Navigating the Murky Waters of the ADA and FMLA

August 12, 2015

Squire Patton Boggs (US) LLP
Webinar Series
Mike Hanna, Partner
E: mike.hanna@squirepb.com
T: 1.216.479.8699

Anne Marie Prack, Associate
E: anne.prack@squirepb.com
T: 1.614.365.2757
Agenda

- Americans with Disabilities Act (ADA): analysis and overview of recent developments and review of latest cases, including what qualifies as a reasonable accommodation under the ADA

- Family and Medical Leave Act (FMLA): eligibility requirements; analysis and overview of recent developments and review of latest cases; review of the definition of “serious health condition”
Americans with Disabilities Act

- The ADA protects qualified individuals with disabilities from discrimination in employment
- Enacted in 1990; celebrated 25 years in 2015
- Amended in 2009
- ADA is enforced by the U.S. Equal Employment Opportunity Commission
What is a disability?

- The ADA defines “disability” as:
  - A physical or mental impairment that substantially limits one or more major life activities (“actual disability”);
  - Having a “record” of such an impairment; or
  - Being “regarded as” having such an impairment
No Disability for Police Officer with ADHD

Weaving v. City of Hillsboro (9th Cir. 2014)

- Plaintiff had personality conflicts with co-workers and was placed on administrative leave pending investigation re: verbal criticism by Plaintiff
- The investigation found that Weaving had created a hostile work environment and that he did not possess the emotional intelligence to work in a team environment—and he was terminated
- Court held that a jury could not reasonably have concluded that Plaintiff's ADHD substantially limited his ability to work
No Disability Found when Plaintiff Fails to Proffer Evidence Proving Disability


- Plaintiff was diagnosed with spondylolisthesis—a spinal cord condition that causes back pain; he claimed he was unable to sit for long periods of time
- In July 2010, Plaintiff was reassigned to a location that was a further drive away from his home
- He requested transfer, but was denied
- Employer received tip that Plaintiff was working from home, rather than the location to which he had been assigned
- Plaintiff was terminated for his misconduct/dishonesty
ADA Protection Based on Association with Disabled Individual

*Manon v. 878 Educ., LLC (S.D.N.Y. 2015)*

- School receptionist was dismissed after several instances of being absent and/or tardy
- The reason for these absences and failure to keep a consistent schedule was due to her daughter’s respiratory issues
- Employer was aware of her daughter’s health issues
Reasonable Accommodation: No ADA Violation for Denying Worker’s Request to Telecommute


- Plaintiff missed significant amount of work due to IBS
- Plaintiff requested to telecommute up to four days each week
- Employer determined that her request was unreasonable because her job responsibilities could not effectively be performed from home.
- Plaintiff rejected employer’s alternative proposals
- Plaintiff was terminated for poor performance and filed a claim with the EEOC
Reasonable Accommodation: No Need to Provide Employee’s Requested Accommodation when Plainly Reasonable Accommodation Already in Place

*Noll v. International Business Machines Corporation*

- Plaintiff, a deaf employee, requested that employer provide on-screen captioning for videos, audio files and other materials displayed on the company intranet site.
- The company sometimes did this—other times, IBM provided Plaintiff with transcripts of the videos/audio files; they also made interpreters available for live meetings and intranet videos.
- Plaintiff sued IBM, claiming that IBM violated the ADA by refusing to provide the accommodation he requested—immediate on-screen captioning of all videos displayed on IBM's intranet site and transcripts of all audio files.
Reasonable Accommodation: Not Reasonable to Hire a Teacher’s Aide


- Plaintiff had difficulty balancing; experienced pain/cramps; and needed to use a walker at times
- She requested the assistance of an aide to help deal with the children—specifically the kids who were unruly/disruptive
- The school refused the accommodation and later terminated Plaintiff for failure to perform essential functions of her position
Reasonable Accommodation: Providing a Chair to a Retail Store Salesman

_Gleed v. AT&T Mobility Services, LLC_ (6th Cir. 2015)

- Plaintiff had a leg condition which made him unable to stand for long periods of time—so he requested that he be able to use a chair.
- AT&T refused, even though a pregnant co-worker was able to use a chair while working.
- Plaintiff also told HR that he would need to miss work because of his medical treatments; however, he did not specifically ask for an adjustment to his schedule.
- Plaintiff prevailed on chair issue, but not scheduling flexibility.
Credit Information

For those you who require CLE credits please note the following states have been approved, Arizona, California, Florida, Ohio, New York and Texas. The program is also approved for HRCI and SHRM for Human Resource Professionals. Please write down the following affirmation code: FMLA128. Later this week, you will receive an email with the CLE affidavit to complete, please complete and PDF a copy of the signed form to Robin Hallagan at robin.hallagan@squirepb.com, along with the program evaluation.
Family & Medical Leave Act—Eligibility

- Employees are eligible for leave if they:
  - Worked for their employer at least 12 months;
  - Worked at least 1,250 hours over the past 12 months; and
  - Work at a location where the company employs 50 or more employees within 75 miles.
Qualifying Reasons For Leave

- Eligible employees are entitled to 12 workweeks of leave for the following reasons:
  - Birth and care of the employee’s newborn child;
  - Placement with the employee of a child for adoption or foster care;
  - To care for the employee’s spouse, child or parent with a serious health condition -- but not “in-laws”;
  - When the employee is unable to perform the essential functions of the employee’s position because of a serious health condition;
  - Qualifying exigency

