2019 DMEC
FMLA/ADA EMPLOYER COMPLIANCE CONFERENCE
MAY 6-9 | PORTLAND, OR

The Answer Is No! Say "No" Legally And Effectively.

Jaclyn L. Kugell, Esq.
Morgan, Brown and Joy, LLP
200 State Street
Boston, MA 02109
(617) 523-6666
jkugell@morganbrown.com

MORGAN, BROWN & JOY, LLP

DMEC

Is it OK to say NO??!!

Employee sought FMLA leave to undergo treatment for recurrent breast cancer. Employer required employees to submit a completed medical certification form within 15 days to support the need for FMLA. Employee failed to submit the form within the 15 day period.

DMEC

Brookins v. Staples Contract & Commercial, Inc., 2013 WL 500874 (D. Mass. 2013).

- Staples made clear on the information provided to the employee that it will "deny…[the] leave request unless [the employee] returns the [certification] within 15-days."
- "[T]he employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification." 29 C.F.R. § 825.305(b).

DMEC

Brookins v. Staples Contract & Commercial, Inc., 2013 WL 500874 (D. Mass. 2013).

- "If the employee does not provide the certification in a timely manner, the employer may deny FMLA coverage until the certification is provided." *Brookins*, 2013 WL 500874, at *9 (citing 29 C.F.R. § 825.313(a)-(b)).
- While an employee cannot be required under the FMLA to return the certification within the proscribed period if "it is not practicable…to do so despite employee's diligent, good faith efforts," 29 C.F.R. § 825.305(b), here the employee only made two calls to try to get the certification completed, and did not call Staples to explain the difficulty she was having until after the 15-days expired.

DMEC Disability Management Employer Coalition

Is it OK to say NO??!!

Employee took a 20-day international vacation. The day Employee was scheduled to return to work, he called and informed a supervisor he had an illness, possibly malaria. Thereafter, Employee attempted to contact Employer again, but Employee's cell service was limited. After 3-weeks of unsuccessful attempts to contact Employee and his emergency contacts, and sending FMLA paperwork to Employee's home, Employer sent a certified letter to Employee's home stating his job was in jeopardy and failure to contact the Employer would be presumed resignation. A week later, after hearing nothing further from Employee, Employer sent a letter to Employee's home advising him of his separation and posted his job. Soon thereafter, and before his job was filled, Employee presented Employer with a doctor's note verifying he had been treated for malaria out of the country for the last 6 weeks and asked to return to work in his position.

DMEC Disability Management Employer Coalition

Sherif v. University of Maryland Medical Center, 127 F. Supp. 3d 470 (D. Md. 2015).

- When the need for leave is unforeseeable, an employee must provide notice as soon as practicable under the circumstances of the case. 29 C.F.R. § 825.303(a). An employee must provide sufficient information for an employer to reasonably determine whether FMLA leave is applicable. *Id.* § 825.303(b).
- Failure to respond to an employer's request for information may result in the denial of FMLA protection. *Id.*
- "The employer is not required to be clairvoyant…the FMLA presupposes that employers and employees will cooperate and exchange information…" *Sherif*, 127 F. Supp. 3d at 479.
- There was no retaliation for failure to rehire him because his re-application was treated consistently with others who applied at the same time; other qualified candidates were already being considered when he applied – one of whom was hired.

DMEC Disability Management Employer Coalition

Is it OK to say NO??!!

Employee took FMLA leave (continuous and intermittent) for treatment for mental health and substance abuse issues. Employer's attendance policy requires employees report an absence or tardy at least 30-minutes before the start of a shift; failure to do so results in a half "occurrence" for a tardy and a full "occurrence" for an absence. Seven occurrences results in termination. Employer decided to terminate employee for violating the attendance policy when employee missed work or called in late 18 times – which amounted to seven occurrences.

Njaim v. FCA US LLC, 2019 WL 127753 (6th Cir. Mar. 19, 2019).

- Employers have a duty to inform their employees about their right to take FMLA leave, but employees must trigger that duty by giving the employer notice they are requesting leave. 29 C.F.R. § § 825.300(b)(1), 825.302(c).
- An employee's notice needs to convey enough information to let an employer know the employee is requesting "leave for a serious health condition that rendered him unable to perform his job." *Njaim*, 2019 WL 127753, at *3.
- In *Njaim*, the employee, on a few occasions, did not provide notice of the need for leave related to his mental health and substance abuse treatment, and thus acquired "occurrences" for these absences.
- Employers are not required to designate absences as FMLA-covered leave after the fact. See 29 C.F.R. § 825.301(d).

Njaim v. FCA US LLC, 2019 WL 127753 (6th Cir. Mar. 19, 2019).

