



Managing Disabilities and Leaves of Absence Under the New ADA and the FMLA

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Managing employees with medical conditions and disabilities compels employers to navigate the elaborate and confusing legal web that involves the interplay between the Americans With Disabilities Act (“ADA”), 42 U.S.C. § 12101 et seq., the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2601 et seq., and similar state laws. Given the ADA Amendments Act’s (“ADAAA”) compelling expansion of the definition of disability, employers will need to be more careful than ever when making decisions regarding employees and applicants with physical or mental impairments. Under the new law, employers will face an increasing number of requests to accommodate, and those requests likely will involve more and varied types of accommodations. The Equal Employment Opportunity Commission’s (“EEOC”) expectations are high with regard to how much an employer must do, how quickly the employer must act, and how proactive the employer must be. Employers should expect an increase in disability discrimination litigation as the margins of the law are tested. Due to the expanded definition of disability coupled with Congress’ expectation that courts will shift the focus of their inquiry to the question of whether an otherwise qualified disabled person has experienced discrimination rather than the threshold issue of coverage, many more disability discrimination claims will survive summary judgment and be sent to trial.

This article explores how the ADAAA and its implementing regulations have significantly altered the disability discrimination landscape, by discussing the expanded definition of disability, the courts’ application of the new definition in practice, and the EEOC’s aggressive enforcement initiative regarding reasonable accommodation. It further explores the ADAAA’s impact on eligibility for leave under the FMLA, as well as other noteworthy case law developments under the FMLA.

THE ADA AMENDMENTS ACT OF 2008

On September 25, 2008, former President George W. Bush signed into law the ADA Amendments Act of 2008, which went into effect on January 1, 2009. The ADAAA is the result of long negotiations between members of Congress to “restore the intent and protections of the Americans With Disabilities Act.” As expressed in the law, the ADAAA is intended to redress an array of federal court decisions that limited the number of individuals eligible for protection under the statute. Indeed, a 2006 study showed that plaintiffs lost 97 percent of ADA employment discrimination claims, frequently on the ground that they did not meet the definition of “disability” under the law.¹

¹ See Amy L. Allbright, *2006 Employment Decisions Under the ADA Title I—Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (July/August 2007) (stating that in 2006, “[o]f the 218 [employment discrimination] decisions that resolved the claim (and have not yet changed on appeal), 97.2 percent resulted in employer wins and 2.8 percent in employee wins”).

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The ADAAA retains the basic three-prong definition of disability under the ADA:

- an impairment that substantially limits one or more major life activities;
- a record of such impairment; or
- being regarded as having such an impairment.

42 U.S.C. § 12102(2)(A). However, it clarifies and expands the meaning of several prongs of the definition to allow more individuals to qualify as “disabled.” As a general matter, the ADAAA: (1) rejects the way in which the term “substantially limits” had been interpreted by the courts and the EEOC; (2) provides an unprecedented list of “major life activities,” which includes a list of “major bodily functions”; (3) rejects the consideration of the ameliorative effects of mitigating measures in determining disability status; (4) clarifies that episodic impairments or impairments in remission will qualify as disabilities if they substantially limit one or more major life activities when active; (5) strengthens the “regarded as” prong of disability; and (6) emphasizes that the focus in disability cases should be on whether a qualified person has been discriminated against on the basis of disability instead of the threshold issue of coverage.

The ADAAA overturned several Supreme Court decisions, which the proponents of the law believed too narrowly construed the ADA, resulting in the denial of protection for many individuals whom Congress intended to protect. Among the decisions the law overturned are Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002) and Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

Congress specifically rejected the strict standard of disability provided by the Supreme Court in Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002). In Williams, the Court held that to be substantially limited in a major life activity, an “individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” Williams, 534 U.S. at 185. According to Congress, the Williams decision created “an inappropriately high level of limitation necessary to obtain coverage under the ADA” and conflicted with Congressional intent to afford broad coverage to individuals with disabilities. 42 U.S.C. § 12101 (note). The ADAAA also took issue with a then-current EEOC regulation that defined the term “substantially limits” as “significantly restricted.” Notably, however, the ADAAA did not define the term “substantially limits.” Instead, Congress simply explained that the term “substantially limits” should be “interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008” and directed the EEOC to promulgate a new rule that allows broader coverage under the ADA. 42 U.S.C. § 12101 (note).

The ADAAA also expressly renounced the Supreme Court’s holding in Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) that the determination of disability requires the consideration of measures taken to correct for or mitigate a physical or mental impairment. Instead, the amendments make clear that the determination of whether an individual is substantially limited in a major life activity should be made without regard to the ameliorative effects of mitigating measures. *See* 42 U.S.C. § 12102(4)(E)(i). The only exception noted is the use of common eyeglasses or contact lenses, the ameliorative effects of which should be considered.

In the two years following the effective date of the ADAAA, employers have already begun to experience its profound impact. The EEOC has reported that the number of disability discrimination charges in 2010 was nearly 30 percent greater than the number of disability discrimination charges the EEOC received in

2008. Disability discrimination charges are expected to continue to increase dramatically in 2011 as ADA enforcement has clearly become a priority for the EEOC. This surge in disability discrimination charges will undoubtedly lead to more lawsuits which will now be much more difficult to defend. Employers will be less likely to win cases on summary judgment because of the ADAAA's more expansive definition of disability, resulting in more jury trials. Cases will now turn on whether employers complied with their reasonable accommodation and other obligations and whether discrimination occurred – and not on the threshold issue of coverage.

Final Regulations Implementing the ADAAA

At long last, the EEOC's final regulations implementing the ADAAA were published in the Federal Register on March 25, 2011. The final regulations reaffirm the purpose of the ADAAA: to make it easier for individuals with disabilities to obtain the ADA's protection. The following discusses the highlights of the final rules.

“Substantially Limited” in a Major Life Activity

Whether an individual has a disability under the first prong of the definition (often referred to as an “actual disability”) turns on establishing that the individual has a physical or mental impairment that “substantially limits a major life activity.” As explained above, before the enactment of the ADAAA, disability discrimination plaintiffs were required to show that they had an impairment that “prevented” or “severely restricted” them from doing activities that are of central importance to most people's daily lives. The impairment also had to be permanent or long-term. In keeping with the amendments, the final regulations make clear that the term “substantially limits” no longer has the same meaning. The regulations do not, however, offer an explicit definition for the term “substantially limits.” Instead, in the final regulations, the EEOC provided the following nine rules of construction for determining whether an individual is substantially limited in a major life activity:

1. The term “substantially limits” should be construed broadly in favor of expansive coverage to the maximum extent permitted by the Act.
2. An impairment need not prevent or significantly limit a major life activity to be considered “substantially limiting.”
3. In keeping with Congress' intent that the primary focus of the ADA should be on whether discrimination occurred, the determination of disability should not require extensive analysis.
4. The determination of whether an impairment “substantially limits” a major life activity requires an individualized assessment.
5. Although the determination of whether an impairment “substantially limits” a major life activity will ordinarily not require scientific, medical, or statistical evidence, such evidence may be used if appropriate.
6. The determination of whether an impairment substantially limits a major life activity should be made without regard to ameliorative effects of mitigating measures (other than ordinary glasses or contact lenses).

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7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
8. An individual need only be substantially limited, or have a record of a substantial limitation, in one major life activity to be covered under the first or second prong of the definition of “disability.”
9. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.

29 C.F.R. § 1630.2(j)(1).

Several of these rules of construction are worth emphasizing. First, the EEOC’s sixth rule of construction highlights Congress’ rejection of the Supreme Court’s decision in *Sutton* by stressing that the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) should not be considered in determining whether an individual is disabled. *See* 29 C.F.R. § 1630.2(j)(1)(vi). Mitigating measures are things that eliminate or reduce the symptoms or impact of an impairment. Examples include medication, medical equipment and devices, prosthetics, hearing aids, mobility devices, oxygen therapy, reasonable accommodations, physical therapy and psychotherapy. *See* 29 C.F.R. § 1630.2(j)(5). Now, the focus should be on whether an individual would be substantially limited in a major life activity without a mitigating measure – even if the mitigating measure completely eliminates the impact of a particular impairment. Furthermore, although the positive effects of mitigating measures may not be considered in the disability analysis, the EEOC regulations explain that the negative effects of mitigating measures (such as the negative side effects of medication or the burdens associated with following a particular treatment regimen) should be considered when determining whether an individual’s impairment substantially limits a major life activity. *See* 29 C.F.R. § 1630.2(j)(4)(ii).

According to the final regulations, in determining whether an individual is entitled to a reasonable accommodation or would pose a direct threat, both the positive and negative effects of mitigating measures should be considered. *See* Appendix to 29 C.F.R. Part 1630. Furthermore, while an employer cannot require an individual to use a mitigating measure, an individual’s failure to use one may affect whether the individual is qualified for the job or would otherwise pose a direct threat.

Second, under the seventh rule of construction, an impairment that is episodic or in remission will meet the definition of disability if it would substantially limit a major life activity when active. *See* 29 C.F.R. § 1630.2(j)(1)(vii). This change may dramatically increase the number of individuals considered disabled given that illnesses such as cancer may be in remission for months or years. The EEOC’s Interpretive Guidance provides examples of impairments that may be episodic, including epilepsy, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder and schizophrenia. According to the EEOC, “the fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity.” Appendix to 29 C.F.R. Part 1630.

Finally, the EEOC’s ninth rule of construction emphasizes that short-term conditions may in fact be substantially limiting. *See* 29 C.F.R. § 1630.2(j)(1)(ix). Prior to the ADAAA, employers looked at the permanent or long-term nature of a particular condition to determine whether it constituted a disability. That will no longer be the case. The duration of an impairment is only one factor that is relevant to

determining whether an impairment substantially limits a major life activity. Short-term impairments may be covered if they are sufficiently severe. For example, the EEOC's Interpretive Guidance explains that an individual with a back impairment that results in a 20 pound lifting restriction for several months is substantially limited in the major life activity of lifting and would, therefore, be covered under the first prong of the definition of disability. *See* Appendix to 29 C.F.R. Part 1630.

Major Life Activities

The ADAAA ensures that more people with medical conditions are covered by the Act by adding two illustrative, non-exhaustive lists of "major life activities." The first list enumerates major life activities which have previously been accepted by the EEOC and the courts as well as some new ones. The list includes "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working." 29 C.F.R § 1630.2(i). The second list of "major bodily functions" is new to the ADA landscape and includes "functions of the immune system, special sense organs and skin; normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic lymphatic, musculoskeletal, and reproductive functions" *Id.* The regulations also explain that the operation of a major bodily function may include the operation of a single organ within the body.

The addition of "major bodily functions" to the list of major life activities" will make it much easier for individuals with certain impairments to demonstrate disability.² For example, the common ailment of irritable bowel syndrome may now be covered under the amended ADA given the newly-listed major life activity of "digestive" or "bowel" function. The final regulations make clear that major life activities need not be "of central importance to daily life."

