

NEW ADA AND FMLA ISSUES

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I. Introduction

- A. Three federal statutes often come into play when employers are faced with the issue of how to treat certain absences from work. These federal laws are:
 - 1. Title I of the Americans with Disabilities Act (“ADA”),
 - 2. The Family Medical Leave Act (“FMLA”), and
 - 3. The Pregnancy Discrimination Act (“PDA”).
- B. Initially, most employers focus on the basic changes necessary to comply with these statutes. Now that they have been in effect for awhile, attention is turning to the more complex issues employers must address to bring their policies and procedures into compliance with these statutes.
- C. This outline will focus on the interplay between the ADA, FMLA, and the PDA. It will also look at the interplay between worker’s compensation and these statutes.

II. ADA

- A. Definitions and requirements.
 - 1. 15 or more employees.
 - 2. Disability: physical or mental impairment which substantially limits one or more of an individual’s major life activities, a record of such an impairment, or being regarded as having such an impairment.
 - 3. ADA requires employers to make “reasonable accommodations” for disabled employees who could, with reasonable accommodation, do the “essential functions” of their position, unless it would result in undue hardship to the business.
- B. Disability.
 - 1. For a condition to be a disability, it must substantially limit one or more major life activities.
 - 2. It must be a condition which limits a broad range of jobs – not just one job.
 - 3. An open question is whether working is a major life activity.

- C. Qualified.
 - 1. To be qualified a person must be able to perform the essential functions of his/her job.
 - 2. A person is not qualified where the proposed accommodation requires the employer to reassign the essential job functions.
- D. Reasonable accommodation.
 - 1. An employer must make reasonable accommodations to enable an employee to perform the essential functions of his/her job.
- E. Undue hardship.
 - 1. The only exception to reasonable accommodation is where the reasonable accommodation would be an undue hardship.
- F. What is reasonable accommodation?
 - 1. An employer is not required to create a new job.
 - 2. An employer is not required to accommodate excessive absenteeism.
 - 3. An employer is not required to allow the employee to come in late.
 - 4. An employer is not required to give the employee indefinite leave.
- G. Indefinite leave.
 - 1. An employer is not required to give indefinite leave based on the employee's hope that the condition will improve. Taylor v. Pepsi-Cola, 196 F.3d 1106 (10th Cir. 1999).
 - 2. An employee must demonstrate the expected duration of the leave when requesting leave. Cisneros v. Wilson, 226 F.3d 1113 (10th Cir. 2000).
- H. Where the employee requested leave longer than the policy allows.
 - 1. It may be a reasonable accommodation.
 - 2. The employer needs to make an individualized assessment before making a decision as to whether to give a leave.
 - 3. Garcia-Ayala v. Lederal Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000).
- I. Requirements.
 - 1. An employer may be required to restructure the job.

2. An employer may be required to provide assistive devices (e.g., different desk, adaptive technology).
3. The employer may be required to include job restructuring for part-time work or modified work schedules. Steele v. Thiokol Corp., 241 F.3d 1248 (10th Cir. 2001).
4. In one case, the court found that an employee's major life activity of working with others was not substantially impaired by her obsessive-compulsive disorder. Therefore, the court found she was not disabled. Doebele v. Sprint, 342 F.3d 117 (10th Cir. 2003). In Doebele, the plaintiff was bi-polar. The company terminated her because of inappropriate interactions with co-workers. The court found that it was a fact question as to whether her termination was motivated by the fact that the supervisors regarded her as substantially limited from a broad class job.
 - a. Significance. The court recognized that interactions with co-workers and communicating with others were considered major life activities.
 - b. A further significance of Doebele was that it protected both disability and disability-related misconduct as long as they were not a direct threat. In the past, this conduct, even if disability-related, was not necessarily protected.

