



The Interplay Between the ADA & the FMLA

Presented by Equip for Equality

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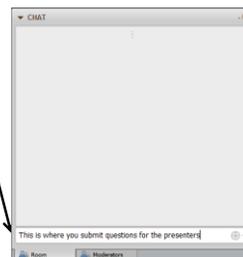
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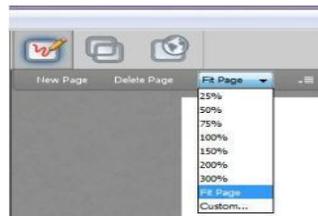
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Outline of Today's Webinar

FMLA and ADA: Overview and interplay issues

- Goals, coverage and eligibility
- Reasons to request leave, amount, intermittent leave
- Health benefits, how to request leave
- Employer notice requirements, medical certification
- When leave must be granted
- Leave extensions & inflexible leave policies
- Returning from leave: accommodations, reinstatement and medical information
- Enforcement

Goals of Laws



ADA: Federal law passed in 1990

- Broad anti-discrimination law
- Ensure that people with disabilities have equality of opportunity, full participation and integration, independence, economic self-sufficiency

FMLA: Federal law passed in 1993

- Allows employees to balance work and family life
- Act states that it benefits employers as well as employees due to the direct correlation between stability in the family and productivity in the workplace

Employer Coverage

- **FMLA:** Covered employers include
 - ❖ Private employers with at least 50 employees
 - ❖ *All* public agencies (federal, state, local government agencies)
 - ❖ *All* public and private elementary or secondary schools
- **ADA:** Covered employers include
 - ❖ Private employers with at least 15 employees
 - ❖ *All* state and local governments
 - ❖ Note: Local laws may cover smaller employers

Interplay Issue: If an employee who works for a private employer with 25 employees and needs medical leave, what should he consider?

Employee Eligibility

- **FMLA:** Covered employees are individuals who:
 - ❖ Worked for a covered employer for 12+ mo, ok if not consecutive
 - ❖ Have 1,250+ hours of service during the 12 month period immediately preceding the leave
 - Additional protections for employees in the military
 - ❖ Work at a location with at least 50 employees within 75 miles
 - ❖ Have (or have a family member) with a “serious health condition”
- **ADA:** Covered employees are individuals who:
 - ❖ Apply to work or work for a covered employer (no tenure req'd)
 - ❖ Are qualified individuals with disabilities

Interplay Issue: If a part-time employee needs medical leave, what should she consider? What about a new employee?

“Qualified Individual with a Disability” v. “Serious Health Condition”

FMLA = “Serious health condition” is:

- An illness, injury, impairment or physical/mental condition involving:
 - ❖ Any period of incapacity or treatment connected with inpatient care in a hospital, hospice, or residential medical care facility **or**
 - ❖ Any period for pregnancy or pre-natal care **or**
 - ❖ Continuing treatment by or under the supervision of a health care provider, including:
 - Conditions that are permanent/long term for which treatment may not be effective (Alzheimer’s, terminal diseases, etc.)
 - Conditions which require multiple treatments (chemo, physical therapy, dialysis, etc.)
 - Chronic serious health condition (asthma, diabetes, epilepsy)
 - A period of incapacity of more than 3 consecutive days

“Qualified Individual with a Disability” v. “Serious Health Condition”

An individual has a “disability” if he or she:

- Has a physical or mental **impairment** that causes a **substantial limitation** of one or more **major life activities**
- Has a record of such an impairment
- Is “regarded as” having an impairment

Who may request leave as an accommodation?

- Someone who falls within the first two prongs
- No accommodation requirement for an employee **regarded as** an individual with a disability

An individual is “qualified” if he or she:

- Can perform the **essential job functions** with or without accommodations

When Covered Employees May Request Leave

FMLA: Covered employees may request leave for:

- The birth and care of a newborn child
- Placement with the employee of a son or daughter for adoption or foster care
- To care for an immediate family member (spouse, child, or parent) with a serious health condition
 - ❖ Note (relevant to later case). Parent = Any individual who stood in “loco parentis to an employee when the employee was a son or daughter.”
- To take medical leave when the employee is unable to work because of a serious health condition

When Covered Employees May Request Leave

ADA: Employees with disabilities may request leave for a wide range of reasons:

- Examples:
 - ❖ Employee has medical appointments
 - ❖ Employee needs treatment for new or progressive limitation
 - ❖ Employee must adjust to new medication
 - ❖ Anything related to their *own* disability-related needs

Interplay question: If an employee needs to take leave to care for a family member with a disability, what should he consider?

