

**KEEPING THE EMPLOYEE WORKING:
REASONABLE ACCOMMODATIONS AND LEAVE REQUIREMENTS**

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March 10-11, 2006
Seattle, Washington

The basic principle underlying the reasonable accommodation provision of the disability laws is to keep qualified employees working. Often, however, the accommodation requested is in the form of leave, which will allow an employee to seek the treatment or rest necessary to return to work and perform the essential functions of the job. Requesting or taking leave from work to address a serious medical condition implicates both federal and state disability laws, as well as federal and state family and medical leave laws. Developing a solid understanding of both the Americans with Disabilities Act and the Family and Medical Leave Act – and understanding in particular the overlap that occurs between the two statutes (and their state counterparts) on issues such as the length of leave, medical documentation required, the process for sharing information with the employer, and rules regarding the return to the workplace – is critical for a civil rights attorney to effectively represent an employee with a serious medical condition and to keep that employee working.

I. Americans With Disabilities Act (ADA)

The ADA provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual” in the terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). Discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability,” unless the employer can demonstrate that the accommodation would represent an “undue hardship on the operation of the business” of the employer. 42 U.S.C. § 12112(b)(5)(A).

Reasonable accommodations may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modification of examinations, and/or the provision of qualified readers or interpreters. See 42 U.S.C. § 12111(9)(B); see also 29 C.F.R. § 1630 App., 1630.2(o). Another common accommodation is a leave of absence to enable an employee to receive treatment for a disabling condition. See 29 C.F.R. § 1630 App., 1630.2(o) (noting that “accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for

necessary treatment”); see also Humphrey v. Mem’l Hosp. Ass’n, 239 F.3d 1128, 1135-36 (9th Cir. 2001) (“We have held that where a leave of absence would reasonably accommodate an employee’s disability and permit him, upon his return, to perform the essential functions of the job, that employee is otherwise qualified under the ADA.”); Cehrs v. Northeast Ohio Alzheimer’s Research Ctr., 155 F.3d 775, 783 (6th Cir. 1998); Criado v. IBM, 145 F.3d 437, 443 (1st Cir. 1998); Rascon v. US West Commc’ns, Inc., 143 F.3d 1324, 1333 (10th Cir. 1998).

The ADA differs from other civil rights statutes in imposing an “affirmative” obligation upon employers: the duty to accommodate an employee’s disability. While that obligation can lead to liability, and thus litigation, it also creates a pre-litigation procedure that may be unfamiliar to or overlooked by civil rights attorneys. That procedure is known as the “interactive process” by which employees and employers attempt to negotiate a reasonable accommodation that will allow an employee to continue working and performing the essential functions of her position. The interactive process is an important and necessary step to keep a disabled employee working.

As a legal matter, the “interactive process” remains relatively devoid of clear rules. The Supreme Court has not addressed whether the ADA requires that an employer engage in the “interactive process” with a qualified individual with a disability. The phrase derives from EEOC regulations that provide that once a qualified individual with a disability requests an accommodation, “it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation.” 29 C.F.R. § 1630.2(o)(3). The EEOC’s Interpretive Guidance takes a stronger stand: “The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability.” See 29 C.F.R. § 1630 App., 1630.9 (“Process of Determining the Appropriate Reasonable Accommodation”).

Generally, courts have held that there is no independent cause of action for an employer’s failure to engage in the interactive process. See, e.g., EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 805 (7th Cir. 2005); Fjellestad v. Pizza Hut of Am., 188 F.3d 944, 952 (8th Cir. 1999); Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997). Nonetheless, in one formulation or another, courts have found that an employee can state a valid claim where the employer’s failure to engage in the interactive process, or actions taken during the process, led to the failure to provide a reasonable accommodation that otherwise could have been found. Id. Thus, an employer’s actions (and inaction) within the interactive process remain highly relevant to the merits of any potential failure to accommodation claim. Additionally, the employer’s actions during the interactive process are relevant to the issue of damages. In cases involving failure to provide a reasonable accommodation, compensatory and punitive damages may not be awarded where the employer “demonstrates good faith efforts, in consultation with the person with the disability who has informed the [employer] that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.” See 42 U.S.C. § 1981a(a)(3); see also Rascon v. U.S. West Commc’ns, Inc., 143 F.3d 1324, 1336 (10th Cir. 1998) (upholding an award of compensatory damages where there was evidence that

employer's justification for failing to provide an accommodation – lack of information – was a pretext for intentional discrimination); EEOC v. Yellow Freight Sys., Inc., No. 98 CIV. 2270 (THK), 2002 WL 31011859, at *35-36 (S.D.N.Y. Sept. 9, 2002) (upholding award of punitive damages where, *inter alia*, employer did not respond to request for accommodation, made no attempt to justify its decision, and did not offer alternative accommodations).

Thus, courts have addressed issues that recur in the interactive process. Civil rights attorneys should be cognizant of the different types of employer conduct they may confront them in order to maximize their ability to negotiate effective accommodations with employers, and keep the employee on the job.

Notice

An employer's duty to engage in the interactive process is not triggered until it receives notice that an accommodation is necessary. See 42 U.S.C. § 12112(b)(5)(A) (requiring accommodation only to the "known" physical or mental limitations of an individual). In terms of content, the request must provide the employer "with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation." Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 313 (3d Cir. 1999); see also Sears, Roebuck & Co., 417 F.3d at 803-04. It is not required that the employer know the specific name of the condition, or that the employee request a specific accommodation. Taylor, 184 F.3d at 314-15. It is the employer's burden "to request additional information that the employer believes it needs." Id. at 315.

Additionally, an employer cannot avoid its responsibility to engage in the interactive process where it already knows of the employee's condition and circumstances indicate that the employee needs an accommodation. Bultemeyer v. Fort Wayne Cmty. Schs., 100 F.3d 1281, 1285-86 (7th Cir. 1996); see also Felix v. New York City Transit Auth., 154 F. Supp. 2d 640, 657 (S.D.N.Y. 2001) (holding that notice concerns "are not relevant when an employer has independent knowledge of an employee's disability"). This often may be the case where the employee suffers from a mental disability. Bultemeyer, 100 F.3d at 1285-86.