J. Procedure.

1. The employee and employer engage in an interactive process. If the employee does not engage in the interactive process, then he/she hasn't established any objections.
2. An employer should evaluate vacant positions.
3. The employer should evaluate all vacant positions to see if the employee meets the qualifications.
4. An employer should evaluate an employee's ability to perform the essential functions of the proposed job.

K. The employee's responsibility.

1. If the employee wants to be reassigned, the employer must identify vacant positions for which the employee is qualified. Frazier v. Simmons, 90 F. Supp. 2d 1221, 1225 (D. Kan. 2000).

L. Direct threat.

1. It is not just a threat to others; it also includes a threat to oneself.
2. An employer is entitled to rely on the opinion of the company doctor as long as its reliance is reasonable. Chevron v. Echazabal, 122 S.Ct. 2045 (2002) (upholding EEOC regulation interpreting the "direct threat" affirmative defense under the Act, which allows an employer to refuse to hire an individual when, because of a disability, the job would pose a direct threat to the health of the individual).

M. Threat to others.

1. Tate v. Farmland Indus., Inc., 268 F.3d 989 (10th Cir. 2001).
 - a. The employee was not qualified for the job because he could not meet the physical requirements of operating a commercial motor vehicle because of the anti-seizure medication he was taking.
 - b. The employer followed the Department of Transportation regulations.

N. The district court.

1. The employer must demonstrate that it made an individualized assessment of the employee's ability to perform the essential functions.
2. It must be based on the most current medical knowledge.

O. Factors to be considered.

1. The duration of the risk.
2. The nature and severity of the potential harm.
3. The likelihood that potential harm will occur.
4. The imminence of the potential harm.

P. Mental health issues.

1. There are various opinions on different mental health issues.
 - a. Bi-polar is not a disability where the employee could not identify substantial limitations on any major life activity.
2. The employee's sleeping problems were solved with medication. Williams v. Hallmark Cards, No. 98-04030, 2001 WL 617821 (10th Cir. June 6, 2001).
3. The employee did not demonstrate any urination problems.

Q. Depression.

1. This condition is not a disability where there were no major life activities affected. Dixon v. Regents of the University of New Mexico, No. 98-725, 2000 U.S. App. LEXIS 25139 (10th Cir. Oct. 6, 2000), cert. denied, 532 U.S. 923 (2001).
2. A report from a vocational expert saying the employee is disabled doesn't mean the employee is disabled where there is no indication of the number of jobs the employee could not perform. The vocational rehabilitation expert disregarded the employee's college degree. Boykin v. ATC/Vancom, 247 F.3d 1061 (10th Cir. 2001).

R. Medical leave.

1. Just because an employee was put on medical leave does not mean that the employer regarded the employee as disabled. Yeske v. King Soopers, No. 98-2516, 2001 U.S. App. LEXIS 15512 (10th Cir. July 2, 2001).
- S. McKenzie v. Dovala, 242 F.3d 967 (10th Cir. 2001).
1. A sheriff had post-traumatic stress disorder from childhood sexual abuse. She was off work, 3/12 months. Before going out on leave, she fired shots into her father's grave.
 2. The department did not rehire her after she was off work.
 3. The department did not do a psychiatric examination before deciding not to rehire her.
 4. The court said the jury must decide if there was a claim based on a perceived disability.
 5. The employee also had a claim based on her record of disability, that a jury should decide (the sheriff's decision was based on knowledge of past problems, not current information).
- T. Medical examinations.
1. The ADA does not allow medical exams pre-offer.
 2. The employer can do post-offer pre-employment examinations as long as it does it for all.
 3. Medical exams include psychological tests, so that type of test must be done post-offer.
- U. Behavioral tests.
1. Typically, behavioral tests are not medical examinations because the test is not looking for information on medical impairment.
 2. Physical agility tests are not medical examinations.
- V. Tousignant v. County of San Bernardino, No. SCV 43233 (San Bernardino County Super. Ct. Dec. 10, 2002).
1. The employer required its employees to take a physical agility test to be a counselor.
 2. When the plaintiff failed the physical agility test, she was not hired.
 3. The jury award was \$1,445,072.
 4. The jury found that the physical agility test was not related to the essential functions of the job.

