

The FMLA, ADA, & PMLA Leaves of Absence and Accommodations

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Applicable Laws

Americans with Disabilities Act (ADA)

- Qualified EEs are entitled to reasonable accommodations unless it causes the ER an undue hardship

Family Medical Leave Act (FMLA)

- Eligible EEs receive unpaid time off for qualifying reasons

Michigan Paid Medical Leave Act (PMLA)

- Eligible EEs received paid time off for qualifying reasons
- **AND...Don't forget your CBAs and policies!**

Who is Protected?

FMLA

- (1) employed by the County for at least one year; AND
- (2) worked at least 1,250 hours in 12 months immediately preceding the leave; AND
- (3) has a qualifying reason for leave.

What Do Employees Get – FMLA

- Generally 12 workweeks of unpaid time off in a rolling 12 month period;
- 26 weeks for military caregiver leave;
- Time off can be taken intermittently;
- Maintenance of health benefits during leave;
- Reinstatement to same or substantially equivalent position;
- No discrimination or retaliation.

Qualifying Reasons for Leave FMLA

- Employee's serious health condition;
- Serious health condition of parent, spouse or child;
- Birth, adoption, or placement of child w/in 12 mos of birth, adoption or placement;
- Serious injury or illness of family servicemember;
- "Qualifying exigency" of family servicemember.

FMLA COVERED CONDITIONS – Serious Health Conditions (SHC's)

An illness, injury, impairment, or physical or mental condition that involves:

- (1) “inpatient care”; or
 - overnight stay in a hospital, hospice, or residential care facility and any period of incapacity or subsequent treatment
- (2) “continuing treatment by a health care provider”
 - A period of incapacity of more than 3 consecutive days, and any subsequent incapacity related to same condition, that also involves:
 - (1) In-person treatment 2 or more times w/in 30 days of the first day of incapacity (the first must occur w/in 7 days); or
 - (2) In-person treatment by a health care provider on at least one occasion (first must occur w/in 7 days) resulting in a “regimen of continuing treatment” under supervision of a health care provider.

FMLA COVERED CONDITIONS – Serious Health Conditions (SHC's)

“Regimen” of continuing treatment does NOT include routine physicals, eye exams, dental exams

- And does NOT generally include simply taking over-the-counter meds, exercise, drinking fluids, or bed rest.
- Usually DOES involve a course of prescription meds or therapy
- NOTE: “health care provider” includes PAs and nurse practitioners

FMLA COVERED CONDITIONS – Serious Health Conditions (SHC's)

A SHC also includes:

- Any incapacity due to pregnancy or absences for prenatal care;
- Any incapacity or treatment due to chronic conditions;
- Any period of incapacity due to permanent or long-term conditions for which treatment may not be effective;
- Any period of absence due to receiving multiple treatments or recovery due to restorative surgery or a condition that would likely result in an absence of more than 3 days in the absence of medical treatment;
- Treatment for substance abuse.

FMLA COVERED CONDITIONS – Serious Health Conditions (SHC's)

Any incapacity due to pregnancy or absences for prenatal care

- Treatment during absence not required and absence need not last more than 3 days
 - Example = incapacity due to severe morning sickness.
- The spouse (not boyfriend) is entitled to FMLA leave if needed to care for pregnant spouse who is incapacitated or if needed to care for her during her prenatal care

FMLA COVERED CONDITIONS – Serious Health Conditions (SHC's)

Any incapacity or treatment due to chronic conditions which:

- (1) Require periodic visits (at least twice a year) for treatment
- (2) Continue over an extended period of time (including recurring episodes of a single underlying condition); and
- (3) May cause episodic rather than a continuing period of incapacity (e.g. , asthma, diabetes, epilepsy, etc.).

Applies even if the EE isn't receiving treatment during the absence or absent for more than 3 days

FMLA COVERED CONDITIONS – Serious Health Conditions (SHC's)

Leave for treatment of substance abuse if it requires:

- (a) inpatient care, or
- (b) continuing treatment by a health care provider
 - A period of incapacity of more than 3 days + treatment

Absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave

Treatment for substance abuse does not prevent ER from taking action against EE for violating substance abuse policy.

