



ZASHIN & RICH

ADA, FMLA, and Leave Issues for Supervisors

Brad E. Bennett

17 South High Street, Suite 900

Columbus, Ohio 43215

www.zrlaw.com

Brad E. Bennett

- 18 years of experience as an employment lawyer and human resources professional.
- Represents clients in litigation, collective bargaining, arbitrations, and administrative proceedings before the EEOC, OCRC, SERB, SPBR.
- Assists clients with HR compliance, including day-to-day issues, discipline, handbook policies, job descriptions, internal investigations, leave issues, FLSA compliance, salary surveys, and internal HR audits.
- Selected as a “Super Lawyer” in 2015 and 2016.
- Certified as a Specialist in Labor and Employment Law by the Ohio Bar Association.



Super Lawyers



Employment Law Litigation

Zashin & Rich's Employment Group has extensive experience representing large and small businesses, non-profit organizations, and public-sector entities. Zashin & Rich's Employment Group's expertise extends into many areas including:

- **Discrimination and Retaliation**
- **General Employment Counseling**
- **Labor Law**
- **Collective Bargaining**
- **FLSA, Wage and Hour Issues**
- **Worker's Compensation**
- **Restrictive Covenants**
- **Employee Handbooks**
- **Unemployment Compensation**
- **Civil Service Law**
- **Public Records/Sunshine Laws**

Discrimination and Retaliation Laws Representation

- **Title VII**
- **ADA**
- **ADEA**
- **FMLA**
- **PDA**
- **FLSA**
- **others**



Agenda

Agenda

1. ADA Update
2. Pregnancy and Religion
3. FMLA Update



The Americans with Disabilities Act



MAIN CLAIMS

1. Discrimination.
 - Includes “*failure to accommodate*”
2. Harassment.
3. Retaliation.



REASONABLE ACCOMODATIONS

Snow plow driver has had a couple minor accidents and, when you confront him, he tells you that he has narcolepsy and it is interfering with his ability to operate the snow plow. . .



- What do you do?



REASONABLE ACCOMMODATIONS

- Goal is the removal of “workplace barriers”
- 3 general categories:
 1. Changes to the job application process;
 2. Modifications to the work environment ;
 3. Changes so a disabled employee can enjoy equal benefits and privileges



Americans with Disabilities Act

- ADA also requires reasonable accommodations to help employees perform the essential functions of their job.
 - Must engage in an interactive process.
 - Cannot pose a danger to self/others
- “Failure to Accommodate” cases on the rise.



ESSENTIAL FUNCTIONS

- Consider the following when considering whether a job duty is an “essential function:”
 - Written position description
 - Amount of time spent performing the duty
 - Employer’s judgment
 - Terms of collective bargaining agreement
 - Work experience of others who performed/are performing the job
 - **“Regular and predictable attendance”?**



REASONABLE ACCOMMODATIONS

A reasonable accommodation is one that “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.”

- Job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position
- Acquiring or modifying equipment
- Changing exams, training materials, or policies
- Providing qualified readers or interpreters
- Costs and benefits are considered



THE INTERACTIVE PROCESS IN 7 STEPS

1. **Employee requests** accommodation
2. Employer **examines** the job and determines essential functions
3. Employer consults with employee to **learn about physical/mental abilities** as they relate to the essential functions
4. Employer makes individualized determination whether employee poses **direct threat**, and if threat can be removed by reasonable accommodation



THE INTERACTIVE PROCESS IN 7 STEPS

5. Employer and employee identify potential accommodations (**interact**)
6. Employer considers whether the accommodation would impose an **undue hardship**, and other alternatives must be considered.
7. If reasonable accommodation is available, employer **provides** it in a timely manner.



REASONABLE ACCOMODATIONS

Back to the narcoleptic snow plow driver . . .

- What do you do?
- Engage in the Interactive Process.



IMPORTANCE OF THE INTERACTIVE PROCESS

Automatic Rejection of Deaf Applicant Without Discussing Accommodations Causes Lawsuit

↳ *EEOC v. Service Temps Inc. (2012)*



TELECOMMUTING

- *EEOC v. Ford Motor Co.*, 782 F.3d 753(6th Cir. April 10, 2015)



- Court applied “common sense” to determine “regular, in-person attendance is an essential function ... of most jobs....”

CASE EXAMPLE

Is a one-eyed firefighter protected under the ADA?



FIRE DEPARTMENT CASE

- Firefighter of 9 years has off-duty accident that blinds his right eye. His doctor and city physician clear him to RTW without restrictions.
- Chief called city physician and convinced him to switch his opinion partially due to National Fire Protection Association (NFPA) guidelines making the operation of fire vehicles in an emergency mode with lights and sirens an “essential function.” – not cleared now.
- Firefighter requests to RTW without having to drive or, alternatively, switched to fire inspector duties.
- City declines both and terminates his employment.