In terms of form, the EEOC has taken the position that an employee may use "plain English" and is not required to use the magic words of "reasonable accommodation." See Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act, available at <http://www.eeoc.gov/policy/docs/accommodation.html> (hereinafter "Enforcement Guidance"), at 5. Notice may be provided by a person other than the employee, including a family member, friend, physician, or other representative. Id. at 5-6. The request need not be in writing. Id.

As a matter of timing, an employee's counsel would be well advised to request an accommodation as soon as practicable upon learning of the disability, lest the disability lead to performance problems, which may give the employer grounds for termination. See Enforcement Guidance, at 6.

Medical Substantiation

Because entitlement to a reasonable accommodation depends on qualification under the ADA, an employer is entitled to know whether an employee requesting an accommodation is a qualified individual with a disability. See Enforcement Guidance, at 7. The EEOC has taken the position that when the employee's disability and/or need for accommodation is not "obvious," the employer may ask the employee for "reasonable documentation" (and ask that it come from a medical provider). Id. Reasonable accommodation is documentation "that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation." Id. An employer may not request information beyond those parameters. The EEOC notes, for instance, that an employer could not ask for an employee's complete medical records since they "are likely to contain information unrelated to the disability at issue and the need for accommodation." Id.

It is important to note that where the disability and/or need for accommodation are not obvious, the employee must provide sufficient documentation or she will not be entitled to reasonable accommodation. Id. at 8. Documentation is sufficient if it:

(1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed.

See "Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA)," available at <http://eoc.gov/policy/docs/guidance-inquiries.html>, at 11.

If the employee fails to provide sufficient information to substantiate the disability or need for accommodation, the ADA does not forbid an employer from requiring that the employee be examined by a physician of the employer's choice to substantiate these issues. See Enforcement Guidance, at 8. Such a medical exam must be job-related and consistent with business necessity, per the ADA, which means the examination must be limited to "determining the existence of an ADA disability and the functional limitations that require reasonable accommodations." Id. The employer must pay all costs of such an examination. Id.

If the employee provides sufficient documentation, however, "continued efforts by the employer to require that the individual see the employer's health professional could be considered retaliation." Id. at 8 n.33.

Where the reasonable accommodation involves leave, requests for medical certification will also implicate the Family and Medical Leave Act, discussed *infra*.

Delay

Delay is a factor that a court will consider heavily in weighing an employer's engagement in the interactive process. "A party that obstructs or delays the interactive process is not acting in good faith." Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996); see also Pantazes v. Jackson, 366 F. Supp. 2d 57, 70 (D.D.C. 2005) (noting that "the absence of good faith, including unreasonable delays caused by an employer, can serve as evidence of an ADA violation"). See also Enforcement Guidance, at 10 ("An employer should respond expeditiously to a request for reasonable accommodation.").

Additionally, delay alone may give rise to liability for failure to reasonably accommodate even where a reasonable accommodation ultimately is provided. Adopting the position that an accommodation delayed is an accommodation denied, some courts have held that unreasonable delay in implementing a reasonable accommodation will support a claim under the ADA. Selenke v. Med. Imaging of Colo., 248 F.3d 1249, 1262-63 (10th Cir. 2001); Krocka v. Riegler, 958 F. Supp. 1333, 1342 (N.D. Ill. 1997). See also Enforcement Guidance, at 10 ("Unnecessary delays can result in a violation of the ADA."). The Tenth Circuit, in the fullest discussion of this type of claim, noted that courts should consider the length of the delay, the reasons for the delay, whether the employer has offered any alternative accommodations while weighing a particular request, and whether the employer has acted in good faith. Selenke, 248 F.3d at 1262-63. Cf. Enforcement Guidance, at 10 n.38 (listing as factors: the reasons for delay, the length of the delay, how much the employer and employee contributed to the delay, the employer's actions during the delay, and whether the requested accommodation was simple or complex to provide.)

It is not clear precisely how much delay is too much delay, but as a general matter, employees will have a difficult time creating a jury issue for a delay shorter than seven months, absent other strong evidence of bad faith. Fol v. City of New York, No. 01 Civ. 1115 THK, 2003 WL 21556938, at *8 (S.D.N.Y. July 9, 2003) (denying motion for summary judgment where eight-month delay); Armstrong v. Reno, 172 F. Supp. 2d 11, 23 (D.D.C. 2001) (denying summary judgment where "delay of over a year"); Krocka, 958 F. Supp. at 1342 (denying motion to dismiss where eight-month delay); James v. Frank, 772 F. Supp. 984, 991-92 (S.D. Ohio 1991) (finding unreasonable accommodation for seven-month delay in Rehabilitation Act case); cf. Cohen v. Montgomery County Dep't of Health & Human Servs., 817 A.2d 915, 924-25 (Md. Ct. Spec. App. 2003) (reversing dismissal of complaint under Maryland law where seventeen-month delay between request and accommodation). In James, only two months elapsed between the plaintiff's request to be allowed to sit in a straight back chair while sorting mail, and the permission to do so. But during those two months, Mr. James was, *inter alia*, required to stand and then sent home when he became fatigued, asked to sit in a straight back chair but given no work to do, told by his supervisor to separate rubber bands according to size and "beauty," and, one day, simply escorted from the building by security. Meanwhile, employees injured on the job were allowed to sort mail from a straight back chair. The court held that the Post Office failed to make timely, reasonable accommodations under the Rehabilitation Act, noting explicitly that "the harassment [Mr. James] suffered at the hands his supervisors . . . is indefensible." James, 772 F. Supp. at 991.

A court will also analyze the reasons for the delay. If an employer can provide reasonable explanations, delay will be excused. Selenke, 248 F.3d at 1262-63 (affirming summary judgment for employer even though year elapsed before implementation of air-flow recommendations for employee with sinusitis; after initial request, employer decided not to improve ventilation in existing office that would be vacated shortly but instead waited until move to new facility, and in the interim provided plaintiff with respirator mask, granted all requests for leave, and provided alternative position; no evidence of bad faith). No clear position has been adopted with regard to bureaucratic delay. Compare James, 772 F. Supp. at 992 (holding that seven-month delay by post office was unreasonable even though “a certain amount of bureaucratic delay can be excused”) with Hartsfield v. Miami-Dade County, 90 F. Supp. 2d 1363, 1372-73 (S.D. Fla. 2000) (affirming summary judgment for employer where no factual dispute that request for accommodation was misplaced in transmittal between county departments, resulting in delay of ten months; no bad faith). As with any purported reason, bureaucratic delay will not justify delay if it is shown to be a pretext. See Krocka, 958 F. Supp. at 1342 (denying motion to dismiss where there was eight-month delay in providing the reasonable accommodation of a scheduling shift; court skeptical of defense that scheduling was complex in large metropolitan police department in view of fact that the department initially refused outright to accommodate plaintiff). Thus, plaintiffs should present evidence that puts the defendant’s reason in dispute. Armstrong, 172 F. Supp. 2d at 23 (denying summary judgment where reasons for “delay of over a year” were in dispute).

