

2019 DMEC ANNUAL CONFERENCE  
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## FMLA/ADA LESSONS LEARNED

Jury Verdicts, Settlements & Recent Court Cases



**FINEOS**

**Megan Holstein, J.D.**  
SVP Absence and Claims



**Sun Life**

**Marjory Robertson, J.D.**  
AVP & Senior Counsel

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# Jury Verdicts

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### Jury Trials: Hawkins v. Grinnel Regional Medical Center (Supreme Court Iowa 6/7/19)

**Iowa Civil Rights Act  
(Disability Discrimination)**

- ER argued it fired EE for poor performance

Damages	Amount
Back Pay	\$ 222,009
Emotional Distress (past)	\$ 2,000,000
Emotional Distress (future)	\$ 2,280,000
Front Pay	\$ 241,746
Attorney's Fees	\$ 615,208
<b>TOTAL</b>	<b>\$ 5,358,963</b>

*Plus ER's attorney's fees*

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# Wednesday General Session 4



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**Jury Trials:**  
**Gunter v. Bemis Company**  
**(6th Cir. 10/16/18)**

**ADA**

- ER argued it fired EE because he could not perform essential job functions

Damages	Amount
Back Pay	\$ 181,000
Emotional Distress	\$ 92,000
Front Pay	\$ 315,000
Attorney's Fees (Petition Pending)	\$ 463,000
<b>TOTAL</b>	<b>\$ 1,051,000</b>

*Plus ER's attorney's fees*



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**Jury Trials:**  
**Cloutier v. GoJet Airlines (N.D. Ill. 1/4/19)**

**FMLA**

- ER argued EE was terminated because
  - He did not give notice of foreseeable leave "as soon as practicable";
  - He did not submit FMLA recertification paperwork; and
  - EE did not show he was harmed by other ER FMLA notice violations

Damages	Amount
Back pay	\$ 187,900
Double Damages (FMLA penalty)	\$ 187,900
Front pay	\$ 50,680
Attorney's fees (petition pending)	\$ 488,940
<b>TOTAL</b>	<b>\$ 915,420</b>



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**Jury Trials:**  
**Antekeier v. Lab. Corp. of America**  
**(E.D. VA 5/15/18)**

**FMLA Retaliation**

- ER argued
  - It did not violate FMLA because work done by EE on FMLA leave was episodic and voluntary
  - It fired EE because of unprofessional behavior

Damages	Amount
Back pay	\$ 223,730
FMLA Double damages	\$ 223,730
Attorney's fees	\$ 395,375
<b>TOTAL</b>	<b>\$ 842,835</b>

*Plus ER's attorney's fees*



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### Jury Trials: Jacobs v. Wal-Mart Stores (W.D. WA 4/22/19)

**ADA**

- ER argued administering immunizations was essential function of pharmacist

Damages	Amount
Back pay	\$ 221,566
Front Pay	\$ 223,054
Emotional Distress	\$300,000 (cap) (award: \$650,000)
Attorney's fees	\$ 671,047
Costs	\$ 54,384
Tax Consequences	\$ 92,273
Prejudgment Interest	\$ 4,999
<b>TOTAL</b>	<b>\$ 1,567,323</b>

*Plus ER's attorney's fees*



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### Jury Trials: Barry v. Ill. Dept. of Correction (C.D. IL 3/25/19)

**ADA**

- ER argued
  - Transfer to different correctional facility where pepper spray was not used as an accommodation for asthma and COPD was not reasonable accommodation

Damages	Amount
Back pay	\$ 159,970
Front pay	\$ 134,853
Emotional Distress	\$ 150,000
Other benefits	\$ 17,278
Prejudgment interest	\$ 8,798
Attorney's fees & costs	\$ 82,728
<b>TOTAL</b>	<b>\$ 553,627</b>

*Plus ER's attorney's fees*



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### Jury Trials: Lampkins v. Mitra QSR KNE, LLC (D. Del. 6/4/19)

**Title VII Sex Discrimination – Lactation**

- ER argued
  - ER complied with legal obligations regarding lactation & EE voluntarily resigned

Damages	Amount
Back pay	\$ 25,000
Punitive Damages	\$1,500,000
<b>TOTAL</b>	<b>\$1,525,000</b>

*Judge reversed verdict on 6/4/19 and ordered new trial  
"Title VII is not an accommodation law"*



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## Jury Trials: Ramirez v. Jack In The Box (CA June 2019)

**CA FEHA (disability discrimination)**

- ER argued EE was terminated because
  - EE manipulated restaurant's internal system for measuring EE performance metrics
  - ER produced video showing EE's alleged misconduct.

