



FMLA/ADA Year in Review: Bloopers, Blunders, and Triumphs

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What Has EEOC Been Up To?

EEOC Focus on ADA

| Fiscal Year | Charges filed | Settlements |
|---|---------------|-------------|
| Fiscal Year 2013 ADA filings and settlements | 25,957 | \$109.2M |
| Fiscal Year 2014 ADA filings and settlements | 25,369 | \$95.6M |
| Fiscal Year 2015 ADA filings and settlements | 26,968 | \$128.7M |
| Fiscal Year 2016 ADA filings and settlements | 28,073 | \$131M |
| Fiscal Year 2017 ADA filings and settlements | 26,838 | \$135.2M |

EEOC Update/Strategic Plan
FY 2017 - 2021

***Does not include monetary benefits
obtained through litigation***

- Expect continuation of aggressive EEOC investigative and litigation practices and broad interpretations of anti-discrimination laws.
- Within the plan, ADA-specific target areas are:
 - Qualification standards and inflexible leave policies
 - Accommodating pregnancy-related limitations

Inflexible Leave Policies Still in the News!

- Employer-Provided Leave and the ADA
- Settlements
 - UPS (8/17)-\$2M
 - American Airlines (11/17)-\$9.8M
 - Loews (5/16)-\$8.6M
 - Many multimillion dollar settlements in prior years

Pregnancy

- Pregnancy Discrimination Act
- ADA
- Pregnant Worker Rights
- State Pregnancy Accommodation Laws
- Municipal Pregnancy Accommodation Laws

Paid Parental Leave

- *EEOC v. Estee Lauder (E.D. Pa.)*
 - New moms get 6 weeks of paid bonding leave
 - New dads get 2 weeks
 - EEOC claims violations of Title VII and EPA
- Primary vs. secondary caregiver?
- What about extending STD without proof of disability?

ADA Update

***ADA:
Leave as a Reasonable
Accommodation***

Vague Doctor's Notes

- *Whitaker v. Wis. Dept. of Health Serv.* (7th Cir. 2017)
 - Bad back
 - Exhausted FMLA leave, employer leave
 - Attendance essential to the position
 - Doctor's note insufficient – Did not explain:
 - Whether Whitaker was receiving treatment
 - Likely effectiveness of the treatment
 - Medical likelihood that leave would enable her to return to work regularly
 - ***Not qualified under ADA!***

Severson v. Heartland Woodcraft

(7th Cir. Sept 2017)

- Ray: suffered from a chronic back condition, limited his ability to walk, bend, lift, sit stand, move and work
- One particular flare up = 12 weeks of FMLA leave
- Ray informed employer: condition not improved, needs surgery
- Terminated

Severson v. Heartland Woodcraft (7th Cir. Sept 2017)

- Employee not qualified under the ADA
 - A couple of days or even a couple of weeks may be appropriate, but leave spanning multiple months is not
 - Inability to work for a multi-month period removes a person from the class protected by the ADA
- Double down? *Golden v. IHA*

Billups v. Emerald Coast Util. Auth.

(11th Cir., October 2017)

- Billups was injured on the job and had an unknown RTW date
- Company policy allowed 6 months but included individual assessment
- Accommodations are to allow employee to “perform the essential functions of their *jobs presently or in the immediate future*”
- Policy was not applied inflexibly due to individual assessment

Hill v. Asian Am. Drug Abuse Prog.

(Cal. Sup. Ct. Jan. 2018)

- Hill requested a leave of absence beginning January 4, 2015 initially for a broken arm but evolving into a mental health situation
- Medical documentation supported leave until April 11, 2015
- Employee was terminated March 31, 2015
- Jury awarded \$4.5M in economic losses and punitive damages finding

Ruiz v. Paradigm Works Group,

(S.D. Cal. Feb. 2018)

- Counselor, accident at her home
- Employer granted three consecutive leaves of absences = 14 weeks
- Requested additional 6 weeks of leave
- Employer terminated employment because no assurance of return-to-work date
- Federal trial court:
 - Failed to show 6 addl wks reasonable
 - Even a finite leave is not a reasonable accommodation unless *"it is likely that at the end of the leave, the employee would be able to perform his or her duties"*

Leave as Reasonable Accommodation: Takeaways

- What's the message to employers?
 - Employers can be more aggressive on extended leaves of absence in Illinois, Wisconsin and Indiana (7th Circuit)
 - But in all cases:
 1. Engaging in the ADA's Interactive Process is Essential
 2. Assess how the absence is impacting your business
 - And when your employee asks for an additional 18 days?

