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Mental Health FMLA and ADA Issues: Preventing and Defending Claims

Covered Mental Health Concerns, Reasonable Accommodations, and Modern Trial Approaches

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Mental Illness Under the ADA and FMLA: Avoiding and Defending Claims

August 28, 2019

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The Expanded Coverage of the ADAAA and EEOC Regulations

Background

A "disability" under the Americans with Disabilities Act is:

1. A physical or mental impairment that substantially limits one or more major life activities;
2. A record (or previous history) of such an impairment; or
3. Being "regarded as" having a disability

Changes to the ADA

- **Under the ADAAA, the three-pronged definition of a disability remains the same, BUT:**
  - The ADAAA changes how the first and third prongs are evaluated
    - **Mandates liberal interpretation of "substantially limits"**
      - To "maximum extent" permitted by ADA
      - Need not limit more than one major life activity
    - **Expanded prior definition of "major life activities" ("MLAs") to include a range of activities such as:**
      - Eating, sleeping, standing, lifting or bending, learning, reading, thinking, concentrating, and communicating

EEOC's Rules of Construction: Impairments that Are Episodic or in Remission

- An impairment that is episodic or in remission meets the definition of disability "if it would substantially limit a major life activity when active"
  - Episodic or in remission: e.g.,
    - Bipolar disorder
    - Major depressive disorder
    - Schizophrenia
    - PTSD

Defining Intellectual Disabilities Under the ADA

EEOC Regulations
29 C.F.R. § 1630.2 (h) "Physical or mental impairment means

- (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems…; or
- (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed 'mental retardation'), organic brain syndrome, emotional or mental illness, and specific learning disabilities."
- Full text of regulations available at http://ecfr.gpoaccess.gov/cgi/t/text/textidx?c=ecfr&tpl=/ecfrbrowse/Title29/29cfr1630_main_02.tpl

Categories of Mental Impairments

- Mood Disorders
  - Depression, Bipolar, Seasonal Affective Disorder, Dysthymia
- Anxiety Disorders
  - Phobias, Panic disorder, Generalized anxiety disorder, OCD, PTSD
- ADHD
- Schizophrenia Spectrum Disorders
- Physicians' source for classifying mental illnesses: Diagnostic and Statistical Manual of Mental Disorders (5th Ed. 2013)

What Intellectual Disabilities are Substantially Limiting?

- According to the EEOC, the following impairments, given their inherent nature, will virtually always be found to impose a substantial limitation on brain function, a major life activity:
- Intellectual disability
- Schizophrenia
- Bipolar disorder
- Autism
- Major depressive disorder
- Post-traumatic stress disorder (PTSD)
- Obsessive-compulsive disorder (OCD)
- 29 C.F.R. § 1630.2 (j) (3) (ii)-(iii)

What is not Considered an Intellectual Disability?

- Normal sadness or grief that is brought on by a traumatic event but that is expected to pass with time (e.g. death, divorce)
- Temporary anxiety due to change in circumstances at work or at home (new boss, ill family member)
- Personality conflicts with particular individuals at work
  - Tinsley v. Caterpillar Fin. Srvcs. Corp., 766 Fed. App'x 337 (6th Cir. 2019)
- Appropriate stress caused by work (e.g., deadlines)
  - Owusu-Ansah v. Coca-Cola Co., 715 F.3d 1306 (11th Cir. 2013)
- ADA's Specific Exclusions: kleptomania, pedophilia, pyromania, compulsive gambling, etc.

Disability – Gender Identity Disorders (Cont'd)

- Blatt v. Cabela's Retail, Inc., 14-CV-04822, 2017 U.S. Dist. LEXIS 75665 (E.D. Pa. May 18, 2017)
  - Plaintiff diagnosed with gender dysphoria alleged Title VII and the ADA discrimination.
  - Defendant argued that 42 U.S.C. § 12211 excludes gender identity disorders from ADA coverage, so Plaintiff's suit should be dismissed.
  - Plaintiff challenged the constitutionality of § 12211 on equal protection grounds.
  - The district court avoided the constitutional question by narrowly interpreting § 12211 to cover only gender identity disorders that relate to the condition of identifying with a different gender, which would not include conditions such as gender dysphoria – a condition broader than simply identifying with a different gender.
  - Plaintiff's gender dysphoria allegedly substantially limited her ability to reproduce, interact with others, and function in social and occupational settings. It also resulted in significant stress.
  - Such disabling conditions in a person identifying with a different gender could thus be covered by the ADA despite § 12211 in the court's view, and thus, it denied Defendant's motion to dismiss.
  - Gender dysphoria is not excluded from ADA coverage and Plaintiff plausibly alleged that she was subject to discrimination and retaliation.