Other than its inclusion in the list of "major life activities," language regarding the major life activity of "working" was removed from the final regulations and moved to the Interpretive Guidance. The EEOC explained that the major life activity of working should rarely be relied upon given the expansion of the definition of "major life activities" to include "major bodily functions." To the extent it is necessary, however, the final regulations reinstate the "class or broad range of jobs in various classes as compared to most people having comparable training, skills and abilities" standard for purposes of conducting the "major life activity of working" analysis, but emphasizes that courts should apply a lower standard in analyzing the major life activity of working than they had in the past. *See* Appendix to 29 C.F.R. Part

² The EEOC recently issued an informal opinion letter, emphasizing that, although people with paruresis or "shy bladder syndrome" must still meet the statutory definition of disability under the ADA, the broader definitions in the ADA Amendments Act will make it much easier for them to do so. *See* EEOC Informal Opinion Letter (Aug. 12, 2011). Paruresis is the inability to urinate in public restrooms or in close proximity to other people, or the fear of being unable to do so. According to the EEOC, employees with paruresis sometimes "are subject to adverse employment actions because they cannot pass standard workplace drug tests and are denied permission to take alternative tests that do not involve urination." As noted by the EEOC, the ADA Amendments Act and its implementing regulations make it much easier for people with paruresis to demonstrate that they are disabled "by including bladder and brain functions as major life activities, lowering the standard for establishing that an impairment 'substantially limits' a major life activity, and focusing the determination of whether an individual is 'regarded as' having a disability on how the individual has been treated because of the impairment, rather than on what the employer may have believed about impairment."

1630. Demonstrating a substantial limitation in performing the unique aspects of one specific job is not sufficient.

“Virtually Always” Disabilities

While emphasizing that the question of “disability” remains an individualized determination, the final regulations provide examples of impairments that should “virtually always” constitute disabilities, including: deafness, blindness, an intellectual disability (formerly termed mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post traumatic stress disorder, obsessive compulsive disorder and schizophrenia. The regulations explain that “with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.” 29 C.F.R. § 1630.2(j)(3). Although the proposed regulations had contained a list of impairments that would not typically qualify as disabilities (e.g., a common cold, a broken bone that is expected to heal completely, and a sprained joint), that list was removed from the final regulations.

“Regarded As” Disabled

The ADAAA significantly altered the “regarded as” prong of the definition of “disability.” Prior to the enactment of the ADAAA, to demonstrate coverage under the “regarded as” prong, the plaintiff had to prove that the employer perceived him or her as having a condition that substantially limited a major life activity. The ADAAA clarifies that an individual can meet the “regarded as” prong if the individual can establish that he or she was subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not “transitory and minor.” 29 C.F.R. §§ 1630.2(l), 1630.15(f). “Transitory” is defined as a condition that lasts less than six months. 29 C.F.R. § 1630.15(f). In other words, under the new ADA, to establish coverage under the “regarded as” prong of disability, plaintiffs will no longer be required to demonstrate that their employers or prospective employers mistakenly believed that they were substantially limited in one or more major life activities. They must simply demonstrate that a covered entity took a prohibited action against them on account of an impairment that was not “transitory and minor.”

The EEOC has emphasized that employees who meet only the “regarded as” prong of the definition of disability are not entitled to reasonable accommodation under the law. Rather, individuals must meet either the “actual” or “record of” definitions of disability to be entitled to reasonable accommodation.

Nevertheless, this change in the “regarded as” prong represents a significant expansion of the law. In fact, the EEOC has emphasized that if an individual is not challenging a covered entity’s failure to make a reasonable accommodation, the individual should proceed under the regarded as prong and will not have to demonstrate an “actual disability” – just an impairment that is not transitory and minor.

The ADAAA in the Courts

The EEOC and most courts have concluded that the ADAAA cannot be applied retroactively. Instead, the new standard of disability applies only when an adverse employment or other prohibited action occurred on or after January 1, 2009, the effective date of the ADAAA. Accordingly, most courts have not yet had occasion to interpret the new provisions. As we approach the third anniversary of the effective date of the

amendments, many more cases will be decided under the new, broader standard for determining coverage. The following summarizes some of the few decisions issued so far under the ADAAA.

Short term impairments

- *Cohen v. CHLN, Inc.*, 2011 WL 2713737 (E.D.Pa. Jul. 13, 2011). The District Court for the Eastern District of Pennsylvania rejected the defendants' argument that the plaintiff-employee's back condition was only temporary and did not substantially limit a major life activity. According to the Court, the plaintiff testified that he suffered from debilitating back and leg pain for nearly four months before his discharge, which impacted his ability to walk, sleep and climb stairs. The plaintiff's back pain was not resolved by the injections recommended by his doctor. His doctor had, therefore, recommended surgery with no indication that the plaintiff's condition would be resolved permanently.
- *Gibbs v. ADS Alliance Data Systems, Inc.*, 2011 WL 3205779 (D.Kan. Jul. 28, 2011). In June 2008, the plaintiff was diagnosed with carpal tunnel syndrome for which she underwent surgery on December 3, 2008. When she returned to work on December 12, 2008, the plaintiff was restricted to using only her left hand. On January 8, 2009, the plaintiff was released to return to work full duty. Her employment was terminated the following day, however, because her employer observed her selling Avon products in violation of the company's solicitation policy. The plaintiff asserted that her discharge violated the ADA, and her employer filed a motion for summary judgment. In denying the defendant's motion for summary judgment, the District Court for the District of Kansas did not pay too much attention to the question of whether the plaintiff was disabled within the meaning of the ADA. Rather, the Court simply explained that, "keeping in mind that the inquiry is not meant to be 'extensive' or demanding," genuine issues of material fact existed as to whether the plaintiff's carpal tunnel syndrome constituted a disability.
- *Budhun v. Reading Hospital*, 2011 WL 2746009 (E.D.Pa. Jul. 14, 2011). The District Court for the Eastern District of Pennsylvania denied the plaintiff's motion to amend her complaint to add a claim of disability discrimination as a result of a fracture to the plaintiff's fifth metacarpal on her right hand. The injury resulted only in the plaintiff's loss of use of her pinky finger for a little over two months and there was no allegation that the impairment limited any major life activity. According to the Court, "the question of whether a temporary impairment is a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity." "Temporary impairments, however, 'such as a broken leg, are not commonly regarded as disabilities, and only in rare circumstances would the degree of the limitation and its expected duration be substantial.'"
- *Bliss v. Morrow Enterprises, Inc.*, 2011 WL 2555365 (D.Minn. Jun. 28, 2011). The plaintiff alleged that her former employer discriminated against her on account of her broken arm, which limited her ability to engage in certain types of movements and had required six surgeries. The District Court for the District of Minnesota granted summary judgment in favor of the employer, finding that no reasonable jury could conclude that the plaintiff was subject to an adverse action on account of her broken arm. On the issue of whether the employee was disabled within the meaning of the ADA, the Court emphasized that it did not need to reach that issue as it decided the employer's motion on other grounds. However, in a footnote, the Court emphasized that it

doubted that the employee was disabled for purposes of the ADA under either the old or new standards of disability.

- *Patton v. ECardio Diagnostics LLC*, 2011 WL 2313211 (S.D.Tex. Jun. 9, 2011). The District Court for the Southern District of Texas addressed the ADA's definition of disability in the context of determining whether an employee was entitled to FMLA leave to care for her adult daughter who the employee contended was incapable of self care because of a "physical disability" following a car accident. In denying the employer's motion for summary judgment, the Court held that a reasonable jury could conclude that the employee's daughter, who suffered from two broken femurs, was disabled within the meaning of the ADA. According to the Court, there was sufficient evidence to demonstrate that the employee's daughter was substantially limited in the major life activity of walking in that she suffered from two broken legs, was confined to a wheel chair for several weeks (if not months) after which time she needed a walker, and continued to experience pain and walked with a limp approximately a year and a half later.
- *Lewis v. Florida Default Law Group*, 2011 WL 4527456 (M.D.Fla. Sept. 16, 2011). The plaintiff brought suit under the ADA, alleging that her employer discharged her because she had the H1N1 virus, i.e., the swine flu, which caused her to be absent from work for four days. Although the plaintiff believed she had been diagnosed with swine flu, her physician testified that she had only been diagnosed with the seasonal flu. Concluding that the plaintiff could not demonstrate that she suffered from an "actual disability" or that her employer "regarded her" as disabled, the District Court for the Middle District of Florida granted the employer's motion for summary judgment. Although the Court recognized that short-term impairments may be substantially limiting if they are sufficiently severe, this was not such a case. The Court likewise rejected the plaintiff's "regarded as" claim, concluding that her impairments were both transitory and minor. The plaintiff's symptoms included: fever, cough, diarrhea, malaise and abdominal pain. According to the Court, "[t]hese short-term symptoms (i.e., impairments) are specifically the type of impairments that the 'transitory and minor' exception was intended to cover."

Impairments That Are Episodic or in Remission

- *Hoffman v. Carefirst of Fort Wayne, Inc.*, 737 F. Supp. 2d 976 (N.D. Ind. Aug. 31, 2010). The plaintiff, a service technician, was diagnosed with renal cancer in November 2007, took short-term disability leave for surgery and recovery, and returned to work on January 2, 2008, without restrictions. One year later, in response to a new requirement that all service technicians work overtime and do a night shift once a week, the plaintiff sought an accommodation, providing a doctor's note stating that he could not work more than 8 hours per day, 5 days per week. After initially rejecting the plaintiff's request, the company agreed to limit the plaintiff's hours but required him to work out of an office that would add at least two hours to his commute each day. The plaintiff brought suit, challenging the denial of accommodation and resulting termination. In its motion for summary judgment, the employer argued that the plaintiff did not have a substantially limiting impairment because his cancer was in remission and he had been working for a year without restrictions at the time of his separation from the company. Rejecting this argument, the District Court for the Northern District of Indiana held that it "is bound by the clear language of the ADA," which "clearly provides that 'an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.'" The

Court also noted that its conclusion was further bolstered by the EEOC's then-proposed regulations, which specifically provided that cancer is an example of an impairment that will "consistently meet the definition of disability" because it "substantially limits major life activities such as normal cell growth." *See also Norton v. Assisted Living Concepts, Inc.*, 2011 WL 1832952 (E.D.Tex. May 13, 2011) (holding that an employee's renal cancer that was in remission was capable of being classified as a disability under the amended ADA).