At least one court has required that a plaintiff show that an employer is delaying an accommodation out of discriminatory animus toward the disabled plaintiff. See, e.g., Powers v. Polygram Holding, Inc., 40 F. Supp. 2d 195, 202 (S.D.N.Y. 1999) (“As with all claims under the ADA, plaintiff must show that this three-week delay in granting plaintiff’s request was motivated by discriminatory intent.”). This holding would seem at odds with the statutory scheme. The ADA defines a failure to provide a reasonable accommodation as a discriminatory act. Thus, if delay is unreasonable, a reasonable accommodation has not been provided and, by statutory definition, discrimination has been shown.

Other accommodations granted by an employer may excuse delay. One court has held, rather rigidly, that as long as the employer offers alternative accommodations (or at least the employer does not suffer an adverse employment action), there is no liability under the ADA. Hartsfield, 90 F. Supp. 2d at 1373.

Finally, delay that exacerbates a plaintiff’s disability – particularly where an employer is aware of that effect of the disease – may strengthen a plaintiff’s case. See, e.g., Cohen, 817 A.2d at 924-25 (reversing dismissal of complaint where employer’s purported accommodations only worsened the plaintiff’s multiple sclerosis).

Rejection of Alternatives/Explanation

The employer may not simply reject proposed accommodations without offering other suggestions or expressing a willingness to discuss possible accommodations. As the Seventh

Circuit has stated, “An employer cannot sit behind a closed door and reject the employee's requests for accommodation without explaining why the requests have been rejected or offering alternatives.” EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 806 (7th Cir. 2005); see also Humphrey v. Mem’l Hosps. Ass’n, 239 F.3d 1128, 1138-39 (9th Cir. 2001); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 648 n.12 (1st Cir. 2000) (reversing grant of summary judgment for employer where the employer “simply rejected the request for the accommodation without further discussion and it did so without pointing to any facts making the accommodation harmful to its business needs”).

The civil rights attorney must realize, however, that this obligation cuts both ways. Alternatives offered by the employer must be considered in good faith. Additionally, although a qualified individual with a disability is not required to accept an accommodation simply because it is offered, if the individual “rejects a reasonable accommodation . . . that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.” 29 C.F.R. § 1630.9(d). An individual cannot reject a reasonable accommodation offered by the employer, and then recover for the employer’s failure to provide a different reasonable accommodation. See, e.g., Phelps v. Optima Health, Inc., 251 F.3d 21, 28 (1st Cir. 2001); Schmidt v. Methodist Hosp. of Ind., Inc., 89 F.3d 342, 344-45 (7th Cir. 1996) (holding that employee's rejection of reasonable accommodations offered by employer “render[ed] him unqualified under the ADA”); Hankins v. The Gap, Inc., 84 F.3d 797, 802 (6th Cir. 1996); Bryant v. Caritas Norwood Hosp., 345 F. Supp. 2d 155, 168-69 (D. Mass. 2004) (“When a plaintiff employee rejects a reasonable accommodation offered by her employer, as Bryant did here, she is precluded from recovering under the ADA for her employer's alleged failure to provide a reasonable accommodation.”).

Continuing Nature of Requirement

The duty to provide a reasonable accommodation to an individual with a disability is a continuing one. It does not end with the provision of an accommodation. See Humphrey v. Mem’l Hosps. Ass’n, 239 F.3d 1128, 1138 (9th Cir. 2001) (“[T]he employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed.”); Picinich v. UPS, 321 F. Supp. 2d 485, 516 (N.D.N.Y. 2004) (“An employer’s duty to make reasonable accommodations is a continuing one, and will not be satisfied by a single effort.”). This duty encourages “employers to seek to find accommodations that really work” and avoids “the creation of a perverse incentive for employees to request the most drastic and burdensome accommodation possible out of fear that a lesser accommodation might be ineffective.” Humphrey, 239 F.3d at 1138. Thus, if the accommodation provided proves to be inadequate, or the employee’s situation changes, civil rights attorneys should avail themselves of further requests for accommodation, which the employer must consider anew.

II. Ongoing Discrimination under the ADA

A request for accommodation may lead to a successful accommodation that enables the employee to remain on the job. Alternatively, and as discussed above, the employer may fail to engage in the interactive process and fail to accommodate the employee, giving rise to a failure to accommodate claim under the ADA. It is also possible that a request for accommodation, or the predicate notice to an employer that an employee has a disability, may occasion precisely the differential treatment from the employer that the ADA is designed to eradicate. In these situations, the civil rights attorney needs to understand the possible claims that lay ahead.

Where the employer discriminates against the employee on the basis of the disability and takes an action against the employee that interferes with the terms, conditions, and privileges of employment, the employee will have a claim for disparate treatment under the ADA. See 42 U.S.C. § 12112(a).

Because courts have held that asking for a reasonable accommodation is a form of protected activity, see, e.g., Wright v. COMPUSA, Inc., 352 F.3d 472, 477-78 (1st Cir. 2003) (collecting cases), the civil rights attorney should also consider a claim of retaliation under 42 U.S.C. § 12203. It is important to note, however, that there is currently a split of authority on the question of whether a plaintiff may recover compensatory and punitive damages for a retaliation claim under the ADA. Compare Kramer v. Banc of Am. Secs., 355 F.3d 961, 965-66 (7th Cir. 2004) (holding that compensatory and punitive damages are not available under the ADA) with Edwards v. Brookhaven Sci. Assocs., LLC., 390 F. Supp. 2d 225, 234-36 (E.D.N.Y. 2005) (concluding that compensatory and punitive damages are available under the ADA). If the relevant jurisdiction does not allow recovery for compensatory and punitive damages, not only will the plaintiff be limited to equitable remedies, including injunction and back pay, but the plaintiff may also be denied the right to a jury trial. Kramer, 355 F.3d at 966-67.