Damages	Amount
Compensatory Damages	\$ 5,400,000
Punitive Damages	\$ 10,000,000
Attorney's fees ????	???
<b>TOTAL</b>	<b>\$ 15,400,000</b>

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## ADA – EEOC Settlements refusing leave as an accommodation

Employer	Settlement	Notes
Family Healthcare Network & December 2018	\$1,750,000	Refusing to accommodate pregnant employees
Corizon Health & Arizona health May 2019	\$950,000 & \$545,000	One-size fits all policies
Mueller Industries July 2018	\$1,000,000	One-size fits all maximum 180-day leave policy.
Stanley Black & Decker May 2019	\$ 150,000	Refusal to grant leave for cancer treatments
Triton Mgmt. Services October 2018	\$ 110,000	Terminated employee instead of providing leave
Time Warner Cable, Inc. May 2019	\$ 99,500	Refusing additional 3 weeks of leave

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## ADA – Other EEOC settlements of note

Employer	Settlement	Notes
CRST Expedited Inc. March 2019	\$47,500	Service dog v. "no pet" policy
Mid South Extrusion March 2019	\$70,000	Safety concern v. accommodation
Party City April 2019	\$155,000	Job coach accommodation
Verona Resort & Spa May 2019	\$16,000	Pregnancy accommodation
Hyatt Corporation May 2019	\$85,000	Sitting as an accommodation

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# FMLA – Court Opinions

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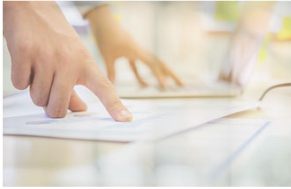
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## FMLA – Notice Cases



- Request to work from home does not put ER on notice of need for FMLA leave
- Fact that a third party absence administrator knew of need for FMLA leave does not put ER on notice of need for FMLA leave
- EE's disclosure of depression (from working on the Edward Snowden investigation) and advice that her provider was recommending 4 weeks of leave put ER on notice to inquire about whether EE was seeking FMLA leave
- Telling ER that MD had recommended EE take a few sick days off from work due to work-related stress is not notice of need for FMLA leave

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## FMLA – Interference



- Courts found the following Employer actions to be FMLA interference
  - Asking EE to delay the start of FMLA leave
  - Failing to help an employee complete gaps in FMLA paperwork
  - Requiring a doctor's note for FMLA intermittent absence
  - Encouraging employees to take FMLA in full day increments
  - Denying an employee FMLA leave who was not eligible after approving leave as FMLA
  - Instant message and talk on phone throughout day while on leave
- Courts found the following not interference
  - Requiring EE to work on leave and pressuring EE to come back early not FMLA interference because EE was paid during leave.
  - Honest belief that EE abused FMLA leave by going on boating trip
  - Refusing to prorate sales quotas to reflect period of FMLA leave

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## FMLA – Call-in Requirements

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- Call-in requirements violated FMLA because no exception for unforeseen circumstances – but ER could use requirements to deny paid leave
- Call-in requirements required 24 notice. Even though not FMLA compliant, no adverse action when EE was not denied leave.
- ER could not enforce call-in requirements because it had inconsistent written procedures
- Requiring EE to call in at least 30 minutes before shift does not comply with FMLA
- ER could not enforce call-in requirements where the requirements were only for FMLA leave and not all leaves and where requirements were only in Handbook and retail EE had limited access to handbook



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## FMLA – Retaliation

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Courts found the following actions could constitute FMLA retaliation

- Job elimination where:
  - Temporal proximity to leave;
  - Manager made negative comment leave; and
  - EE only one impacted
- Terminating for performance where:
  - Temporal proximity to leave; and
  - Evidence EE had performance problems before and not terminated
- PIP or Performance Review referred to FMLA absences
- Negative performance review after FMLA leave may be retaliation because may discourage leaves



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## FMLA Forced Leave

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<p><b>Violates the FMLA</b></p> <ul style="list-style-type: none"><li>• Forced full day increments</li><li>• Forced FMLA leave where EE had received treatment in past for alcoholism and ER placed her on leave and required medical exam out of concern she had relapsed (observed anxiety and tremors)</li></ul>	<p><b>Does Not Violate the FMLA</b></p> <ul style="list-style-type: none"><li>• If the forced FMLA leave does not result in adverse employment action or negatively impact the employee</li></ul>
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# ADA – Court Opinions



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## ADA – Processes, Forms, etc.