How Much Leave is Permitted?

FMLA:

- **Entitled** to 12 weeks of leave in a 12 month period
- Leave is capped at 12 weeks
- Service members injured in the line of active service or people caring for them may receive 26 weeks of leave

ADA:

- **It depends** - no *per se* rules regarding maximum leave permitted
- Standard principles regarding reasonable accommodations apply
- (Stay tuned for discussion about when leave must be granted)

Intermittent Leave

FMLA:

- 12 weeks may be taken intermittently when medically necessary
- Employee must make “reasonable effort” to schedule treatments to avoid disruptions
- If leave is foreseeable, employer may require employee to temporarily transfer to an available alternative position for which the employee is qualified and which better suits his/her reduced hours (for the duration of the leave)

ADA:

- Intermittent leave can be a reasonable accommodation
- If leave would pose an undue hardship, reassignment to other positions that are open and for which the person is qualified should be considered

Interplay: History of Intermittent FMLA Leave Supports ADA Claim

Carmona v. Southwest Airlines Co **604 F.3d 848 (5th Cir. 2010)**

- Flight attendant w/ psoriatic arthritis approved for intermittent leave
- Took FMLA leave 3-4 times per month for 7 years
- No longer eligible for FMLA (didn't work enough hours) - fired
- **5th Cir:** Found for employee on ADA (affirmed jury; reversed ct)
 - ❖ Flight attendants have nearly unlimited discretion in determining when/how often to work, though can't just skip scheduled days
 - ❖ Not unreasonable for jury to conclude that EE was qualified
 - ❖ Assuming attendance was essential, SWA had lenient policy
 - ❖ Employee had irregular attendance for 7 years w/o problem

Interplay: FMLA Makes Unreasonable Accommodation Possible

Santiago v. Department of Transportation **50 F.Supp.3d 136 (D. Conn. 2014)**

- Plaintiff worked as a material storage supervisor, a position that required significant overtime during snowy winter months
- He has “cluster headaches” – more severe than migraines
- Doctor restricted overtime as it triggered headaches
 - ❖ Under the ADA: Overtime was likely an essential function
- Requested (through his attorney) ability to use intermittent FMLA
- **Issue:** Can employee take intermittent FMLA for this purpose?
 - ❖ Employer: FMLA requires incapacitation. Not for prevention.
- **Court:** FMLA does not require a complete inability to work
 - ❖ Cites FMLA regs re: FMLA leave to avoid onset of illness

Interplay: FMLA Makes Unreasonable Accommodation Possible

- **Issue:** Can plaintiff use his yearly FMLA leave allotment to essentially permanently change his position into one in which he was no longer required to work overtime?
- **Court:** Yes – this is permissible under the FMLA
 - ❖ Possible because employers can't force employees to take “more intermittent leave than is necessary” – OK to take increments of 1 hour
 - ❖ 12 weeks of leave = 480 hours = 9.2 hrs/week = 1.8 hrs / day
 - ❖ As a result, employee can use yearly allotment to alter schedule
- “The FMLA could be used to essentially create a new position for [plaintiff] that does not involve overtime.”
 - ❖ Unlike ADA, FMLA has no “undue hardship” defense
 - ❖ Congress did not restrict this type of use

Health Benefits

FMLA:

- During leave, employer must maintain employee's existing level of coverage under a group health plan provided the employee pays his or her share of the premiums
- If paid leave is substituted for FMLA, employee must pay share of premium by method normally used during paid leave
- Employer must also provide employee with the same benefits (e.g., life or disability insurance) normally provided to an employee in the same leave or part-time status to prevent discrimination

ADA:

- Employer must continue health insurance coverage for an employee taking leave or working part-time only if the employer also provides coverage for other employees in the same leave or part-time status

Paid or Unpaid

FMLA:

- FMLA leave is generally unpaid
- Employees may choose – and employers may require – employees to use (concurrently) their accrued paid leave to cover some or all of the FMLA leave period

ADA:

- Leave under the ADA is generally unpaid
- Employees may choose – and employers may require – employees to use (concurrently) their accrued paid leave to cover some or all of the ADA leave period

Requesting Leave

FMLA:

- Timing re: foreseeable leave = Generally 30+ days in advance of leave
- Timing re: unforeseeable = As soon as practicable
- Content: Sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request
 - ❖ 1st request: No need to use “magic words”
 - ❖ Subsequent request: Must reference qualifying reason or FMLA

ADA:

- No need to use “magic words” (ADA or reasonable accommodation) - Only required to say they have a medical need/disability and that they are requesting something related to that need
- No requirement to make request in writing

Best practice for both = use magic words and put it in writing

Requesting Leave (FMLA) Case Highlights Employer’s Burden

Coutard v. Municipal Credit Union **848 F.3d 102 (2nd Cir. 2017)**

- EE sought leave to care for grandfather who raised him as a child
- Recall FMLA definition of “parent” includes this type of relationship
- ER denied leave b/c the FMLA doesn’t apply to grandparents
- EE did not explain nature of his relationship; ER did not ask
- **Issue:** Who has the obligation to ask/provide information?
- **2nd Cir.:** If eligible EE provides sufficient info for ER reasonably to determine that the requested leave “may” qualify for FMLA, ER “must” specify what additional information is needed
 - ❖ Here, EE’s request was sufficient - reversed and remanded MSJ

Interplay: ADA Accommodation Request on FMLA Documentation

Jenks v. Naples Community Hosp., Inc. **829 F. Supp. 2d 1235 (M.D. Fla. 2011)**

- Employee took FMLA leave to seek treatment for breast cancer
- FMLA documentation stated that fatigue was a side effect of cancer
- Employee's estate brought an ADA lawsuit asserting:
 - ❖ FMLA documentation requested an ADA accommodation
 - ❖ Hospital failed to provide reasonable accommodations (additional breaks or approved long absences from her desk)
- **Court:** Employee never requested a reasonable accommodation
 - ❖ FMLA documentation did not request additional breaks or approved long absences from desk

Practice tip: Be explicit when requesting reasonable accommodations

Employer Notice Requirements

FMLA: Very specific notice requirements regarding eligibility, rights, responsibilities and designation

- 1st Request: **Eligibility notice** must be provided within 5 days of request OR when employer acquires knowledge that leave may be for a qualifying reason. If not eligible, explanation why.
- All requests: **Rights/responsibilities notice** (in writing), including:
 - ❖ Notification that leave may be FMLA leave
 - ❖ Certification requirements and consequences of failure
 - ❖ Right to substitute paid leave
 - ❖ Instructions for premium payments
 - ❖ Right to restoration and maintenance of benefits
 - ❖ Designation as “key” employee and implications
 - ❖ www.dol.gov/whd/forms/wh-381.pdf

Employer Notice Requirements

FMLA (cont.): All requests: **Designation notice** (in writing), including:

- ❖ Provided within 5 days of receipt of information sufficient to determine eligibility
- ❖ Provided for each qualifying reason
- ❖ Include designation determination, and any substitution for paid leave requirements
- ❖ Include fitness for duty requirements
- ❖ Provide the amount of leave designated and counted against entitlement, if known
- ❖ www.dol.gov/whd/forms/wh-382.pdf

ADA:

- No specific rules re: response or timing
- Instead, employers must engage in interactive process

Employer Notice Requirements (FMLA) Importance of Notice for Informed Decisions

Vannoy v. Federal Reserve Bank of Richmond **827 F.3d 296 (4th Cir. 2016)**

- EE diagnosed w/ major depression and needed inpatient treatment
- Requested 30-day leave supported by his doctor
- ER approved FMLA leave but notice omitted job protection rights
- Fearful of losing his job, employee reported to work
 - ❖ He had problems at work and was fired
- **Court:** Found for EE (reversed MSJ) re: FMLA interference
 - ❖ Violated FMLA b/c no notice re: right to reinstatement
 - ❖ Violation was prejudicial – EE testified that had he known of his right to reinstatement, he would have taken the full 30-day leave to obtain inpatient treatment

Medical Certification

FMLA:

- Employer may seek certification of the serious health condition
- If forms are not sufficient, employer must inform employee of the deficiency and allow 7 days to cure it
- Employer has 5 days to request certification after leave request
- Employer may require add'l medical opinions (at employer's expense), periodic reports (not less than 30 days), and recertification

ADA:

- Requires medical inquiries to be job-related and consistent with business necessity
- Employers generally permitted to request medical support
- Documentation limited to establishing disability and need for accommodation