Disability – Gender Identity Disorders

- Parker v. Strawser Constr., Inc., 2018 WL 1942374 (S.D. Ohio Apr. 25, 2018) – Dysphoria not covered
- EEOC v. IXL Learning, Inc., No. 3:17-cv-02979 (N.D. Cal.) – Transgender man won jury verdict

Is Medical Evidence Required?

- What can the Employer do if an Employee asks for an accommodation?
  - Request medical documentation of
    - Nature
    - Severity
    - Duration, and
    - Extent of intellectual disability
    - If employee does not provide documentation, employer does not have to provide an accommodation, Ward v. McDonald, No. 12-5374, 2014 U.S. App. LEXIS 15402 (D.C. Cir. Aug. 12, 2014)
    - But, employer must give employee a reasonable time to produce documentation
  - HIPAA Release, EEOC's GINA safe harbor language
- Caveat: Doctor/Therapist is making the diagnosis based entirely on what employee is telling him/her about work environment and is likely to be an advocate for what the patient wants

Options for the Employer to Defend a Claim

- Challenge the Diagnosis
  - Get a 2nd (or 3rd) medical opinion
  - Cannot be a medical professional with whom the employer has a relationship
- An employee's actions may make a Fitness for Duty evaluation appropriate
  - Determine whether employee is capable of performing the essential functions of the job and/or whether employee poses a direct threat
  - Not a challenge to an employee's claim of disability
  - May need to avoid negligent retention claims in some situations

Fitness for Duty Examinations

- Coffman v. Indianapolis Fire Dept., 578 F.3d 559 (7th Cir. 2009)
  - Court found employer's multiple fitness for duty evaluations of firefighter were job-related and consistent with business necessity
  - Court cited evidence of employee's emotional withdrawal, indecisiveness, diminished performance, and defensiveness as well as categorical rise in firefighter suicides
- Ward v. Merck & Co., No. 06-1270, 226 F. App'x 131, 2007 WL 760391 (3d Cir. Mar. 14, 2007)
  - Plaintiff was terminated after he refused a fitness for duty examination and claimed the requested examination violated the ADA
  - The Third Circuit held that the examination was proper in light of plaintiff's increased angry outbursts at the workplace, rapid decline in conduct and in job performance following diagnoses of anxiety disorder, schizophrenia, and panic disorder

Fitness for Duty Examinations

- Doby v. Sisters of St. Mary of OR Ministries, No. 13-00977, 2014 US Dist. LEXIS 110972 (D. OR Aug. 11, 2014)
  - Preschool teacher with OCD properly fired after refusing psychological fitness for duty exam when her disorder allegedly made her believe Mormons are "contaminated"
- Grassel v. Dep't of Educ. of N.Y., 2017 U.S. Dist. LEXIS 39683 (E.D.N.Y. Mar. 20, 2017)
  - Employer required Plaintiff to undergo a fitness-for-duty exam in 2011 following his reinstatement as a teacher after exhibiting irrational behavior in 1997
  - The Court held that the 2011 psychological and physical exam was a reasonably effective method of assessing Plaintiff's capacity to teach in part because of (1) Defendant's strong interest in protecting the health and welfare of students; (2) exam appropriately inquired into intertwined physical and mental health issues; and (3) over 13-year delay in conducting the exam, primarily caused by Plaintiff's refusals, reinforced the need to assess Plaintiff's fitness-for-duty in 2011

Medical Examination – Anxiety and Stress Disorders

- Owusu-Ansah v. Coca-Cola Co., 715 F.3d 1306 (11th Cir. 2013).
- Employer required Plaintiff to undergo a fitness-for-duty examination in order to maintain his job after banging his fists on a table and threatening his manager
- 11th Circuit joined the 2nd, 6th, 8th, and 10th Circuits in holding a Plaintiff does not have to be disabled to bring a claim under the ADA's ban on most employer medical inquiries
- However, the court upheld the examination order because it was job related and consistent with business necessity
  - An employee's ability to handle the reasonable and necessary stresses of his job and to work well with others are job-related requirements and essential to any job

Determining Whether an Applicant or Employee with an Intellectual Disability Is Qualified

- Test: Can the applicant or employee perform the essential functions of the job, either with or without a reasonable accommodation?
  - Remember: Employers cannot use qualification standards or other selection criteria that screen out individuals with a disability on the basis of that disability, unless the standard is job-related for the subject position and consistent with business necessity