Frequently, the discriminatory actions to which an employer subjects an employee may not individually constitute the kind of adverse actions that give rise to a claim. In combination and frequency, however, the actions may become severe or pervasive enough to give rise to a claim for hostile work environment harassment. Numerous courts have now held that there is a cause of action for hostile work environment harassment under the ADA. See Lanman v. Johnson County, Kansas, 393 F.3d 1151, 1155 (10th Cir. 2004); Shaver v. Indep. Stave Co., 350 F.3d 716 (8th Cir. 2003); Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir. 2001); Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 235 (5th Cir. 2001). Although the elements of the claim may vary slightly by court, generally a plaintiff will have to show: (1) that he is a qualified individual with a disability; (2) that he was subjected to unwelcome harassment; (3) that the harassment was based on his disability; (4) that the harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment; and (5) that some factual basis exists to impute liability for the harassment to the employer. Fox, 247 F.3d at 177. Courts have largely imported principles regarding these factors from the sexual harassment context, see id. at 178 (noting requirement of subjective and objective perception of hostile work environment), and civil rights attorneys should be mindful of the agency principles governing employer liability for harassment, as elucidated in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742

(1998), Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Pennsylvania State Police v. Suders, 542 U.S. 129, 140-41 (2004). See Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., Nos. 04-2614, 04-2615, 2006 WL 74411 (1st Cir. Jan 13, 2006) (discussing concepts of employer liability in disability context).

The civil rights attorney needs to stay in communication with his or her client regarding detrimental changes in the workplace that may give rise to this fact-specific claim. Relevant employer actions might include: assignments beyond an employee's medical restrictions, the employer's failure to provide agreed upon accommodations, increased performance scrutiny, physical and verbal abuse by supervisors or co-workers, stereotyping, interference with the performance of existing assignments, and ostracism. Numerous cases involving these facts, and others, in various combinations have survived summary judgment and supported verdicts for the plaintiff. See generally Fox, 247 F.3d at 179 (upholding jury verdict on harassment claim where supervisors berated plaintiff with "vulgar and profane language" on a weekly basis, encouraged other employees to ostracize disabled workers and refuse to give them necessary materials, and exposed plaintiff to physical harm by requiring him to perform tasks that were too physically demanding and beyond his medical restrictions); Flowers, 247 F.3d at 236-37 (upholding jury verdict where employee's supervisor, upon learning that employee was HIV positive, intercepted employee's phone calls, and eavesdropped on her conversations, and employee was required to undergo four random drug tests in a one week period, written up for her performance, and lured into antagonistic meetings under false pretenses); Johnson v. Billington, No. Civ.A. 98-1618 RWR, 2005 WL 3274488, at *10 (D.D.C. 2005) (stating that "[i]f Johnson was ostracized at work because of his disability, if he was subjected to daily disparaging conduct by his supervisors because of his disability, if he was denied basic resources to do his work because of his disability, and if he was blocked from advancement opportunities due to disability-based animus," then a reasonable jury could conclude he had been subjected to a hostile work environment); Hendler v. Intelcom USA, Inc., 963 F. Supp. 200, 201-02 (E.D.N.Y. 1997) (denying summary judgment where, after employer assured employee with asthma of a smoke-free work environment, employee's office did not have proper ventilation, supervisor ignored employee's requests that supervisor stop smoking in employee's presence and encouraged other employees to smoke, and supervisor told employee to "Grow up"); Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1108 (S.D. Ga. 1995) (denying summary judgment to employer on hostile work environment claim where supervisor berated plaintiff, physically assaulted him, warned him that he would "ride him until he quit," forced him to work beyond his medical restrictions, and assigned him the least desirable shifts).

On appropriate facts, a court may even find that disability harassment amounts to constructive discharge.¹ For example, in Smith v. Henderson, 376 F.3d 529 (6th Cir. 2004), the

¹ Although the United States Supreme Court held that the Faragher- Ellerth defense is available on a claim arising from constructive discharge, the defense is not available where the constructive discharge arises from "official action." See Pennsylvania State Police v. Suders, 542 U.S. 129, 140-41 (2004).

Sixth Circuit reversed a grant of summary judgment in a Rehabilitation Act case where, in the face of requests for reasonable accommodation, a supervisor criticized and berated the plaintiff in front of her subordinates, unilaterally altered the work schedules of the plaintiff's subordinates, refused to authorize overtime for plaintiff's subordinates, and refused to permit the plaintiff to delegate certain duties. *Id.* at 534. These actions had “the foreseeable consequence that [the plaintiff's] health would markedly deteriorate” and that she “would be compelled to quit her job in order to preserve her health.” *Id.* at 538.

In sum, the civil rights attorney should be aware of the issues, described above, that impact the interactive process. Moreover, where the requested accommodation is a leave of absence from work, the civil rights attorney must be aware of the issues that arise from the unavoidable intersection of the ADA and the FMLA, another statutory scheme that provides its own rules and standards that govern leaves of absence made necessary because of limitations arising from the employee's health.

III. The Family and Medical Leave Act (FMLA)

Under the FMLA, an employee may take up to 12 work weeks of unpaid leave during any twelve month period for a number of specified reasons, including because of the employee's own “serious health condition” that renders the employee unable to perform the functions of his or her job. *See* 29 U.S.C. § 2612(a)(1). The employer or employee may substitute the employee's accrued paid sick leave, provided that the health condition meets the employer's normal criteria for use of sick leave. *See* 29 C.F.R. § 825.207(c). The employer may calculate the twelve-month period in a variety of ways (calendar year, fiscal year, 12 months beginning at start of employee's FMLA leave, etc.), but the chosen method must be applied consistently to all employees. *See* 29 C.F.R. § 825.200(d)(1). The leave may be taken on an intermittent or reduced schedule basis when medically necessary.² If the employee elects to take intermittent leave, the employer may require the employee to transfer temporarily to an available position with equivalent pay and benefits, although not necessarily equivalent job duties, which can better accommodate the recurring periods of leave. *See* 29 U.S.C. § 2612(b)(2).

² *See* 29 C.F.R. § 825.117.