Medical Certification (FMLA) Sufficiency of Notice Sent Electronically

Gardner v. Detroit Entertainment **2014 WL 5286734 (E.D. Mich. Oct. 15, 2014)**

- Employee with degenerative spinal disorder regularly took FMLA
- Employee expressed preference for mail; rec'd letters through mail
- FMLA certification letter was sent via *email*
- Employee says she did not open this email in time to respond by the deadline so didn't submit recertification paperwork
- **Issue:** Is email notice sufficient?
- **Employer:** Email must be sufficient as verbal notice is sufficient
- **Court:** No, email is not proper notice
 - ❖ Court explained that oral notice guarantees delivery
 - ❖ Email lacks proof that it has been opened and received

Confidentiality

FMLA:

- Employer must hold following records in confidence: Records and documents relating to FMLA certifications, recertifications, or medical histories of employees/employees' family members
- Must keep records in separate files/records from the usual files
- Regs reference ADA confidentiality requirements and exceptions

ADA:

- Medical information must be maintained in confidence
- Exceptions: Disclosure is permitted to supervisors/managers, if information is regarding necessary restrictions or accommodations; first aid personnel; government officials investigating compliance; when employee has voluntarily disclosed condition

Must The Leave Be Granted?

FMLA: Yes, under the FMLA, leave is an entitlement.

- Eligible employees must be given leave

Query: What if employee could continue working with an effective reasonable accommodation?

Answer: If employee is eligible under the FMLA, leave must be granted, even if he or she could continue working with a reasonable accommodation.

- FMLA does not prevent an employee from accepting an alternative to leave, but acceptance must be voluntary and not coerced.

Must The Leave Be Granted?

ADA: It depends

- Standard principles regarding reasonable accommodations apply
- Fact-specific inquiry into whether:
 - ❖ Request is reasonable
 - ❖ Leave would pose an undue hardship on the employer
 - ❖ Leave is an effective accommodation
 - ❖ There is an alternate accommodation that would be effective

Must The Leave Be Granted: Is The Request Reasonable?

No bright-line rules about when a leave request is reasonable.

Walker v. NF Chipola, LLC
2016 WL 1714871 (N.D. Fla. March 28, 2016)

- Certified nursing assistant worked at a nursing facility
- She requested six months of leave for shoulder surgery
- Provided 12 weeks under FMLA – then fired/forced to resign
- Court previously denied MSJ; Jury found for employee
- **Court:** Upheld jury verdict - 6 month leave was reasonable
 - ❖ Rejected request to find that 6 month leave was unreasonable
 - ❖ Bright line rules conflict w/ reasonable accommodation concept
 - ❖ Here, many CNAs employed due to high turnover – employer “easily” could have left her on the roster w/o pay or benefits

Must The Leave Be Granted: Would Leave Pose Undue Hardship?

- Undue hardship = action requiring significant difficulty or expense
- Requires individualized assessment into current circumstances
- Employer's burden
- Factors: **42 USC § 12111**
 - ❖ Nature and cost of the accommodation needed
 - ❖ Overall financial resources of the facility, number of employees, effect on expenses/resources, impact on operations
 - ❖ Overall financial resources, size, number of employees, and type and location of facilities of employer (if the facility involved in the reasonable accommodation is part of a larger entity)
 - ❖ Type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative/fiscal relationship of the facility

Must The Leave Be Granted: Would Leave Pose Undue Hardship?

EEOC:

- In certain circumstances, undue hardship will derive from the disruption to the operations of the entity that occurs because the employer can neither plan for the employee's return nor permanently fill the position.

*EEOC Enforcement Guidance: Reasonable Accommodation
and Undue Hardship Under the Americans with Disabilities Act*

Must The Leave Be Granted: Is The Request Reasonable / Undue Hardship?

Generally, indefinite leave is generally not considered reasonable

- *See, e.g., Corder v. Lucent Technologies Inc.*, 162 F.3d 924, 928 (7th Cir. 1998): “Nothing in the ADA requires an employer to give an employee indefinite leaves of absence.” *See also Hudson v. MCI Telecomm. Corp.*, 87 F.3d 1167, 1168 (10th Cir.1996)

Dispositive question (to many courts)

- Is the request for indefinite and open-ended leave?
 - ❖ If so – not required
- Is the request for temporary leave, which would enable the employee to perform the essential functions of his job in the near future?
 - ❖ If so – likely required

Must The Leave Be Granted: Is The Request Reasonable / Undue Hardship?