Creating ADA Compliant Job Descriptions

- Review job descriptions to ensure they accurately reflect the extent to which communication and related skills are an essential function of a job. Be prepared with examples of the significance of effective communication skills to the position in question
  - Remember: Inability to perform essential job functions with or without accommodation is a defense
- Irregular attendance
  - Mental illnesses often manifest themselves more sporadically than physical disabilities; an employer might be asked to accommodate an employee's irregular attendance
    - Advice: Where appropriate, job descriptions should include "regular and consistent attendance" as an essential function of the position
- E.g., VandenBroek v. PSEG Power CT, 356 Fed. App'x 457 (2d Cir. 2009)
  - Court: Regular attendance is an essential function of a boiler utility position because absenteeism may result in power outages or explosions

Consideration of Particular Intellectual Impairments

- Bipolar disorder
  - Characterized by widely fluctuating behavior as individual cycles from manic state to depressed state
  - Calandriello v. Tenn. Processing Ctr., No. 3:08-1099 (M.D. Tenn. Dec. 15, 2009)
    - Employee in security sensitive facility revealed he was bipolar after being disciplined for defacing company property with a picture of Charles Manson
    - Further investigation revealed that employee had viewed online images of violence, assault weapons, and serial killers on his company computer in violation of company policy
    - Court upheld employer's decision to terminate employee as being conduct-based, not discriminatory

PTSD – Mason v. Avaya Communications, Inc., 357 F.3d 114 (10th Cir. 2004)

- Plaintiff developed PTSD and changed employers after witnessing the murder of several co-workers. She then began working as a service coordinator.
- After learning that a colleague pulled out a knife during an argument at work, Plaintiff asked to work from home because her PTSD made her physically and emotionally incapable of working in the same building as her knife-wielding colleague.
- Plaintiff's requested accommodation was to work from home. Employer refused on the basis that physical presence at the facility was an essential element of the job.
- Court:
  - Though plaintiff was disabled within the meaning of the statute, the requested accommodation was not reasonable
  - Physical attendance at the facility was an essential function of the job because it required supervision as well as teamwork

PTSD – Interactive Process & Reasonable Accommodation

- Lawler v. Peoria School District No. 150, No. 15-2976, 2016 WL 4939538 (7th Cir. Sept. 16, 2016), p. 22
  - Due to PTSD, Plaintiff requested medical leave and a transfer to a classroom with fewer students with severe behavioral and emotional disorders.
  - District's refusal to transfer Plaintiff to one of the vacant positions in a less stressful classroom was a failure to accommodate.
  - Two-week medical leave did not qualify as a reasonable accommodation because it did not address the long-term issues that both Plaintiff and her doctor raised.

Autism

Jakubowski v. Christ Hospital, 627 F.3d 195 (6th Cir. 2010)

- Medical resident requested an accommodation for his Asperger's Disorder. Plaintiff's supervisors noted his weak communication skills with patients as well as his lack of self-awareness, social competence, and inability to manage relationships with colleagues or patients
- Plaintiff had difficulty relaying instructions between medical professionals and communicating with patients on the phone leading supervising physicians to become concerned harm to patients could occur unless plaintiff was closely monitored at all times

Autism - Jakubowski (cont'd)

- Hospital proposed transferring Plaintiff to Pathology, a specialty with little patient interaction. Plaintiff proposed that hospital make physicians and nurses aware of his condition, its symptoms and "triggers" and order them to deal with him with "understanding and awareness" and have another doctor accompany him in patient interactions
- Sixth Circuit affirmed the district court's grant of summary judgment for the hospital, finding
  - (1) plaintiff did not demonstrate that he was "otherwise qualified" for his medical residency, and
  - (2) the requested accommodation did not resolve his inability to perform the essential functions of the job

Developmental Disability – Qualified – Bad Behavior Caused by a Disability

McElwee v. Cnty. of Orange, 700 F.3d 635 (2nd Cir. 2012) (Title II Case)

- Plaintiff, a developmentally disabled nursing home volunteer, required constant care and assistance to complete non-routine tasks
- Plaintiff volunteered as a janitor, housekeeper, and helped transport nursing home residents to religious services
- Dismissed for sexually harassing several female employees and visitors
- Plaintiff's mother requested the administration excuse Plaintiff's behavior or speak with his therapist who could explain his actions

Developmental Disability – Qualified – Bad Behavior Caused by a Disability

- Court:
  - Plaintiff was not "otherwise qualified" to work as a volunteer because while he was able to perform assigned tasks, he was not emotionally able to conduct himself appropriately
  - Inappropriate behavior is a legitimate non-discriminatory reason for dismissal, even if that behavior was the result of disabilities
  - Plaintiff's proposed accommodations were just excuses for past conduct
- Customer service rep could not excuse hanging up on customers and retroactive leniency not appropriate despite disability. DeWitt v. Southwestern Bell Tel. Co., 845 F.3d 1299 (10th Cir. 2017).
- Compare EEOC v. Walgreen Co., 2014 U.S. Dist. LEXIS 52061 (N.D. Cal. Apr. 11, 2014) (violation of anti-grazing rule)