- *Feldman v. Law Enforcement Associates Corp.*, 2011 WL 891447 (E.D.N.C. Mar. 10, 2011). The District Court for the Eastern District of North Carolina denied an employer's motion to dismiss ADA claims brought by two discharged employees. One of the plaintiffs suffered from multiple sclerosis and the other had a transient ischemic attack ("mini stroke"), which caused him to be hospitalized for two days and required several weeks of recovery at home. The employer argued neither employee had a substantially limiting impairment. The Court disagreed, stating that it was "certainly plausible" under the ADAAA that both plaintiffs had a physical impairment that constitutes a disability. The Court applied the ADAAA's new rule for conditions that are "episodic or in remission" to conclude that the employee with multiple sclerosis could state a claim because his impairment could be substantially limiting when active. It further noted that the EEOC's then-proposed regulations listed MS as an impairment that will consistently meet the definition of disability. With respect to the employee who experienced a mini-stroke, the Court rejected the employer's contention that this impairment did not constitute a disability as a matter of law due to the short duration of the episode. According to the Court, although the mini-stroke was not part of an episodic or underlying chronic condition, it could nevertheless qualify as a disability. Emphasizing the ADAAA's expressed intent to be interpreted as broadly as possible, the Court explained that while the duration of his impairment "may have been relatively short, the effects of the impairment were significant."
- *Medvic v. Compass Sign Co., LLC*, 2011 WL 3513499 (E.D.Pa. Aug. 10, 2011). The plaintiff brought suit, contending that he was subjected to a hostile work environment and discharged because of his stutter, which he alleged substantially limited his major life activity of communicating. The defendant filed a motion for summary judgment, arguing, among other things, that the plaintiff was not disabled within the meaning of the ADA. The District Court for the Eastern District of Pennsylvania denied the defendant's motion for summary judgment on the plaintiff's discharge claim. According to the Court, "there was evidence from which a reasonable jury could conclude that when Plaintiff's stutter is active, it substantially limits his ability to communicate, sometimes rendering him totally incapable of communicating at all." In so holding, the Court noted that the plaintiff offered evidence demonstrating that his stutter can keep him from commuting his thoughts to others for minutes at a time. The plaintiff's struggle with stuttering during his deposition further evidenced his substantial limitation in communicating. The plaintiff's hostile work environment claim was dismissed on other grounds.
- *Kinney v. Century Services Corp.*, 2011 WL 3476569 (S.D.Ind. Aug. 9, 2011). The plaintiff, who suffered from depression, brought suit contending that her employer discharged her in violation of the ADA. In its motion for summary judgment, the defendant argued that the plaintiff's "isolated bouts" of depression did not constitute a disability because they did not impact her major life activities. Emphasizing that the ADAAA provides that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active," the

District Court for the Southern District of Indiana denied summary judgment. Given the plaintiff's debilitating symptoms when her depression was active, the Court concluded that the plaintiff raised a genuine issue of material fact as to whether she was disabled within the meaning of the ADA.

Major Bodily Functions

- *Horgan v. Simmons*, 2010 WL 1434317 (N.D. Ill. Apr. 12, 2010). The plaintiff's employment was terminated after his employer learned of his HIV-positive status. He brought suit under the ADA, alleging unlawful termination and impermissible medical inquiry. Moving to dismiss, the employer contended that the plaintiff failed to plead that his HIV-positive status substantially limited a major life activity. Denying the motion, the District Court for the Northern District of Illinois explained that the "ADAAA clarified that the operation of 'major bodily functions,' including 'functions of the immune system,' constitute major life activities under the ADA's first definition of disability." The Court concluded that it was "certainly plausible – particularly, under the amended ADA – that Plaintiff's HIV positive status substantially limits a major life activity: the function of his immune system." In so holding, the Court noted that this conclusion was consistent with the EEOC's then-proposed regulations, which identified HIV as an impairment that will consistently meet the definition of disability.
- *Meinelt v. P.F. Chang's China Bistro, Inc.*, 2011 WL 2118709 (S.D. Tex. May 27, 2011). The plaintiff was discharged three days after informing his supervisor that he had a brain tumor that would require surgery several months later. The defendant moved for summary judgment, contending that the plaintiff's brain tumor was not a disability because it did not substantially limit any major life activity. The District Court for the Southern District of Texas disagreed, noting that under the ADAAA, the term major life activity also includes the operation of a major bodily function, which includes normal cell growth and brain function. Summary judgment on the plaintiff's ADA claim was denied.

"Regarded As" Disabled

- *Dugay v. Complete Skycap Services, Inc.*, 2011 WL 3159171 (D. Ariz. Jul. 26, 2011). After suffering back and neck injuries in a car accident, the plaintiff was informed that he could not return to work until he provided a medical release. The plaintiff provided a doctor's note, but was told that he could not return to work until he presented a full release. When he subsequently presented a full release, his employer told him that there was no work available for him. The plaintiff brought suit under the ADA. The employer filed a motion to dismiss, contending that the plaintiff did not aver facts suggesting that he was disabled within the meaning of the ADA. The District Court for the District of Arizona granted the employer's motion. According to the Court, the plaintiff could not demonstrate that his employer regarded him as disabled because, from the face of his complaint, it was clear that his impairment lasted just over three months. As such, it fell within the statutory exception for "transitory and minor" impairments. Notably, the Court did not discuss the severity of the impairment in its analysis. Other courts have concluded that a condition lasting less than 6 months may nevertheless fall outside of the statutory exception for "transitory and minor" impairments if the impairment is sufficiently severe as the exception requires that the impairment be *both* "transitory" and "minor."

- *Lowe v. American Eurocopter, LLC*, 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010). The plaintiff brought suit asserting, among other things, that she was discharged because of her weight. The defendant responded by filing a motion to dismiss, arguing that obesity is not a disabling impairment under the ADA. Although it recognized that many pre-ADAAA cases held that obesity was not a disabling impairment, the District Court for the Northern District of Minnesota denied the employer's motion to dismiss for lack of coverage. According to the Court, in light of changes made by the ADAAA, the plaintiff may be able to establish an "actual disability" or that her employer "regarded" her as disabled within the meaning of the ADA.

Reasonable Accommodations Under the ADA

The ADA requires employers to provide reasonable accommodations to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodations would cause undue hardship. *See* 42 U.S.C. § 12112(b)(5)(A). An accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. Reasonable accommodations can include, among other things, leaves of absence, flexible work schedules, job restructuring, modifications to facilities or equipment, providing readers or interpreters, and reassignment to a vacant position. The ADAAA's expanded definition of disability undoubtedly will increase the number of employees who are protected by the federal law and, therefore, entitled to reasonable accommodation. Because the focus of disability discrimination claims has shifted away from the threshold issue of coverage and toward the question of whether an employer complied with its obligations under the ADA, employers must be prepared to demonstrate that they made good faith efforts to accommodate their employees.

Leave as an Accommodation Under the ADA

The EEOC has long emphasized that unpaid leave may be a reasonable accommodation under the ADA. *See Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the ADA* (October 17, 2002)(the "Guidance"). Most courts have agreed. *See e.g., Rascon v. US West Communications*, 143 F.3d 1324 (10th Cir. 1998); *Criado v. IBM Corp.*, 145 F.3d 437, 444 (1st Cir 1998); *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 782, (6th Cir. 1998); *Haschmann v. Time Warner Entertainment Co., L.P.*, 151 F.3d 591, 602 (7th Cir. 1998). Consequently, employers must provide leaves and modified or reduced work schedules, and extensions of leave upon exhaustion of any paid or unpaid leave entitlement, absent undue hardship. While the right to accommodation under the ADA may run concurrently with the right to continuous, intermittent or reduced schedule/leave under the FMLA, an employee covered by the ADA but ineligible for FMLA leave nonetheless may be entitled to leave or a modified schedule.

Current EEOC Guidance and Anticipated New Guidance

When it issued its Guidance in October 2002, the EEOC set forth its enforcement position on leaves and modified part-time schedules as reasonable accommodations under the ADA. As discussed above, because the legal focus in ADA cases following the passage of the ADAAA is no longer on whether a person is disabled under the ADA, but rather on whether the employer complied with its obligation to provide reasonable accommodation, the EEOC's long standing Guidance is being rigorously applied and tested.

Managing Disabilities and Leaves of Absence Under the New ADA and the FMLA

The current Guidance makes clear that employers must permit the use of accrued paid leave, or unpaid leave, as a form of reasonable accommodation under the ADA when necessitated by an employee's disability, absent undue hardship. Employers should allow an employee with a disability to exhaust accrued paid leave first and need not provide paid leave beyond what is provided to similarly situated employees, but then should provide unpaid leave. Leave may be required for several reasons related to the disability, such as: obtaining medical treatment, therapy or rehabilitation services; recuperating from an illness or episodic manifestation of the disability; obtaining repairs on assistive devices; avoiding temporary adverse conditions in the work environment, including those that may exacerbate a disabling condition; and training related to the disability (e.g., in the use of a service animal or in Braille).

It has long been the EEOC's position under the Guidance that an employer violates the ADA by applying a "no fault" leave policy in a manner in which employees are automatically terminated after they have been on leave for a certain maximum period of time. Instead, an employer must grant additional leave as an accommodation unless it can show that there is another effective accommodation that would enable the person to perform the essential functions of his/her job or that granting additional leave would cause undue hardship.

Unlike the FMLA, the ADA does not contain a specific time limit on the amount of leave an employee may take. The amount of leave that may be required as a reasonable accommodation under the ADA depends on the facts and circumstances of each individual case. Although many courts have found that requests for indefinite leave are inherently unreasonable, according to the EEOC, an employer may not automatically deny a request for leave or additional leave on the ground that the employee cannot provide a fixed date or approximate date of return to work. Instead, the employer must consider the leave and can deny it only where the lack of a fixed date would cause an undue hardship. Such hardship could derive from disruption of the employer's operations because it cannot plan for the employee's return nor permanently fill the position. When granting leave in such a case, the employer can require, as part of the interactive process, that the employee provide periodic updates on his/her condition and possible date of return, including the need to postpone the return-to-work date due to unforeseen medical developments, so that the employer can reevaluate whether allowing continued leave would cause an undue hardship.

Significantly, the EEOC maintains that the ADA entitles a disabled employee who is granted leave as a reasonable accommodation to return to his/her *same* position following leave unless holding open the position would impose an undue hardship. If it cannot hold open the *same* job, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which he/she can be reassigned.

Like under the FMLA, an employer may not penalize an employee with a disability for work missed during leave taken as a reasonable accommodation. According to the EEOC, any such penalty would render the leave an ineffective accommodation and would also constitute retaliation prohibited by the ADA. So, for example, counting leave granted as an accommodation as an absence in connection with lay-off selection decisions or evaluating productivity would violate the law.

While the EEOC's Guidance acknowledges that the ADA permits an employer to provide, instead of leave, another effective accommodation that would require an employee to remain on the job, rights under the FMLA can trump this ADA allowance. The FMLA prohibits interference with an employee's exercise of rights under that law by discouraging an employee from taking FMLA leave or "manipulating" a situation to prevent an employee from taking FMLA leave for which he/she is eligible.

See 29 C.F.R. § 825.220. Such manipulation can include changing the essential functions of the job to preclude the taking of leave. Forcing an employee recovering from a serious health condition, as defined under the FMLA, to take a light duty assignment in lieu of taking FMLA leave is also prohibited. *See* 29 C.F.R. §825.220(d). When an employee is covered by both the ADA and FMLA, his/her leave rights under each statute must be considered separately, and where the laws overlap, the employer must consider both laws and comply with the most protective, applicable provision.

In addition to granting continuous leave, the EEOC's Guidance emphasizes that an employer must permit an employee with a disability to work a modified or part-time schedule as a reasonable accommodation, absent undue hardship. This is so even if the employer does not provide such schedules for other employees. A modified schedule may include allowing employees to use accrued paid leave, providing periodic breaks, altering arrival or departure times, etc. If modifying an employee's schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested. Here again, requests for modified or part-time schedules for an employee covered under the ADA and FMLA must be handled in compliance with both laws.