Nothing in the FMLA prevents an employer from granting leave more generous than that required by the FMLA. See 29 U.S.C. § 2653; 29 C.F.R. § 825.700. For example, an employer may grant an employee several weeks of paid leave rather than unpaid leave, and allow more than 12 weeks of leave per year.³

Serious Health Condition

A “serious health condition” is defined as “an illness, injury, impairment, or physical or mental condition” that involves either (1) “inpatient care in a hospital, hospice, or residential medical care facility,” or (2) “continuing treatment by a health care provider.” 29 U.S.C. § 2611(11).

“Inpatient care” -- i.e., any overnight stay in a hospital, hospice, or residential medical care facility -- includes any period of incapacity (inability to work, attend school, or perform other regular daily activities due to a serious medical condition or recovery therefrom) or any subsequent treatment in connection with the inpatient care. See 29 C.F.R. § 825.114(a)(1).

“Continuing treatment by a health care provider”⁴ is defined as:

- (1) a period of incapacity (defined above) of more than three consecutive days, and any related subsequent treatment or period of capacity, which also involves (a) treatment two or more times by a health care provider, or by a nurse, physician’s assistant, or health care service provider (e.g., physical therapist) operating under the supervision or referral of a health care provider, or (b) treatment one or more times by a health care provider which results in a regimen of continuing treatment under that provider’s supervision. See 29 C.F.R. § 825.114(a)(2)(i).

³ See Douglas v. E.G. Baldwin & Assoc., 150 F.3d 604, 608-09 (6th Cir. 1998) (finding that district court lacked subject matter jurisdiction over FMLA action against employer with fewer than 50 employees, even though employer voluntarily adopted policies comporting with the FMLA).

⁴ “Health care provider” includes doctors, osteopaths, clinical psychologists, dentists, podiatrists, optometrists, nurse practitioners, nurse midwives, chiropractors (for the treatment of spinal problems demonstrated by X-rays to exist), clinical social workers, licensed Christian Science practitioners, or anyone else accepted by the employer or employer’s health care benefits administrator for the certification of serious health conditions. See 29 C.F.R. § 825.118.

- (2) Any period of incapacity due to pregnancy, or for prenatal care, even if the absence does not last more than three days, and even if the employee or immediate family member does not receive treatment from a health care provider during the absence (e.g., due to severe morning sickness). See 29 C.F.R. § 825.114(a)(2)(ii) and (e).
- (3) Any period of incapacity or treatment due to a chronic serious health condition (a condition that requires periodic visits for treatment by a health care provider, continues over an extended period of time, or causes episodic periods of incapacity), even if the absence does not last more than three days, and even if the employee or immediate family member does not receive treatment from a health care provider during the absence (e.g., due to an asthma attack). See 29 C.F.R. § 825.114(a)(2)(iii) and (e).
- (4) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer’s or the terminal stages of a disease). See 29 C.F.R. § 825.114(a)(2)(iv).
- (5) Any period of absence to receive multiple treatments from a health care provider, or by a nurse, physician’s assistant, or health care service provider operating under the supervision or referral of a health care provider, either for restorative surgery after an accident or injury, or for a condition that would likely result in a period of incapacity of more than three days in the absence of medical intervention (e.g., chemotherapy treatments for cancer). See 29 C.F.R. § 825.114(a)(2)(v).
- (6) Examinations to determine if a serious health condition exists and to evaluate that condition. See 29 C.F.R. § 825.114(b).

A serious health condition generally does not include: routine physical, eye, or dental examinations; a regimen of treatment that can be initiated without a visit to a health care provider (e.g., bed rest, taking over-the-counter medications); common ailments such as a cold, the flu, upset stomach, routine dental care, etc., unless complications arise. See 29 C.F.R. §§ 825.114(b)-(c); cf. Miller v. AT & T Corp., 250 F.3d 820, 831 (4th Cir. 2001) (holding that employee’s flu qualified for FMLA leave because it met the regulatory requirements for a “serious health condition;” regulation stating that flu would not qualify for FMLA leave “unless complications arise” merely expressed the view that the flu would not normally meet the regulatory requirements for a “serious health condition”).

Treatment for substance abuse (as opposed to absence due to substance abuse) may qualify as a serious health condition if the above requirements are met. See 29 C.F.R. § 825.114(d). Likewise, “mental illness resulting from stress or allergies” may be a serious health condition if the above requirements are met. See 29 C.F.R. § 825.114(c).

Covered Employers

The FMLA applies to employers who have “50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”⁵ 29 U.S.C. § 2611(4). The 20 workweeks need not be consecutive. The Department of Labor uses the “payroll” method in counting the number of employees at a particular employer — if a person is listed on an employer’s payroll, he or she is counted as an employee regardless of whether he or she is actually paid during that week, whether he or she is on paid or unpaid leave, whether he or she works full-time or part-time, etc. See 29 C.F.R. § 825.105. Once an employer meets the 50 employees/20 workweeks threshold, it remains covered until it no longer meets that threshold for both the current and the preceding year.

An “employer” also includes any person who acts in the interest of an employer. Persons acting in the interest of the employer are individually liable for any violation of the FMLA. See 29 C.F.R. §§ 825.104(a), (d).

Eligible Employees

In order to be eligible for FMLA leave, an employee must (1) have worked at least 12 months for that employer (or the employer’s predecessor-in-interest), and (2) have worked at least 1,250 hours for that employer during the preceding 12-month period. In addition, the employee must be employed at a worksite where 50 or more employees are employed by that employer within 75 miles of that worksite. See 29 U.S.C. § 2611(2); 29 C.F.R. § 825.110(a).

The 12 months of work for the employer need not be consecutive. See 29 C.F.R. § 825.110(b). The hours counted towards the 1,250-hour requirement are defined according to the Fair Labor Standards Act’s definitions of compensable work hours. See 29 C.F.R. § 825.110(c).

⁵ Factors such as common management, interrelation of operations, centralized control of labor relations, or degree of common ownership or financial control may suggest that separate entities are part of an “integrated employer,” in which case their employees can be added to meet the 50 employee threshold. See 29 C.F.R. § 825.104(c)(2); see also Hukill v. Auto Care, Inc., 192 F.3d 437, 444 (4th Cir. 1999) (holding that common ownership of separate corporations was outweighed by separateness of operations and labor relations, and that district court had erred in finding that separate corporations constituted an “integrated employer”); Cousin v. Sofono, Inc., 238 F. Supp. 2d 357, 364-65 (D. Mass. 2003) (denying summary judgment to employer where genuine issues of fact on whether defendant’s three Domino’s Pizza franchises could be aggregated for purposes of determining whether defendant was a covered employer).