Medical Examination – Mandatory Counseling

Kroll v. White Lake Ambulance Auth., 793 F.3d 619 (6th Cir. 2014)

Plaintiff, an EMT, was discharged for refusing to undergo psychological counseling after co-workers' reports that she was emotionally distraught and violated safety rules while driving an ambulance

- Employer's demand for counseling came only after it discovered that Plaintiff was having a tumultuous affair with a married co-worker, and a moralistic, rather than medical, rationale appeared to be the basis for requiring counseling
- Sixth Circuit reversed district court's grant of summary judgment
- EMT position qualifies for public safety exceptions allowing employers greater discretion in requesting psychological exams, but the moralistic rather than medical justification relied upon here failed to meet even that lower standard

Hostile Work Environment Claim Viable

- Fox v. Costco Wholesale Corp., 918 F.3d 65 (2d Cir. 2019)
  - Plaintiff had Tourette's and OCD, allegedly resulting in mocking behavior and special reprimands from co-workers and supervisors
  - Plaintiff alleged that management did not take actions to address the alleged harassment despite his complaints and that this culminated in a panic attack wherein Plaintiff was put on medical leave
  - The Second Circuit held, for the first time, that hostile work environment claims are permissible under the ADA and that this claim should thus survive summary judgment

QUESTIONS?

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Defending ADA Failure To Accommodate and FMLA Leave Claims

August 28, 2019
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Presented by Strafford

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EMPLOYER DEFENSES TO ADA FAILURE TO ACCOMMODATE AND FMLA CLAIMS

1. **Employee failed to request a reasonable accommodation**

2. **Employee failed to document disability**

3. **Employee failed to engage in interactive process**

4. **Employee's request for accommodation not required by ADA**

5. **Employer provided leave under both the ADA and the FMLA (Interaction between ADA/FMLA)**

EMPLOYER DEFENSES

I. Employee Failed to Request a Reasonable Accommodation

A. General Rule

Employee must let employer know (1) that adjustment or change at work is needed and (2) related to medical (mental) condition. Source: EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, No. 915.002 (March 25, 1997) available at http://www.eeoc.gov/policy/docs/psych.html.

- *Murray v. Warren Pumps, LLC*, 821 F.3d 77 (1st Cir. 2016) – where disabled employee agreed to let employer know if he needed accommodations, employer could not be faulted when employee "opted to remain silent" and failed to inform employer of his need for an accommodation.

- *Tennial v. UPS*, 840 F. 3d 292, 307 (6th Cir. 2016) – employee's "fleeting reference to 'my ADA deal' was insufficient to put [employer] on notice of an accommodation request" where employee "did not explain that the recorder [device the employee asserted he needed] would help accommodate his disability and the record evidence indicates that [employer] did not understand his request as such."

- *Waggoner v. Carlex Glass America, LLC.*, 682 Fed. Appx. 412 (6th Cir. 2017) – Because the employee had never made clear that his request for a transfer to another department was connected to his bipolar disorder or stated that his coworkers triggered his disorder, no duty to accommodate.

- *Walz v. Ameriprise Financial, Inc.*, 779 F.3d 842, 846 (8th Cir. 2015) – holding that employee who engaged in disruptive behavior due to her bipolar disorder failed to put employer on sufficient notice that she was disabled and required accommodation.

B. Exceptions

1. **In cases involving mental disabilities, employee may not need to ask for accommodation if employer has reason to believe that job performance affected by known disability and employee is sufficiently impaired from asking. See EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, No. 915.002 (March 15, 1997), available at http://www.eeoc.gov/policy/docs/psych.html**

- See *Kowitz v. Trinity Health*, 839 F.3d 742 (8th Cir. 2016) – employer's knowledge that an employee had a disabling condition and was unable to obtain a work related certification until after she had undergone several months of medical treatment presented sufficient evidence to raise a jury issue as to whether the employee had made a request that the employer accommodate the employee's inability to obtain the certification the employer required.

- *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127 (2nd Cir. 2008) – upholding jury verdict that employer failed to reasonably accommodate employee with cerebral palsy even though employee had not asked for accommodation where disability obvious.