FMLA COVERED CONDITIONS – Serious Health Conditions (SHC's)

Ordinarily the following are NOT considered SHC's:

- treatments for plastic and other cosmetic surgery
- common cold
- flu
- ear aches
- upset stomach
- minor ulcer
- headaches (other than migraine)
- routine dental or orthodontia problems, periodontal disease, etc.,

HOWEVER...all conditions could be SHC's if inpatient hospital care is required or unless complications develop

FMLA COVERED CONDITIONS – Birth or Adoption of Child

Leave for Birth or Adoption of Child

- Both mother and father are entitled to up to 12 weeks
 - BUT - Spouses working for same employer are limited to 12 weeks total to spend time with healthy baby. Each is still entitled to up to 12 weeks for other covered conditions
- Must be taken within one year of birth or placement
- Leave may be taken before adoption, if necessary to make sure adoption will proceed
 - E.g., to attend counseling, appear in court, consult with attorney or doctor of birth parent, submit to physical examination, or travel to another country
- NOT required to grant intermittent leave for healthy child

FMLA COVERED CONDITIONS – Military Servicemember Leaves

Qualifying exigency” arising out of active duty or call to active duty of EE’s spouse, parent or child;

OR

To care for a covered military servicemember who has or is being treated for a serious injury or illness if the EE is the spouse, son, daughter, parent, or next of kin of the covered servicemember.

Who is Protected?

ADA

*“qualified individual with
a disability”*

Protected Conditions - ADA

What conditions are protected?

- ADA:
 - impairment that **substantially limits a major life condition**
 - record of having an impairment
 - regarded as having an impairment

Protected Conditions - ADA

ADA says that:

- “disability” must be construed broadly; and
- the focus should not be on analyzing whether a particular individual’s impairment is or is not a “disability”

“Major life activities” include “major bodily functions”, such as:

- normal cell growth, immune system, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, reproductive

Must consider condition without “mitigating measures” (except as to ordinary eyeglasses and contact lenses)

Episodic medical conditions

“Episodic or cyclical impairments, or impairments that go into remission” are disabilities even during remission if they would substantially limit a major life activity when active.

- Examples: depression, bipolar disorder, Post-Traumatic Stress Disorder, other psychiatric conditions, epilepsy, cancer, etc.

Protected Conditions - ADA

Still...the person must be otherwise “qualified”

- Must meet legitimate skill, experience, education, or other requirements of an employment position and be able to perform the essential functions of the position with or without reasonable accommodation.

Otherwise Qualified

- *Gross v. Peoples Gas Light & Coke Co.*, 2022 WL 4599369 (N.D. Ill., Sept. 30, 2022): Plaintiff could not perform the essential functions of his job, which required that he occasionally engage in outdoor activities such as field training, when his doctor said that he could not walk, stand, or climb.
- *Williams v. MTA Bus Co.*, 44 F.4th 115 (2nd Cir. 2022): Plaintiff was not entitled to an interpreter for a pre-employment examination where he was not otherwise qualified for the position to which he was applying because he did not have the requisite experience for the position he was seeking. “Qualified” means that the individual can perform the essential functions “of the employment position that such individual holds or desires,” not simply qualified to take the test for the position.

Determining Essential Functions

Factors to consider when determining whether a function is essential:

- Employer's judgment
- Job descriptions
- Amount of time spent performing the function
- Consequences of not requiring the person to perform the function
- Terms of a collective bargaining agreement
- Work experience of others who have had, or currently hold, the same or similar positions

Substantial Limitation

- *King v. McDonough*, 596 F.Supp.3d 206 (D. Mass. 2022)
 - Plaintiff's assertion that his ADD caused him to "miss details" and "get distracted easily" was not sufficient to establish a substantial limitation of a major life activity.
- *Shields v. CreditOne Bank, N.A.*, 32 F.4th 1218 (9th Cir. 2022)
 - Impairment that substantially limits a major life activity does not require showing long term effects. EEOC regulations specifically state that a condition lasting less than 3 months can be substantially limiting. While duration of an impairment is a factor, there is no rule excluding short term impairments, "which may be covered if sufficiently severe." Where following bone surgery the plaintiff could not fully use her shoulder, arm, or hand, and could not type, write, tie shoes, or lift a hairdryer, the Employer's to dismiss on the pleadings was denied.

