Robert T. Bernstein - A Discussion of Recent ADA and FMLA Cases and Their Practical Implications

Agency Updates: In 2018, the Department of Labor released two significant opinion letters demonstrating its interpretation of the Family and Medical Leave Act. In FMLA2018-2-A, the DOL determined that an organ donor is entitled to FMLA leave when the donation involves either inpatient care or continuing treatment. In FMLA2018-1-A, the DOL clarified how employers need to balance no-fault attendance policies with an employee's FMLA leave, stating that employers may "freeze" an employee's attendance points while they are on leave. In 2019, the DOL released FMLA2019-1-A, which asserts that employees cannot decline FMLA leave or force employers to classify FMLA qualifying leave as another form of leave.

Per the Equal Employment Opportunity Commission's annual report, the EEOC secured more than $505 million for victims of discrimination for the fiscal year 2018. Amongst them, the EEOC won a verdict in the Ninth Circuit against a railway, holding that it was a violation of the ADA to force an employee to obtain an MRI at his own expense before beginning employment. *EEOC v. BNSF Railway Company*, 902 F.3d 916 (9th Cir. 2018).

Long-Term/Indefinite Leaves of Absence Under the ADA: Courts have ruled differently with respect to whether long-term or undefined leaves of absence are reasonable accommodations under the ADA. It depends on the jurisdiction that you are in and/or the particular facts of the case. The Seventh Circuit held that a long-term or undefined leave of absence is *not* a reasonable accommodation under the ADA. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 482 (7th Cir. 2017). Several courts have followed *Severson* and held that indefinite or long-term leaves of absence are unreasonable. *See Rancourt v. OneAZ Credit Union,* No. cv-17-00194-phx-jjt, 2018 U.S. Dist. LEXIS 138805 (D. Ariz. Aug. 16, 2018); *Markowitz v. UPS*, 711 Fed. Appx. 430 (9th Cir. 2018); *Wilson v. Greenco Indus.*, No. 17-cv-934-wmc (W.D. Wis. Mar. 7, 2019). However, at least one court has declined to follow *Severson*, holding that an extended unpaid leave *could* be a reasonable accommodation so long as it was not an undue hardship for the employer, regardless of the length of the leave. *Estep v. Forever 21 Retail, Inc.*, (D. Or. Nov. 13, 2018) (citing *Nunes v. Wal-Mart Stores, Inc*., 164 F.3d 1243, 1247 (9th Cir. 1999)).

ADA and Obesity: Employers should reevaluate accommodation requests and hiring processes for employees and applicants that are obese. Any denials of accommodation or refusal

to hire should be based on the limitations posed by obesity itself, not based on any "perceived" characteristic associated with obesity. Courts may determine that employers "regarded" an employee as disabled based on perceived health complications associated with obesity, amounting to a violation of the ADA. *See Shell v. Burlington Northern Santa Fe Railway Company*, No. 15-cv-11040 (N.D. Ill. Mar. 5, 2018).

FMLA Notice Requirements: Courts have reinforced that employers may require notice of the use of FMLA leave and an initial showing of a "serious health condition." However, employers should not deny requests simply because an employee has not expressly stated that the employee needs or is using FMLA leave. Additionally, employees are not required to return to work when they are cleared for light-duty by a medical provider, and may still utilize unexhausted FMLA leave before returning to the workplace. Still, employers may require employees to notify the employer if and when the employee decides to return. *See Stein v. Atlas. Indus.*, 730 Fed. Appx. 313 (6th Cir. 2018).

FMLA Interference: As demonstrated in *Walker v. Pocatello*, No. 4:15-cv-00498-BLW (D. Id. Jan. 31, 2018), employees maintain the right to require a second opinion from an employee's medical provider if it has objective reason to doubt the validity of FMLA medical certification. However, if an employer takes additional actions to find evidence of an employee's medical issues – including internet or video surveillance – these measures could amount to FMLA interference.

Takeaways for the ADA: Continue to assess accommodation requests on a case-by-case basis, and review policies regarding pre-employment medical examination requests.

Takeaways for the FMLA: Employers may still require notification and certification to evaluate whether an employee is eligible for FMLA, but employees may still be entitled to take FMLA leave even where they have not expressly stated that they are using FMLA or have a need to take FMLA leave.