B. Exceptions cont.

2. Employer Received Accommodation Request From Others

EEOC says – Family member, friend, healthcare professional may request accommodation for disabled employee. SOURCE: EEOC Enforcement Guidance, *supra; Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999) (employee's son); *Bultemeyer v. Ft. Wayne Comm. Sch.*, 100 F.3d 1281 (7th Cir. 1996) (employee's psychiatrist).

But see Miller v. Nat'l Casualty Co., 61 F.3d 627 (8th Cir. 1995) - request for accommodation not sufficient where employee's sister informed employer that employee falling apart mentally and family try to get employee into a hospital.

II. Employee Failed to Document Disability

A. General Rule

Where employee fails to provide documentation of disability, no employer liability for failure to accommodate. SOURCE: EEOC Enforcement Guidance, supra.

- *Ortiz-Martinez v. Fresenius Health PR, LLC*, 853 F.3d 599 (1st Cir. 2017) – upholding the dismissal of an employee's ADA claim for failure to accommodate where in response to the employer's request for more specific information concerning the employee's medical restrictions, the employee failed to respond. The employer's requests for more specific medical information were both reasonable and important in assessing whether the employee could perform the essential functions of the job and what type of accommodations might be required.

- *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476 (5th Cir. 2016) – employer did not violate the ADA by terminating employee who failed to provide doctor's note or report justifying employee's statement to employer that he had been undergoing medical tests during his week long absence.

II. Employee Failed to Document Disability

B. Exceptions

1. Employer may seek only "reasonable" documentation.

Not reasonable – submission of all medical records from employee's healthcare provider.

2. Medical exam by employer's doctor allowed only if the employee "initially provides insufficient information to substantiate" disability and need for accommodation. SOURCE: EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2001) at Question 6, available at http://www.eeoc.gov/policy/docs/accommodation.html

III. Employee Failed to Engage in Interactive Process

General Rule: Where employee fails to engage in interactive process, employer is not liable for failure to accommodate.

- *Frazier-White v. Gee*, 818 F.3d 1249, 1257-58 (11th Cir. 2016) – where plaintiff failed to identify any reasonable accommodation that would have allowed her to return to work, "there is no basis for imposing liability on defendant for failing to engage in an 'interactive process' to identify accommodations."

- *Ward v. McDonald*, 762 F.3d 24 (D.C. Cir. 2014), cert. denied, 2015 U.S. 5225 (2015) – employee who did not respond to questions from employer failed to engage in interactive process.

- *EEOC v. Kohl's Dep't Stores, Inc.*, 774 F.3d 127 (1st Cir. 2014) – employee's premature resignation after employer requested additional information failed to engage in interactive process.

IV. Employee's Requested Accommodation Not Required by ADA

A. Types of Reasonable Accommodation

- Job Restructuring
- Modified Work Schedules and Part-Time Work
- Reassignment to a Vacant Position
- Acquisition or Modification of Equipment or Devices
- Adjustment or Modification of Employer Policies
- Qualified Readers or Interpreters
- Making Existing Facilities Readily Accessible To and Usable by Persons with Disabilities

42 U.S.C. § 12111(9); 19 C.F.R. § 1630.2(0)(2)

Also, temporary "job coach" to assist in job training. 29 C.F.R. App. § 1630.9

B. Accommodation provided need only be effective; not employee's choice.

- *Noll v. IBM*, 787 F.3d 89 (2d Cir. 2015) – Court (2-1) held that IBM had reasonably accommodated deaf employee by providing ASL interpreters for work-related Internet videos. Employee wanted on-screen captioning, but court found ASL interpreters sufficiently effective. Dissent argued that whether accommodation effective should be for jury.

C. Accommodation Would Be Undue Hardship.

1. Undue hardship defined as significant difficulty or expense or would fundamentally alter the nature of the job. 42 U.S.C.§§ 12111(10), 12112(b)(5)(A).

- See *Reyazzuddin v. Montgomery County,* 789 F.3d 407 (4th Cir. 2015) – Jury issue as to whether providing accessible software to blind employee would be undue hardship where estimates of cost ranged from $130,000 to $650,000.
- *Stephenson v. Pfizer,* 641 Fed. Appx. 214 (4th Cir. 2016) – Jury issue as to whether providing driver for sales representative, whose vision impairments rendered her unable to drive, constituted reasonable accommodation or undue hardship.

2. If providing one type of accommodation would be an undue hardship, employer has obligation to consider other accommodations.