“Reasonable” Accommodations

- Reasonable = whether the benefits outweigh the costs
- Some courts look to what other employers are doing in similar circumstances
- The accommodation must also be effective to be reasonable

Accommodation Examples

Physical modifications to make worksite accessible

Providing aids, devices, readers, interprets, equipment

Modification of policies/rules

Modification of job

- Restructure to part-time or modified schedule
- DO NOT need to remove essential functions or lower production standards (qualitative or quantitative)

Work from home (telecommute)

Reassignment to vacant position

- DO NOT need to create a new position, allow for bumping (unless otherwise allowed), override seniority rules, or promote
- Person must be qualified

Leave of Absence

- Need not be indefinite, but cannot cut off until unreasonable or undue hardship
- Bright line rules not allowed

Duty to Accommodate

Employers must provide “reasonable” accommodations to qualified individuals with disabilities that would enable them to perform the essential functions of their jobs, unless it would cause an “undue hardship”.

Duty to Accommodate

If there is no reasonable accommodation that can be provided that would enable the employee to perform his/her essential job functions, the person is not *qualified* for the job and is not entitled to protection under the Act.

Duty to Accommodate

- The accommodation does not need to be one of the employee's choosing, as long as its reasonable
- No duty to accommodate “regarded” as disabled, but may need to accommodate “record of” disabled
- No duty to accommodate associational disability (e.g., someone who has a family member with a disability; but remember FMLA)

Accommodation Process

What triggers the duty to accommodate:

- The employee requests an accommodation
 - EE need not mention the ADA or use the words “reasonable accommodation.” He/she needs only to request a change or modification based on a medical condition.
- Employer (1) knows that the employee has a disability, and (2) reasonably believes that the employee may need an accommodation.
- What happens after the duty is triggered?
- Employer must engage in the “interactive process”
- Purpose is to determine whether an accommodation is truly necessary because of a disability

King v. Steward Trumbull Memorial Hospital, Inc., 30 F.4th 551 (6th Cir. 2022)

A leave of absence can be a reasonable accommodation. An employer is not required to grant indefinite leave, but a request for 5 weeks is not a request for indefinite leave. The employer cannot establish undue hardship where policies explicitly allow for a leave of absence up to 12 weeks.

Modification of “Work” Schedule

Modification of work schedule:

- E.g., allowed to arrive late, leave early, take breaks, flex schedule, part-time schedule, change shifts, etc.

Issues:

- Would the change affect the employee’s ability to perform essential functions?
- Many courts have said that you are not required to create a part-time position where you don’t otherwise have any.

The Interactive Process

- Analyze essential v. non-essential functions of the position.
- Talk directly with employee.
 - You can ask: the nature of the condition, its severity, expected duration, life activities it limits, extent of limitations with respect to ability to perform essential functions.
- Ask what accommodation(s) he/she is seeking.
- Ask for medical documentation to support the need.
 - Medical must be accepted unless contradicted by second medical opinion
 - Do not overuse the independent medical exam. Remember – the focus is not on whether the condition actually qualifies as a disability anymore.
- Suggest alternate accommodations that might be reasonable (effective).
 - Remember - The employee's desired accommodation doesn't have to be provided if another one exists that is better for the employer.

DOCUMENT, DOCUMENT, DOCUMENT

Interactive Process

Owens v. Georgia Governor's Office of Student Achievement, 52 F.4th 1327 (11th Cir. 2022)

An employer does not have any duty to engage in the interactive process until the employee makes a specific request for an accommodation. Plaintiff did not trigger the duty to accommodate when she requested telework following childbirth, even though she advised the employer of childbirth-related complications, because she did not say what the disability was or how the accommodation (teleworking) would address the limitations.

Dansie v. Union Pacific Railroad Co., 42 F.4th 1184 (10th Cir. 2022)

A reasonable jury could find that Defendant failed to engage in the interactive process when it did not determine exactly what Plaintiff's limitations were and did not explore any accommodations, while Plaintiff suggested several possible accommodations.