Following its announcement in late 2010 that it would revise its existing Guidance, the EEOC held hearings this past summer to discuss issues that continue to concern employers, including how much leave must be provided as a reasonable accommodation. According to EEOC Commissioners Chai Feldblum ("Feldblum") and Victoria Lipnic, in issuing new guidance, the EEOC will endeavor to make clear how an employer can run a business effectively even with reasonable accommodation requests. Contending that the ADA was not intended to leave employers with financial and operational hardship in accommodating workers with disabilities, but rather to steer them toward reasonable steps that permit disabled persons to operate equally in the workforce, Feldblum nonetheless emphasized that, with the passage of the ADA, employers must now pay significant attention to reasonable accommodation requirements.

Employers can expect that the new guidance will detail their accommodation obligations. Although acknowledging that fixed and no-fault leave/attendance policies do not per se violate the ADA, the EEOC maintains that an inflexible period of leave for medical disability, however long and whether or not paid, often will not satisfy the ADA's reasonable accommodation requirements. Rather, employers will need to make individualized assessments on how much leave must be provided to an ADA-covered employee. And, in making these assessments and decisions about what may be reasonable and effective, employers will need to communicate with employees, health care providers, and accommodation resources, and evaluate possible accommodations with supervisors/managers.

The EEOC's approach sounds simple, but practical difficulties abound in administering leave and schedule modification programs, as made evident in recent noteworthy EEOC cases. Settlements exacted by the EEOC in many of these cases demonstrate the high bar for compliance the agency believes exists under the ADA, and courts are increasingly willing to deny summary judgment in these cases, upping the ante for employers. Demands made by the EEOC when negotiating class settlements may give employers a glimpse of what to expect in the highly anticipated new guidance.

EEOC Litigation Challenging Leave Practices

The EEOC has shifted its emphasis from individual cases to pattern or practice and/or class disability discrimination cases which have a broad impact on a company, industry, profession or geography. After

an individual files a charge, the EEOC often expands its investigation into the employer's related employment practices. Any alleged statutory violation the agency discovers can serve as the basis for a systemic class action. As noted below, the EEOC's results in cases have been impressive. Monetary settlements have been large, and employers have agreed to undertake a range of actions, at times even beyond what the ADA likely requires, and to permit EEOC oversight for several years. The plaintiffs' bar has taken notice and begun filing similar private suits.

Inflexible Leave Policies

- *EEOC v. Sears Roebuck & Co.*, No. 04cv7282 (N.D. Ill.) (settlement filed 2/4/2010). In a federal lawsuit against Sears, the EEOC alleged that Sears' policy of terminating employees unable to return to work after exhausting 12 months of workers' compensation leave violated the ADA's reasonable accommodation requirements. Sears allegedly never offered reasonable accommodations that would have permitted 235 affected employees to return to work. Sears settled the lawsuit for \$6.2 million, and agreed to train employees about their rights under the ADA, provide written reports to the EEOC regarding future compliance, and post notices concerning the settlement at all Sears facilities.
- *EEOC v. Supervalu, Inc.*, No. 1:09cv5637 (N.D. Ill.) (settlement filed 1/5/11). The EEOC sued Supervalu and its subsidiaries, American Drug Stores LLC and Jewel Food Stores, Inc., alleging they violated the ADA's reasonable accommodation requirements by: prohibiting employees on paid disability from returning to work unless they could return to full duty without any restrictions; terminating such employees upon exhaustion of a one-year leave period; and prohibiting disabled employees not injured on the job from participating in the company's 90-day light duty program. The parties settled the case pursuant to a consent decree, which neither addressed, nor required changes to, the company's light duty Temporary Alternative Work Program. Under the agreement, Supervalu established a \$3.2 million settlement fund payable to 110 individuals deemed eligible out of 1,000 employees terminated under the challenged leave program. In addition, Supervalu agreed to: revise its leave policies to conform to the ADA; communicate to disabled employees that they need not be fully healed to return to work; advise such employees about how to request accommodations (including leave extensions); and train managers on the ADA, including return-to-work accommodation issues. Supervalu also agreed to provide semi-annual reports to the EEOC for three years on its efforts to accommodate disabled employees who attempted to return to work following an injury. Finally, Supervalu agreed to engage a job description consultant to revise job descriptions to ensure they did not contain "unnecessary" strenuous physical demands, and an accommodations consultant to assist in identifying possible accommodations to common physical limitations experienced by employees in non-managerial jobs. Both consultants will be required to meet with the EEOC to discuss the scope of their work.
- *EEOC v. United Parcel Service, Inc.*, No. 1:09cv 05291 (N.D. Ill.) (dismissed on 9/28/11). Based on complaints made by two individuals (a former administrative assistant with multiple sclerosis terminated after taking more than a year of leave, and a former UPS loader with emphysema put on leave and then terminated after requesting a transfer to a better ventilated area), the EEOC filed a class action seeking to represent unidentified individuals subjected to UPS' alleged unlawful "inflexible" leave policy. According to UPS, its 12-month leave policy was not

absolute, and the company had many examples of employees whose leaves had been extended beyond 12 months when accommodation under the ADA was sought. The EEOC countered that the policy did not “adequately” accommodate employees and instead provided for their termination. Concluding that the EEOC failed to plead sufficient facts to support the class allegations, a federal judge dismissed them, but allowed the individual claims to go forward. However, had the EEOC obtained more detailed information about potential class members during its investigation of the underlying individual charges, the class claims undoubtedly would have survived.

Failure to Accommodate and Discriminatory Treatment Related to Shutdown

- *Cookson v. New United Motor Mfg., Inc.*, No. 3:10-cv-02931 (N.D. Cal.)(settlement filed 8/18/11). The EEOC, which found cause in plaintiff disabled workers’ charge underlying this lawsuit, continued to pursue conciliation of that charge in tandem with the prosecution of this private class action. Had private counsel not been secured, the EEOC surely would have sued on behalf of the affected employees. The workers alleged that New United had violated the ADA in connection with its treatment of them leading up to the shutdown of New United’s plant which was operated in a joint venture with Toyota-General Motors and employed over 4,000 workers. Prior to the shutdown in April 2010, New United announced a severance package in exchange for a release with a base payout plus an enhanced payment for employees who had actually worked the last six months leading up to the shutdown. The enhanced amount was labeled a “retention bonus,” but, according to the plaintiffs, the announcement of the package was made after most of the retention period had run. Furthermore, during the final six-month period, New United offered employees transitional services including access to a one-stop center, career and educational fairs, and skills assessments, which were not made available to workers on leaves. Contending they had been on leave during the final six months either because New United had refused to accommodate them so they could remain working and/or because of their disabilities, the plaintiffs alleged that the terms of the severance package were discriminatory in violation of the ADA. After months of negotiations, including private mediation, the EEOC resolved the charge by conciliation agreement, and the related private class action settled for \$6 million plus \$650,000 in attorneys’ fees.

Refusal to Continue to Allow Modified Schedule/Part-time Work as an Accommodation

- *EEOC v. United Airlines, Inc.*, No. 2:06-cv-1407 (W.D.Wash.)(consent decree approved 12/17/10). In 2003, United Airlines (“United”) ceased permitting employees hired as reservation and service agents to work less than their full schedule per week even where reduced hours were needed for medical reasons. The change was purportedly caused by poor economic conditions triggered by the September 11, 2001 incident, as well as due to increased work volume. As a consequence, all reservation sales and service employees who exhausted reduced leave benefits under United’s Transitional Duty Policy (“TDP”) and could not work their full bid schedule were compelled to either retire or go out on extended, unpaid leave for up to three years. Upon exhausting the three years of extended leave, if the employee was unable to return to his/her full shift or to another suitable job, his/her employment was terminated.

The EEOC brought suit against the company in the Western District of Washington, contending that United’s blanket policy of forcing employees onto unpaid extended leave and terminating

them after three years, without making individual assessments concerning reasonable accommodation, violated the ADA. The EEOC noted that there were other customary practices available at United which would have enabled the affected agents to work reduced hours, including procedures that permitted agents to sign up to leave work early if workload permitted and allowing employees in the same classification to trade days or work hours. Thus, an employee who found a trade partner to work some of his/her bid shift hours for an unlimited period could have been accommodated. The EEOC also argued that the 90-day TDP was not an exclusive remedy for ADA disabled employees and that the TDP's 90-day limit itself might violate the ADA.

Of over 4,000 agents employed by United at the time, 37 were affected by the challenged practice. According to the terms of a three-year consent decree approved by the Court, the case settled for \$600,000, and United agreed to end its blanket policy against reduced schedules and provide training to employees who administer the company's accommodation process.

- *EEOC v. IPC Private Services, Inc. (a/k/a Journal Disposition)*, No. 1:10-cv-886 (W.D. Mich.). The EEOC sued IPC, alleging that its failure to allow employee Derek Nelson ("Nelson") to continue working reduced hours in his full time job after a six-month leave and one-month transitional part-time period violated ADA reasonable accommodation requirements. After Nelson, a full-time maintenance worker, was diagnosed with cancer, he successfully applied for the 26-week leave maximum available under IPC's short-term disability leave policy. IPC did not automatically terminate employees who exhausted leave, but rather considered them on a case-by-case basis. Towards the end of his leave, Nelson asked that he be permitted to return on a reduced schedule of 4 hours per day, five days a week. Understanding that Nelson would be returning to full-time work in a month, IPC granted the accommodation. At the end of the month, Nelson asked for the first time that he be permitted to continue working 4 hours a day, but now only every other week, for at least another five months. IPC, which was in the process of eliminating jobs in its maintenance department for economic reasons, denied Nelson's more recent request and terminated his employment. IPC also laid off two other maintenance employees and its maintenance department supervisor around the same time. Nelson subsequently notified IPC he could return full time. Although it had no job in maintenance, IPC found him a job in the mail department, where Nelson remains working. Nonetheless, the EEOC contends that IPC discharged Nelson under its STD policy in violation of the ADA.

IPC filed a motion for summary judgment, contending that Nelson's ongoing request for a part-time schedule would have imposed an undue hardship on the business. According to IPC, its workforce had been steadily reduced over several years from 500 to 200, maintenance positions continued to be eliminated as work demands had slowed, and the company was not in a position to hire. With only a few full-time jobs remaining in maintenance, having allowed Nelson to work part-time for an extended period would have meant that other full-time employees in maintenance would have been required to cover his workload. IPC's motion is still pending. Accordingly, whether IPC's undue hardship argument will succeed remains to be seen.

Assuming Employee Is Unable to Work Without Making an Individualized Assessment

- *EEOC v. Greater Baltimore Medical Center*, Case No. 1:09-CV-0248 (D. Md.) (summary judgment granted in favor of defendant 1/21/11). The EEOC sued under the ADA on behalf of a

hospital employee, Michael Turner (“Turner”), with necrotizing fasciitis (or flesh-eating disease) who was discharged after leaves extending well over a year taken for that disease and a stroke. Turner had worked as a full time nursing unit secretary for over 20 years before requiring leaves for his illnesses. Beginning in January 2005, he applied for and received the maximum 12 months’ leave pursuant to hospital policy. In early 2006, a hospital physician determined Turner was medically unable to return to his former job, but cleared him to return in a file clerk position. Turner chose not to apply for a file clerk opening for several reasons, including standing and walking requirements he thought were incompatible with his restrictions, and he was rejected for a part-time unit secretary job. In May 2006, Turner’s physician released him to return to full-time work with no restrictions. Turner then applied for over 20 openings for which the hospital admitted he was qualified, but he was not selected for any and was discharged in late June 2006 when his leave expired. He was never rehired.