FIRE DEPARTMENT CASE

- Were the national guidelines adopted? Employee said “no” – City supplied nothing in writing to verify.
- Is driving an emergency vehicle an essential function for a firefighter? Here, the job description said “may” operate emergency vehicles – not “shall.”
- Is having binocular eyesight an essential function for Firefighters?
- ***Rorrer v. City of Stow***, 743 F.3d 1025 (6th Cir. 2014)



CASE EXAMPLE

Horn v. Knight Facilities Mgmt., 556 Fed. Appx. 452 (6th Cir. 2014)

Janitor developed sensitivity to cleaning chemicals and was fired after her doctor mandated a restriction of "no exposure to cleaning solutions."

Proposed accommodations were: (1) eliminating bathrooms on her route; (2) use of a respirator

Accommodations were not objectively reasonable since eliminating the bathrooms on her route still would have involved exposure to cleaning chemicals, and respirator would have complied with the doctor's restriction.



CASE EXAMPLE

Parsons v. Auto Club Group, 565 Fed. Appx. 446 (6th Cir. 2014)

Employee told supervisor “that his apnea ‘was coming back again’ and that he would have to pay \$1,200 for the medical device he needed because Blue Cross would not cover it” just to let him know.

“This is not enough to suggest that Parsons requested accommodation from Auto Club.”

“When an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be ‘too little, too late.’”

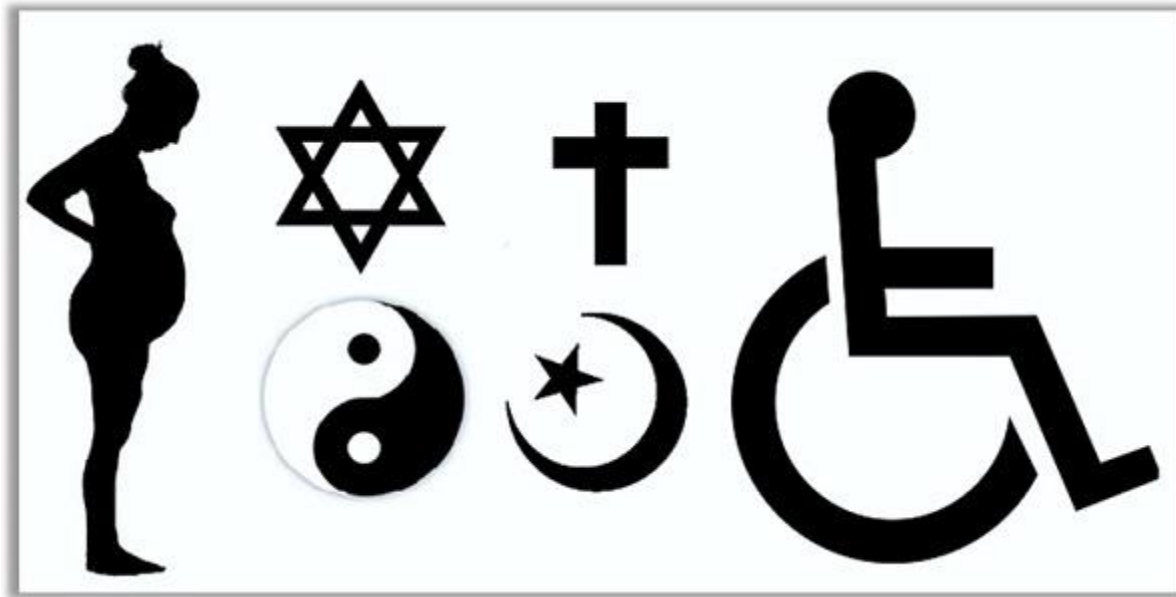


ADA AND MARIJUANA

- Most courts that have addressed this issue have held that ADA does not protect medical marijuana because it remains illegal under federal law.
- Ohio's Medical Marijuana Law allows it to be prohibited under a drug free workplace policy.



Accommodations Not Limited to Disability



Religious Accommodations

Consider Religious Accommodations During the Interview Process

✦ *EEOC v. Abercrombie and Fitch*, 789 F.Supp.2d 1272 (2015)



ADA and Pregnancy

- The EEOC recently updated its guidelines on pregnancy, making clear that while pregnancy itself is not a disability, pregnant employees' impairments related to pregnancy affecting major life activities are covered by the ADA.
 - Complications
 - Bed rest
 - High Blood pressure



ADA and Pregnancy

- **EEOC guidelines on ADA and pregnancy:**
 - Pregnancy-related impairments do ***not*** have to be severe or fully prevent a major life activity to be covered
 - A pregnant employee may require early leave
 - Reasonable accommodations may include allowing a pregnant employee to have a water bottle at her station, take more frequent breaks, or sit while working



Lactation Breaks

- The **Patient Protection and Affordable Care Act** also requires employers to accommodate nursing mothers' need to express breast milk by providing a place to do so as often as needed.
 - Do you have a Lactation Break policy?