“Undue Hardship”

- Undue Hardship = “significant difficulty or expense”
- Impact on operations is more important than financial cost
- Must be assessed on a case-by-case basis

Undue Hardship

EEOC's list of factors to be considered in determining whether leave would cause an undue hardship:

- amount of leave required.
- frequency of leave.
- whether there is flexibility regarding days on which leave is taken.
- whether leave will be intermittent and unpredictable.
- impact of the leave on coworkers and on whether the specific job duties can be performed timely and appropriately during leave.
- impact on the employer's operations and its ability to serve customers/clients appropriately and timely (considering employer's size).

“Direct Threat”

- “Direct Threat” = “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
- A "significant" risk is a high; not just slightly increased.
- Must be based on an individualized medical assessment of the employee’s ability to safely perform the functions of the job.
- Must be based on objective evidence.

Brooks v. Avancez, 39 F.4th 424 (7th Cir. 2022)

Plaintiff could not establish pretext for disability discrimination when she was terminated after telling Human Resources that she had PTSD “and anything can happen,” which the Company interpreted as a threat.

Always Be Mindful of CBA Restrictions on Assignments and Essential Functions

Sarkisian v. Austin Preparatory School, 2022 WL 17683765 (D. Mass. Dec. 6, 2022)

- (1) Teaching, attendance in person, was essential function for in-person school teacher who also monitored activities, acted as advisor, etc.
- (2) School was not required to provide extended and continuing leave of absence with no end date after multiple extensions of leave time, no accommodation proposed by Plaintiff or physician other than additional leave (“total temporary disability”)
- (3) Plaintiff said if she had known her position was in jeopardy, she would have come back in a wheelchair; court said school could reply on what Plaintiff and doctor had communicated

Glover v. DeJoy, 2022 WL 4451016 (E.D. Pa. Sept. 23, 2022)

Plaintiff's failure to accommodate claim was rejected where (1) Plaintiff submitted documentation saying that he was fit for duty with no accommodation needed, (2) Plaintiff later submitted medical documentation that his stress and anxiety were caused by his grandfather's death, (3) Plaintiff was not eligible for a permanent assignment to a particular mail station pursuant to the collective bargaining agreement, and (4) Plaintiff was unwilling to discuss alternate accommodations and quit showing up for work.

Tate v. Dart, 51 F.4th 789 (7th Cir. 2022)

- (1) Plaintiff was correctional officer in jail, suffered back injury, had restrictions: “avoid situations where there is a significant chance of violence or conflict”
- (2) Promoted to sergeant, allowed to work in unit that had relatively low possibility of violence or physical conflict
- (3) Then sought promotion to lieutenant, but position required being “able to manage regular, violent situations involving inmates”
- (4) Plaintiff suggested assignment to areas where outbreaks were less likely. Defendant and court – but incidents still happen, and you have to be able to deal with them (“like being able to use a gun, even if it is never necessary”)
- (5) Employer couldn’t give Plaintiff easiest assignments – would violate the CBA, which is never a reasonable accommodation
- (6) The consequences of not being able to respond are huge

Blanchet v. Charter Communications, L.L.C., 27 F.4th 1221 (6th Cir. 2022)

Employer failed to reasonably accommodate plaintiff when it terminated her without reaching out to the third party administrator to determine the status of plaintiff's leave requests.

Gross v. Peoples Gas Light & Coke Co., 2022 WL 4599369 (N.D. Ill., Sept. 30, 2022)

Plaintiff, who could not performing the essential functions of his job, alleged that he was not given other jobs for which he was qualified, but failed to identify the disability status of people who got the job. The Court granted summary judgment as to those position where Defendant articulated reasons why others got the positions, but denied summary judgment as to those positions where Defendant simply stated that the successful applicants were “better.”

Powley v. Rail Crew Xpress, 25 F.4th 610 (8th Cir. 2022)

Case dismissed on Plaintiff's failure to accommodate claim where Plaintiff had been given numerous accommodations over the years but was denied his last request – to leave his dispatcher position and go back to driving – where Plaintiff did not provide a doctor's note or provide information indicating that the request was based on a disability.

Who is Protected?

PMLA

- “Non-exempt” employees in Michigan who are:
 - Full time; or
 - Part-time, but who work 25+ hrs/wk on average; or
 - Temporary, but who work > 25 weeks in a year
- County employees covered by an existing CBA as of effective date of PMLA (3/29/19) are not eligible until the CBA expires.