ADA Update: Working from Home

Meacham

v.

Memphis

Light, Gas

(6th Cir. Feb. 2018)

- Andrea, in-house attorney, requested work from home because on bed rest
- No work-at-home policy, but denied Andrea's request
- Andrea stood her ground . . . while working at home
- Court:
 - Job description 20 years old!
 - Allowed work-at-home before (and even for Andrea!)
 - No interactive process

Morris- Huse v. GEICO

(M.D. Fla. Jan 30, 2018)

- Susan, Supervisor
- Deals with random attacks of vertigo, chronic bouts of dizziness and imbalance
- Requested work from home, ultimately denied
- Court: In-person presence required, ADA claim denied
 - Directed technical, clerical employees
 - Conducted team meetings
 - Monitored employees in real-time

Teleworking Factors to Consider

- Ability to supervise the employee equally
- Whether face-to-face interaction and coordination of work with other employees is necessary
- Whether any duties require use of certain equipment that cannot be replicated at home
- Whether in-person interaction with outside colleagues, clients, or customers is necessary
- Whether the position requires the employee to have immediate access to documents or other information located only in the workplace

***ADA Update:
Can You Force an
Independent Medical Exam?***

Forced IME

- *Monroe v. Consumer's Energy* (E.D. Mich. Dec. 2017)
- Monroe:
 - Trouble concentrating at work, stopped interacting with co-workers
 - Complained of being tracked by GPS, surveillance at the office
- Employer: Time for an Independent Medical Exam
- Monroe to court: Employer regarding me as disabled!
- Court: No ADA claim
 - *“unusual behavior, including the nature of allegations against her co-workers in her internal complaint, coupled with performance issues would have caused any reasonable employer to inquire as to whether she was still capable of effectively doing her job”*
- Similar: *Painter v. IL Dept. of Transportation* (7th Cir. Dec 2017)

Stragapede v. City of Evanston

(7th Cir. July 2017)

- Water service worker with the City of Evanston
 - Short-term memory problems following severe head trauma
 - After months of leave, released by neurologist with a work “trial”
 - City alleged additional performance issues related to his memory loss and terminated him
- Jury: \$225k in compensatory damages; \$354k in back pay
- Employee could perform essential job functions, not a direct threat
- Employer could not rely on neurologist’s report:
 - Conducted several months after initial exam
 - Based on info provided by City, not an actual exam of employee

Outsourcing ADA

- 2017 DMEC Survey shows an increase in outsourcing ADA from 2016
- Among large employers (1000+ employees), approximately 10% outsource ADA
- Companies with more than 500 employees are most likely to outsource
- A third of these employers leverage the same external vendor they use for leave management

2017 DMEC Employer Leave Management Survey White Paper.

What Has DOL Been Up To?

FMLA Enforcement Trends

- 2012 to 2015: 192% increase in FMLA court filings.¹
- 2017: DOL handled 1,165 FMLA complaints. 50% of these found violations
- Nature of each complaint investigated by the DOL:
 - 225: Refusal to grant FMLA leave
 - 122: Refusal to restore to an equivalent position
 - 493: Termination
 - 11: Failure to maintain health benefits
 - 314: FMLA discrimination matters
- 2017: DOL secured \$1,481,952 in back wages as a result of FMLA violations.²

¹Bloomberg BNA, October 24, 2016 report

²DOL FMLA Enforcement Statistics. 2017 Statistics by Administrative Office of the U.S. Courts, <https://www.dol.gov/whd/data/datatables.htm#panel5>

Opinion Letters are back!



