

PUBLIC TRANSIT- MEDICAL ISSUES AFFECTING YOU!

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FMLA RETALIATION

- RETALIATION AND INTERFERENCE ARE SEPARATE AND DISTINCT CLAIMS:

RETALIATION:

- * Here an employee is discriminated against for engaging in a protected activity
- The Courts will consider whether an employee invoked the right to FMLA;
- That the employee suffered an adverse employment action;
- That the adverse decision was related to the FML request
- NOTE: You do not need to pursue any form of administrative remedy before filing a federal complaint for FML



FMLA INTERFERENCE

- Interference with an FMLA claim
 - Here an employer interferes with an employee's rights
 - Employee must prove that they were an eligible employee under FMLA
 - Entitled to leave under FMLA
 - Employee gave notice of intent to take FMLA
 - Employer denied FMLA benefits
- Interfering can also mean discouraging an employee from using FMLA which may include failing to provide individual notice of rights, obligations and entitlement to FMLA
- REMEMBER: An employee is "subject to immediate discharge on the very first workday that an employee is absent from work and no longer protected by FMLA"



WHAT DOES FML REQUIRE BEYOND 12 WEEKS?

- There is no FML claim for failure to offer a reasonable accommodation after 12 weeks.
- FML does not require an extension of 12 weeks
- FML does not require that leave be granted if an employee can never return to their pre-FML position
- ADA claims are separate and distinct and require a separate analysis
- FML claims can be brought against individual supervisors with FML responsibility. 29 USC § 2611(4)(A)(ii).
- Thomas v. St. Mary Medical Center, 2014 Eastern District



WHAT IS A SERIOUS HEALTH CONDITION

- Various elements:
 - Illness, injury, impairment or physical or mental condition that involves:
 - Inpatient care;
 - Continuing treatment by a health provider (which includes a period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of capacity related to the same condition
 - Or a period of incapacity due to a chronic serious health condition;
 - Which means requires periodic visits (at least twice per year by a health provider);
 - Continues over an extended period of time
 - May cause episodic rather than a continuing period of incapacity



FML AND YOUR UNION

- Can an employee file a grievance if FML is awarded and abused in violation of sick time policies of a CBA?
- What about the case of multiple conditions?
- What about the use of drugs for an FML condition v. Substance Abuse Policy





AMALGAMATED TRANSIT UNION

KNOW YOUR RIGHTS
FAMILY & MEDICAL LEAVE ACT

Bus Driver AND a Bar Tender

- Employers must be very thoughtful and thorough in analyzing FMLA abuse cases. Crewl demonstrates that employers should use the following tools available to help combat FMLA abuse:
 - Use the medical certification and recertification processes
 - Pay particular attention to patterns of FMLA use on Friday and holidays
 - Use surveillance in certain cases
 - Look for advance FMLA requests that point to fraudulent leave use

WORKERS COMPENSATION V. FML

- Consult always with your claims adjusters- you may forever buy a Worker's Compensation Claim
- FML and Worker's Compensation may run concurrently
- The Worker's Compensation Act provides that it is against public policy for terminating an at-will employee for filing a claim
- If a supervisor is forced to interfere with a Worker's Compensation claim, than an employer can be found liable for such activity.
- You cannot discipline a supervisor for dissuading a subordinate employee from seeking Worker's Compensation benefits.



JOB POSTING – ADA CONCERNS?

- Job postings must be clear
- ADA liability can be potentially triggered by a mere mention of a disability (depression, anxiety, etc.) during an interview
- If you want to make physical requirements an evaluation criteria, you must be upfront about those requirements
- Job description is a critical tool in this hiring process



“REGARDED AS” WHAT DOES THAT MEAN?

- You can be liable under ADA by simply perceiving an individual as having a substantially limiting disability under the ADA



DOT PHYSICALS – NOW WHAT?



HOW HAVE THE TIGHTER STANDARDS AFFECTED YOU?

- In 2014, only certified doctors may perform examinations
- Courts have held that the DOT epilepsy standards may apply even to governmental agencies not forced to follow DOT standards. Clark v. SEPTA (JILL PULL)
- The Pennsylvania Courts have upheld transit authority's right to apply the DOT standards for physical examinations – BUT, you MUST have a policy that is uniform.
- The Courts are taking a hard line on drivers of commercial vehicles and ensuring that they can safely perform their duties



ESSENTIAL PHYSICAL REQUIREMENTS

- 2013, State Police Matter:
 - Clearly spelled out physical requirements
 - Clear deference to medical professionals
- State Police had medical providers develop their protocols regarding medical and/or physical issues that are used and interpreted the same for all employees of the class
- Rehabilitation Act – applies to all employers who are recipients of federal funds. The Act looks at whether a person is otherwise qualified to perform a program's requirements



QUALIFICATION STANDARD DEFENSE

- A new defense is emerging that must be in writing and confirmed that states: an employer may assert a defense to a charge of discrimination by showing its qualification standard, test or other selection criteria that screens or tends to screen out an individual with a disability is job related for the position in question and is consistent with business necessity; and that "satisfaction of its qualification standard, test , or selection criteria cannot be accomplished by reasonable accommodation.
- You may create standards based upon safety. Clark v. SEPTA 2008 WL 219223
- Your standards must be articulated if they are not based upon statute
- Documentation was critical in Clark including formal policies, medical information and job criteria
- Your qualification criteria must be job related and applied uniformly (i.e., running, lifting, etc.) Lanning 308 f.3d 286
- State Police Court looked at all records of termination FOR ALL EMPLOYEES to see if any Trooper received a waiver of a probationary period
- State Police Court looked to see if the State Police treated any trooper differently based upon their physical qualification standards



DIRECT THREAT DEFENSE:

- The Rehabilitation Act provides qualification standards for employees that include a requirement that an individual shall not pose a direct threat to the health or safety of himself or others is not a qualified individual with a disability. 42 USC § 12113 (b)
- An employee who is a direct threat to the safety of himself or others may be excluded from employment
- Now, the Courts have carried this further to look at the actual work environment that a person engages in
- This defense requires an individualized assessment looking at the essential functions of the job and based upon reasonable medical judgment



LIMITED DUTY

- When do you provide this? Work injuries? All Injuries?
- Do you have a policy? Policy Considerations:
 - First come first serve
 - Limited duty is Temporary
 - State Police case gives recitals on budgetary and essential purpose of your organization for basis of policy limitations. Coleman v. State Police, 2013 WL 3776928
 - Establish a chain of command for limited or modified duty evaluation



UNEMPLOYMENT COMPENSATION AND MEDICAL ISSUES

- Whether a failed physical examination will allow an employee to qualify for unemployment compensation depends upon the circumstances:
 - Did you warn employees of pending examination requirements?
 - Can the employee do other work in another capacity? (NOT AN ADA Standard)
 - Suitable work is a different standard for unemployment compensation than other Acts.



JOB OFFERS AND MEDICAL EXAMS

- In July 2014, the Court defined several examinations as “improper” under the ADA.
- You must make an offer prior to any drug test or medical examination
- You must check the credentials of your pre-employment medical screeners
- Your examination requirements must be established by policy or job description
- Even if you hire a person, you have violated the ADA as soon as you send a job candidate for an examination without a pre-examination offer and even if there is no damage



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