What Do Employees Get - PMLA

- 40 hours of paid leave per year to use for covered reasons
- Any form of paid time off can be used to satisfy this requirement as long as employees can use for any PMLA covered reason and family member
- County employees have PTO to be used for any reason, including PMLA covered reasons

Reasons for Leave - PMLA

- Employee or “family member’s” illness, injury, or preventative medical care
- Various reasons if the employee or the employee’s “family member” is a victim of domestic violence or sexual assault
- If the employee’s workplace is closed due to public health emergency or the employee needs to care for child whose school or place of care is closed due to public health emergency
- It is determined by a public health official that the employee or a “family member” is a public health risk due to exposure to a communicable disease

Who Is Covered Family Member?

ADA

- No accommodation for care of family member

FMLA

- Parent (employee's only)
- Spouse
- Child (under 18 unless disabled and incapable of self care, or leave for qualified exigency, serious injury or illness of service member)

PMLA

- Same as FMLA, **plus**:
 - Spouse's parent
 - Grandparent or grandchild
 - Sibling

Intermittent & Reduced Schedule Leave

ADA

Leave for unpredictable / unreliable attendance usually not reasonable and an undue hardship

FMLA

Must be allowed if medically necessary in maximum of ¼ hour increments because County allows PTO to be used in that increment

Not required in cases of leave to care for healthy newborn or newly adopted child (but employer can choose to provide)

PMLA

Can be used in ¼ hour increments

Process For Leave - ADA/FMLA

ADA

- No advance notice required
- Must engage in interactive process
- Can request documentation, IME, so long as medical inquiry is “job related and consistent with business necessity”

FMLA

- 30 days’ notice or as much as “reasonably practicable”
- Can enforce customary policies and notice requirements for requesting leave
- Can discipline for failure to follow notice policy
- DOL forms (15 days to return medical certification)
- Can get 2nd/3rd opinion

Process for Leave - PMLA

PMLA

Can enforce customary policies and notice requirements for requesting leave

Can discipline for failure to follow notice policy

Can require documentation of need for leave

Must give minimum of 3 days to produce documentation

Cannot require details of domestic violence, sexual assault, or medical condition to be disclosed

ALL

Medical information is confidential

Coordination of Leaves

ADA/FMLA

- Can require employee to use up paid leave while on leave (must bargain this for union employees) until STD or work comp benefits kick in, then optional

PMLA

- All paid leave (vacation, sick, personal, etc.) can count toward PMLA requirement so long as employee can use it for reasons covered by the Act
- Can and should be used for absences covered by ADA/FMLA
- Can also be used for absences for medical reasons that do not reach ADA/FMLA threshold

Reassignment

Employer must reassign an individual with a disability who no longer is able to perform a job's essential functions to an appropriate vacant position if one exists.

- Must be qualified and able to do essential functions.
- Could be vacant now or in immediate future.

Not required to:

- Bump another employee.
- Create a new position.
- Promote an employee



Coordination of Leaves

***ALWAYS CHECK THE
CBA CAREFULLY!***

Relationship between FMLA and ADA

Murphy v. District of Columbia,
590 F.Supp.3d 175 (D.D.C. 2022), supplemental ruling,
2022 WL 2643554 (D.D.C. Jul. 8, 2022)

Plaintiff filed a failure to accommodate claim based on the employer's failure to respond to his FMLA request; the employer argued that it did not get the necessary medical information from Plaintiff's physician until after the termination decision had been made. Initially, the Court questioned whether a request for FMLA leave is a request for accommodation, citing cases opining that the FMLA is for an employee who cannot work, and the ADA is for an employee who can work with accommodation. Following supplemental briefing, the Court ruled that an application for FMLA leave is not a request for accommodation in and of itself, but information could be conveyed in the application or related discussions that would constitute a request for accommodation, even if no "magic words" are used, and a leave of absence can be a reasonable accommodation.

Jackson v. Sprint/United Management Co., 599 F.Supp.3d 314 (D. Md. 2022)

A request for FMLA leave could be considered a request for accommodation such that evidence of animus toward the employee for requesting leave could support a claim of retaliation in violation of the ADA.

When Can You Terminate?