Pregnancy and Light Duty Policies

An employee, who delivers light packages for UPS, becomes pregnant. Her doctor orders her to lift no more than 20 lbs. Even though her work rarely, if ever, requires her to lift heavy packages, UPS includes lifting up to 70 lbs as an essential job function.

- Employer policy accommodated lifting restrictions with temporary assignments only when: (1) the employee suffered an on-the-job injury; (2) the employee had a disability under the ADA; or (3) a driver lost their DOT certification.

UPS requires the employee to take unpaid leave (she used all of her FMLA leave), and reinstated after giving birth.



Pregnancy and Light Duty Policies

The Supreme Court decided that UPS's rule that employees could be assigned to light duty only for on-the-job injuries discriminates against pregnant women. The Court's rationale is the same as the EEOC guidelines.

The EEOC's 2014 guidelines specify that employers must accommodate pregnant employees with light duty if the same is done for employees ***similar in their ability or inability to work.***

Young v. UPS, 135 S. Ct. 1338 (2015):



Pregnancy and Light Duty Policies

- Supreme Court’s prima facie case for pregnancy accommodation:
 - (1) affected by pregnancy, childbirth, related medical condition; (2) requested accommodation; (3) denied accommodation; and (4) employer accommodated others similar in their ability or inability to work.
- Employer must then proffer its legitimate, nondiscriminatory reason (which cannot involve cost of including pregnant worker)
- Employee can overcome Employer’s reason if she demonstrates that the employer’s policies impose a “significant burden” on pregnant workers



PREGNANCY (Cont.)

- **Takeaways**

- Review/revise your policies to ensure that they capture requirements for employees affected by pregnancy, childbirth, or related medical conditions.
 - Job accommodations, light duty, leave of absence, lactation breaks, discrimination/harassment, etc...
- Conduct management/supervisor training



The Family and Medical Leave Act



The Family and Medical Leave Act

- **ADA/FMLA overlap**
- **Intermittent Leave**
- **Abuse**

MAIN CLAIMS

1. Discrimination.
2. Interference.
3. Retaliation.



The
Family
and
Medical
Leave
Act



FMLA: DEFINING WHO IS COVERED

Employer

- Private Sector if employ 50+ employees.
- All public sector regardless of size.

Employees

- At least one year of service credit with the employer;
- 1,250 hours worked within the last year; and
- Employed at a worksite with 50 or more employees within 75 miles of the worksite



QUALIFYING REASONS FOR FMLA

- Birth or placement of a child for adoption or foster care
- A “***serious health condition***” of the employee or a close family member
- Qualifying exigencies of call to active service of family member
- To care for a military service member who was injured in the line of duty if employee is the “next of kin”



WHAT IS A “SERIOUS HEALTH CONDITION”

Any illness, injury, impairment, or physical or mental condition that also involves:

- Inpatient care;
- Any period of incapacity of more than 3 calendar days and ALSO involves:
 - 2 or more treatment by health care provider OR
 - Treatment by provider on 1 occasion that results in a “regimen of continuing treatment under supervision of a health care provider”
- Any period of incapacity due to pregnancy/prenatal care



WHAT IS A “SERIOUS HEALTH CONDITION”

Any illness, injury, impairment, or physical or mental condition that also involves (*continued*):

- Chronic serious health condition that involves all of the following:
 - Periodic visits for treatment to provider;
 - Continue over extended time period;
 - May be episodic rather than continuing in nature
- Any period of incapacity which is permanent/long term and where treatment may not be effective (terminal stages/Alzheimer's)
- Absence for restorative surgery after accident/injury OR for a condition that would likely result in absence of more than 3 days at a later date without medical intervention (chemo/dialysis)



WHAT IS A “SERIOUS HEALTH CONDITION”

Are the following “serious health conditions” under FMLA?

- Lasik eye surgery?
- Breast augmentation?
- Weight loss surgery?