D. Types of accommodations not required

1. Job restructuring where restructuring would eliminate essential function.

- *Stevens v. RiteAid Corp.*, 851 F.3d 224 (2d Cir. 2017), cert. denied, 2017 U.S. LEXIS 6347 (U.S. Oct. 15, 2017) – pharmacist with needle phobia and whose job required that he give immunization injections to customers suggested as a reasonable accommodation that the company could hire a nurse to give immunization injections for him or assign him to another pharmacy location with another pharmacist who could give immunizations. In rejecting the employee's arguments, the Second Circuit explained that neither accommodation was required under the ADA because other employees would have been required to perform the pharmacist's essential immunization duties.
- *Stern v. St. Anthony's Health Center,* 788 F.3d 276 (7th Cir. 2015) – eliminating administrative and supervisory responsibilities of hospital's chief psychologist with short-term memory deficiencies not required because duties were essential.
- *Emerson v. Northern States Power Co.*, 256 F.3d 506 (7th Cir. 2001) - customer telephone consultant with acute anxiety disorder and panic attacks could not perform the essential functions of her position, which included handling safety-sensitive calls. Although plaintiff suggested routing safety-sensitive calls to other employees, employer not obligated to change essential functions of job.

2. Unscheduled Absences

- *Rask v. Fresenios Med. Care N. Am.*, 509 F.3d 466 (8th Cir. 2007) - Employer not required to allow patient care technician with depression to take sudden unscheduled absences due to problems with medication.

- *Williams v. AT&T Mobility Services LLC*, 847 F.3d 384 (6th Cir. 2017) – no duty to accommodate flex schedule that would not address employee's unpredictable anxiety attacks when at work

3. Telework

a. Not required where onsite attendance essential

- *Mason v. Avaya Comm., Inc.*, 357 F.3d 1114 (10th Cir. 2004) - Service coordinator with PTSD not qualified for her position because on-site attendance was an essential function of the job and working at home could not be a reasonable accommodation. Management could not adequately supervise her and she would not be available to cover other coordinators at busy times.
- *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (en banc) - employee with irritable bowel syndrome requested accommodation to work from home up to 4 days a week. Ford had a telecommuting policy, but denied employee's accommodation request because her job as a resale steel buyer required her to frequently interact face-to-face with coworkers. Court ruled in favor of Ford because attendance at the job site was an essential function and employee's disability-related absences meant she was not a "qualified" individual under the ADA.
- *Credeur v. State of Louisiana*, 860 F.3d 785 (5th Cir. 2017) – state attorney general not required to accommodate a litigation attorney, who developed serious health problems due to complications from a liver transplant, and wanted to work from home. Litigation attorneys engaged in an interactive and team-oriented approach, which could not be accomplished when an employee was working from home. Additionally, the attorney's working at home resulted in the employee's cases being reassigned to other attorneys.
- *Winston v. Ross*, No. 17-8041 (10th Cir. Feb. 27, 2018) – telework not reasonable accommodation where job involved receptionist duties and other tasks requiring employee to be in the office.
- *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565 (7th Cir. 2019) - physical presence at work was required in order for the employee to perform the essential functions of her job which involved changing day-to-day responsibilities, some of which the employee could not perform working remotely. As a consequence, the court pointed out that the team with which the employee worked was "spread very thin at times."
- *Yochim v. Carson*, 2019 U.S. App. LEXIS 24346 (7th Cir. Aug. 15, 2019) – medical needs of government attorney with carpal tunnel and osteoarthritis did not require that she work from home three or more days a week where government agency offered other alternatives such as reduced typing demands, paralegal help, and flexible work schedule.

b. Issue of Fact

- *Humphrey v. Memorial Hosp. Ass'n*, 239 F.3d 1128 (9th Cir. 2002) - work from home may be reasonable accommodation for medical transcriptionist suffering from OCD.
- *Woodruff v. Peters*, 482 F.3d 521 (D.C. Cir. 2007) – factual issue as to whether work at home reasonable for federal employee who was team leader where agency had policy allowing telework 5 days/wk and employee had previously telecommuted 2 days/wk and said that team was self-directed.
- *Goonan v. FRB of N.Y.*, 2014 U.S. Dist. LEXIS 99922 (S.D.N.Y. July 22, 2014) – request to work at home or be transferred to a different position could be reasonable accommodation based on comparator evidence even though employer had policy that teleworking was only available for strong performers, and employee was regarded as a poor performer.
- *Buie v. Berrien*, 85 F. Supp. 3d 161 (D.D.C. 2015) – EEOC investigator's request to work at home could be reasonable accommodation where there was a dispute as to whether the employee had to be physically present in the office.

4. New Supervisor

a. Employer not required to provide new supervisor

SOURCE: *Weiler v. HFC*, 101 F.3d 519, 526 (7th Cir. 1996); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999); *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 581 (3d Cir. 1998).