The EEOC contended that Turner had been able to work following his leave, but nonetheless was discharged by the hospital. The parties filed cross-motions for summary judgment. The hospital argued that, because Turner applied for Social Security Disability Insurance after he was discharged, claiming he had been unable to work beginning as early as his first period of leave and continuing thereafter, the EEOC could not establish that Turner was a qualified individual who could perform the essential functions of his job. The District Court for the District of Maryland agreed, granting summary judgment in favor of the hospital. According to the Court, the EEOC had not sufficiently explained how Turner’s statements in his SSDI application that he was unable to work coupled with his continuing receipt of SSDI benefits could be reconciled with his then-current contention that he was able to work without reasonable accommodation.

Challenges to No-Fault Attendance Policies

- *EEOC v. Verizon of Maryland, et al.*, Case No. 1:11-CV-01833 (D. Md.) (settlement filed 7/6/11). The EEOC filed a nationwide class action against numerous Verizon-affiliated companies, claiming that, in policy and practice, their no-fault attendance policies providing for progressive discipline of non-managerial employees violated the ADA. According to the EEOC, under the policies, all absences were counted for disciplinary purposes without exception other than those for FMLA-certified leave, jury or military duty, death in the family, and excused time off without pay. No provisions were made under the policies to accommodate ADA-covered employees incurring chargeable absences caused by their disabilities, despite requests for such accommodation by employees. Instead, the EEOC alleged that Verizon disciplined or terminated employees who needed such accommodations.

Promptly after the suit was filed, the parties settled the matter pursuant to a consent decree. Under the three-year agreement, Verizon agreed to pay \$20 million in monetary relief and significant equitable relief, including revising its attendance policies and plans. The required, revised policies/plans will explain that certain absences may be deemed non-chargeable as a reasonable accommodation under the ADA, and absences related to the granting of a modified or flexible work schedule as an accommodation will not be chargeable. Verizon will be required to determine on a case-by-case basis if an employee’s absence is non-chargeable. To qualify as non-chargeable, all of the following criteria will need to be met: the employee must be a person with a disability under the ADA; the absence was caused by the disability; the employee or

someone on his/her behalf requested time off from work due to the disability using the company's designated process; the employee's absences have not been "unreasonably" unpredictable, repeated, frequent or chronic and are not expected to be such; Verizon is able to determine from the request, or through the interactive process, a definite or reasonably certain period of time off the employee would need because of the disability; and the need for time off as an accommodation does not pose a significant difficulty or expense for Verizon's business. Verizon also agreed to provide mandatory periodic training on the ADA to employees administering the attendance plan and reports to the EEOC during the term of the agreement.

Other Reasonable Accommodations Under the ADA

In line with the ADA's new focus, the EEOC has begun to aggressively litigate reasonable accommodation issues, taking an expansive view of the types of accommodations an employer must provide. Set out below are descriptions of the myriad cases brought by the EEOC in the area of reasonable accommodation as well as recent court opinions discussing types of accommodations that an employer may be obligated to provide. The sheer number of disability discrimination cases filed and the agency's aggressive enforcement position should alert all employers to the need to engage in an individualized interactive process and carefully consider all requests for accommodation.

The EEOC Aggressively Pursues Reasonable Accommodation Cases

The EEOC filed an action against Ford in federal court in Michigan in late August 2011 claiming that the automaker failed to reasonably accommodate an employee with a gastro-intestinal condition when it denied her request to telecommute. *See EEOC v. Ford Motor Company, Inc.* Case No. 2:11CV13742 (E.D.Mich. 2011). The employee worked in Ford's Dearborn, Michigan facility, and according to the agency, Ford began to criticize her performance, placed her on a performance improvement plan and then discharged her within months of her accommodation request.

The same week, the agency filed suit against Kohl's department store in federal court in Maine alleging that the retailer violated the ADA when it refused to accommodate a diabetic employee's request for a regular schedule. *See EEOC v. Kohl's Department Stores*, Civil Action No. 11-00320 (D.Maine 2011). In the suit, the agency alleges that the employee began to suffer significant medical complications from her diabetes after Kohl's switched her from a set schedule, under which she worked for a long time, to an irregular and flexible one and that the store repeatedly ignored her oral requests to return to that set schedule, even when supported by a doctor's note. The EEOC claims that numerous other employees were allowed to work set schedules and that Kohl's accommodated these requests for reasons such as child-care, transportation and other personal needs.

On August 30, 2011, the EEOC filed a complaint against SITA, an Atlanta-based air transport communications company. *See EEOC v. SITA Information Networking Computing USA, Inc.*, Case No. 1:11-cv-02818-RLV (N.D.Ga. 2011). The Complaint alleges that Darlene Case had received an offer to serve as personal assistant to the company vice president, only to learn that she needed cancer surgery. The agency alleges that Case then asked for a 2-week delay in her start date and a part-time schedule for the first two weeks of work. SITA's response was to rescind the job offer.

In early September 2011, there were at least three more reasonable accommodation cases filed. On September 8, 2011, the agency sued Miles Kimball Company in the District Court for the Eastern District

of Wisconsin alleging that the company denied the accommodation request of Laura Nejedlo “for no good reason.” *See EEOC v. Miles Kimball Co.*, Civil Action No. 11-C-850 (E.D.Wis. 2011). Nejedlo, who is deaf, requested a sign language interpreter during training on new computer software. The company denied the request and fired the employee.

The agency sued G2 Secure Staff, LLC, a staffing company with an office in Raleigh NC, claiming that the company unlawfully refused to accommodate a disabled applicant who needed an accommodation during the hiring process. *See EEOC v. G2 Secure Staff, LLC*, Civil Action No. 5:11-cv-475 (E.D.N.C. 2011). All applicants for employment must pass a drug screen which was done through urinalysis. The applicant, Sharif Thompson, has end-stage renal disease and was not able to urinate. Thompson asked if he could take the drug test using a hair sample as an accommodation for his disability. The company denied the requested accommodation and failed to hire Thompson.

The EEOC also sued Bank of American Corporation, claiming that the company failed to accommodate a legally blind data entry worker and fired him after only one day at work because of his disability. *See EEOC v. Bank of America Corp.*, Case No. 11-cv-7373 (N.D. Ill. 2011). The bank was aware of the vision impairment yet “failed to consider whether it would be reasonable to provide him with a bigger monitor, font-enlarging software, or any other accommodation.”

The end of September saw the filing of 5 more cases. The agency sued ITT Technical Institutes, a for-profit educational provider, in the District Court for the Eastern District of California claiming that the company refused to accommodate a blind applicant during the hiring process and denied him a job in violation of the ADA. *See EEOC v. ITT Educational Services, Inc.* (E.D.Cal 2011.). The applicant applied for work as an educational recruiter and was required to take a timed on-line assessment as part of the application process. He knew the answers to the questions, but his screen-reading software was too slow and would not enable him to complete the assessment on time. He requested an accommodation of a reader or additional time. The company denied the request and refused to hire him.

The agency also sued D.O.E. Technologies, a company that sells legal software. *See EEOC v. D.O.E. Technologies*, Civil Action No. 1:11-cv-00861 (D.Del. 2011). The agency filed the complaint in the District Court for the District of Delaware alleging that D.O.E. failed to accommodate the disability of a hard-of-hearing employee and fired him instead. The employee, Christopher Vely, was a sales representative with conductive hearing loss. Vely requested that the company permit him to work in a quiet area to make sales calls or allow him to telecommute. The company neither discussed these requested accommodations with him nor suggested others, choosing instead to fire Vely.

The EEOC sued America’s Thrift Stores of Alabama, Inc. in the Northern District of Alabama for refusing to provide an employee with a reasonable accommodation and subsequently firing her because of her disability, degenerative joint disease. *See EEOC v. America’s Thrift Inc.*, Case No. 2:11-cv-03466-AKK (N.D.Ala. 2011). The employee requested the use of a computer as an accommodation to perform some of her job duties. The company denied her request and fired her 1 week later calling her a “liability.”

The agency sued Engineering Documentation Systems, Inc. in the District Court for the District of Nevada claiming that the company violated federal law when it failed to accommodate a pregnant administrative assistant with disabilities. *See EEOC v. Engineering Documentation Systems, Inc.*, Case No. 3:11-cv-00707 (D.Nev. 2011). The EEOC contends that a management official denied repeated

requests to move the assistant's office closer to the restroom to accommodate severe nausea and vomiting arising from her high risk pregnancy. As a result of the denial, the administrative assistant, who had to descend two flights of steep stairs to reach the restroom, fell on at least two occasions. The company ultimately fired the employee upon her return from medical leave.

Hospital Housekeeping Systems of Houston, Inc. allegedly violated federal law when, according to the EEOC, it denied reasonable accommodation to and discharged a housekeeper due to her disability, a mental impairment that substantially limited her ability to read. *See EEOC v. Hospital Housekeeping Systems of Houston, Inc.*, Case No. 1:11-cv-01658-LJO-DLB (E.D.Cal. 2011). Two weeks after her hire, when the housekeeper had trouble reading signs, she requested time to learn the signs at home, since she was not able to do so immediately upon reading them. The supervisor denied the request and immediately fired the employee; this was despite the retention of other housekeepers without disabilities who were also unable to read the signs. The agency sued the company in the District Court for the Eastern District of California.

The Courts Weigh In On Reasonable Accommodation Under the ADA

While in the past the courts have generally taken a somewhat narrower view than the EEOC of when and how an employer must reasonably accommodate a disabled employee, new case law suggests that this view is changing. Recent decisions have required employers to provide modifications to an employee's schedule, to purchase and use various types of devices, readers or interpreters to assist with hearing or vision issues, and even to provide assistance with the commute to or from work, all as reasonable accommodations. The lesson learned from these decisions is that employers must be prepared to engage in the interactive process, listen carefully to requests for accommodation and be ready to provide various forms of accommodations in many cases.

For example, the case of *Nixon-Tinkelman v. New York City Department of Health and Mental Hygiene*, 2011 WL 3489001 (2nd Cir. Aug. 10, 2011) highlights the length to which an employer may be required to go to accommodate an employee. Barbara Tinkelman ("Tinkelman") was hearing impaired and suffered from cancer, heart problems and asthma. The employer transferred her from its facility in Queens, where she had worked for several years, to one in Manhattan. Tinkelman alleged that the employer refused to assist with her commute to the new facility and thus failed to reasonably accommodate her. The district court granted summary judgment to the employer on the ground that commuting falls outside the scope of a person's job and, therefore, assisting with the commute was not required under the ADA or the Rehabilitation Act.

The Court of Appeals for the Second Circuit disagreed, holding that "an employer may have an obligation to assist in an employee's commute. Indeed, this Court has stated that there is nothing inherently unreasonable ...in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work." *Id.* at *2. The Court remanded the matter to the lower court to evaluate whether it would have been reasonable for the company to provide assistance related to Tinkelman's ability to get to work, including looking at the location of its other offices for a possible transfer, whether she could work at home, or even providing her with a car. *Id.* at *3. The Court's view of an employer's obligation, going so far as to evaluate whether to provide a car, should serve as a wake-up call to all employers about the scope of their legal obligations to reasonably accommodate employees.