1. All FMLA must be exhausted
2. All PTO must be exhausted (typically)
3. Must determine after careful analysis that continued leave would not be reasonable and/or would cause an undue hardship
4. Must ensure CBA doesn't provide greater rights

Remedies – ADA & FMLA

ADA

- 300 days to file EEOC Charge, 90 days to file lawsuit after receiving Right to Sue letter
- Lost wages (past and future)
- Compensatory (e.g., emotional distress) and/or punitive damages (capped at \$300,000)
- Costs, interest, attorney fees

FMLA

- 2 years to file lawsuit (3 years if willful violation)
- Lost wages (past and future)
- Double damages for willful violation
- Costs, interest, attorney fees

Remedies - PMLA

- 6 months to file claim with LARA
- LARA Director to “investigate” and attempt to resolve through “mediation or other means”
- LARA may “impose penalties and ... payment of all PML improperly withheld”
- Fines up to \$1,000 for failing to provide PML
- Fines up to \$100 for posting violation (posters are available)
- No private right of action

Case Study # 1

Jack the Janitor has back problems and cannot lift anything heavy or stand for more than 30 minutes without a break for 6 weeks. His essential functions including heavy lifting.

Case Study # 1

1. Does he go on leave? Under what law?
2. At the end of 6 weeks, he needs another 6 weeks. Ok?
3. After 12 weeks, Jack comes back with another doctor's note – needs another 6 weeks. What do you do?
4. How long does the employer have to hold his job open?
5. The employer has a policy that an employee cannot remain on leave more than 26 weeks for any reason. At 25 weeks Jack brings in a note saying he can return without restrictions in 2 weeks. Do you let him?

Case Study # 2

Allie the Accounting Clerk has morning sickness and sometimes needs to start the day 1-2 hours late.

Case Study # 2

1. Is this covered by FMLA? ADA?
2. She wants to just use sick time, not FMLA – she is saving FMLA for when she has her baby. Ok?
3. Can the County tell her that if she is more than an hour late, she has to stay out all morning because it has already brought in a temp to cover for her?

Case Study # 3

Isaac the IT guy is a part-time employee with a child who has epilepsy. Isaac works on average 20 hours/week.

Case Study # 3

1. Is he covered by the ADA? FMLA? Why/Why not?
2. On September 1, 2019, Ian becomes full time and begins experiencing debilitating migraines. When can he start taking time off under the ADA? FMLA?
 - a) What do you need to know to answer that question?

Case Study # 4

Lisa meets with her supervisor. She tells the supervisor she is depressed since she was reassigned to a different department.

Lisa has been tardy to work lately however. In explaining her tardiness, Lisa stated that “it was all related to [her] current work environment created by [Eko,] ... includ[ing] a lack of leadership, direction, a lack of trust within the group, favoritism.”

Case Study # 4

Enough to trigger employer obligations under the ADA?

Hrdlicka v GM (6th Cir. March 23, 2023) 2023 WL 2604691

- *Burdett-Foster v. Blue Cross Blue Shield of Michigan*,” 574 F. App'x 672, 680 (6th Cir. 2014) (“Personality conflicts, workplace stress, and being unable to work with a particular person or persons do not rise to the level of a ‘disability’ or inability to work for purposes of the ADA.
- “In sum, Plaintiff made only a single, unsubstantiated statement that she was depressed without any corroborating medical evidence and without ever having sought medical help, and she consistently presented the issue as a workplace conflict, not a disability. Although a diagnosis is not necessary for an ADA claim to succeed, Plaintiff failed to present any of the relevant information” that this court has found pertinent to determining if an employer was placed on notice of a disability.”

Case Study # 5

Adam applies for FMLA on May 5, 2022 because of a heart condition. He is approved for intermittent FMLA on May 13, 2022; and he receives a letter that he is eligible to take the leave on May 22, 2022. For a period of time between May 26 to June 2 due to pneumonia, Adam was totally incapacitated and couldn't work. Adam calls the third-party administrator for the reporting absences and the company classified the absences as FMLA leave. Adam is terminated six days after his last reported absence.

Case Study # 5

Legal?

Maxwell v FCA, (6th Cir. March 21, 2023) 2023 WL 2636586

“Viewing the record in the light most favorable to him and drawing all reasonable inferences in his favor, there is a genuine dispute as to whether he was engaged in protected activity and whether FCA was aware of it. And there is no question that Maxwell's termination is an adverse employment action. Finally, we recently reiterated that the required causal connection between the protected activity and the adverse action can be established solely by temporal proximity, and so Maxwell's termination six days after his last absence is sufficiently close for summary-judgment purposes. Accordingly, Maxwell showed that there is a genuine dispute as to whether he established a prima facie case of FMLA retaliation.”