But see Kennedy v. Dresser Rand Co. (2d Cir. 1999) (employee may rebut presumption that new supervisor not reasonable accommodation); *Calero-Cerezo v. U.S. DOJ*, 355 F.3d 6, 24-25 (1st Cir. 2004) (fact finder could find that transfer to another worksite with new supervisor was reasonable accommodation for attorney with depression).

b. But, employer may need to change methods of supervision by:

- Communicating by email (rather than orally) about work assignments, evaluations and training
- Providing additional training or modified training materials
- Providing detailed day-to-day feedback and guidance

SOURCE: EEOC Enforcement Guidance, supra

5. Providing stress-free environment or immunizing employee from criticism

- *Marino v. U.S. Postal Serv.*, 25 F.3d 1037 (1st Cir. 1994) - unreasonable to place employee in stress-free environment or to immunize him from criticism
- *Pesterfield v. TVA*, 941 F.2d 437, 442 (6th Cir. 1991);
- *Grillasca-Pietri v. Portorican American Broadcasting Co.*, 233 F. Supp.2d 258, 264 (D.P.R. 2002).
- *Cohen v. Ameritech Corp.*, 2003 U.S. Dist. LEXIS 23166 (N.D. Ill. Dec. 23, 2003) - even though employee's anxiety disorder exacerbated by manager's monitoring and disciplinary authority, unreasonable to exempt employee from monitoring and discipline.

6. Excuse Violation of Performance and Conduct Standards

a. Enforcement of Conduct Standards

EEOC says employer may (1) discipline employee for violating workplace conduct standard even though misconduct caused by disability and (2) set standards to maintain safe workplace. SOURCE: EEOC Enforcement Guidance, *supra*

- *Sista v. CDC Ixis N. Am. Inc.*, 445 F.3d 161 (2d Cir. 2006) (upheld termination of employee who made threats of violence to co-workers and supervisor).
- *Macy v. Hopkins Ctny. Sch. Bd. of Educ.*, 484 F.3d 357 (6th Cir. 2007) (upheld termination of teacher for threatening students even though verbal outbursts caused by disability, post-concussive syndrome).
- *Jarvis v. Potter,* 500 F.3d 1113 (10th Cir. 2007) (upholding termination of employee who was a veteran and suffered from PTSD where employee had been involved in numerous physical altercations at work).
- *Walz v. Ameriprise Fin., Inc.* (8th Cir. 2015) – employee's bipolar disorder caused her to interrupt meetings, disrupt coworkers, and be insubordinate; essential function of job required "people, teamwork, and communication skills."
- *Mayo v. PCC Structurals,* Inc. (9th Cir. 2015) –employee's major depressive disorder caused him to inappropriately handle stress and threaten to kill his supervisors, employee not qualified to perform essential job functions.

b. Exception

Conduct standards must be "job related and consistent with business necessity." SOURCE: EEOC Enforcement Guidance, *supra*

V. Defending Claims for Leave Under FMLA and as an Accommodation Under the ADA

A. Leave Under the Family and Medical Leave Act

1. Are you covered?

- Employer must have 50 or more employees during each of 20 or more workweeks in the current or preceding calendar year (DOL Reg. § 825.104).

- Employee must have been employed by a covered employer for at least 12 months (not consecutive) and for at least 1,250 hours during the 12-month period immediately preceding the start of leave. Exception: employee not eligible if there are less than 50 employees within 75 miles of the worksite (DOL Reg. § 825.110).

2. What are the Triggering Events for Leave Due to Employee's Medical Condition?

- A "serious health condition" making the employee unable to perform the functions of the position. A "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:
  - Inpatient care in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with such inpatient case.
  - Continuing treatment by a health care provider. Continuing treatment includes any one or more of the following:
    - A period of incapacity or more than three consecutive calendar days and any subsequent treatment or period of incapacity relating to that condition that also involves:
      - Two or more treatments; or
      - At least one treatment resulting in a regiment of continuing treatment.
    - Any period of incapacity due to pregnancy, or for prenatal care.
    - "Chronic" serious health condition (e.g., asthma, diabetes, epilepsy, etc.).
    - A period of incapacity with is permanent or long-term due to conditions for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal stage of disease).
    - Any period of absence to receive multiple treatments (e.g., cancer/chemotherapy and radiation therapy, severe arthritis/physical therapy, kidney disease/dialysis).
  - Less stringent definition than "disability" under ADA

3. Extent of Entitlement to FMLA Leave

- Entitled to a total of 12 weeks of unpaid leave during any 12-month period.
- Employee may require employer to grant intermittent or reduced leave when medically necessary.
- Restoration to the position held or to an equivalent ("virtually identical"/"substantially similar") position with equivalent benefits, pay, and terms.
- Exception: Employer may deny return to work to:
  - Certain highly paid key employees if notified in advance and if restoration would cause substantial and grievous economic injury. See DOL Reg. § 825.217, 218, 219.
  - Employees who fail to provide valid fitness for duty certificate.