- Delay of 4-6 months in providing accommodation was not unreasonable
- Employee handbook provided for 1 year of personal leave, but employee who requested 5 week leave was denied.
- Medical certification form asked provider to describe any “physical or mental” condition when only physical was at issue. Triable ADA claim.
- Centralized ADA process No ADA violation for failure to accommodate where ER had centralized ADA process that EE did not follow



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## ADA – Essential Functions

Courts have concluded that the following are relevant in determining “essential job functions”

- What others do
  - Have ERs allowed other EEs to get out of performing this or similar tasks?
- What this EE has done
  - Has the EE permitted this EE to get out of performing this task in the past?
- Does the job description use the magic phrase “essential job function”
  - A “physical demand” in a job description is not an essential function
- What the EE and others actually do can override a job description
  - Job description may say lifting patients alone is required but if ER encourages EEs not to lift alone & people rarely lift alone may not be essential job function



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### ADA – Medical Documentation Must Support Accommodations

**Courts emphasize that medical documentation must support accommodations**

- Medical documentation must address
  - No mention of need to be able to take notes in meetings
  - No mention of need for air filter to help mold allergy resulting in asthma
- Mere recommendation of health care provider not enough – must be required
- Employee's preference not enough
  - Transfer to a different location to be closer to family
  - EE says working from home will "help"

*But – if doing job without accommodation makes it painful for the employee, then must accommodate*

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### ADA – What is A Reasonable Accommodation

**Courts found the following may not be a reasonable accommodation**

- Change in hours (undue hardship to others)
- Employer-provided medical treatment
- Service dog if others must care for dog
- Employee preferred, or best accommodation, just an effective one
- Advancing paid sick leave
- Extended intermittent leave (regular, reliable attendance is essential function)
- Getting 100% extra time
- Stress-free workplace

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### ADA – What is A Reasonable Accommodation

**Some surprises in what courts found could be reasonable accommodation**

- Providing a co-leader of a camp may be reasonable accommodation – evidence it had been done in the past.
- Allowing reduced workload and time off may be reasonable accommodation – citing Hostettler 2018 6<sup>th</sup> Circuit Case.
- New EE – not FMLA eligible. Court said three months absence due to migraines not "extensive" or "indefinite" even though leave had to be extended

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## ADA – My Manager is Stressing Me Out! Courts say too bad!

**Courts do not support employees who want a different manager:**

- Not getting along with manager is not an ADA claim
- Request for stress-free workplace is not reasonable
- Transfer to a new manager is not reasonable
- “No contact” with manager and all instructions in writing is not reasonable



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## ADA – Be Careful About Relying on Safety Concerns

Can rely on safety concern when	But not in these circumstances
<ul style="list-style-type: none"> <li>• Bomb squad employee has a hand tremor</li> <li>• Doctor makes patient care errors</li> <li>• Employee demonstrates psychological issues</li> </ul>	<ul style="list-style-type: none"> <li>• Ordering medical exam just because employee is depressed                             <ul style="list-style-type: none"> <li>• No evidence that performance impacted</li> </ul> </li> <li>• Employee with bone deformity falls at work</li> </ul>

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## ADA – Miscellaneous

1	Performance may be considered as a factor in denying or granting accommodations	<ul style="list-style-type: none"> <li>• EE not productive telecommuting 4X/week. Not have to agree to 5X/week</li> <li>• Additional training not required as accommodation when EE's performance very poor to date</li> </ul>
2	Continued debate about what is/is not a disability	<ul style="list-style-type: none"> <li>• Obstructive sleep apnea</li> <li>• Migraines</li> <li>• Temporary conditions</li> <li>• Diagnosis ≠ Disability (PTSD)</li> <li>• Obesity</li> </ul>
3	No ADA protection for misconduct caused by disability	<ul style="list-style-type: none"> <li>• EE with bipolar can be fired for misconduct even if conduct caused by disability</li> <li>• EE can be terminated for outburst caused by disability</li> </ul>
4	Essential functions may change over time	<ul style="list-style-type: none"> <li>• ER permitted telecommuting as communications specialist for EE with Multiple Sclerosis</li> <li>• After merger with another company, new leader redefined the role and concluded that full time attendance in the office was an essential job function.</li> </ul>

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## Always: Avoid Stupid Comments

Don't Comment About Health Condition	Don't Text	Don't Tell Others	Don't Comment about Approved Leave
<ul style="list-style-type: none"><li>ER said "because of your health this won't work out"</li><li>ER told EE he was being fired because of health issues</li><li>Manager's preoccupation with an injury</li></ul>	<ul style="list-style-type: none"><li>Managers were dissatisfied with EE because of symptoms of depression: negativity and unhappiness</li><li>Sent problematic text messages</li></ul>	<ul style="list-style-type: none"><li>Manager told team that EE would be out for psychological reasons</li></ul>	<ul style="list-style-type: none"><li>Manager made comments that EE who took FMLA leave was "not dependable"</li><li>Manager made comments that FMLA leave made them "short staffed"</li></ul>

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**Megan Holstein, J.D.**  
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