- W. Required medical examinations during employment.
1. The jury needs to examine the reasons.
 2. The medical exam must be job-related and consistent with business necessity.
 3. See Borgialli v. Thunder Basin Coal, 235 F.3d 1284 (10th Cir. 2000) (the employee is no longer qualified to perform their current position due to their disability; this does not preclude a claim for an accommodation of reassignment). See also Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999). In Smith, the employee performed light assembly work and came into contact with various chemicals, from which the employee developed muscular injuries and dermatitis that caused a permanent disability. The court held that although the employee was not qualified for her current position, she had a claim for reassignment. Id. The Tenth Circuit stated that both the employer and employee should participate in the interactive process of accommodation. The court considered the following factors in determining whether the employer adequately attempted to reassign the employee: (1) the scope of the disability; (2) the limitations on the employee's ability to work; and (3) whether the employee would be qualified, with or without the reasonable accommodation, for another position. Id. An employer should reassign an employee to existing vacant positions and positions the employer reasonably anticipates will become vacant in the fairly immediate future. Id. The ADA requires reassignment within a "reasonable amount" of time. Boykin v. ATC/Vancom, 247 F.3d 1061 (10th Cir. 2001) (the employer did not violate the ADA by offering a position that became available six months after discharge).

III. The FMLA

- A. In general terms, the FMLA requires employers covered by the Act to give covered employees up to 12 weeks of unpaid leave in a 12-month period to employees who need time off for the birth or placement of a child for adoption or foster care, for a serious health condition that prevents the performance of the essential functions of the employees position, or for the serious health condition of a parent, spouse, or child of the employee where the employee is needed to care for the family member. This statute is administered by the DOL.
- B. Not all employers are covered by the FMLA. Only those employers who have employed over 50 employees at a worksite for 20 workweeks in the current or preceding calendar year are covered by the FMLA. Moreover, not all employees of covered employers may be entitled to FMLA leave. To be eligible for FMLA, the employee must have been employed by the employer for 12 months (not necessarily continuously) and for 1250 hours in the 12-month period immediately preceding the request for the leave. The following are recent cases in Colorado and the Tenth Circuit on the FMLA.
1. The employer has the burden of proving that the same employment action would have been taken even if the employee was not on leave. 29 C.F.R. § 825.216(a); Smith v. Diffie Ford-Lincoln-Mercury, Inc., 298 F.3d 955 (10th Cir. 2002) (approving burden allocation).
 2. An employer must give the employee written notice, within one or two days after a leave request, if feasible, when leave is being treated as FMLA leave, but an employer is not required to give notice of an employee's prior use of FMLA leave. Krauss v. Catholic Health Initiatives Mtn. Region, 2003 WL 193732 (Colo. App.

2003); see also Ragsdale v. Wolverine World Wide, Inc., No. 00-6029, 535 U.S. 81 (2002) (striking down an FMLA regulation stating that if an employee is not notified that leave will be considered as FMLA leave, then that leave will not count towards the FMLA entitlement). In Krauss, the court found that the employer did not interfere with the FMLA rights because she could not have acted differently even if the employer had informed her properly because she still could not return to work at the end of the 12-week period. Id.

