can kill you. Sleep disorders, headaches, digestive problems, heart disease, and a compromised immune system are among the documented effects of prolonged bullying. Psychological effects include everything from loss of confidence to depression and self-destructive behaviors such as drug or alcohol abuse. Allowed to continue, bullying undermines the performance of a target and of witnesses, resulting in unjust discipline and discharge that the union must also fight. The social consequences include strained relationships both at work and at home as friends distance themselves or take sides and relatives feel powerless to help.

As workers attempt to stay out of the line of fire, solidarity and worker empowerment — as well as productivity and creativity — all take a nose dive. The economic impact can be severe as well: more than 80 percent of targets leave their jobs, many for health reasons, and nearly all of them involuntarily.

While most cases of bullying involve a supervisor and a worker, it is not uncommon for one worker to bully another worker — a steward's worst nightmare. Many stewards erroneously tell targets that, if they won't file a formal grievance, the union can't help them. Stewards and supervisors are often tempted to dismiss bullying complaints as "personality conflicts" or to counsel targets to grow a thicker skin — essentially giving bullies a green light to continue their assaults.

Like other harassment cases, bullying can be very difficult to prove, requiring volumes of documentation and witnesses who will testify, taking the case beyond a deadlocked and fruitless discussion of "he said/she said." Currently, bullying is not illegal and, in most cases, it is not a violation of the contract. And, unless a target is a member of a protected status group (based on gender, race, ethnicity, religion, etc.), there is no protection against this kind of harassment. In fact, courts have found "equal-opportunity bullying" to be nondiscriminatory and, therefore, permissible.

What to Do

So, how do you handle it? Several strategies to deal with workplace bullying are emerging.

1 The first challenge for a steward and the union is to recognize the problem. The steward and the union must be informed about bullying and educate others. This includes other union officers, workers, and management. Bullying

thrives when people cannot see the patterns of behavior and, consequently, do not believe there is a problem. Given that bullies are often personable — except toward their current targets — there is a tendency to discount early reports. A responsible steward will investigate every complaint.

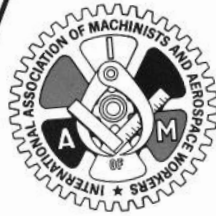
2 Support the target: Once recognized, it is important to validate the target's experience and provide support. The target cannot be asked or expected to stand up to the bully him- or herself: the union and members must be involved because the most effective strategy to combat bullying requires carefully planned, concerted action. Co-workers who say the bully "doesn't bother me" must come to understand that bullying is a problem for everyone and that everyone is entitled to respect and civil treatment.

3 Undertake union-management initiatives: With the high costs of bullying for employers, it is easy to get their attention. Stewards can take a leadership role to make workplace bullying a joint priority for unions and management. You can also make it a health and safety issue. Remember, stress slowly kills through stress-related illnesses, and stress contributes to many workplace accidents.

4 Take concerted action: One chief steward convinced his union to conduct two noon-hour education sessions, the first to cover the basic information about bullying, and the second to plan a coordinated campaign at all worksites, involving all stewards and workers in demanding civil treatment at work. Because of the union's campaign, management is now requesting training for supervisors and Employee Assistance Program personnel.

— Corliss Olson. The writer is associate professor at the School for Workers, University of Wisconsin-Madison.

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OFFICE OF THE INTERNATIONAL PRESIDENT

Dear Sisters and Brothers,

As 2010 heads into fall there are two important events that will affect our union for years to come. One is a series of representation elections for more than 30,000 workers spurred by the merger of Delta and Northwest Airlines. The other is the midterm elections in the United States.

Everyone in our union should be aware of the high stakes in the elections at Delta/ Northwest. The merger set in motion the possibility of elections in each IAM-represented employee group to determine the fate of the combined Delta/Northwest workforce. If we win the elections, we can protect our 12,000 brothers and sisters at the former Northwest and extend the benefits of union membership to an additional 18,000 unrepresented Delta workers. For any group that fails to vote for union representation, all of the employees in that group will be unrepresented.

So please help if you can. If you know Delta or Northwest workers, encourage them to vote for the IAM. The website for the campaign is www.IAM4Delta.org. If you are near an airport or reservations center with Delta or Northwest workers you can volunteer to help. To volunteer, call Transportation Coordinator Jay Cronk in the IAM Transportation Department at (301) 967-4558. If all of us work together, we can make this one of the greatest organizing wins in our union's history.

Also on the horizon are the midterm elections in the United States. With unemployment hovering near ten percent, voters in the U. S. are in one of the most anti-incumbent moods in decades. All of our hard work putting pro-worker majorities in Congress and a friend in the White House is in jeopardy.

Granted, Democrats haven't been successful enough on creating jobs and have missed important opportunities to put people back to work. But there's a reason for that. Behind the scenes, the Republicans have waged a relentless war to block or delay almost every measure to create jobs and put the economy back on track. Just take unemployment insurance as an example. In the fight to extend benefits for Americans most deeply affected by the jobs crisis, GOP senators put up a solid wall of opposition this summer, defeating the extension three times. Senator Jon Kyl (R-TX) suggested "continuing to pay people unemployment compensation is a disincentive for them to seek new work." Senator Orrin Hatch (R-UT) said, "We should not be giving cash to people who basically are going to go and blow it on drugs and not take care of their own children." And Congressman Dean Heller (R-NV) asked "Is the government now creating hobos?"

That is just a sample of the kind of people who will be in the majority if we let anti-labor forces get control of Congress in November. So please, educate your fellow members and let's keep moving forward. Let's make sure we don't return to the anti-worker policies of the past and let's work together to grow our union at Delta/Northwest.

In Solidarity,

R. Thomas Buffenbarger
International President