No anticipated date of return? Indefinite leave to some courts

Salem v. Houston Methodist Hospital
2015 WL 6618471 (S.D. Tex. Oct. 30, 2015)

- Employee did not provide an anticipated return to work date.
- “[R]equests...without an end-date [are] requests for indefinite leave.”

Anticipated date is aspirational? Indefinite leave to some courts

Maat v. County of Ottawa, Michigan
657 Fed.Appx. 404 (6th Cir. Aug. 10, 2016)

- Court reporter for small courthouse worked reduced schedule for nearly 7-months and then requested full-time leave until Aug. 1
- Despite date, doctor did not know “probable duration” and date just signified the date they “hoped” she “might” be able to return

Must The Leave Be Granted: Is The Request Reasonable / Undue Hardship?

However, employers cannot call a request “indefinite” to escape liability

- *Bernhard v. Brown & Brown*, 720 F. Supp. 2d 694 (E.D. Pa. 2010)
 - ❖ Employer argued that request for additional 3 month leave of absence after expiration of FMLA was indefinite; court rejected argument as “disingenuous[]” and “absurd”
- *Feldman v. Law Enforc. Ass. Corp.*, 779 F. Supp. 2d 472 (E.D.N.C. 2011)
 - ❖ Rejected employer’s assertion that an employee with Multiple Sclerosis sought “indefinite” leave, as the employee sought leave for “at least three weeks” on two separate occasions

Must The Leave Be Granted: Is The Request Reasonable / Undue Hardship?

A range does not necessarily make a leave request indefinite

Sharbaugh v. West Haven Manor, LP 2016 WL 6834613 (W.D. Pa. Nov. 21, 2016)

- Plaintiff worked as the Environmental Director of a nursing home
- Requested FMLA and then extended leave for 2 knee surgeries
 - ❖ Surgeon speculated he needed 2-6 weeks after 2nd surgery
 - ❖ Initial FMLA document estimated 13 weeks from 1st surgery
- **Court:** Found for employee (denied Employer’s MSJ)
 - ❖ Employer argued that 2-6 week range was indefinite
 - ❖ No medical professional can foresee the exact day a patient will recover – that does not make request indefinite or open-ended

Practice tip: Be as specific as possible about a return to work date

Must The Leave Be Granted? Is The Request Reasonable / Undue Hardship?

EEOC v. Interstate Distributor Company **Civil Action No. 12-cv-02591-RBJ (D. Colo.)**

- EEOC challenged “maximum leave policy” (automatically terminated employees who needed leave in excess of 12 weeks)
- **EEOC:** ADA requires employers to consider whether a leave extension would be a reasonable accommodation under the ADA
- **2012 Settlement:** \$4.85 million
 - ❖ Enjoined from engaging in further discrimination
 - ❖ Policy modifications
 - ❖ Training, reporting, monitoring requirements

www.eeoc.gov/eeoc/newsroom/release/11-9-12.cfm

Practice tip: Avoid inflexible leave policies or create policy to enable employees to seek an extension as a reasonable accommodation

Must The Leave Be Granted: Is The Leave Effective?

Sclafani v. PC Richard & Son **668 F. Supp. 2d 423 (E.D.N.Y. 2009)**

- Employee was diagnosed with PTSD after surviving an assault in employer’s parking lot; she exhausted FMLA leave and sought additional unpaid leave under ADA
- Doctor stated that she could never work at her place of employment
- **Court:** Employee’s requested leave would not have rendered her qualified so employer did not violate ADA by denying leave

See also *Basden v. Professional Transport Inc.*, 714 F.3d 1034 (7th Cir. 2013) (Upholding employer’s decision to deny employee’s request for a 30-day leave of absence, even though the employer failed to engage in the interactive process, because employee suggested that she would remain unable to return to work following the requested leave time).

Must The Leave Be Granted: Alternative Effective Accommodation?