ADA/FMLA OVERLAP

- **EEOC and DOL position:**
 - “A single request for FMLA leave is enough to put the employer on notice of a potential need for an ADA job accommodation.”
 - Leave of absence may be a “reasonable accommodation” under the ADA
- **So, if I grant 12 weeks of FMLA to a person who may qualify as “disabled” under ADA – am I good?**
 - Extension of leave beyond normal limits must also be considered under ADA accommodation precedent



CASE EXAMPLE REQUEST FOR LEAVE

- Employee in probationary period is pregnant (not yet eligible for FMLA)
 - She requested FMLA on a date in the future for childbirth. Claims she was retaliated against after the request (harassed, placed on an unreasonable PIP, and ultimately fired).
 - She sued. Employer defended saying she was not eligible for FMLA so not covered.
- Result?
 - *Pereda v. Brookdale Sr. Living Center* (11th Cir. 2012) - - because the FMLA requires “advance notice” of need, the FMLA protects employees from pre-eligibility interference. Here, she “would have been eligible for leave” at the time of the need for leave for the birth of her child.



DEALING WITH LEAVE ABUSE

SEEGER v. CINCINNATI BELL (6th Cir. 2012)

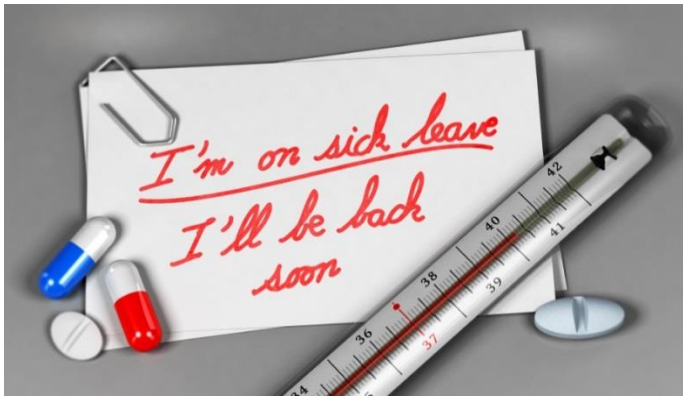
- Employee suffered herniated disc. Granted FMLA and paid short term disability.
 - Offered him light duty first but employee declined “too disabled to work.”
- Several days later, he was seen at Oktoberfest.
 - Upon questioning – he admitted to walking over 10 blocks and drinking beer.
 - Employer had “leave fraud” policy = fired him.
- Result?
 - “Reasonable belief” in FMLA abuse enough?
 - “Legitimate business reason” established?



DEALING WITH LEAVE ABUSE

LINEBERRY v. RICHARDS (E.D. Mich, 2013)

- An RN at Medical Center was approved for FMLA due to lower back and leg injury.
 - Dr. certified substantial lifting and mobility restrictions.



- Result?
 - “Reasonable belief” in FMLA abuse enough?
 - “Legitimate business reason” established?



BEST PRACTICES FOR LEAVE ABUSE

- Don't make it easy to call-off.
 - Entitled to have a reason for the absence supplied to you.
- Ask for second opinions when in doubt
- Develop effective tracking process
- Re-certification process when inconsistent use



BEST PRACTICES FOR LEAVE ABUSE

- Use social media as an investigation tool
- Utilize private investigators
- Take advantage of Employment Policies
 - Employees must follow customary paid leave call-in policy of employer regardless of FMLA
 - Dishonesty
 - Investigate excessive leave and suspicious patterns
 - Leave Abuse Policy



BEST PRACTICES FOR INTERMITTENT LEAVE

- Make sure they qualify.
 - Must be “medically necessary.”
 - Can only be taken for :
 - “serious health condition”
 - “serious injury/illness of covered service member”
 - “qualifying exigency”
 - NOT for birth, adoption, placement UNLESS employer agrees/allows under policy



BEST PRACTICES FOR INTERMITTENT LEAVE

- Don't take it lying down
 - If used for planned medical treatment – enforce that employee is obligated to schedule outside work hours when possible
 - Can deny if it does not fit within basis for intermittent leave
 - *Lane v. Pontiac Hospital* (2010). Employee granted intermittent FMLA to care for his mother (diabetes, arthritis). However, employee denied leave when he tried to use it for 4 days missed cleaning up flooding in his mother's basement.
 - Court upheld denial since time was not used to care for mother's illness.
 - Recertify every 30 days when no time established by certification.



DOCUMENT, DOCUMENT, DOCUMENT!

Document :

- The ADA interactive process
- FMLA notices, requests, approvals
- Medical Excuses
- Your policies and UPDATE!!
- Essential Job Functions (Job Descriptions crucial)
- Training of managers and employees
- Internal Investigations



Zashin & Rich Newsletter

Newsletter Signup

**Stay up to date on the latest Z&R news,
Employment Law Quarterly newsletters, and
Employment Law Alerts.**

<http://zrlaw.com/newsletters.html>



THANK YOU!

Questions concerning this presentation, please contact:

Brad E. Bennett

Zashin & Rich

17 South High Street, Suite 900

Columbus, Ohio 43215

(614) 224-4411

beb@zrlaw.com

www.zrlaw.com