The 12 month and 1,250 hour requirements are calculated as of the time the requested FMLA leave would commence. See 29 C.F.R. § 825.110(d).

The twelve-month requirement was considered in Babcock v. Bellsouth Adver. & Publ'g Corp., 348 F.3d 73 (4th Cir. 2003). In that case, mistakenly believing that she had been approved for medical leave, the employee was absent from work from May 27th to June 9th. During that time, her one year anniversary with her employer passed. On June 9th, she learned that she would have to report to work that day or be subject to disciplinary action. She requested additional unpaid medical leave, which was not granted because the employer believed she was ineligible under the FMLA because her leave had started prior to her twelve month anniversary. The employer then terminated the plaintiff on June 14th. The Court rejected the employer's argument that the employee's leave began prior to her one year anniversary, finding instead that her absence was "unexcused" and therefore did not constitute leave. Although the employer could have fired her at any time prior to her one year anniversary, it did not do so. By the time it terminated her, the employee had requested leave for which she was now eligible under the FMLA. Accordingly, the Company was liable for interference with her rights. Id. at 77-78. See also Ruder v. Mainegeneral Med. Ctr., 204 F. Supp. 2d 16, 19-20 (D. Me. 2002) (allowing an employee to use unused vacation time to reach the one-year threshold).

In Plumley v. Southern Container, Inc., 303 F.3d 364 (1st Cir. 2002), the Court considered whether compensation awarded for work-hours lost during an employee's successful pursuit of a grievance count as "hours of service" within the FMLA. Id. at 366. Based on a review of the text and structure of the FMLA, the Court concluded that hours of service "include only those hours actually worked in the service and at the gain of the employer." Id. at 372.

In Butler v. Owens-Brockway Plastic Prods., Inc., 199 F.3d 314 (6th Cir. 1999), the plaintiff, who was terminated for excessive absenteeism following an FMLA leave period, alleged that she was terminated in retaliation for taking leave. The district court granted summary judgment for the employer, finding that the plaintiff had not worked 1,250 hours in the 12 months prior to *her termination*. The Sixth Circuit reversed, finding that the plaintiff had worked 1,250 hours in the 12 months prior to *her FMLA leave*, and that she could therefore sustain a retaliation claim. Id. at 318; see also Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1 (1st Cir. 1998) (holding that plaintiff must be FMLA-eligible at the time of the requested leave, not at the time of the adverse action).

When an employee requests FMLA leave, an employer must notify him or her of eligibility to take such leave. Under 29 C.F.R. § 825.110(d), if an employer mistakenly confirms the employee's eligibility, or if it fails to inform a non-eligible employee that he or she is not eligible before the requested leave begins, the employer loses the right to challenge that employee's eligibility. Several courts have held that this regulation is invalid, however, because it impermissibly seeks to expand the statutory definition of eligible employees. See Woodford v. Community Action of Greene County, Inc., 268 F.3d 51, 56-57 (2d Cir. 2001); Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 582-83 (7th Cir. 2000); Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 795-97 (11th Cir. 2000). Other courts have distinguished these

cases, finding that an ineligible employee could still prevail under the doctrine of equitable estoppel if the employer failed to inform the employee of the FMLA's requirements for eligibility. See Duty v. Norton-Alcoa Proppants, 293 F.3d 481, 493-94 (8th Cir. 2002); Kosakow v. New Rochelle Radiology Assocs., P.C., 274 F.3d 706, 722-27 (2d Cir. 2001).

Notice and Certification Requirements

For a foreseeable leave period based on a planned medical treatment, an employee must provide an employer with notice of a request for leave at least 30 days before the date the leave is to begin. If the leave will begin in less than 30 days, the employee should give notice as soon as practicable. See 29 U.S.C. § 2612(e). For unforeseeable medical leave, an employee normally will be required to give notice within two days after learning of the need for leave. See 29 C.F.R. § 825.303(a). By regulation, the “employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed.” 29 C.F.R. §§ 825.302(c), 825.208(2). The notice must only provide the employer with the circumstances showing that the FMLA might apply. See Brenneman v. Medcentral Health Sys., 366 F.3d 412, 421 (6th Cir. 2004) (“[T]he critical test for substantively-sufficient notice is whether the information that the employee conveyed to the employer was reasonably adequate to apprise the employer of the employee’s request to take leave for a serious health condition that rendered him unable to perform his job.”); see also Daoud v. Avamere Staffing, LLC, 336 F. Supp. 2d 1129, 1139-40 (D. Or. 2004) (denying summary judgment for employer where employee informed her supervisor that “her arthritis was flaring up and asked for shortened workdays”). Notice may be verbal or written. See 29 C.F.R. § 825.302(c). An employee may be asked to comply with an employer’s customary procedures for the request of leave (e.g., providing a written note), but an employer cannot deny FMLA leave on this ground if the employee has given at least verbal notice. See 29 C.F.R. § 825.302(d).

The civil rights attorney should pay particular care to advise their clients to provide adequate notice, since notice is a frequent topic of litigation. Quite often, an employee, believing that he or she has adequately informed an employer about the need to take leave, will be absent from work. The employer then terminates the employee due to this absence. When litigated, the employer asserts that the employee was fired for absenteeism and that the notice was insufficient to invoke FMLA protection.

In Manuel v. Westlake Polymers Corp., 66 F.3d 758, 762 (5th Cir. 1995), an early case addressing this issue, the plaintiff developed a severely ingrown toenail and was unable to walk without crutches for over a month. After informing her employer of the problem and her inability to return to work, the plaintiff took over a month off, and was suspended as a result. After the plaintiff brought suit, the employer asserted that this absence was not protected under the FMLA because the plaintiff had not mentioned the FMLA in her request for leave, emphasizing that the FMLA’s notice provision requires employees to give notice of the “employee’s intention to take leave under such subparagraph,” 29 U.S.C. § 2612(e)(1). In denying the defendant’s motion, the court held that an employee need not mention the FMLA by name in order to request FMLA leave. “The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee’s request to take

time off for a serious health condition.” Id. at 764; accord Brohm v. JH Properties, Inc., 149 F.3d 517, 523 (6th Cir. 1998) (same).