Daley v. Cablevision Sys. Corp. 2016 WL 880203 (S.D.N.Y. March 7, 2016)

- Plaintiff worked as an Advanced Field Services Technician
- Injured in motorcycle accident and took leave (including FMLA)
- Doctor's note: Capable of providing sedentary work, but unable to work as a technician for approximately 6 months
- Plaintiff requested additional medical leave under the ADA
- Given an additional 2 months of leave, then told to identify vacant sedentary positions; notified of vacant positions; refused all except one that would be considered a promotion. Plaintiff fired.
- **Court:** Found for employer
 - ❖ Plaintiff refused to consider sedentary positions

Must The Leave Be Granted: Alternative Effective Accommodation?

While employers are generally able to choose which effective accommodation to provide, leave may be improper if another accommodation would enable employee to work

Mamola v. Group Mfg. Svcs., Inc 2010 WL 1433491 (D. Ariz. April 9, 2010)

- Employer denied salesman's request to telework for a 5 week recuperation period following a series of surgeries, citing the "security and integrity of the Company's computer network and data" and instead extended leave
- **Court:** "A reasonable fact finder could therefore conclude that unpaid leave actually prevented [the employee] from earning wages for work that he would have performed if [the employer] had granted the requested accommodation."

Must The Leave Be Granted: Alternative Effective Accommodation?

Reilly v. Revlon, Inc. **620 F.Supp.2d 524 (S.D.N.Y. 2009)**

- Employee developed post-partum depression following birth of child
- FMLA expired on Nov. 24; medically unable to return
- Took additional leave until Feb. 8 and requested to return p/t , slowly increasing hours until March
- Request denied – instead placed on add'l paid leave and then fired
- **Court:** Found for employee (denied MSJ) on ADA case
 - ❖ “Providing paid disability leave above and beyond the FMLA requirements is commendable, but providing benefits to a person who cannot work is not the same thing as making an accommodation in the workplace so the person can work.”

Leave is Over... Now What? Right to Reinstatement

ADA:

- Employee *should* be reinstated to the same position absent an undue hardship
- If undue hardship, consider reassignment to a vacant position for which employee is qualified (starting with equivalent job)
 - ❖ www.eeoc.gov/policy/docs/accommodation.html

FMLA:

- *Guaranteed* right to return to same position or virtually identical position, with certain exceptions
- FMLA cannot result in the loss of any benefit the employee earned or was entitled to before using FMLA leave
- Subject to certain exceptions (next slide)

Exceptions to Right to Reinstatement: FMLA

- Employer is not required to reinstate employee if:
 - ❖ Employee would have been terminated if not on leave
 - ❖ Employee is a “key employee,” among the highest paid 10% of employees within 75 miles of worksite **and** restoration to employment would cause **substantial** and **grievous** injury to employer
 - ❖ Employee is unable to perform the job
 - stay tuned... discussion on “accommodated returns”

Leave is Over... Now What? What Medical Exams Are Permissible?

FMLA:

- May require employees to submit certification of ability to work
- Must be specific to particular health condition that caused leave
- Designation notice must reference certification requirement and whether certification will address essential functions
- Not permitted, generally, for each intermittent absence
- May not require second/third opinions

ADA:

- May require medical documentation and/or medical exam/fitness for duty that is job-related and consistent with business necessity
- Rules aren't as clear
- If documentation is insufficient, ER should explain why and allow time to correct. If sends to own doctor, ER must pay cost

Leave is Over... Now What? What Medical Exams Are Permissible?

Cleveland v. Mueller Copper Tube Co 2012 WL 1192125 (N.D. Miss. April 10, 2012)

- Employee with various restrictions from prior injuries (including lifting) sought to return from workers' compensation/FMLA leave
- Bid on position, which required lifting in excess of her limitations
- Employer initially refused, but then asked employee to have a doctor evaluate her restrictions through a functional capacity evaluation
- Employee refused and was laid off
- **Court:** Employer had objective reasonable medical basis for FCE
 - ❖ No ADA violation – ER attempted to undertake an “individualized assessment” to determine whether EE posed a direct threat
 - ❖ No FMLA violation – EE’s failure to submit to exam was reason for termination

Interplay: Medical Exam is Permissible Under the ADA due to FMLA Documentation

Leonard v. Electro-Mechanical Corporation 2014 WL 1385356 (W.D. Va. Apr. 9, 2014)

- Janitor with degenerative disc disease was cleared to return from leave
 - ❖ Employee’s doctor: Reviewed job description and said employee could return to work without restrictions
- 2 months later, employee submitted FMLA request form
 - ❖ Doctor said employee was unable to perform any job function when his condition flared up (1-2/month, 3-5 days)
 - ❖ Employee also disclosed limitations to manager (need to sit/rest)
- Employee required to go to independent medical examination
 - ❖ Refused and was fired
- **Court:** Independent medical exam was proper
 - ❖ Based on doctor’s “seemingly conflicting opinions” (and employee’s own statements)

Leave is Over... Now What? What if Employee Can't Do Her Job?