- There was no "protected activity" to support an FMLA retaliation claim when Employee failed to follow "call in" procedures. "…[P]olicy require[d]…employees to call in to report an absence thirty minutes before the start of the[] shift…[Employee] called in …only nine minutes before his shift…[therefore] employee did not take FMLA leave.. [and Employer] could not retaliate against him …" *Njaim*, at *7.
- There was no retaliation even though Employer concedes it does not impose an "occurrence" each time an employee fails to report their absence; discipline is imposed only if the absence is "caught on time." The Court found the fact that "some absences have gone unpunished is insufficient to redefine what the policy is or change the fact that [Employee] violated it." *Id.* at *8.

Is it OK to say NO??!!

Employee's physician diagnosed her with "acute stress," and directed her to stay out of work for a week and get rest. Employee, a residential counselor for a nonprofit providing housing for individuals with special needs or in recovery, stated she was stressed and had too much work because the employer was increasing the number of patients under her supervision.

DMEC Disability Management Employer Coalition

Lee v. Heritage Health & Housing, Inc., 2009 WL 3154314 (S.D.N.Y. 2009).

- Employee's stress was not a serious health condition as the employee did not demonstrate that she received inpatient care in a hospital. 29 U.S.C. § 2611(11)(A). Therefore, the employee needed to demonstrate continuing treatment by a healthcare provider. 29 U.S.C. § 2611(11)(B).
- Though Employee provided evidence of "incapacitation" for more than three consecutive days, Employee did not show a continuing regimen of treatment despite seeing another doctor during her leave and allegedly having her blood pressure medication adjusted.
- However, the Court notes that "acute stress" may, under certain circumstances, constitute a serious health condition, i.e., when it otherwise meets the definition of "serious health condition." *Lee*, 2009 WL 3154314, at *13.

DMEC Disability Management Employer Coalition

Is it OK to say NO??!!

Employee sought to undergo in vitro fertilization. Employee visited a doctor three times in one week in July to begin the procedure. Employee informed Employer of her infertility and need to take time off for the treatment. Staffing needs required Employer to deny the request.

DMEC Disability Management Employer Coalition

Victoriana v. Internal Med. Clinic, 2016 WL 5404653 (E.D. La. 2016).

- Employee did not suffer from an illness that required inpatient care, and thus her infertility did not meet that definition of "serious health condition." *See* 29 C.F.R. § 825.114 (2013).
- Additionally, because Employee visited the clinic on three nonconsecutive days during a one-week period and was allowed to return to work during this time, the condition was not a "serious health condition" as she was not incapacitated for more than three consecutive days.

But, Infertility Could Be a "Disability" For Which Reasonable Accommodation May Be Available.

- *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758 (W.D. Mich. 2001). Employee was placed on a restricted work schedule in order to undergo medical treatments for infertility. Employee informed a supervisor with one business-day's notice of an appointment, but no one could cover the shift. After failing to report to work, Employee was terminated.
- Infertility is the "chronic failure of an organ system," falling within the ADA's description of a physiological disorder or condition affecting the reproductive system. *Id.* at 764 (citing 29 C.F.R. § 1630.2(h)(1)).
- Focusing on the request for one day off, the court found it could be a reasonable accommodation, and denied Wal-Mart's motion for summary judgment. *LaPorta*, 163 F. Supp. 2d at 767-68.

Is It OK to say NO??!!

Employee could no longer lift 15-20 pounds or perform triage, essential functions of the job of a nurse. Employer temporarily granted an accommodation that relieved Employee from the duty of performing triage (which included lifting 20 pounds) and placed her on light duty. Employer later removed the accommodation, and told Employee she could no longer work light duty and had to return to full duty.

Hancock v. Washington Hospital Center, 13 F. Supp. 3d 1 (D.D.C. 2014).

- Performing triage, including lifting 15-20 pounds, was an essential function of Employee's job as a nurse.
- Simply because Employer voluntarily provided a temporary accommodation does not mean Employer waived the essential function of the job, nor does it mean Employee, who is unable to perform the essential function of the job with or without accommodation, is a "qualified individual" with a disability under the ADA.
- An accommodation that eliminates an essential function of a job is unreasonable under the ADA even if it had been previously provided.

DMEC Disability Management Employer Coalition

Is it OK to say NO??!!

A cashier was diagnosed with osteoarthritis in both her knees, making it difficult for her to walk without assistance of a cane or to stand for prolonged periods of time. The cashier's job duties included unloading trucks, stocking shelves, and light cleaning during the periods of time when not assisting customers. The cashier requested an accommodation to sit in a chair for half of her working time.

DMEC Disability Management Employer Coalition

EEOC v. Eckerd Corp., 2012 WL 2726766 (N.D. Ga. 2012).

- The cashier's job had significant physical requirements per the job description, including housekeeping duties, unloading merchandise, stocking shelves, and building merchandise displays.
- Eckerd had a lean staffing model.
- The cashier's requested accommodation would eliminate essential job functions and not enable her to perform the functions. Because of this, it was *per se* unreasonable. *Id.* at *17.
- The cashier never identified an alternative reasonable accommodation, and provided no indication that such an accommodation existed. Accordingly, she was not a "qualified individual" with a disability under the ADA. *Id.* at *22.