Assisting with a commute has been the focus of several reasonable accommodation cases this year. In *Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3d Cir. 2010), the plaintiff Jeanette Colwell worked as a part-time clerk at one of Rite Aid's retail stores. Her schedule varied, and she sometimes worked the evening shift from 5:00 to 9:00 pm. At one point she was diagnosed with loss of vision in one eye and could no longer drive at night. Since there was no public transportation in the area, she requested that the employer assign her only to day shift. Colwell needed no accommodation once she got to work, it was the drive at night which caused an issue. Colwell ultimately resigned her position when no accommodation was made.

Rite Aid argued that it had no duty to accommodate the request because an employee's commute to and from work wasn't a proper subject of an accommodation. The trial court agreed stating "the ADA is designed to cover barriers to an employee's ability to work that exist inside the workplace, not difficulties over which the employer has no control." The Third Circuit disagreed and ruled that the ADA clearly contemplates an accommodation that involves a shift change to "alleviate [an employee's] disability-related difficulties in getting to work." The Court reasoned that the scheduling of shifts is something done inside the workplace. This is distinguished from an employee's request for assistance in getting to work, which the court stated would not be a reasonable accommodation. *See also Livingston v. Fred Meyer Stores, Inc.*, 2010 WL 2853172 (9th Cir. Jul. 21, 2010) (reversing summary judgment for the employer, finding that an employer has a duty to accommodate an employee's limitations in getting to and from work).

The case of *Valle-Arce v. Puerto Rico Ports Authority*, 2011 WL 2652449 (1st Cir. Jul. 8, 2011) dealt with requests to change the employee's starting time and to make modifications to the work space. Plaintiff Maritza Valle-Arce ("Valle") worked as the Auxiliary Chief of the Human Resources Department and suffered from chronic fatigue syndrome ("CFS"). As accommodations, she requested a flexible start time (over an approximately 2-hour window) and certain changes to her work space that helped Valle deal with her symptoms. These included an air conditioner in the office, and an office located closer to the restroom and printer to shorten the amount of walking she needed to do each day. The Authority eventually granted her requests but only after approximately 5 months, and only after requesting significantly more medical documentation than that requested of others who sought accommodation. Further, the Authority did not grant all of the requests, and it did not grant the requests to the extent that actually accommodated her condition. The agency then disciplined and terminated Valle's employment for alleged performance deficiencies. The case went to trial and the lower court granted judgment as a matter of law in favor of the employer at the close of the plaintiff's case in chief.

On appeal, the First Circuit reversed stating that "unreasonable delay may amount to a failure to provide reasonable accommodations...So too may an employer's failure to engage in an informal interactive process following an employee's request." *Id.* at *8. The Court of Appeals found that Valle was entitled to present to a jury the question of whether the agency failed to grant her a reasonable accommodation. The employer's delay appeared akin to stone-walling and its insistence on excessive documentation was a refusal to engage in the interactive process in good faith.

The case of *Gesegnet v. J.G. Hunt Transport, Inc.*, 2011 WL 2119248 (W.D.Ky. May 26, 2011) involved requests for accommodation during a pre-employment drug test. The plaintiff had applied for the position of commercial truck driver with Hunt, and, as part of the application process, he was required to submit to a drug screen at a local clinic. When he arrived at the clinic, the plaintiff was informed that no driver

could leave the area until he had given a urine sample. The same warning appeared on the clinic door and on the sign-in sheet. Leaving the area was considered a refusal to test and, therefore, a failure of the drug screen.

The plaintiff had bi-polar and anxiety disorder and had an aversion to being in small spaces. After sitting in the clinic waiting area for his test, the plaintiff began to feel confined and he got up to leave. When he got to the door, Gerri Norseworthy, the Hunt safety manager, stopped him, re-explaining the policy and the consequences of leaving. The plaintiff stated that “he had problems with small spaces” and needed “to stand away from the crowd,” but he went back to the waiting area anyway. When another applicant closed the blinds, the plaintiff became anxious and hurriedly left. He went to the cab of his truck, took anxiety medication and called Norseworthy to explain what happened. Only after leaving did he tell her that he had a diagnosed disorder that caused him to leave. The manager reiterated that leaving the clinic was deemed a refusal to test and he was ineligible for hire. The plaintiff sued for disability discrimination.

The company argued that Hunt had no knowledge of the plaintiff’s alleged disability at the time he violated clinic policy and that the plaintiff was too company of his disability to be due a reasonable accommodation. The District Court for the Western District of Kentucky agreed and stated that the ADA only requires employers to accommodate the *known* physical or mental limitations of an employee. In this case, the plaintiff did not provide sufficient information about any disability or medical limitations. The statements that he had trouble with small spaces and wanted to stand away from the crowd were not sufficient, particularly since he returned to the waiting area after making the statements. The Court continued, however, that even if the plaintiff’s statements were sufficient to trigger a duty to accommodate, the request for accommodation itself was too vague to support a discrimination claim. A request must not only “be direct and specific, but also include an explanation of the link between the disability and the request.” *Id.* at *5. In this case, the plaintiff’s comments were vague and not sufficiently specific for the company to infer a link to the plaintiff’s psychiatric diagnoses. Summary judgment was granted to Hunt.

Leaves of Absence Under the FMLA

The Family and Medical Leave Act continues to be a challenge for employers who confront both a difficult and confusing regulatory scheme and, sometimes, manipulative employees. With litigation of FMLA-related matters continuing to inundate the courts, and requests for leave on the rise, employers need to stay abreast of new guidance offered by the courts concerning their duties under the Act. The following provides a general overview of the most significant case law developments under the FMLA this past year.

ADAAA Expansion of FMLA Eligibility

Under the FMLA, eligible employees may take up to twelve weeks of leave per year to care for the serious health condition of a son or daughter or for the birth, adoption/foster care placement and related care of a son or daughter. In the context of these types of FMLA leave, son or daughter means a child either under age 18, or one who is age 18 or older and “incapable of self-care because of a mental or physical disability.” *See* 29 C.F.R. § 825.122(c). Incapable of self-care means the person requires active assistance or supervision in three or more activities of daily living (e.g., grooming and hygiene, bathing,

dressing, eating, cooking, shopping, maintaining a residence, paying bills, etc.). *See id.* Importantly, a “physical or mental disability” is one that substantially limits one or more major life activities, as defined under the EEOC’s ADA regulations at 29 C.F.R. Part 1630. *See* 29 C.F.R. § 825.800.

As a consequence of the ADAAA’s broadening the universe of persons who qualify as disabled under the ADA, the availability of FMLA leave to care for an employee’s adult son or daughter with a serious health condition likewise has been expanded. This issue was highlighted in *Patton v. ECardio Diagnostics*, 2011 WL 2313211 (S.D.Tex. Jun. 9, 2011), discussed above. There, the Court refused to grant summary judgment in a case where the employer argued that the employee was not entitled to FMLA leave to care for an adult daughter who suffered two broken femurs in a car accident because her short-term impairment did not qualify as an ADA disability. Pre-ADAAA, the employer likely would have prevailed. Under the ADAAA, however, the Court concluded that the fact that the daughter was confined to a wheel chair for several weeks (if not months), subsequently used a walker, and continued to experience pain and walk with a limp over a year later sufficiently demonstrated that she was substantially limited in walking, and was, therefore, a person with an ADA disability.

Given the wide range of “per se” disabilities identified in the EEOC’s revised regulations, the addition of major bodily functions to the list of major life activities, and the relaxation of when an impairment is considered to substantially limit a major life activity, employers will need to exercise particular care when evaluating employee requests to care for ill or injured adult children.

Needed “To Care For”

In *Baham v. McLane Foodservice, Inc.*, 2011 WL 2623575 (5th Cir. Jul. 1, 2011), the Court of Appeals for the Fifth Circuit emphasized that geographic proximity is required to invoke FMLA protection for absences “to care for” a covered family member. Gerard Baham’s (“Baham”) daughter was injured during a family vacation and was airlifted to a hospital in Miami, Florida. While there, Baham called his employer in Texas and requested time off from March 20, 2008 through May 5, 2008. Although his wife and daughter stayed in Florida, Baham returned to his home in Texas on April 12, 2008. He asserted that he went home to respond to complaints from the neighborhood association about his unattended yard, as well as to clean the house and prepare it for his daughter’s return. He further asserted that he maintained constant contact with his wife and daughter via telephone while he was at home. Baham’s wife and daughter returned to Texas on April 29, 2008.

During his absence, Baham was notified that his FMLA paperwork was incomplete because it did not include information regarding the expected duration of his daughter’s treatment. Baham did not endeavor to provide the requested information. Upon his return to work on May 5, 2008, Baham was informed that his FMLA paperwork was still incomplete and was again asked to provide the requested missing information. Baham subsequently left the workplace, leaving his keys and ID card, and did not return. Interpreting his abrupt departure as a resignation, the company sent Baham a letter terminating his employment.

Baham sued, contending that the company unlawfully discharged him for taking FMLA leave. The district court granted summary judgment in favor of the employer, holding that Baham failed to establish that he was entitled to FMLA leave during the period in which he was at home in Texas and away from his injured daughter. The Court of Appeals for the Fifth Circuit agreed. Upholding the lower court’s decision, the Court concluded that, because Baham was not “taking care” of his daughter when he

returned to Texas, he was not entitled to FMLA leave and could not, therefore, set forth a cognizable retaliation claim. In so holding, the Court noted that “courts have affirmed the use of FMLA leave only where the employee is in physical proximity to the cared-for-person.” *Baham*, 2011 WL 2623575, at *3.

The question of whether an employee’s leave was properly taken “to care for” a covered family member was also at issue in *Tayag v. Lahey Clinical Hosp., Inc.*, 632 F.3d 788 (1st Cir. Jan. 27, 2011). There, the Court of Appeals for the First Circuit concluded that an employee’s leave to accompany her seriously ill husband on a faith-healing pilgrimage was not protected by the FMLA.

The plaintiff, Maria Lucia Tayag (“Tayag”), requested a seven-week leave to accompany her husband, who suffered from serious medical conditions, on a faith healing trip to the Philippines. Tayag’s husband’s doctor submitted a note indicating that she needed the leave because her husband needed physical assistance on a regular basis. However, her husband’s cardiologist provided an FMLA certification indicating that Tayag’s husband was “presently...not incapacitated” and that Tayag would not need leave. Although Lahey Clinical Hospital (the “Hospital”) denied Tayag’s leave request and directed her to return to work, Tayag left on her trip. Her employment was subsequently terminated.

Tayag filed claims for interference and retaliation under the FMLA. In response to the Hospital’s motion for summary judgment, she argued that the “faith-healing pilgrimage” constituted medical care under the FMLA and that she was needed to care for her spouse while he received such medical care. The district court granted the Hospital’s motion, concluding that the Tayags’ trip was not protected under the FMLA because it was essentially a vacation. The Court of Appeals for the First Circuit agreed, affirming summary judgment in favor of the Hospital. During their trip, Tayag and her husband visited family and friends, went to Mass and met with church officials. No conventional medical treatment was provided. According to the Court, the Tayags’ “healing pilgrimage” did not comprise medical care within the meaning of the FMLA. While the Court recognized that FMLA leave is available to provide “psychological comfort and reassurance” to a covered family member with a serious health condition, that does not extend to accompanying “an ill spouse on lengthy trips unrelated to medical care.” *Tayag*, 632 F.3d at 791 n.2.

