

## 6 Lessons From Recent FMLA And ADA Decisions: Part 1

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Administration of the Family and Medical Leave Act, 29 U.S.C. §2601 et seq. and the Americans with Disabilities Act, 29 U.S.C. §12101 et seq. continues to be challenging, even for the most seasoned employment law and human resources professionals. The FMLA contains myriad technical requirements and the ADA's accommodation obligations seem to expand with every change of season. An error in administration, even if minimal, can expose an employer to litigation and significant damage awards.

Given the risks associated with FMLA and ADA compliance, it is essential that employers keep abreast of continuing developments in this area. To that end, this two-part series sets out six lessons that employers should learn from recent cases to ensure legal compliance and minimize litigation risk. Part one of the series covers the following topics: (1) recognizing when an employee provides notice; (2) understanding when a medical condition will be considered a serious health condition and/or a disability; and (3) understanding and proving what constitutes an essential job function.

Part two of the series covers the remaining three topics: (1) determining when lengthy leaves of absence are too long and may be denied; (2) understanding when an employee on leave may be asked to help with work and understanding other examples of FMLA interference; and (3) how to determine if an employee is abusing leave while not running afoul of the law. Employers who consistently review and understand recent FMLA and ADA cases will ensure careful administration of leaves and other accommodations, and minimize legal risk.

### 1. Episodic Tardiness Does Not Put an Employer on Notice of the Need for FMLA Leave

Determining when an employee has provided notice of the need for leave sufficient to trigger an employer's obligations under the FMLA continues to be a challenge. According to the FMLA, an employee must "provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request."<sup>[1]</sup> To be clear, an employee need not specifically mention the FMLA to trigger its protections, but need only convey that he or she may have a serious health condition for which leave is needed. Some courts, however, have found that an employee's conduct alone (such as unusual behavior or a



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change in demeanor) — even in the absence of a formal request — may be sufficient “constructive notice” of the need for FMLA leave.[2]

Earlier this year, however, in *Guzman v. Brown County*, [3] the Seventh Circuit clarified that an employer need not be clairvoyant; “constructive notice” occurs only with extreme behavioral changes. The plaintiff Caroline Guzman, a 911 dispatcher, was diagnosed with sleep apnea in 2006 and used a CPAP machine to treat her condition. Following gastric bypass surgery and significant weight loss in 2008, Guzman stopped using the machine. Between September 2011 and December 2012, Guzman was late to work four times and received discipline. After another lateness in February 2013, Guzman was given a three-day suspension and warned that she would be fired with another lateness. At no time during this process did Guzman mention sleep apnea. Two weeks later, Guzman was late again, and the county decided to terminate her employment. At the termination meeting, Guzman presented her manager with a doctor’s note explaining that she “most probably” had sleep apnea and needed to be retested and treated for that condition. Guzman herself could not recall whether she had ever told the county about her sleep apnea or CPAP machine treatment. The county terminated Guzman’s employment during that meeting, and Guzman subsequently brought suit.

Acknowledging that she failed to request FMLA leave, Guzman argued that the county had constructive notice of her need for leave because her six incidents of lateness between September 2011 and March 2013 were uncharacteristic of her performance history. The court disagreed and affirmed summary judgment for the county, explaining that the cases in which it had previously found possible constructive notice all entailed “stark behavioral changes,” such as an employee who suddenly and uncharacteristically began shouting at coworkers over trivial issues. According to the court, “six incidents of oversleeping, spread over eighteen months, do not constitute the sort of stark and abrupt change which is capable of providing constructive notice of a serious health condition.”[4]

The *Guzman* decision confirms that (at least in the Seventh Circuit), in the absence of actual, verbal notice of a serious health condition, constructive notice occurs only with extreme behavioral changes. Nonetheless, employers must always exercise caution when dealing with an employee who suddenly exhibits peculiar or uncharacteristic behavior. In such cases, it is always prudent to open the lines of communication.

