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A monthly "best practices" alert for multinationals confronting the challenges of the global workplace

This Month's Challenge

Disability discrimination means different things in different countries.

Best Practice Tip of the Month

Multinational employers cannot assume that discrimination laws they understand in their home country apply the same way in other countries. Consultation with counsel versed in each country's definitions and rules is essential.

Law & The Workplace℠

UK High Court Raises the Bar for Disability Discrimination Suits

In a recent landmark decision by the House of Lords, the United Kingdom's highest court has made it more difficult for employees to successfully pursue discrimination claims under the country's disability discrimination law, the Disability Discrimination Act 1995 ("DDA"). Although the decision, *Mayor and Burgesses of the London Borough of Lewisham v. Malcolm*, [2008] UKHL 43 HL, involved a case of housing discrimination, it nonetheless implicates the rights and responsibilities of employers, as discrimination in housing and employment were defined in the same terms in the DDA.

Threshold for Proving Disability Discrimination Raised

The *Malcolm* case involved a tenant who was evicted from his home for subletting his apartment in violation of the terms of his lease. He opposed the eviction, on the grounds that because he suffered from schizophrenia, which had influenced his decision to sublet his apartment, his eviction constituted discrimination on the basis of his disability. To decide this case, the courts had to struggle with the meaning of the statutory definition of discrimination: "a person ('A') discriminates against a disabled person if – (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and (b) he cannot show that the treatment is justified."

Prior to this decision, English courts, including the intermediate appellate court in this case, had held that disability discrimination had to be assessed by comparing the treatment given to the disabled plaintiff with the treatment that would have been given to another person who did not engage in the conduct giving rise to the treatment of the plaintiff. Thus, in the *Malcolm* case, discrimination occurred if Malcolm, by being evicted for violating the no-sublet terms of his lease, was being treated less favorably than another tenant who had not breached his lease.

In the opinion of most of the law lords, this reading of the statute made no sense. A comparison of the treatment afforded an individual who had engaged in misconduct with the treatment of another individual who had not engaged in misconduct would, in their view, be a meaningless exercise, broadly sweeping innocent conduct under the definition of discrimination. Under that previous standard, less favorable treatment and discrimination were all but presumed, since absent the misconduct, the eviction (or, for employment cases, termination) would not have occurred.

Under the new standard adopted by the Lords of Appeal, plaintiffs now face a significantly higher threshold for claiming discrimination, as they must show that they have been treated less favorably than a similarly situated, nondisabled person. Moreover, the House of Lords further held that a defendant cannot be liable for discrimination if it was unaware of the disability.

Implications for Employers

The *Malcolm* decision signals an important shift in the approach that UK courts will take in disability discrimination cases. In particular, employers are likely to be in a stronger position if they decide to terminate an employee for absences related to a disability. Such action no longer constitutes *prima facie* discrimination. Employers remain under a duty to make "reasonable adjustments" (what in the U.S. would be referred to as "reasonable accommodations") to accommodate the employee's disability. Thus, UK employers must be sure to attempt reasonable adjustments in these situations before resorting to termination, as the reasonableness of the employer's action will likely be the emphasis of future litigation.

Disability Standards in Other Countries

The *Malcolm* decision mirrors a similar judgment delivered by the High Court of Australia in 2003. That case, *Purvis v New South Wales (Department of Education and Training)*, similarly held that determining whether a particular act constitutes disability discrimination depends on how a non-disabled person would be treated in similar circumstances. Like their counterparts in the U.S. and the UK, employers in Australia must make reasonable adjustments to accommodate the employee.

While U.S. readers may find the analysis in *Malcolm* to be familiar, other facets of disability law in different international jurisdictions vary markedly from Anglo-American principles. For instance, many countries enforce a system of quotas regulating the number of disabled employees that employers must hire and retain. In Japan, private-sector employers must have at least 1 disabled person for every 56 employees (1.8%). Germany imposes a more stringent quota, mandating companies with over 20 employees to employ "severely" disabled persons in at least 5% of those positions. In both countries, failure to meet the quota will subject the employer to a monthly fine for each unfilled post reserved for disabled workers. And, in Italy, if a disabled employee is terminated, the employer

must inform the Italian Employment Office within 10 days and replace the dismissed employee with another disabled employee.

Multinational employers should be mindful of the existence of different disability discrimination regulations and confer with legal counsel to assure compliance with local policies in each jurisdiction in which they do business.

International Labor and Employment Law Practice Group

Proskauer Rose LLP's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

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