*Letters, We Get Letters, We Get
Stacks and Stacks of Letters . . .*

- DOL back in the business of opinion letters
- **June 2017:** “DOL is committed to helping employers and employees clearly understand their responsibilities so employers can grow their businesses and create jobs”
- DOL *FMLA* opinion letters issued since June 2017: *Ummmm...one?*

Temporal Proximity

- Courts keep saying it's not enough but....
 - *Degner v. Juneau County (W.D. Wis. 3/5/18)*
 - Employer argued that performance issues discovered during FMLA leave were “final straw” that led to termination after leave
 - Years of inaction on performance issues and solid reviews undermined employer’s argument and created triable issues
 - *Valle v. Frank Martz Coach Company (M.D. Pa. 11/16/17)*
 - *Fred Walpool v. Frymaster, LLC (W.D. La 11/16/17)*
 - *Woods, v. START Treatment & Recovery Centers, Inc. (2nd Cir., 7/19/17)*

***This is Why We
Train Our Employees
on the FMLA***

Boadi v. Center for Human Dvpmnt.

(D. Mass. Sept. 2017)

- Grace hospitalized due to sudden mental health issues
- Son reported hospitalization, HR sent FMLA paperwork
- Supervisor to son: can't call on mom's behalf, don't call again
- Drafted termination letter for NC/NS; another supervisor signed letter
- Grace released from hospital, certification supporting leave for 1 mo., but terminated a short time later after submitting certification
- Jury:
 - Grace entitled to leave, son gave notice, no good basis for termination
 - Lost wages and liquidated damages over \$284,000

Stewart v. Wells Fargo

(N.D. Ala. Mar. 2017)

- Debby: interacted with clients, sales quota
- Clients complaining, met 11% of sales quota
- Debby requests leave after being warned about performance
- Debby returns: more client complaints, poor sales numbers, and not trying anymore
- Boss in an email: Outlines performance issues, states termination “justified because ‘Debby submits a request for medical leave’”

Takeaways:

- FMLA 101
- How does Debby compare with other employees?

Wink v. Miller Compressing Co.

(7th Cir. 2017)

- Tracy approved to work from home 2 days/wk. to care for autistic son; time not worked = FMLA leave
- Employer changed “work-at-home” policy; Tracey to report next day
- Tracy: could not find care for her special needs child this quickly; reported to work, but left early to care for son
- Tracey terminated; HR: your FMLA only covered treatment and therapy
- Jury award: \$120,000k+ (back pay and liquidated damages)

Perry v. Isle of Wight County

(E.D. Va. Aug. 2017)

- Lisa injured herself at work, fractured shoulder
- Out of work through July 31; extended to August 4, but Lisa did not inform employer of extension
- Policy:
 - Failure to report to work after leave ends results in resignation
 - But: call-in policy allowed employees up to 4 days to report absence
- Court: Lisa entitled to reinstatement since she followed call-in policy
- \$747,000+ for back pay, benefits, liq. damages, front pay



***Beyonce, well,
Because it's Beyonce!***

Jackson v. BNSF Railway Co.

(N.D. Tex., Aug. 2017)

- Michelle: overwhelmed by the volume of work
- Put on PIP, took FMLA leave shortly thereafter and remained out of work with no estimated return date
- While on leave, Michelle attended a Beyoncé concert . . . in the employer's luxury suite
- Manager: please report to work to explain yourself
- Michele did not respond, terminated
- Court: Honest suspicion of abuse, Michele refused to cooperate, FMLA claims dismissed

FMLA Class Actions

Class or Collective?

Carrel v. MedPro Group, Inc. (N.D. Ind. 4/26/17)

Butler v. Ill. Bell Tel. Co. (N.D. Ill. 2/14/08)

Loy v. Motorola, Inc. (N.D. Ill. 11/23/04)

Andrews v. CSX Transportation (U.S.D.C. FL 8/2/10)



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