B. Leave As Accommodation Under ADA Over and Above FMLA Leave

1. Indefinite leave not required

EEOC: "[I]ndefinite leave—meaning that an employee cannot say whether or when she will be able to return to work at all—will constitute an undue hardship, and so does not have to be provided as a reasonable accommodation." EEOC "Employer-Provided Leave and the Americans with Disabilities Act" (May 9, 2016)

- Punt v. Kelly Services 862 F.3d 1040 (10th Cir. 2017)
- Peyton v. Fred's Stores of Arkansas, Inc., 561 F.3d 900 (8th Cir. 2009)
- Fiumara v. President and Fellows of Harvard College, 327 F. App'x. 212 (1st Cir. 2009)
- Larson v. United Nat. Foods W. Inc., 518 F'Appx. 589, 591 (9th Cir. 2013)
- Moss v. Harris County Constable Precinct One, 851 F.3d 413 (5th Cir. 2017)
- Minter v. District of Columbia, 809 F.3d 66 (D.C. Cir. 2015)

2. Time periods unreasonable based on facts:

- *Hwang v. Kansas Severson v. Heartland Woodcraft*, 872 F.3d 476 (7th Cir. 2017) – "multimonth" leave of absence after FMLA leave expired is not a reasonable accommodation under the ADA

- *State University*, 753 F.3d 1159 (10th Cir. 2014) - 6-month leave after 6 months of paid leave

- *Luke v. Bd. of Trustees Florida A&M Univ*., 674 Fed. Appx. 847 (11th Cir. 2016) - 6 month leave, after 9 month leave

- *Echevarria v. AstraZeneca Pharmaceutical LP*, 856 F.3d 119 (1st Cir. 2017) - 12 month leave after 5-month leave held not reasonable

- *Hill v. Walker,* 918 F. Supp. 2d 819 (E.D. Ark. 2013), aff'd, 737 F.3d 1209 (8th Cir. 2013) – 2 weeks (where no evidence employee would have been able to perform the essential functions at the conclusion of leave)

- *Boileau v. Capital Bank Fin. Corp.,* 646 Fed. Appx. 436 (6th Cir. 2016) – 8 to 12 weeks at a time

- *Stallings v. Detroit Pub. Schs.,* 658 F'Appx. 221, 226-27 (6th Cir. 2016) – 4 months (teacher)

- *Larson v. United Nat. Foods W. Inc.,* 518 F'Appx. 589, 591 (9th Cir. 2013) – at least 6-month leave

Litigating A Mental Health Disability Case

- Expert testimony
  - Consider whether it is necessary to prove or refute disability
    - Whether a plaintiff must introduce medical evidence at trial to establish that he or she is covered by the ADA will vary on a case by case basis. With certain types of impairments, such as a missing limb, a lay jury will be capable of making a determination as to whether the plaintiff is disabled. On the other hand, where a medical impairment and its impact is not so apparent, medical evidence may need to be presented. *Mancini v. City of Providence,* 909 F.3d 32 (1st Cir. 2018).
  - With alleged mental health condition, is a separate expert pertaining to the issue of emotional distress necessary?
- Importance of Summary Judgment
  - Plaintiff's proof of disability
    - "A person with a **disability** who, with or without **reasonable accommodation,** can perform the **essential functions** of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).
  - Plaintiff's proof of qualification
    - EEOC: a "qualified individual with a disability" is a person "*who satisfies the requisite skills, experience, education, and other job-related requirements of the employment position the individual holds or desires,* and who, with or without reasonable accommodation, can perform the essential functions of the position." 29 C.F.R. § 1630.2(m).
  - Interactive process – who dropped the ball?
    - The ADA defines discrimination to include not making reasonable accommodation to the known limitations of an otherwise qualified individual with a disability unless the employer can demonstrate the accommodation would pose an undue hardship. 42 U.S.C. § 12112(b)(5)(A).

Litigating A Mental Health Disability Case cont.

- Jury pool
  - Is the stigma surrounding mental health issues all but gone?
  - The jury pool is likely to contain one or more individuals who have had a diagnosed mental health condition

- How to address delicate topic of mental health

- Causation – "but for" analysis, not "mixed motive"
  - The standard of causation for disability discrimination claims under the ADA is "but for." *Natofsky v. New York, et al.*, 921 F.3d 337 (2nd Cir. 2019) (joining the 4th, 6th and 7th Circuits in so ruling).

QUESTIONS?

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