

Employees with Disabilities: Know Your Rights

By Craig Rothwell

In Florida, a colour-blind traffic light installer was fired because he could not tell the difference between red and green. In New York a bus driver was fired whose colour-blindness meant he was unable to distinguish traffic signals. Both brought complaints of disability discrimination against their employer. The Florida employee won because his employer could have offered him alternative work not involving the installation of traffic lights. Possibly to the relief of New York pedestrians, the bus driver lost his case and was not allowed to insist upon returning to his driving duties.

In the UK recently, a driving instructor with a stutter was refused work at a driving school because his prospective employer felt that he would not be able to say 'stop' quickly enough in an emergency. He also has claimed he was discriminated against on the grounds of his disability.

As the cases above go to illustrate, after discrimination related to sex and race, it is discrimination against people with disabilities that is arguably now becoming the most litigated form of discrimination in countries around the world. The Americans with Disabilities Act 1990, the UK's Disability Discrimination Act 1995 and (enacted well prior to both of these) Bermuda's own Human Rights Act 1981 are all examples of progressive legislation which has aimed to ensure equality of opportunity for the disabled.

Most people have a fairly clear idea of what constitutes a disability. This would usually consist of those who are wheelchair-bound or who are deaf or blind. The law's definition is wider than this. The Human Rights Act 1981 states that a 'disabled person' is a person who 'has any degree of physical disability, infirmity, malformation, or disfigurement that is caused by bodily injury, birth defect or illness'.

Specifically, it then goes on to include within the definition those suffering from 'diabetes, epilepsy, AIDS, HIV, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog, wheelchair or other remedial appliance or device.'

Therefore, as well as the more recognised disabilities, others such as AIDS and diabetes are specifically identified as falling within the legal definition. This is very useful as having to prove to a court that you are sufficiently 'disabled' to fall within the law's general definition of disability can be distressing. Particularly, as it is in contrast to the approach taken by people in everyday life of overcoming or minimising the effects of their disabilities.

The definition of disability in Bermuda has its emphasis very much on physical rather than mental disability. In contrast, both in the US and the UK, mental impairment has been clearly brought within the definition of disability. This has assisted many with recognised mental illnesses and those with learning difficulties including dyslexia. To give another unusual example from the US, a lady with Tourette's syndrome has used the disability discrimination provisions there to sue her landlord for evicting her from her apartment. She had been evicted because of her involuntary yelling of 'Fire!' at the top of her voice which had attracted complaints from her neighbours in the apartment block.

The basis of the tenant's complaint in that case was that her landlord should have made greater efforts to accommodate her condition before deciding to evict her. Similar requirements do apply in Bermuda. As with race or sex discrimination, employers (or landlords) must not treat a 'disabled person' any less favourably

than others because of their disability. With disability discrimination, there is then an additional obligation for an employer to modify the circumstances of the employment so as to eliminate the effects of a person's disability. This is if it is possible to make the modifications without 'unreasonable hardship'.

What type of modifications would be expected of employers? Typical modifications would include making adjustments to premises, allocating some of the disabled person's duties to another vacancy, altering the person's working hours, changing the workstation of the disabled person, allowing time off during working hours for rehabilitation or treatment, acquiring or modifying equipment or providing supervision.

Factors determining whether such modifications cause 'unreasonable hardship' to an employer would include assessing the modification's practicability, effectiveness, financial cost, disruption to the business and the employer's resources. With regard to an employer's resources, more may be expected of an employer with greater financial resources as the cost of any modifications will not be so unreasonable for them.

A similar legal test of being 'reasonable or excusable in all the circumstances' is also used to determine whether those providing facilities or services break the law by refusing or omitting to make provision for those with a disability. As well as practicability or financial cost, this test is also directed at the balance that has to be struck between a disabled person's right to use a facility against safety issues for them and others.

Scared by litigation, some fairground attractions in the US have erred on the side of 'liberty and the pursuit of happiness' in allowing access to some high risk rides only to be faced with a loss of 'life'. For similar safety reasons, the driving school refusing employment to the stuttering instructor may also be able to justify their decision and ultimately not be found liable for disability discrimination.

This article contains information of a general nature and should not be relied upon as a substitute for professional legal advice given with respect to a particular factual situation.

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