In Collins v. NTN-Bower Corp., 272 F.3d 1006 (7th Cir. 2001), the plaintiff, who was suffering from depression, called her supervisor and told him that she would be missing work because she was “sick.” The court assumed that the plaintiff’s depression was clinical depression and that it could meet the statutory requirement of a “serious health condition.” The court concluded, however, that, as a matter of law, telling an employer that you are “sick” represents insufficient notice of a request to take FMLA leave, as the descriptor “sick” does not allow an employer to determine whether the leave would qualify as a “serious health condition.” See id. at 1008.

In Spangler v. Federal Home Loan Bank of Des Moines, 278 F.3d 847, 850 (8th Cir. 2002), the plaintiff, a bank employee, had been diagnosed as having a form of depression. The bank was aware of the plaintiff’s depression, as she had frequently taken leave because of it. The plaintiff had a problem with absenteeism; on multiple occasions, she called in to work and left a voice mail for her supervisor informing him that she would not be able to work that day. One morning, the plaintiff called in to work and informed her employer that she was missing work that day because she had “depression again.” When the plaintiff failed to show up for work the next day, she was terminated. The district court granted summary judgment for the defendant because it found the plaintiff’s notice to be insufficient as a matter of law. The Eighth Circuit Court of Appeals reversed, finding that a reasonable jury could conclude that the plaintiff had given her employer adequate notice of her request for FMLA-protected leave. The Eighth Circuit stated that

[u]nlike Collins, the Bank here knew Spangler suffered from depression, knew she needed leave in the past for depression and knew from Spangler specifically on September 16, 1998, she was suffering from ‘depression again.’ The Bank may have a strong argument that Spangler’s notice was untimely, or was unclear and otherwise inappropriate, or was even in violation of the Bank’s reasonable notice policies. However, we cannot say, as a matter of law, viewing the evidence in the light most favorable to Spangler, no genuine issue of material fact with regard to appropriate notice exists.

Id. at 852-53.

The circumstances surrounding the employee’s medical condition itself may also provide sufficient notice of the need for FMLA leave. In Byrne v. Avon Products, Inc., 328 F.3d 379 (7th Cir. 2003), an employee with “more than four years of highly regarded service” began to sleep on the job. Investigation by the company confirmed that the employee was sleeping between three and six hours of his shift. When the employee failed to show up for a meeting, the company fired the employee. The employee, it turned out, was suffering from depression, and had suffered hallucinations and had attempted suicide. The Seventh Circuit reversed the grant of summary judgment, holding that a reasonable juror could conclude either that the employee’s

“dramatic change in behavior” provided notice to the employer of his medical problem and the need for leave, or that the employee’s inability to provide notice excused him from providing it. Id. at 381-82. Cf. Conrad v. Eaton Corp., 303 F. Supp. 2d 987, 998 (N.D. Iowa 2004) (noting that “[t]he thrust of the *Byrne* decision . . . is that a qualifying employee’s unusual workplace behavior can, itself, constitute notice to the employer that FMLA leave could be necessary,” but declining to apply this theory of notice).

An employer may ask that a request for leave due to the serious health condition of the employee be accompanied by certification from the health care provider. See 29 U.S.C. § 2613(a). Such an initial request must be in writing.⁶ See 29 C.F.R. 825.305(a). See also Conrad, 303 F. Supp. 2d at 999-1001 (denying summary judgment to employer where there was factual dispute over whether employer’s FMLA summary document constituted a “specific request” for medical certification of plaintiff’s medical condition). At the time of the request, “the employer must also advise an employee of the anticipated consequences of an employee’s failure to provide adequate certification.” See 29 C.F.R. § 825.305(d).

Where the leave is foreseeable and thirty days’ notice has been given the employee should provide this certification before the leave begins. See 29 C.F.R. § 825.305(b). When the leave is not foreseeable, “the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer’s request), unless it is not practicable under the particular circumstances to do so despite the employee’s diligent, good faith efforts.” Id.; see Peter v. Lincoln Tech. Inst., 255 F. Supp. 2d 417, 443 (E.D. Pa. 2002) (“The failure of an employer to provide notice of when medical certification is due goes to whether it met its notice obligations under the FMLA.”).

In Peter, the employer requested medical certification and the employee filled out the necessary forms, delivered them to her physician’s office, and informed the physician that they needed to be completed and returned. The physician did not do so, despite repeated requests from the plaintiff. The Court held that a jury “could reasonably find that Peter’s reliance on [her doctor’s] office’s assurances that the form would be mailed, coupled with her weekly

⁶ Generally, “the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.” See 29 C.F.R. § 825.305(c).

communication with [her employer], constituted sufficient good-faith diligence to excuse her delay” in providing the certification. Id. at 442-43.

The certification must include: (1) the date on which the serious health condition began, (2) the probable duration of the condition, and (3) the medical facts regarding the condition.⁷ See 29 U.S.C. § 2613(b). The certification must state that the employee is unable to perform the functions of his or her job.⁸ See 29 U.S.C. § 2613(b).

The employer may request additional information from the employee’s health care provider with the employee’s permission, for purposes of clarification and authenticity of the certification. See 29 C.F.R. § 825.307(a). If the employer has reason to doubt the certification from the employee’s health care provider, the employer may require, at its own expense, that the employee obtain a second opinion from a health care provider chosen or approved by the employer. See 29 U.S.C. § 2613(c). This second health care provider “may not be employed on a regular basis by the employer.” See 29 C.F.R. § 825.307(a)(2). In the event that the opinions of the first and second health care providers conflict, the employer may require, at its own expense, that the employer consult a third health care provider, and the opinion of this third health care provider shall be binding on both the employer and the employee. See 29 U.S.C. § 2613(d); 29 C.F.R. § 825.307(c). There is a split of authority on whether an employer who fails to utilize the second and third opinion procedures forfeits the right to challenge the employee’s health condition in subsequent proceedings. Compare Sims v. Alameda-Contra Costa Trans. Dist., 2 F. Supp. 2d 1253, 1263 (N.D. Cal. 1998) (holding that employer does forfeit later challenge by failing to request second and third opinions); Wheeler v. Pioneer Dev. Servs., Inc., 349 F. Supp. 2d 158, 167 (D. Mass. 2004) (applying Sims); Dowell v. Indiana Heart Physicians, Inc., No. 1:03-CV-01410-DFH-TA, 2004 WL 3059788, at *5 n.1 (S.D. Ind. Dec. 22, 2004) (distinguishing Sims, although agreeing with its reasoning); with Rhoads v. FDIC, 257 F.3d 373, 385 (4th Cir. 2001) (holding that employer does not forfeit later challenge by failing to request second and third opinions); Stekloff v. St. John’s Mercy Health Sys., 218 F.3d 858, 860 (8th Cir. 2000) (same); Porter v. New York Univ. Sch. of Law, No. 99 Civ. 4693(TPG), 2003 WL 22004841, at *7-8 (S.D.N.Y. Aug. 25, 2003) (same).