## **2. Not Every Medical Condition Triggers FMLA or ADA Protections**

The first question every employer must ask when confronted with a request for leave or other accommodation is “Does this employee have a serious health condition or a disability within the meaning of the FMLA or the ADA?” The answer to this question is remarkably technical.

For its part, under the FMLA, an employee seeking leave for his or her own serious health condition must demonstrate an impairment, injury, illness, or physical or mental condition that fits neatly into one of six categories: (1) inpatient care; (2) incapacity for more than three days with continuing treatment by a health care provider; (3) incapacity relating to pregnancy or prenatal care; (4) chronic serious health conditions; (5) permanent or long-term incapacity; or (6) certain conditions requiring multiple treatments.[5]

The case of *Curtis v. Nucor Corp.*[6] illustrates the applicability of the definition’s technical aspects. Steve Curtis worked as a port crane operator for Nucor Corporation. On Oct. 19, 2013, he injured his knee while hunting and did not work for the next few days. He first saw a doctor nine days after his initial injury. The doctor diagnosed “left knee pain,” prescribed an anti-inflammatory, and told Curtis to

return “if anything gets any worse.” After leaving the doctor, Curtis drove to Nucor and delivered a note excusing him from work through the end of the year. The doctor subsequently returned an FMLA certification form stating that Curtis had “no use of left lower extremity” and that treatment would be provided “as needed.” Nucor personnel had seen Curtis walking when he delivered the note, however, and the company decided to seek a second opinion. When Curtis refused to attend the scheduled appointment, Nucor denied his FMLA leave and terminated his employment due to his four-day unexcused absence. Curtis sued, asserting an FMLA claim, and the district court granted summary judgment in favor of Nucor.

On appeal, the Eighth Circuit affirmed, finding that Curtis was not protected by the FMLA because he couldn’t demonstrate that he satisfied the “incapacity plus continuing treatment” prong of the definition of serious health condition. Section 825.115 of the FMLA regulations outlines several ways to establish continuing treatment. For an acute condition involving a period of incapacity of more than three consecutive days, continuing treatment includes either (1) treatment “two or more times, within 30 days of the first day of incapacity;” or (2) initial in-person treatment followed by “a regimen of continuing treatment under the supervision of the health care provider.”[7] In either case, the first in-person treatment visit “must take place within seven days of the first day of incapacity.”[8] Curtis, however, waited nine days to seek treatment. Also, because he did not communicate with the doctor for more than two months following his initial visit, he did not receive treatment two or more times in a 30-day period. Finally, the court noted that Curtis’ FMLA certification contradicted any assertion that Curtis’ knee injury constituted a chronic condition by explaining that his condition would neither require treatment visits at least twice per year nor cause episodic flare-ups.

Like the FMLA, the ADA’s definition of disability is complex, but not without limitation. An individual is disabled if he or she has a “physical or mental impairment that substantially limits one or more major life activities.”[9] Of course, employees may also be considered disabled under the statute if they have a record of such an impairment or if their employer regards them as such.[10] While the ADA Amendments Act broadened the definition of disability, the courts of late have begun to impose a modicum of limitation.[11]

In *U.S. Equal Employment Opportunity Commission v. STME LLC* [12], Kimberly Lowe, a massage therapist, asked her employer, Massage Envy, for vacation time to visit her sister in Ghana. Although her request was initially approved, Massage Envy discharged Lowe three days before her trip because one of the owners feared that Lowe would contract Ebola while in Africa and would infect Massage Envy’s employees and clients upon her return. Lowe filed a discrimination charge, alleging that Massage Envy discriminated against her based on a “perceived disability.” The EEOC filed suit on Lowe’s behalf asserting claims for “regarded as” discrimination among other things.