CASE STUDY # 6

Martin is a perfusionist—operates the heart/lung machine to keep blood flowing during surgery.

Martin had a major medical issue in which his kidneys were compromised, and he was heavily sedated. Martin's expected recovery was more than six months, based on medical records.

Plaintiff is terminated.

Ultimately, Plaintiff was released to return to work without restrictions after four months, but he had already been terminated and was not reinstated

?

CASE STUDY # 6

Appropriate?

Cline v. Clinical Perfusion Systems, Inc., ___ F.Supp.3d
___, 2022 WL 16541186 (N.D. Okla. Oct. 28, 2022)

Court: Plaintiff could not perform the essential functions of his position without an accommodation. A request for leave of “more than 6 months” is not reasonable. The fact that Plaintiff ultimately only needed 4 months is irrelevant – at the time of the termination decision, the leave was indefinite and was expected to last longer

Case Study #7

Andy is in customer service answering questions by phone, email and in person to resolve customer issues at the University.

He develops lockjaw—takes 6 weeks of FMLA due to speaking problems and then returned back to work with reduced schedule to attend to medical appointments/deal with flare ups. Andy requests accommodation of reduced speaking (15 minutes/hour or every other hour)

Ultimately, University agrees to 15 minutes non-speaking breaks every hour and it would find another position for Andy.

Andy is terminated because he could not work a full schedule.

Ehlers v. University of Minnesota, 34 F.4th 655 (8th Cir. 2022)

Court: University acted in good faith, helped to find many jobs, adaptive technology. Some jobs wouldn't work, and the University could not immediately tell Plaintiff about each possible job without any information. Even if the University did not make good faith efforts, Plaintiff had to show she could have been accommodated but for the lack of good faith. There was no evidence that Plaintiff was qualified for any of the jobs he requested to be assigned to.

Case Study #8

Mary, a web-content specialist, has a high risk pregnancy and was approved for FMLA until her due date. When she exhausted FMLA, Mary was placed on unpaid leave.

Mary submits doctor's note: she had a c-section, was "doing well", and should telework until November (the baby was born in July). Supervisor is OK with 6 week arrangement of working from home.

Case Study #8

After 6 weeks, Mary states that because of complications from C-section, she would have to stay home and telework another 8 weeks. She has a doctor's note that said she could telework for 8 weeks but did not mention any complications or specifics.

HR sent Plaintiff the paperwork for an accommodation – verify disability, describe how limitations restrict ability to do the job, identify accommodation, and release medical information. Mary forwards paperwork to doctor to complete, but doctor and Mary both drop the ball and don't deliver the information to employer.

Owens v. Georgia, Governor's Office of Student Achievement, 52 F.4th 1327 (11th Cir. Nov. 9, 2022)

- Court: the employer does not have any duty to engage in the interactive process until the employee makes a specific demand for accommodation and shows that it is reasonable.
- Plaintiff did say that she wanted to telework due to childbirth complications, but she did not say what the disability was or how the accommodation would address the limitations. The employer does not have to grant the specific accommodation requested, so it needs information about the nature of the disability and the desired accommodation.

Owens v. Georgia, Governor's Office of Student Achievement, 52 F.4th 1327 (11th Cir. Nov. 9, 2022)

- “The link between the disability and the requested accommodation may often be obvious,” e.g., an employee in a wheelchair doesn’t need a doctor’s note to explain why she can’t climb a steep staircase. But childbirth and pregnancy are not disabilities, and “childbirth-related complications” does not say what the condition or restriction is. Saying she had a C-section or blood transfusion 5-6 weeks earlier simply describes a medical procedure, not a condition or limitation. Because Plaintiff failed to provide information to trigger the interactive process, the employer had no duty to engage further – Plaintiff caused the breakdown.

The logo for Miller Canfield, featuring the company name in a white serif font inside a teal circle. The background of the slide is a colorful abstract pattern of overlapping shapes in shades of red, orange, yellow, green, and blue.

MILLER
CANFIELD

Questions?



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