Misuse of Leave/Violation of Leave Policy

One of the biggest employer complaints about the FMLA is the perception that employees are misusing or fraudulently taking FMLA leave. In several recent decisions, courts have upheld employers’ enforcement of policies prohibiting outside employment and non-medically necessary travel during FMLA leave, which were aimed at curbing FMLA abuse.

For example, in *Edwards v. Sam’s West, Inc.*, 2011 WL 3957531 (N.D.Utah Sept. 7, 2011), the District Court for the Northern District of Utah supported an employer’s application of its policy prohibiting outside or self-employment during leaves of absence. Dale Edwards (“Edwards”), an Assistant Manager at Sam’s Club’s Salt Lake City Club, requested and was granted a leave of absence in February 2008 due to persistent back problems. Sam’s Club’s Leave of Absence Policy provided that “[e]mployment with another employer and/or starting or furthering a self-employment venture is prohibited while on leave of absence unless approved by a member of the Executive Committee.” *Edwards*, 2011 WL 3957531, at *1. During his leave, Edwards continued to maintain part-time self employment, preparing tax returns, providing accounting services, and helping clients obtain mortgages. Although Edwards disclosed this

part-time employment on his job application, he didn't notify Sam's Club of his intention to continue performing these services while on leave, let alone request permission. When Sam's Club discovered that Edwards was engaging in outside employment during his leave, it terminated Edwards' employment.

Edwards brought suit, claiming his discharge violated the FMLA. Sam's Club moved for summary judgment. In granting the motion, the Court emphasized that the "rights to FMLA leave and reinstatement are not absolute. An employee must abide by the employer's rule against outside employment while on leave." *Id.* at *5. Because there was no dispute that Sam's Club maintained a policy prohibiting outside employment while on leave, Edwards engaged in such outside employment, and Sam's Club discharged Edwards after discovering that he had violated the company's policy, summary judgment was appropriate. In reaching its conclusion, the Court rejected Edwards' argument that he did not receive proper notice of Sam's Club's policy against outside employment. Although Edwards did not receive a copy of the policy in his FMLA packet, the FMLA packet contained all the notices required by the FMLA and directed Edwards to the full, written Leave of Absence Policy located on the company's intranet. That Leave of Absence Policy expressly precluded outside employment during leaves of absence.

Similarly, in *Pellegrino v. Comm. Workers of Amer.*, 2011 WL 1930607 (W.D.Pa. May 19, 2011), the District Court for the Western District of Pennsylvania rejected the claim of an employee who was discharged for violating her employer's paid sick leave policy by traveling to Cancun during her leave of absence.

While on an approved FMLA leave for a hysterectomy surgery, Denise Pellegrino ("Pellegrino") went to Cancun for a week. She did not inform her employer, Communications Workers of America ("CWA"), that she would be leaving the country, nor did she request permission to travel. Pellegrino's FMLA leave ran concurrently with paid sick leave she was receiving under CWA's Sickness and Absenteeism policy. That policy required employees receiving benefits to "remain in the immediate vicinity of their homes during the period of their sick leave," with limited exceptions. Upon learning of Pellegrino's trip, CWA terminated her employment.

Pellegrino sued CWA, alleging that CWA violated the FMLA by interfering with her FMLA rights. CWA moved for summary judgment, contending that it terminated Pellegrino's employment because she violated the company's Sickness and Absenteeism policy by traveling to Cancun – not because she took FMLA leave. The District Court for the Western District of Pennsylvania granted CWA's motion, concluding that CWA's application of its policy did not violate the FMLA. In so holding, the Court emphasized that "the FMLA does not shield an employee from termination if the employee was allegedly involved in misconduct related to the use of the FMLA leave." *Pellegrino*, 2011 WL 1930607, at *5. The Court further concluded that CWA's policy was designed to prevent abuse and did not discourage or prevent CWA employees from taking FMLA leave. To the contrary, providing wage replacement encourages employees to take otherwise unpaid leave under the FMLA. According to the Court, "no reasonable jury could find that an employer acts illegitimately or interferes with FMLA entitlements when that employer terminates an employee for taking a week-long vacation to Mexico without at least notifying the employer that her doctor had approved the travel or that she would be out of the country." *Id.* at *6 n.2.

Leave for Substance Abuse Treatment

Substance abuse may constitute a serious health condition under the FMLA if it otherwise meets the definition of “serious health condition” under the Act. However, under the current FMLA regulations, FMLA leave may only be taken for treatment of substance abuse by a healthcare provider or by a provider of health care services on referral by a health care provider.³ See 29 C.F.R. § 825.119(a). Absences caused by an employee’s use of the substance, instead of for treatment, are not protected. See *id.* Unfortunately, it is not always clear which absences are attributable to substance abuse and which absences are for treatment.

In one recent case, the United States District Court for the Southern District of Texas seemed to blur the line between substance abuse and treatment for abuse. In *Picarazzi v. John Crane, Inc.*, 2011 WL 486211 (S.D. Tex. Feb. 7, 2011), the Court held that a worker with alcoholism who was fired for absenteeism could proceed on his FMLA and ADA claims. Perry Picarazzi (“Picarazzi”), a customer service representative for John Crane, Inc. (“JCI”), had a history of alcoholism, which led to a number of absences during the months of January 2008 through March 2008. Although these absences triggered enough points under JCI’s attendance policy to warrant a written warning, JCI did not give Picarazzi the written warning until June 20, 2008. According to JCI, the delay was occasioned by Picarazzi’s subsequent absences.

In late March or early April 2008, Picarazzi told his supervisor about his alcohol problem and voluntarily admitted himself into a treatment program on April 2, 2008. He requested a leave of absence from JCI beginning on April 1, 2008. Picarazzi was subsequently discharged from the inpatient treatment program on April 23, 2008. However, Dr. Zella, the doctor who treated Picarazzi while he was in treatment, referred Picarazzi to an outpatient treatment program and opined that he could return to work on April 30, 2008. Picarazzi did not return to work in the days immediately following his release from the inpatient treatment program and subsequently contacted his supervisor on April 29, 2008 to report that he had relapsed and had decided to return to rehab. Picarazzi was in rehab from April 30, 2008 to May 8, 2008 and was released to return to work on May 13, 2008. After returning to work as expected on May 13, 2008, Picarazzi again relapsed in mid-May 2008 and was absent several times between May 15, 2008 and May 21, 2008. On May 21, 2008, Picarazzi notified JCI of his relapse. He was then absent from work between May 21, 2008 and May 29, 2008. Picarazzi did not see a physician during this time, but rather sought help from Alcoholics Anonymous and clergymen. He then entered another rehab facility between June 9, 2008 and June 15, 2008. Picarazzi returned to work on June 18, 2008, following his discharge from the treatment program.

On June 20, 2008, JCI issued Picarazzi a written warning for his absences in the January 2008 to March 2008 time frame and a final written warning for various subsequent absences. Six days later, on June 26, 2008, JCI discharged Picarazzi for accumulating too many points under JCI’s attendance policy. In reaching its decision, JCI considered the periods when Picarazzi was in inpatient treatment programs as FMLA leave and did not assess any points against him for those absences. However, JCI did assess absence points against Picarazzi for days on which Picarazzi was absent, but not in a treatment program.

³ Employees suffering from alcoholism and recovering drug addicts may also be entitled to leave for treatment as a reasonable accommodation under the ADA.

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For example, Picarazzi was assessed points for absences between the dates on which he was discharged from treatment programs and his return to work dates.

Picarazzi sued JCI for retaliation under the FMLA and the ADA. Denying JCI's motion for summary judgment on Picarazzi's FMLA claim, the Court concluded that a reasonable jury could find that Picarazzi qualified for FMLA leave because he was receiving treatment for his substance abuse during his absences. The Court rejected JCI's contention that Picarazzi was only entitled to protected FMLA leave during his stays in inpatient rehabilitation centers. Although the applicable regulation provides that "FMLA leave may only be taken for treatment of substance abuse by a healthcare provider or by a provider of healthcare services on referral by a healthcare provider" (*see* 29 C.F.R. § 825.119(a)), the Court emphasized that the language of the regulation "does not indicate that, to qualify for FMLA leave, Plaintiff must have been under the care of a physician or enrolled in a rehab institution for *each day* that he was on leave." *Picarazzi*, 2011 WL 486211, at *9. Thus, according to the Court, some of the other days Picarazzi was absent may also have been considered FMLA leave.

In addition, the Court concluded that, even if Picarazzi was not receiving "treatment" for some of the absences for which points were assessed against him, JCI was estopped from asserting that Picarazzi was not qualified for leave based on JCI's representations to Picarazzi concerning his entitlement to leave and his reliance thereon. By way of example, the Court noted that JCI had sent Picarazzi a notice indicating that he was on approved leave from April 1 through May 4, after receiving a medical certification explaining that Picarazzi was expected to remain in a rehab program through that date. Although Picarazzi was discharged earlier than expected, JCI never informed Picarazzi that his absences after his release date would not be protected. According to the Court, Picarazzi reasonably relied to his detriment on JCI's representation that he was on an approved leave through May 4, 2008.

The Court went on to find that the temporal proximity between Picarazzi's leave and his discharge suggested a causal connection sufficient to satisfy Picarazzi's prima facie burden. Furthermore, while JCI asserted that it discharged Picarazzi for a legitimate, non-discriminatory reason due to his accumulation of absence points, the Court held that a reasonable jury could find that such reason was pretextual, especially if Picarazzi was successful in demonstrating that absence points were improperly assessed against him while he was on a protected leave. For similar reasons, the Court also denied JCI's motion for summary judgment on Picarazzi's ADA claim.

The employer fared better in *Ames v. Home Depot U.S.A., Inc.*, 629 F.3d 665 (7th Cir. 2011). There, the Court of Appeals for the Seventh Circuit held that a Home Depot USA, Inc. ("Home Depot") employee discharged for alcohol use lacked claims under the FMLA and the ADA.

After working for five years without incident, Diane Ames ("Ames") told her manager that she had a drinking problem and needed assistance through Home Depot's Employee Assistance Program ("EAP"). In connection with the EAP, Ames agreed to periodic drug and alcohol testing throughout the remainder of her employment. She likewise agreed that she would be immediately discharged if she tested positive for alcohol on the job. After taking a leave of absence to seek treatment for alcohol abuse, Ames returned to work.

The following month, however, Ames was arrested for driving under the influence. Upon learning of her arrest, Home Depot required her to schedule an alcohol treatment evaluation. Ames requested and was

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granted several extensions within which to schedule the evaluation. During this time period, she sought accommodations from her manager so she could attend her Alcoholics Anonymous meetings.

On December 23, 2006, Ames reported for her regular shift and smelled of alcohol. A blood alcohol test revealed that she was in fact intoxicated. As a result, Home Depot made the decision to terminate her employment, which it planned to communicate to her on January 2, 2007. On January 1, 2007, however, Ames checked herself into the hospital and was subsequently discharged on January 2, 2007 with instructions to seek an outpatient treatment program. Because of her hospitalization, Ames did not attend her January 2, 2007 meeting with her manager. On January 10, 2007, Home Depot sent Ames a letter by mail, terminating her employment.