FMLA:

- No right to restoration/reassignment if “employee is unable to perform an essential function of the position.”

ADA:

- Employee can seek reasonable accommodations if she can perform her essential job functions with reasonable accommodations
- Employee can seek reassignment if she is no longer able to do previous position, even with accommodations

Interplay: FMLA regs acknowledge obligations under ADA

www.eeoc.gov/policy/docs/fmlaada.html

ADA v. FMLA: What if Employee Can't Do Her Job?

Piburn v. Black Hawk-Grundy Mental Health Center, Inc. **2016 WL 1464570 (N.D. Iowa Apr. 13, 2016)**

- Psychiatrist with sleep apnea, major depressive disorder, and other disabilities took FMLA leave for treatment
- Upon return, required reasonable accommodations (reduced patient schedule and using a transcription service) – ultimately fired
- **ADA Claim:** Found for employee
 - ❖ Evidence that requests were reasonable accommodations
- **FMLA Claim:** Found for employer
 - ❖ “Because the FMLA does not impose a duty of reasonable accommodation, and Piburn specifically requested upon his return from FMLA leave an accommodation . . . Piburn is not entitled to reinstatement under the FMLA.”

Interplay: Requiring FMLA for ADA Accommodation Upon Return

Basta v. American Hotel Register Co. **2012 WL 88187 (N.D. Ill. Jan. 11, 2012)**

- Employee took 2 leaves to recover from an on-the-job shoulder injury, and asked to return to 4 hour work day
- Employer agreed but required employee to consider leave time under the FMLA
- **Court:** Not “improper for an employer to provide an employee with a reduced schedule as a reasonable accommodation while also attributing the unworked portion of the plaintiff’s workday as leave time under the FMLA.”
 - ❖ Emphasized that employer provided employee with notice of deduction, and that employee did not explicitly request to be automatically transferred to a part-time position

Protection from Retaliation

FMLA:

- Prohibits any employer from “discriminating or retaliating” against an employee or prospective employee for exercising, or attempting to exercise, any FMLA right

ADA:

- Title V of the ADA expressly prohibits retaliation for engaging in any protected activity
- Requesting or taking reasonable accommodation of leave is a protected activity

Interplay: Protection from Retaliation

Gresham-Walls v. Brown

2014 WL 6685478 (N.D. Ill. Nov. 25, 2014)

- Employee took FMLA leave regularly (block and intermittent)
- Fired 3 weeks after leave b/c her “services no longer needed”
- **Court:** Found for employee (denied MSJ on FMLA/ADA)
 - ❖ Evidence that employee’s supervisor complained to management about employee’s absences
 - ❖ Even drafted a memo about her concerns about absenteeism requesting that she be transferred to another department
 - ❖ Said needed an admin ass’t who was more regularly in the office due to time-sensitive projects, despite signing FMLA form
 - ❖ Admitted she considered absences in evaluating performance

Enforcement

FMLA:

- Administrative enforcement = Department of Labor, Wage and Hour Division
- May go directly to court
 - ❖ No administrative exhaustion requirement
 - ❖ Statute of limitations = 2 years or 3 years for willful violations

ADA:

- Administrative enforcement = EEOC
 - ❖ Must file within 180 days of adverse action (300 days if there is an analogous state law)
 - ❖ Federal employees have 45 days to report
 - ❖ Must exhaust administrative remedies before going to court

Final Thoughts: ADA/FMLA

Practical Tips

- Follow the law that provides the most protection
- Employers:
 - ❖ Consider leave extensions as accommodation requests under the ADA
 - ❖ Avoid inflexible leave policies
- Employees:
 - ❖ Do not request indefinite leave – do your best to anticipate a return to work date

EEOC's guidance: www.eeoc.gov/eeoc/publications/ada-leave.cfm

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- Illinois **attorneys** interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
- Participants (non-attorneys) looking for continuing education credit should contact the Great Lakes ADA at 877-232-1990 (V/TTY) or webinars@ada-audio.org



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