DMEC Disability Management Employer Coalition

EEOC v. Eckerd Corp., 2012 WL 2726766, at *9 (N.D. Ga. 2012).

Undue Hardship Found!

"Accommodations that result in other employees having to work harder or longer are often denied on the ground of undue hardship…[P]roviding the accommodation (of letting employee sit for half of her shift) essentially requires the defendant to pay (employee) for twice the hours that she actually works while assigning many of her responsibilities to other employees. As such, the accommodation meets the definition of 'undue hardship' under the ADA." (internal citations omitted).

DMEC

But, It's Always Dependent On the Specific Job; and, Sometimes It's Not About the ADA At All.

- *Kilby v. CVS Pharmacy, Inc.*, 2018 WL 2441552 (S.D. Cal. May 31, 2018). Employee spent approximately 90% of work time operating a cash register; duties included scanning, reaching, lifting, bagging, and processing customer payments, all of which could be performed while seated.
- California Labor Code provides "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." Cal. Code Regs., tit. 8, § 11040, subd. 14(A).
- "The "nature of the work" refers to an employee's tasks performed at a given location for which a right to a suitable seat is claimed….If the tasks being performed at a given location reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing, a seat is called for." *Kilby*, 2018 WL 2441552, at *5 (citing *Kilby v. CVS Pharmacy, Inc.*, 368 P.3d 554 (Cal. 2016)).

DMEC

Is it OK to say NO??!!

A maintenance mechanic was treated for carpal tunnel syndrome. A physician imposed a permanent work restriction limiting the employee to lift no more than 15-35 pounds with the affected arm. The maintenance mechanic's position regularly required lifting 40 pounds or more. The employee suggested assistance from other mechanics and the use of lift-assisting devices as reasonable accommodations.

DMEC

Gardea v. JBS USA, LLC, 915 F.3d 537 (8th Cir. 2019).

- Accommodations that require "other employees to work harder, longer, or to be deprived of other opportunities (are) not mandated under the ADA." *Id.* at 542.
- Lifting more than 40 pounds was a fundamental job function that was common for the mechanic's position. JBS offered multiple reassignments as reasonable accommodations.
- If an employer offers reassignment as a reasonable accommodation, the employee must show that the position offered was inferior to the employee's former job *and* that a comparable position for which the employee qualified was open. *Id.*

DMEC Disability Management Employer Coalition

Is it OK to say NO??!!

A police officer, who suffered from depression, sought to be removed from the mandatory overtime list in order to attend group therapy and psychiatric treatment appointments.

DMEC Disability Management Employer Coalition

Johnson v. City of Blaine, 970 F. Supp. 2d 893 (D. Minn. 2013).

- Working overtime was a job duty for all officers, and as such, was an essential function of the position. It was included in both the job description and the collective bargaining agreement. An accommodation is unreasonable if it requires the elimination of an essential function of the job.
- The officer could request leave as needed to attend specific appointments. The officer did not suggest, and could not point to, additional accommodations the City should have made.

DMEC Disability Management Employer Coalition

Is it OK to say NO??!!

Employee was not hired for a position as a forklift operator. Employee alleged he had PTSD and depression and was registered under Hawaii's Medical Cannabis Program. As a condition of employment, Employee would have to pass an on-site drug test.

Kamakeeaina v. Armstrong Produce, Ltd., 2019 WL 1320032 (D. Haw. 2019).

- Using marijuana is not a reasonable accommodation under the ADA because a person cannot be a qualified individual with a disability if they are engaging in the use of illegal drugs. Only qualified individuals with a disability are entitled to reasonable accommodations. 42 U.S.C. §§ 12114(a), 12112(a).

But, Marijuana Is A "Growing" Dilemma; The Answer May Not Be "No," Particularly Under State Disability Discrimination Law.

- *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456, 457 (2017). Employee used marijuana to mitigate symptoms of Crohn's disease. Employee informed a supervisor of her condition and use prior to mandatory drug testing. After testing positive for marijuana, Employee was terminated.
- Use of medical marijuana is not "facially unreasonable" simply because the use or possession of marijuana violates Federal law.
- The use of marijuana may be an "undue hardship" if it jeopardizes the employer's ability to perform its business, e.g., Federal regulations applicable to the business.
- However, no accommodation of on-site use is required.

THANK YOU!

Jaclyn L. Kugell, Esq.
Morgan, Brown and Joy, LLP
200 State Street
Boston, MA 02109
(617) 523-6666
jkugell@morganbrown.com

DMEC Disability Management Employer Coalition

MBJ
MORGAN, BROWN & JOY, LLP