Ames brought suit, contending that her discharge violated both the FMLA and the ADA. Affirming summary judgment on Ames' FMLA interference claim, the Court held that Ames failed to demonstrate that she was entitled to leave under the Act. Although Ames received treatment for alcoholism through Home Depot's EAP, she failed to demonstrate that she suffered from a serious health condition. Under the FMLA, substance abuse may qualify as a serious health condition if it involves "inpatient care" or "continuing treatment by a healthcare provider." The Court concluded that Ames failed to demonstrate that she suffered from either condition. Prior to the company's decision to terminate her employment, Ames did not go into inpatient care for treatment; nor did she establish that her condition required continuing treatment by a healthcare provider. In fact, she testified that she was never incapacitated by her condition. Although the parties spent considerable time arguing whether Ames gave Home Depot sufficient notice of her need for leave, the Court did not reach this issue, finding that she was not in any event entitled to leave.

The Court also concluded that Ames' FMLA retaliation claim was properly dismissed on summary judgment because she presented no evidence of a causal connection between her alleged requests for leave and her discharge. Rather, the record evidence demonstrated that Ames was discharged for violating Home Depot's Code of Conduct by coming to work under the influence of alcohol.

Employee Duty to Provide Notice

To claim protection under the FMLA, an employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave. But, no magic language is required. When seeking leave for the first time for an FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. *See* 29 C.F.R. §§ 302(c), 303(b). Instead, where an employer has reason to believe that an employee may be absent for an FMLA qualifying reason, the employer must inquire further to determine whether the employee is seeking FMLA-protected leave.

The facts presented in *Righi v. SMC Corporation*, 2011 WL 547364 (7th Cir. Feb. 14, 2011) highlight the steps employers should take when confronted with a request for leave that is somewhat vague, but potentially FMLA-qualifying. There, the Court of Appeals for the Seventh Circuit held that an Illinois sales representative did not provide sufficient notice of his need for FMLA leave where he failed to inform his employer how much time he would need off from work and neglected to respond to his employer's repeated requests for additional information concerning his absence.

Robert Righi (“Righi”) was employed by SMC Corporation (“SMC”) as a sales representative. While at a training seminar on July 11, 2006, Righi received a call from his sister who informed him that their mother had gone into a diabetic coma. Righi left the seminar to return home to Illinois to be with his mother. The following day, Righi sent an email to his supervisor, explaining that he left the seminar to attend to his mother and that he needed a couple of days to make arrangements for her immediate care. He further noted “I do have vacation time, or I could apply for the family care act, which I do not want to do at this time.” Upon receiving the email, Righi’s supervisor tried to contact him approximately 15 times over the next seven days to inquire further about his need for leave. Righi failed to return his supervisor’s calls. When Righi’s supervisor finally got in touch with Righi on July 19, 2006, he told Righi to come into the office for a meeting the following day. During that meeting, on July 20, 2006, SMC terminated Righi’s employment. Righi then sued SMC, asserting FMLA violations.

While the Court of Appeals disagreed with the district court that Righi’s statement in his email that he did not want to apply for leave under the “family care act” “at this time” constituted a waiver of his right to FMLA leave, it nevertheless upheld summary judgment in favor of SMC. According to the Court, “ordinarily, an employee’s statement to his employer indicating that he needs leave to care for a seriously ill parent would be sufficient to invoke the protections of the FMLA.” *Righi*, 2011 WL 547364, at *4. And, in fact, Righi’s email to his supervisor was sufficient to give rise to SMC’s duty to make a further inquiry regarding Righi’s absence. However, in this case, SMC repeatedly attempted to fulfill its obligation to inquire further; but, Righi failed to respond to SMC’s calls or otherwise contact SMC to provide additional information regarding his leave request, including the anticipated duration of such leave. “The FMLA does not authorize employees to ‘keep their employers in the dark about when they will return’ from leave.” *Id.* at *5. Finding no extraordinary circumstances that justified Righi’s failure to respond to SMC, the Court concluded that Righi’s failure to notify SMC of the expected duration of his leave foreclosed his FMLA interference claim.

Interference with FMLA Rights

Although employers may require employees on FMLA leave to provide periodic reports of their status and intent to return to work (*see* 29 C.F.R § 825.311), there can sometimes be a fine line between checking in with employees and interfering. The holding in *Terwilliger v. Howard Mem. Hosp.*, 2011 WL 308990 (W.D.Ark. Jan. 27, 2011) demonstrates the perils of an overzealous manager.

Regina Terwilliger (“Terwilliger”) was employed as a housekeeper by Howard Memorial Hospital (“Howard”). During her FMLA leave for back surgery, Terwilliger’s supervisor called her every week to ask when she was going to return to work. During one call, Terwilliger asked whether her job was in jeopardy, and her manager replied that she should “return to work as soon as possible.” Following her return, Terwilliger was discharged by Howard in connection with an investigation of thefts at the Hospital. She subsequently brought suit, contending that the Hospital interfered with her FMLA rights by pressuring her to return to work early and retaliated against her for taking leave. In denying Howard’s motion for summary judgment on Terwilliger’s FMLA interference claim, the Court held that a reasonable jury could conclude that Terwilliger’s supervisor interfered with her FMLA rights by discouraging or “chilling” her exercise of those rights.

Retaliation

In *Male v. Tops Mkts.*, 2011 WL 2421224 (W.D.N.Y. Jun. 13, 2011), the District Court for the Western District of New York held that providing a negative reference to a prospective employer about a former employee could constitute unlawful retaliation in violation of the FMLA. There, Julie E. Male (“Male”), sued her former employer, Tops Markets, LLC (“Tops”), for retaliation. Male had taken FMLA leave while employed by Tops and was subsequently discharged. In her complaint, she contended that, following her separation from Tops, she applied for more than 100 jobs, “interviewed well, and was told that she would be called back,” but was never hired. She averred that a Tops manager informed one of her prospective employers that Male “was a good employee for the first couple of years,” but thereafter “missed and was late to work a lot because of her personal and medical issues.”

Denying Tops’ motion to dismiss, the Court found that Male’s allegations, at least at the pleading stage, were sufficient to support her claim for post-termination retaliation. The Court stated that the alleged statement regarding Male’s “medical issues” created a reasonable inference that Tops was referring to Male’s absences which she took under the FMLA or because of her alleged disability. Such a statement to a prospective employer could negatively affect a person’s ability to get a job, and “the possibility of an employer uttering such a statement would discourage an employee from exercising his or her rights under the...FMLA...” *Male*, 2011 WL 2421224, at *3. According to the Court, “[w]hile the statement that Plaintiff took absences due to her personal and medical issues may have been true, if Plaintiff can prove the Defendant made such a statement to a prospective employer in retaliation for the Plaintiff’s exercising her rights under the FMLA...,” she may be able to succeed on her FMLA retaliation claim. *Id.*

Exacerbation of Medical Condition

In a case of first impression for the Circuit, in *Breineisen v. Motorola Inc.*, 2011 WL 3873771 (7th Cir. Sept. 2, 2011), the Court of Appeals for the Seventh Circuit held that a former employee’s claim that his supervisor’s conduct “exacerbated” his pre-existing medical condition was not viable under the FMLA. James Breineisen (“Breineisen”) worked for Motorola Inc. (“Motorola”) at various facilities between 1994 and 2003. In January 2001, he took leave under the FMLA to receive treatment for gastroesophageal reflux. When he returned to work 12 weeks later, Breineisen was assigned to a different position. Although he continued to receive the same pay and benefits, he nevertheless considered the new job to be a demotion. A few weeks after returning from leave, Breineisen took leave again on April 20, 2001 to have esophageal surgery. He returned to Motorola in September 2001, but took leave for a third time in February 2002 to undergo a total esophagectomy. Because Breineisen had already exhausted his FMLA entitlement, his second and third leaves were not FMLA-protected. Breineisen never returned to work and was discharged in June 2003.

Breineisen brought suit, contending that his former Motorola supervisor subjected him to harassment when he returned from his second leave in September 2001 and that the resulting stress exacerbated his pre-existing medical condition and caused him to take the third leave to undergo an esophagectomy, from which he never returned. He sought recovery of back pay, front pay, and payment for medical bills. The district court dismissed Breineisen’s claim, finding no basis in the FMLA that would enable Breineisen to recover even if he were able to demonstrate a causal link between his medical condition and Motorola’s alleged misconduct. According to the district court, Breineisen was barred from collecting back pay and front pay under the FMLA during periods when he was unable to work and had already exhausted his FMLA leave.

The Court of Appeals for the Seventh Circuit affirmed, concluding that the cause of Breneisen's injury was irrelevant under the FMLA, and that Breneisen's claimed exacerbation of his pre-existing injury was not a valid theory of recovery under the FMLA. According to the Court, "[w]hen serious medical issues render an employee unable to work for longer than the twelve-week period contemplated under the statute, the FMLA no longer applies. This is true regardless of the cause of the infirmity." *Breneisen*, 2011 WL 3873771, at *3.

Practical Advice

Set out below are some practical tips and best practices for employers to follow to successfully confront the new disability landscape.

- Update leave and accommodation policies. Employers should review all leave of absence policies. If the organization chooses to offer a fixed-leave policy, it should include an explicit statement that an employee may be eligible for additional leave as a reasonable accommodation, even if the employee is not eligible for or has exhausted the company-provided leave. Similarly, an employer should consider a statement in the organization's FMLA policy that an employee may be eligible for leave as a reasonable accommodation, even if the employee is not eligible for FMLA leave or has exhausted FMLA leave. Finally, employers should consider eliminating all statements from leave and attendance policies stipulating that an employee must be able to return to full duty, without restriction, in order to return to work.
- Review job descriptions. It is more important than ever that a company have a current job description that accurately sets forth the essential functions of the job the employee currently performs.
- Develop or renew focus on interactive process procedures. Employers should fully engage in the interactive process when receiving a request for accommodation. This includes the initial request for accommodation as well as later requests to continue or revise the accommodations provided. With regard to leaves of absence in particular, it is essential to communicate with employees in advance of their anticipated return-to-work date to confirm when they are returning and whether they will need any additional accommodations, such as additional leave.
- Train supervisors and managers. Managers and supervisors should be trained on the expanded scope of the ADAAA. They should also be trained on the need to notify human resources of all accommodation requests including leave or time-off requests. Keeping the human resources department informed and involved will ensure that the organization promptly and consistently engages in an individualized interactive process with all disabled individuals.
- Document like never before. Given the increase in the number of administrative charges filed and the amount of litigation in the area of reasonable accommodation, an employer needs to be prepared to prove that it acted appropriately when handling accommodation requests. A company must document when it received an accommodation request, that it engaged in an individualized interactive process, and that it afforded reasonable accommodation to the requesting employee in a timely and effective fashion. Making the effort to assist the employee and proving that the effort was made, even if not granting every request, will go a long way to minimizing litigation risk in this area.

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- Seek advice from counsel before denying a request for accommodation. Given the EEOC's renewed focus in this area and its aggressive enforcement posture, an employer should ensure that it took all steps necessary to meet its ADA obligations.