

Employment: Adverse Action and Termination

Adverse Action (such as refusing to hire, restricting hours, demotion, suspension, termination, discipline, etc.):

- Typically, if an employer takes an adverse employment action against a person with diabetes because of that person's diabetes, this could be illegal discrimination.
- An employer generally may not take "adverse action" against a person just because of his or her diabetes.
- However, there are some exceptions to this. For example, an employer may take such actions:
 - If the employee is unable to do the essential functions of the job even with reasonable accommodations.
 - If the employee is a direct threat to himself or herself or to others and this threat cannot be reduced or eliminated with reasonable accommodations.

If an employer terminates an employee with diabetes and states a non-discriminatory reason for doing so, then the burden shifts to the employee to prove that the employer's reason is pretextual – meaning, it is not the true reason and that the real reason is discriminatory.

Retaliation:

The ADA prohibits retaliation by an employer against someone who opposes discriminatory employment practices, files a charge of employment discrimination, or testifies or participates in any way in an investigation, proceeding, or litigation related to a charge of employment discrimination. It is also unlawful

for an employer to retaliate against someone for requesting a reasonable accommodation. According to guidance from the EEOC available here: <https://www.eeoc.gov/laws/guidance/retaliation-qa.cfm>, retaliation occurs when an employer takes a materially adverse action because an applicant or employee asserts rights protected by equal employment laws.

- Whether an action is "materially adverse" depends on the facts and circumstances of the particular case. Depending on the specific facts of the case, examples of materially adverse actions might be: (this is *not* an exhaustive list).
 - Denial of promotion, failure to hire, denial of job benefits, demotion, suspension, termination.
 - Work-related threats, warnings or reprimands.
 - Negative or lowered evaluations.
 - Transfers to harder work within the same pay grade, less prestigious or desirable work or work locations.
- The key inquiry is whether the action taken by an employer may dissuade a reasonable person from engaging in the protected activity. In other words, for example, would a reasonable person not ask for reasonable accommodations in order to avoid the action taken by the employer?

Please note: You may have protections available under state laws and we cannot provide guidance about state law. To learn more about your state's laws, consider consulting with a locally licensed attorney.

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Here are some possible action steps for adverse action/retaliation that results when claiming rights under the ADA:

1. Review the attached Fact Sheet about Reasonable Accommodations.
2. Review the resources at the following link from the EEOC website, which provide additional information about your rights as an employee with diabetes. Note, the EEOC is the federal agency that enforces the ADA.

- Questions & Answers about Diabetes in the Workplace and the Americans with Disabilities Act (ADA):

<https://www.eeoc.gov/laws/types/diabetes.cfm>

- The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities:

<https://www.eeoc.gov/facts/performance-conduct.htm>

3. Consider sending a letter to the employer explaining your rights, your employer's obligations, and requesting your employer reconsider its employment decision.
 - Please find attached a couple of sample letters that you may use. Please note, since these are only samples, it is important that you read through any letter you send and change it to ensure accuracy.
 - We recommend sending the letter by email or certified mail so that there is a record it was sent. Make sure to keep a copy for your own records as well.

- Also, just to be clear, any letter you send will come from you, not from the American Diabetes Association.

4. If you feel your rights have been violated, you can file a discrimination complaint with the EEOC.

- You can find more information on filing a complaint here:

<https://www.eeoc.gov/employees/charge.cfm>

- A complaint must ordinarily be filed within 180 days of the last act of discrimination.
- Prior to drafting your complaint, please review the attached Making Diabetes Discrimination Employment Claims fact sheet to learn more about potential claims and the EEOC process.

5. Consult with a local attorney. Below are some suggestions on how you might be able to locate an attorney in your area with experience in employment issues.

- National Employment Lawyers Association (NELA) website- use the "Find-A-Lawyer" search function at

<http://exchange.nela.org/network/findalawyer>

- State bar association legal referral program.
- Local or state legal aid programs.
- Local disability rights or protection and advocacy organization
- Disability Rights Bar Association

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Please also note: Attorneys you locate using any of the above suggestions are not employed by the American Diabetes Association and we are not responsible for their work. There is no guarantee that they will take your case. When you consult with an attorney, be sure to ask about fees.

Here are some possible action steps for adverse action/retaliation that results when claiming rights under the FMLA:

1. Review the attached Fact Sheet about the FMLA.
2. Review the fact sheets available from the Department of Labor, Wage and Hour Division (WHD) website:
https://www.dol.gov/whd/fmla/fact_sheets.htm
3. Consider whether reviewing the DOL's Employer's Guide to the FMLA will help answer questions or clarify the rules for your employer, your health care provider, or yourself. You can download the guide here:

<https://www.dol.gov/whd/fmla/employerguide.htm>

4. If you suspect your employer may have violated your rights under FMLA, you could consider filing a complaint with the WHD or you can file a lawsuit. Here is information about how to file a complaint with the WHD:

<https://www.dol.gov/whd/howtofilecomplaint.htm>

For help with filing a lawsuit, you should consult with a local attorney.

5. Consult with a local attorney. See above for suggestions.

Important Note: This fact sheet is for your general information and review only, and is not to be construed as a substitute for the advice of legal counsel.