3. An employee who has actual knowledge of an employer's requirements for taking FMLA leave can be disciplined for failing to comply with the employer's notice requirements to call in his absences on a daily basis. DeLong v. Trujillo, 25 P.3d 1194 (Colo. 2001). Moreover, an employer may assert that an employee was not covered by FMLA if the employee failed to produce medical certification of the serious health condition. Id.
4. The Tenth Circuit held that there was enough evidence to support a jury's conclusion that the employer had an honest belief that the employee was not on FMLA leave at the time it terminated her, where the employee had not given accurate contact information to the employer and had not obtained a certification of the serious health condition, even though she was aware that she was required to do so. Medley v. Polk Co., 260 F.3d 1202 (10th Cir. 2001).
5. In the Tenth Circuit, an employee who requests or is on FMLA leave has no greater protection against termination for reasons not related to his or her FMLA request or leave than the employee did before submitting the request. Renaud v. Wyoming Dept. of Family Serv's, 203 F.3d 723, 732 (10th Cir. 2000). An employee may be terminated if the action would have been taken in the absence of the FMLA request or leave. Id. In Renaud, an employee on FMLA leave for treatment of alcoholism was properly terminated for having been drunk while on duty. Similarly, in McBride v. Citgo Petroleum Corp., 281 F.3d 1099 (10th Cir. 2002), the court dismissed an employee's claim where she alleged that she did not receive her job back because of work performance problems caused by her illness.

IV. The Pregnancy Discrimination Act

- A. The PDA is a definitional amendment to Title VII that Congress enacted to include pregnancy-based discrimination in Title VII's prohibition of gender-based employment discrimination. To achieve that end, Congress amended Title VII to define the terms "because of sex" or "on the basis of sex" to include pregnancy, childbirth, or related medical conditions. The PDA applies to employers with 15 or more employees.
- B. The PDA essentially requires employers to provide pregnant women with the same work opportunities that it provides to other individuals with a similar capacity to work. In other words, employers must accommodate the needs of pregnant women so as not to treat pregnant employees differently from other employees who are similar in their ability or inability to work. For instance, in EEOC v. Ackerman, Hoods & McQueen, 956 F.2d 944, 948 (10th Cir. 1992), a pregnant worker was entitled to be excused from overtime work because the employer had an unwritten policy of granting work schedule requests for personal and medical reasons for other employees.
- C. Thus, employers must ensure that their policies and procedures are applied to pregnant workers in the same manner as the policies and procedures are applied to other employees with similar needs and restrictions on their ability to work. For instance, if

other employees are granted excused absences for personal and medical needs, then pregnant employees must be afforded the same treatment.

V. Interrelationship of the PDA, FMLA and ADA

- A. In many respects, FMLA is an extension of the PDA. In other words, FMLA provides pregnant workers with additional protections and benefits over and above the basic prohibition against pregnancy discrimination in the PDA. Thus, pregnant workers fall under the coverage of FMLA (assuming the requisite number of employees).
- B. FMLA differs in several respects from the ADA, including coverage, impact of essential functions of the job, difference in the benefits provided, whether or not leave may be taken on an “intermittent” or “reduced schedule” basis, continuation of benefits during the leave, and permissible medical inquiries.
- C. Coverage.
 - 1. Protected conditions are not necessarily the same under FMLA and the ADA. Some conditions which are exempt under the ADA are covered by the FMLA (and/or the PDA). For example, pregnancy is not considered a disability under the ADA (see Richards v. City of Topeka, 173 F.3d 1247 (10th Cir. 1999)), but is a basis for FMLA leave (and for protection under the PDA).
- D. Essential job functions.
 - 1. Employers are not required to accommodate excessive absenteeism. The Tenth Circuit has held that under the ADA, attendance is an essential function of any job, and an employee's failure to attend work regularly rendered her unqualified for the position. Cisneros v. Wilson, 226 F.3d 1113 (10th Cir. 2000), overruled on other grounds, Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001). Punctuality is also an essential job function. Martinez v. Pacificorp, 211 F.3d 1278 (10th Cir. 2000).
 - 2. An employee may entitled to protection under the ADA if an employee shows that she is disabled and that her disability substantially restricts a major life activity. In some cases working may be a major life activity. See Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. ____, 122 S.Ct. 681 (2002) (the central inquiry for determining disability under the ADA is whether the claimant is unable to perform tasks that are central to daily life). The employee must prove that she is significantly restricted in her ability to perform a broad range of jobs, not just the particular job she holds. Rakity v. Dillon Cos., 302 F.3d 1152 (10th Cir. 2002); Nielsen v. Moroni Feed Co., 162 F.3d 604 (10th Cir. 1998); see also Dilley v. SuperValu, Inc., 296 F.3d 958 (10th Cir. 2002) (discussing how lifting restrictions limited ability to work). The inability to work for a particular supervisor does not prevent an employee from performing a wide range of jobs. Simon v. ATT Corp., 117 F.3d 1173 (10th Cir. 1997).
- E. Leaves of absence.
 - 1. The fact that the FMLA allows 12 weeks of leave does not limit the amount of leave which may be considered a reasonable accommodation under the ADA to 12 weeks. Conversely, an employee not eligible for FMLA leave need not be given 12 weeks of leave under the ADA.

