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A Look Back: Insights Into Key 2018 FMLA & ADA Cases

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Initial Thoughts

- Much of ADA and FMLA law remains "under-developed"
- Keep your eyes on appellate cases – unless you like litigation
- Unscheduled intermittent FMLA leave continues to be the key FMLA risk
- Integration of FMLA, ADA, voluntary leave and paid time practices has never been more challenging and important
- It's time for the Supreme Court to weigh in on some ADA issues
- ADA is your bigger litigation risk – in part because of more consistent FMLA leave administration

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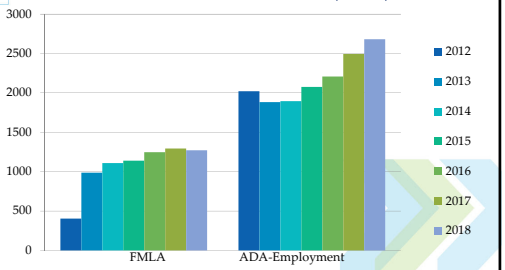
Federal FMLA & ADA Lawsuits

Source: Administrative Office of the US Courts, Table C-2 (2012-2018)



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Number of Federal FMLA and ADA Lawsuits Filed (2012-2018)

Source: Administrative Office of the US Courts, Table C-2 (2012-2018)

Federal Lawsuits Filed	2012	2013	2014	2015	2016	2017	2018
FMLA	404	987	1108	1139	1246	1293	1271
ADA-Employment	2020	1883	1894	2076	2208	2494	2681

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ADA Case Developments

Time Away from Work

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Intermittent Leave as an ADA Reasonable Accommodation

- In the last six months, the Second, Fourth, Fifth and Eighth Circuits all hold that employees with disabilities cannot sustain ADA cases after violating company attendance policies
- Trautman v. Time Warner Cable Tex., LLC, No. 18-50053 (5th Cir. Dec. 12, 2018), Vitti v. Macy's Inc., No. 17-3493 (2d Cir. Dec. 21, 2018), and Lipp v. Cargill Meat Sols. Corp., No. 17-2152 (8th Cir. Dec. 19, 2018). Hannah P. v. Coats, No. 17-1943 (4th Cir. Feb. 19, 2019).

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Lipp v. Cargill Meat Sols. Corp., 911 F.3d 537 (8th Cir. Dec. 19, 2018)

- An employee with lung disease who had 195 unplanned days absent within a year for personal and medical reasons was not qualified under the ADA because she did not show that she "could regularly and reliably attend work, an essential function of her employment."
- The court noted that the "ADA does not require employers to provide an unlimited absentee policy."

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But … not all courts accept regular and predictable attendance is required of all jobs

- In *Ward v. Massachusetts Health Research Inst., Inc.*, 209 F.3d 29 (1st Cir. 2000), the First Circuit held that a reasonable jury could decide that a set schedule was not an essential function of plaintiff's data entry job.
- There was no evidence that data entry, plaintiff's sole duty, had to be completed at any particular time as long as it was completed prior to the laboratory opening the following day.

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And … don't forget accommodation analysis

- *Hostettler v. College of Wooster*, 2018 U.S. App. LEXIS 19612 (6th Cir. 2018)
- "An employer must tie time-and-presence requirements to some other job requirement." In other words … why is it so essential?
- The court held there was a genuine issue of material fact as to whether full-time presence was an essential function of plaintiff's HR generalist position. Plaintiff claimed she could fulfill her job duties by working part-time in the office and performing other tasks remotely in the evening.

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ADA "Attendance" Take-Aways: Three Issues

- Whether regular attendance is an essential function of the job: *Can you spell job descriptions!!*
- If it is, whether the employee was fulfilling the essential function of regular attendance: *Absence tracking and record-keeping are critical!!*
- If the employee was not, whether the employee could have fulfilled the essential function of regular attendance with a reasonable accommodation: *This is all about mastering the ADA interactive process!!*

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ADA Case Developments

"Continuous" Leave Since *Severson v. Heartland Woodcraft, Inc.*

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No Automatic *Dismissal* of Leave Claim

- On April 10, 2018, an Illinois court denied a motion to dismiss the plaintiff's ADA claims in *EEOC v. S&C Electric Co.*, Case No. 17-c-6753, squarely rejecting defendant's argument that, under *Severson*, an employee who seeks to return to work following a multi-month leave of absence is not protected by the ADA.
- The court noted that, unlike the plaintiff in Severson, the plaintiff claimed she was "ready, willing and able to return to his position without any accommodation," and was ultimately fired not because he could not work, but rather, because he could.

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But … Courts continue to reject indefinite leave as a reasonable accommodation

- Loosely worded request for leave for a few weeks or a few months was indefinite and open-ended and, as such, was not reasonable. *Kieffer v. CPR Restoration & Cleaning Servs., LLC*, 2018 U.S. App. LEXIS 12560 (3rd Cir. May 15, 2018).