The district court granted Massage Envy’s motion to dismiss. It concluded that Massage Envy did not regard Lowe as disabled within the meaning of the ADA. Massage Envy did not perceive Lowe as presently having Ebola; rather, the company “perceived her as having the potential to become infected with Ebola (i.e., become disabled) in the future.”[13] The term impairment however, “does not include characteristic predisposition to illness or disease.”[14]

The lesson to be learned is that the definitions of serious health condition and disability, while broad, are not limitless. Employers should tread carefully, seek additional medical information, and begin a dialogue with the employee. This process will allow employers to make informed and sound decisions regarding the scope of their obligations.

### **3. Employers Must Be Able to Prove That Asserted Essential Job Functions Are Actually Essential**

The ADA does not require employers to eliminate essential job functions to accommodate disabled employees. As a result, whether a function is essential becomes a critical and often dispositive issue in ADA litigation. The employer must not only assert that a function is essential, but prove that to be true.

A carefully crafted job description outlining a position's essential functions can be invaluable in defending against a failure to accommodate claim.[15] Of course, the job description must be accurate to be useful. The decision in *Mosby-Meachem v. Memphis Light, Gas & Water Division*[16] is illustrative. Andrea Mosby-Meachem was an in-house attorney for Memphis Light Gas & Water. She was on bed rest due to pregnancy complications and requested to work from home for 10 weeks. MLGW denied the request explaining that physical presence was an essential job function. Mosby-Meachem brought suit claiming failure to accommodate, among other things. At trial, the jury returned a verdict in Mosby-Meachem's favor and MLGW appealed.

The court of appeals upheld the verdict, notwithstanding the existence of a written job description. Mosby-Meachem had presented testimony from several MLGW employees and outside counsel stating that Mosby-Meachem could perform all essential functions from home. Although the written job description included such tasks as taking depositions and trying cases, all of which seemingly required her presence, Mosby-Meachem testified that she never performed any of those functions during her tenure. Significantly, her evidence demonstrated that the job description was based on an old questionnaire and did not reflect job changes resulting from technological advances.

Less than six months after issuing the Mosby-Meachem opinion, the Sixth Circuit decided *Hostettler v. College of Wooster*,[17] another case involving proof of an asserted essential job function. Heidi Hostettler was hired by the College of Wooster as a full-time human resources generalist. She was four months pregnant at the time of hire. Following the birth of her child, Hostettler experienced severe postpartum depression and separation anxiety, and her doctor recommended that she return to work on a reduced schedule. The college agreed, permitting Hostettler to return at the beginning of May and work five half days per week through June 30.

Beginning in July, however, Hostettler's supervisor requested that Hostettler return to work full-time. In response, Hostettler submitted an updated medical certification, which stated that she should continue to work part-time, and estimating a full-time return to work date in September. Shortly after receiving the updated certification, the college sent Hostettler a letter terminating her employment because she was unable to return to her position in a full-time capacity. Hostettler sued, asserting, among other things, that the college failed to accommodate her disability as required by the ADA. The district court granted summary judgment in favor of the college on all of Hostettler's claims, concluding that full-time presence was an essential function of the HR generalist position, and Hostettler could not demonstrate that a part-time schedule was a reasonable accommodation.

The appellate court disagreed and reversed. Conceding that regular, in-person attendance is an essential function of most jobs, the court explained that it is not "unconditionally so." [18] "Full time presence at work is not an essential function of a job simply because an employer says it is." [19] The employer "must tie time-and-presence requirements to some other job requirement." In other words, the college needed to present evidence explaining "why Hostettler could not complete the essential functions of her job unless she was present 40 hours per week." [20] Here, Hostettler presented evidence that she satisfied all the core tasks of her position while working on a reduced schedule, including an affidavit submitted by a former colleague who confirmed Hostettler's effectiveness. Hostettler's supervisor also

agreed that Hostettler never failed to perform any responsibility or finish an assignment in a timely manner. Though the listing for her position indicated that it was full-time and there was some evidence that Hostettler's absence was putting a strain on the department, the court concluded that this just created questions of fact to be resolved by a jury. According to the court, the college "may have preferred that Hostettler be in the office 40 hours a week. And it may have been more efficient and easier on the department if she were. But those are not the concerns of the ADA." [21]