- Eligible employees are entitled to 26 workweeks for military caregiver leave
Updated Forms

- Prior forms expired February 28, 2015
- New forms published May 2015
- New forms have been updated to clarify that health care providers should not provide information about genetics or genetic services to the employer
FMLA: Definition of Spouse

- **Former rule:** Leave related to a same-sex spouse was based on where the marriage was entered into (place of celebration)
- **NOW:** The US Department of Labor has revised the definition of spouse under the FMLA so that eligible employees in same-sex marriages can take FMLA leave to care for their spouse or family member, regardless of where they live
  - Effective March 27, 2015.
Employee Reliance on Employer Representation of Eligibility

*Tilley v. Kalamazoo Cnty. Road Commission* (6th Cir. 2015)

- Employer gave Plaintiff a formal FMLA Eligibility Notice, which indicated that he was eligible for FMLA leave
- Plaintiff was not actually eligible because he was not within 75 miles of at least 50 other employees
- Plaintiff could have reasonably relied on employer’s representations about his eligibility for FMLA leave
What Constitutes a Serious Health Condition?: Overnight Stay in the Hospital

- Bonkowski v. Oberg Industries, Inc. (3d Cir. 2015)
  - “Overnight stay” clearly defined as:
    - (1) Stay in a hospital, hospice or residential medical facility for a substantial period of time; and
    - (2) Be admitted on one calendar day and discharged the next calendar day.
  - Here, Plaintiff was admitted and discharged in the same day
What Constitutes a Serious Health Condition?: Self-report

_Casagrande v. OhioHealth_ (S.D. Ohio 2015)

- Plaintiff worked as RN; terminated for poor work performance
- Court dismissed employer’s argument that Plaintiff was not suffering from a “serious health condition” because he indicated that he could return to work
What Constitutes a Serious Health Condition?: A Close Call with H1N1

Michaels v Norton Healthcare (W.D. Ken. 2014)

- Plaintiff missed work because of an H1N1 scare with her daughter, which ended up being strep throat
- Strep throat is not a serious medical condition
Potential for Abuse—and Mitigating the Same

- Intermittent leave
- Medical certification and exams
- Track absence pattern
- Social media posts
  - “honest belief/suspicion”
“Honest Belief” Rule

Bridget Dalpiaz v. Carbon County Utah Rose Barnes (10th Cir. 2014)

- HR employee was in car accident and RTW with restrictions
- Multiple co-workers reported that she was engaged in activities beyond those allowed by her doctor
- Employer asked for return of FMLA form and for her to undergo a medical exam—she pushed back on getting scheduled for an exam
- Employer terminated her for failing to validate her claim
HOT TOPICS
HOT TOPICS:
EEOC Pregnancy Discrimination Guidance

Pregnancy Discrimination Act: Applies to current and past pregnancies, potential and intention to become pregnant, and new fathers
HOT TOPICS:
EEOC Pregnancy Discrimination Guidance

Medical Conditions
- Lactation

Accommodation
- Includes lactation breaks, frequency of breaks, lifting restrictions
- Cannot make employee take leave if physically able

Light Duty
HOT TOPICS:
Paid Pregnancy and/or Family Leave

- U.S. is one of the only industrialized countries not to provide paid maternity leave
- In March 2015, the Family and Medical Insurance Leave Act was reintroduced, which would provide workers with up to 12 weeks of partial income
- A couple of states—California, New Jersey and Rhode Island—do have paid family leave
HOT TOPICS:
Private Companies and Paid Leave Policies

- Netflix
  - Announced that it will allow its employees to take unlimited maternity or paternity leave during the first year after their child’s birth or adoption—while earning their normal pay

- Twitter
  - Birth moms at Twitter can receive up to 20 weeks of full pay, while other new parents receive up to 10 weeks for "bonding time"

- Microsoft, Facebook, etc.
HOT TOPICS:
Federal Paid Sick Leave

- None, currently
  - Healthy Families Act

- President Obama is currently considering an executive order forcing any company that contracts with the federal government to provide paid sick days
  - The order would likely set a minimum of 56 hours a year of paid sick leave
HOT TOPICS:
Locations with Paid Sick Leave

Cities / Counties
Emeryville, CA
Oakland, CA
San Francisco, CA
Washington, DC
Montgomery Cty, MD
Bloomfield, NJ
East Orange, NJ
Jersey City, NJ
Montclair, NJ
Passaic, NJ
Paterson, NJ
Trenton, NJ
New York, NY
Eugene, OR
Portland, OR
Philadelphia, PA
Seattle, WA
Tacoma, WA

States
California
Connecticut
Massachusetts
Oregon
Credit Information

For those you who require CLE credits please note the following states have been approved, Arizona, California, Florida, Ohio, New York and Texas. The program is also approved for HRCI and SHRM for Human Resource Professionals. Please write down the following affirmation code: FMLA128. Later this week, you will receive an email with the CLE affidavit to complete, please complete and PDF a copy of the signed form to Robin Hallagan at robin.hallagan@squirepb.com, along with the program evaluation.
Questions or comments?

Mike Hanna
E: mike.hanna@squirepb.com
T: 1.216.479.8699

Anne Marie Prack
E: anne.prack@squirepb.com
T: 1.614.365.2757
Navigating the Murky Waters of the ADA and FMLA