2. When considering an employee's request to "tack on" a reasonable accommodation leave under ADA, the employer can take into account corrective measures in determining whether an employee is disabled under the ADA. Sutton v. United Airlines, 119 S.Ct. 2139 (1999) (myopic applicants were not disabled within the meaning of ADA because they could fully correct their impairment with corrective lenses); Pack v. K-mart, 166 F.3d 1300 (10th Cir. 1999) (sleep disturbance is not a disability for the purposes of ADA when the mitigating effects of medication are taken into account), cert. denied, 120 S. Ct. 45 (1999).
3. A reasonable accommodation under the ADA is one which presently, or in the immediate future, enables the employee to perform the essential functions of the job, and indefinite leave is not a reasonable accommodation. Taylor v. Pepsi Coal, 196 F.3d 1106 (10th Cir. 1999) (the employer did not violate the ADA by denying the employee additional time off or reassignment where the employee had been absent for one year and never contacted his employer and could not identify which tasks he was capable of performing).

VI. Workers' Compensation

- A. An employee injured on the job may be covered by the ADA and FMLA, as well as workers' compensation. In considering absenteeism policies, the interrelationship of the state and federal statutes should be taken into account.
- B. Many injuries under the workers' compensation law qualify as a serious health condition under the FMLA, but not necessarily all injuries. A workers' compensation disability does not necessarily qualify a worker for ADA protection. An employer should follow the guidelines pursuant to the FMLA and ADA to determine if an employee is covered under the statute.
- C. A workers' compensation absence and an FMLA leave may run concurrently subject to proper notice and designation by the employer. See 29 C.F.R. § 825.207(d)(2). Many employers offer "light duty" jobs within the employee's temporary restrictions until the employee is either released to return to work or reaches maximum medical improvement. Under the ADA, it may be a reasonable accommodation for the employer to reassign an employee to a light duty position. See EEOC Technical Assistance Manual, Ch. IX. When an employer places an employee in the light duty position, the employer must gauge its accommodations in relation to the light duty position. Id. Under the FMLA, an employer may not require participation in a return-to-work program while the employee is on FMLA leave. 29 C.F.R. § 825.702. Nonetheless, an employee who elects FMLA leave instead of light duty may forfeit her rights under workers' compensation. C.R.S. § 8-42-105(2)(d).

VII. Reinstatement Rights under the ADA and FMLA

- A. Under the ADA, the employer must reinstate an employee to the same job unless it is an undue hardship.
- B. Even if the employer can't hold the job open because of undue hardship, the employer must look to see if there is a vacant position available to which the employee can be reassigned.
- C. FMLA reinstatement requirements.

1. It must be the same or equivalent position.
2. The only exception is if the employee is a key employee.
3. The employer must continue the employee's health insurance on the same conditions as before.
4. Employee reimbursement – if the employee fails to return after a leave unless it is for the same health condition, the employee must reimburse the employer.

VIII. Conclusion

The ADA, FMLA, and the PDA will apply to many employment issues received by an employer. It is therefore very important that an employer identify and evaluate all potential conflicts among these statutes before making a leave decision, and apply attendance policies in a uniform manner.