The employer fared better in *Faidley v. United Parcel Service of America Inc.* [22] Jerry Faidley worked for UPS as a package car driver. He suffered from back problems and a degenerative hip condition. After attempting to return to work full duty following a leave of absence to recover from surgery, Faidley was medically restricted to eight-hour days. He requested an eight-hour-a-day accommodation, asserting that he rarely had to work overtime in any event. UPS concluded that the essential functions of Faidley's position included the ability to work 9.5 or more hours per day. The company, therefore, denied Faidley's request. As he was unable to obtain reassignment to any alternative full-time jobs, Faidley remained on medical leave and ultimately filed suit against UPS.

Sitting en banc, the Eighth Circuit affirmed the district court's grant of summary judgment in favor of UPS, agreeing with the company that the ability to work overtime was an essential job function. Significantly, UPS explained its rationale — delivery drivers' workloads often increase unpredictably, particularly during the year-end holiday season, and drivers also encountered unpredictable weather while completing their routes. Moreover, if a driver were unable to deliver all his packages within eight hours, other drivers would have to finish the deliveries. Otherwise, packages would not be timely delivered. Either alternative would adversely affect UPS' business. UPS also pointed to the job description — which listed mandatory overtime — and the issue was collectively bargained with the union. Having both included overtime as an essential function in the applicable job description and been able to articulate a logical basis for such inclusion, UPS was well-positioned for success.

The lesson from these recent cases is simple: have a written job description and ensure that this job description is complete, accurate and reflective of the employees' "actual experience" in the position.

Part two of this series will address remaining lessons to be learned from recent ADA and FMLA cases.

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[1] 29 C.F.R. §825.303(b); see also 29 C.F.R. §825.302(c)

[2] See *Valdivia v. Township High School District 214*, 2017 WL 2114965, at \*3 (N.D.Ill. May 15, 2017) (an employee provided sufficient notice of need for leave when she began "crying regularly and uncontrollably" at work).

[3] 884 F.3d 633 (7th Cir. Mar. 7, 2018)

[4] *Id.* at 639

[5] See 29 C.F.R. §§825.113–825.115

[6] 713 F. App'x 520 (8th Cir. 2018)

[7] 29 C.F.R. §825.115(a)

[8] 29 C.F.R. §825.115(a)(3)

[9] See 42 U.S.C. §12102(1)

[10] See *id.*

[11] See e.g., *Hoppman v. Liberty Mut. Ins. Co.*, 2018 WL 1769364, at \*6 (D.Or. April 12, 2018) (holding that the inability to work overtime due to stress and anxiety did not render plaintiff disabled); *Jackson v. Oil-Dri Corp. of Am.*, 2018 WL 1996474, at \*6-7 (N.D. Miss. April 27, 2018) (finding that plaintiff failed to demonstrate that chronic obstructive pulmonary disease and other breathing issues substantially limited any major life activities)

[12] 309 F. Supp. 3d 1207 (M.D. Fla. 2018)

[13] *Id.* at 1212

[14] 29 C.F.R. Part 1630 App'x §1630.2(h)

[15] See *Sepulveda-Vargas v. Caribbean Restaurants LLC.*, 888 F.3d 549 (1st Cir. 2018) (Affirming summary judgment for employer. Request for fixed schedule not reasonable where employer offered job application and position advertisement to prove that working rotating shifts was essential job function); *Snead v. Fla. A & M Univ. Bd. of Trs.*, 724 F. App'x 842, 845 (11th Cir. 2018) (upholding jury verdict for security officer who requested eight-hour instead of 12-hour shift as accommodation. University's job description silent as to need to work 12 hours).

[16] 883 F.3d 595 (6th Cir. 2018)

[17] 895 F.3d 844 (6th Cir. 2018)

[18] *Id.* at 854

[19] *Id.* at 857

[20] *Id.* at 856

[21] *Id.* at 857

[22] 889 F.3d 933 (8th Cir. 2018)