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8th Circuit Rejects EEOC's Position on Leave

- Employee who did not return to work before FMLA ended leave was not entitled to job restoration. Court rejected the EEOC's Guidance that ADA requires employers to hold open the original position of an employee that has been granted leave absent a showing of undue hardship.
- The Court held that the EEOC document was not binding authority and employee's request to work from home was not a reasonable accommodation. *Brunckhorst v. City of Oak Park Heights*. (8th Cir. Feb. 4, 2019).

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ADA Case Developments

Schedule Changes and Less than Full-Time Work

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Request for Reduced Work Schedule

- A university police officer requested to work 8-hour shifts instead of 12-hour shifts due to a medical condition. The Eleventh Circuit rejected the university's argument that working 12-hour shifts was an essential function of the job.
- The court relied on the language in the university's job description for police officers that failed to list 12-hour shifts among the essential functions of the job. *Snead v. Fla. Agric. & Mech. Univ. Bd. of Trs.*, 2018 U.S. App. LEXIS 4350 (11th Cir. Feb. 21, 2018).

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Overtime as an Essential Job Function

- 8-hour a day restriction not reasonable for delivery driver where weather and number of packages could require longer hours.
- The ADA claim failed because working overtime was an essential function of his job as a package car driver. Among other things, the court relied on the job description, collective bargaining agreement and evidence regarding the consequences of not working overtime in concluding that overtime was an essential function. *Faidley v. UPS of Am., Inc.*, 889 F.3d 933 (May 11, 2018).

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Shift Rotation as an Essential Job Function

- The First Circuit rejected a Burger King assistant manager's ADA claim. He suffered from PTSD and depression after being attacked at gunpoint and resigned when his employer refused his request for a permanent fixed work schedule.
- The Court found the ability to work rotating shifts was an essential function. Temporarily granting a fixed schedule did not mean rotating shifts was a nonessential function. *Sepulveda-Vargas v. Caribbean Restaurants, LLC*, 888 F.3d 549 (April 30, 2018).

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Leave Donation Does Not Require Job-Protection

- The Tenth Circuit affirmed dismissal of ADA claims where employer ended employee's participation in a leave transfer program. Employer approved participation in program for a year, provided flexible work schedule and temporary reductions in her hours but denied a request to telework two days per week because she could not perform receptionist duties from home. Donated leave did not enable her to fulfill the essential function of physical attendance.
- *Winston v. Ross*, 2018 U.S. App. LEXIS 4788 (10th Cir. Feb. 27, 2018).

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Interactive Process & Non-Leave Accommodations

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Not Every Accommodation Denial Creates a Potential ADA Accommodation Claim

- The Tenth Circuit held employer did not have to create a new position where it gave the employee a part-time office job with the same pay (worker's compensation benefits were included), did not make any other changes in her employment status, and continued to look for accommodations.
- The full panel of the Tenth Circuit has asked to re-hear this case: "Whether an adverse employment action is a requisite element of a failure-to-accommodate claim under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-213." *Exby-Stolley v. Bd. of County Comm'Rs*, 906 F.3d 900 (10th October 11, 2018).

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Accommodations To Reduce/Eliminate Leave

- Employee's work injury precluded lifting and she was placed on leave while the company engaged in an interactive process.
- Three months later, she returned to work without restrictions. The court denied ADA claim finding the employee voluntarily abandoned the interactive process. "An employer's refusal to provide an accommodation to the position of the employee's choice immediately upon the employee's request is not, in and of itself, a failure to accommodate under the ADA." *Brumley v. UPS*, 909 F.3d 834 (6th Cir. Nov. 30, 2018).

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Employer Entitled to Time to Process Accommodation Requests

- Employee asked for an extended lunch break to exercise for a longer time but quit before the employer responded.
- The Sixth Circuit held employee failed to show the accommodation was necessary to accommodate her disability since her physician's letter was too vague to show she needed an extended lunch break to exercise, and in any event, the employer never denied the request since the employee quit before the employer could resolve the request. *McDonald v. UAW-GM Ctr. for Human Res.*, 2018 U.S. App. LEXIS 16752 (June 21, 2018).

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Employer Entitled to Enforce Safety Standard

- A journey lineman had a foot injury involving amputation of several toes and surgical reconstruction of the foot. Employer refused to allow an exception to its policy requiring safety shoes but the employer made good faith efforts to secure a boot that met the safety footwear standards and offered to assist him in applying for a different job with the company.
- The Eighth Circuit affirmed summary judgement in the employer's favor. *Sharbono v. Northern States Power Co.*, 902 F.3d 891 (8th Cir. Sept. 6, 2018).

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ADA Case Developments

Medical Screening Programs

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EEOC Challenges Physical Ability Tests

- EEOC claimed JBS Carriers violated the ADA by:
  - using pre-employment screening procedures that improperly screen out truck driving applicants on the basis of disability.
  - by requiring and relying on a third party's screening without conducting individualized assessments, including reasonable accommodations.
- Parties settle claim for $250,000 and agreement that JBS Carriers will not use testing provider for three years.

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Applicant Need Not Pay for MRI

- Plaintiff received a job offer contingent on a post-offer medical review and was required to have MRI of his back at his own cost, which he could not afford. Employer revoked job offer, and EEOC sued for ADA violations. Ninth Circuit affirmed summary judgment ***for the EEOC*** on regarded as claim holding employer impermissibly required MRI at applicant's expense.
- The Ninth Circuit agreed with the district court that an injunction was appropriate, but remanded to establish proper scope of the injunction.
- *EEOC v. BNSF Ry. Co.*, 902 F.3d 916 (9th Cir. Sept. 12, 2018)

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Employer Reliance On FCE Not Conclusive

- After a work-related shoulder injury and doctor-imposed restrictions, employer terminated plaintiff, relying on a doctor's functional capacity evaluation and another doctor report.
- The Sixth Circuit rejected that argument, stating the doctor's restrictions did not dictate essential job functions. "The jury heard evidence from several witnesses that the plaintiff could handle the fundamental duties of a press assistant with these restrictions." *Gunter v. Bemis Co.*, 906 F.3d 484 (6th Cir. Oct. 26, 2018).

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Return to Work Offer is not FMLA Interference

- Plaintiff alleged that her FMLA rights were interfered with because her employer asked her if she wanted to work during her leave.
- Fifth Circuit held that "giving employees the option to work while on leave does not constitute interference with FMLA rights so long as working while on leave is not a condition of continued employment." D'Onofrio v. Vacation Publs., Inc., 888 F.3d 197 (5th Cir. April 23, 2018).

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Employee's Failure to Provide Supporting Documentation Doomed FMLA Claim

- Employer denied FMLA because employee failed to provide the requested information. The Tenth Circuit explained that the FMLA permits an employer to inquire if it needs more information and can deny FMLA leave if the employee fails to respond to the inquiries or, absent unusual circumstances, to follow the procedural requirements. *Dulany v. Brennan*, 2018 U.S. App. LEXIS 15351 (10th Cir. June 7, 2018).

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Doctor's Note Insufficient to Establish Serious Health Condition

- Note at termination that tardiness was "most probably" related to sleep apnea did not establish employee suffered from sleep apnea at time of termination.
- Employee had not been treated for sleep apnea in seven years, had not been diagnosed with sleep apnea since that time, had thrown away her CPAP machine, had reported she no longer suffered from sleep apnea, and been absent for a variety of reasons. *Guzman v. Brown* Cty., 884 F.3d 633, 2018 U.S. App. LEXIS 5722 (7th Cir. March 7, 2018).

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Disputes about Reasons for Absence Lead to Trial

- Assembly operator testified she said, "I had a migraine and I would not be in that day." Employer said employee never specified migraines and only stated she would be absent due to either an "illness" or "doctor's visits." Supervisor wrote "ill/out," "ill out," "DR," and "DR," respectively and did not recall if employee mentioned migraines.
- The Court concluded that if Ms. Holladay cited migraines as the reason for her absences in the voicemails then the company should have designated her absences as FMLA. Therefore, case must go to trial on FMLA interference claim. *Holladay v. Rockwell Collins, Inc.*, (S.D. Iowa, Jan. 24, 2019)

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Job Restoration Denied Because Employee Could not Provide Regular Attendance

- The Ninth Circuit upheld the district court's decision on the grounds that the employee had no right to restoration to her old job because (1) that job no longer existed for reasons unrelated to the employee's FMLA leave, and (2) Plaintiff was unable to perform the essential function of her old position – regular attendance. *Ogden v. Pub. Util. Dist. No 2 of Grant City*, 722 Fed. Appx. 707 (9th Cir. 2018) (identified as not for publication, therefore, limited precedential value).

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Employee Not Required to Complete Fitness for Duty Form Immediately Upon Conclusion of FMLA.

- Employer denied job restoration because employee (1) could not perform his essential job duties; and (2) failed to timely provide a fitness for duty form. Court denied employer summary judgment, finding employee's expressed preference for limited work did not prevent him from performing his prior duties, no showing he could not perform the essential job functions, and employee submitted certification within 14 days of FMLA leave ending. *Lindstrom v. Bingham Cnty., Idaho,* No. 1:17-CV-00019-DCN, 2018 WL 1352147 (D. Idaho Mar. 15, 2018)

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Employees Must Follow Employer Rule Requiring Notice of Intent to Return to Work on Light Duty

- 6th Circuit affirmed dismissal of the FMLA interference and retaliation claims because the employer's policy required the employee either to return to work or call in once released to light duty, and the employee did neither. Employee's confusion about policy did not excuse failure to comply. *Stein v. Atlas Indus., Inc.*, 730 F. App'x 313; 2018 WL 1719097 (6th Cir. Apr. 9, 2018) (not recommended for full publication – may have limited precedential value).

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2018 Leave & Accommodation Case Take-Aways

- ADA cases are on the rise and complex.
- Courts generally respect usual and customary notice and procedural rules in FMLA cases if they are well publicized.
- Always have a good story to tell – it can be outcome determinative.
- Go above and beyond to educate employees on FMLA leave rights.
- Embrace and master communication about reasonable accommodation, bolstering efforts to engage in a documented interactive dialogue.

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Thank You!!

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