⁷ See Boyd v. State Farm Ins. Cos., 158 F.3d 326, 331 (5th Cir. 1998) (holding that employee had failed to comply with certification requirement where he had submitted notes from doctors that failed to state that the employee’s absence was medically required).

⁸ An employee is unable to perform his or her job functions if he or she cannot work at all, or if he or she cannot perform one of the essential functions of his or her job, within the meaning of the Americans with Disabilities Act. See 29 C.F.R. § 825.115.

Although it is the employer's responsibility to designate leave as FMLA leave, see 29 C.F.R. § 825.208(a), the ramifications of its failure to do so remain unclear. Prior to 2002, the Department of Labor promulgated a regulation that provided: "If an employee takes paid or unpaid leave and the employer does not designate the leave as unpaid leave, the leave taken does not count against an employee's FMLA entitlement." See 29 C.F.R. § 825.700(a). The Supreme Court struck down 29 C.F.R. § 825.700(a) as an impermissible exercise of authority by the Department of Labor. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002). In Ragsdale, the plaintiff, under her employer's own leave policy, took seven months of unpaid medical leave in order to receive treatment for cancer. The employer did not notify the plaintiff that it was designating her leave as FMLA leave. The plaintiff returned to work and then requested to take FMLA leave, but was informed that she had already used all of her available leave. The plaintiff brought suit, claiming that under section 825.700(a), she was entitled to 12 weeks of FMLA leave in addition to the seven months of leave she had already taken under her employer's plan.

The Supreme Court, in a 5-4 decision, affirmed the Eighth Circuit's ruling in favor of the employer. Writing for the majority, Justice Kennedy concluded that the regulation violated the statutory scheme imposed by Congress in two ways. First, while the FMLA entitles employees to "a total" of 12 workweeks of leave during any 12-month period, see 29 U.S.C. § 2612(a)(1), the regulation would require certain employers to grant leave longer than this minimum period. The regulation thus impermissibly expanded the substantive guarantees of the FMLA. See 535 U.S. at 93-94. Second, the regulation created an irrebuttable presumption that an employee has been prejudiced by an employer's failure to designate leave as FMLA leave. Under the statute, a plaintiff must prove damages by showing the prejudice he or she suffered by an employer's failure to grant him or her FMLA leave. In Ragsdale's case, however, the plaintiff had not shown that she would have behaved differently (by, for example, taking less leave, or by taking intermittent leave) had she received the required notice. The regulation thus impermissibly instructed courts to ignore the statute's requirement of proof of actual harm. Id. at 90-91.

Ragsdale thus left doubt over the validity of regulations that preclude an employer from retroactively designating leave as FMLA leave. In the case of paid leave, for instance, 29 C.F.R. § 825.208(c) provides:

If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

Numerous courts have questioned the validity of this provision in the wake of *Ragsdale*. See, e.g., *Sims v. Schultz*, 305 F. Supp. 2d 838, 845 (N.D. Ill. 2004) (noting that validity of 29 C.F.R. 825.208 “may fairly be questioned after *Ragsdale*” and that plaintiff will have to show prejudice due to failure of employer to properly designate leave); *Bukta v. J.C. Penney Co.*, 359 F. Supp. 2d 649, 660-61 (N.D. Ohio 2004) (same); *Donahoo v. Master Data Ctr.*, 282 F. Supp. 2d 540, 555 (E.D. Mich. 2003) (same).

During an employee’s FMLA leave period, an employer must continue to maintain the employee’s health benefits coverage under any group health plan, on the same terms coverage would have been provided had the employee not taken leave. See 29 U.S.C. § 2614(c)(1); 29 C.F.R. § 825.209.

Restoration

Any eligible employee who takes FMLA leave must be restored to his or her previous position, or to an equivalent position with equivalent pay, benefits, and other conditions of employment, upon his or her return from leave. See 29 U.S.C. § 2614(a)(1). An employee has no right to “any right, benefit, or provision of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.” 29 U.S.C. § 2614(a)(3). For example: (1) a employee may be subject to termination during a workplace reduction-in-force (“RIF”) while he or she is out on FMLA leave, but the employer must demonstrate that the employee would have been terminated notwithstanding the FMLA leave (e.g., if the RIF was performed according to seniority and the employee had little seniority); (2) if a shift has been eliminated completely, the employer is not obligated to restore the employee to that same shift; (3) the employer may terminate an employee if the employee was hired for a specific term and that term has expired. A RIF may not be used as pretext to retaliate against an employee for asserting FMLA rights.

Additionally, under 29 C.F.R. § 825.216:

If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer’s responsibility to continue FMLA leave, maintain group health plan benefits, and to restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise.

An employer also may deny restoration to certain highly compensated “key” employees (employees whose salaries are among the highest 10% for that employer within 75 miles of the employee’s worksite) if such denial is necessary “to prevent substantial and grievous economic injury to the operations of the employer.” See 29 U.S.C. § 2614(b).

Remedial Provisions

The FMLA provides two types of causes of action. First, a plaintiff may bring an “interference” or “entitlement” action. See 29 U.S.C. § 2615(a)(1) (“It shall be unlawful for any

employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.”). This action is based on the denial of a right granted by the FMLA and does not require an analysis of an employer’s motivation.

Second, a plaintiff may bring a “retaliation” or “discrimination” action. This action is based on an employer’s discrimination against an employee for opposing practices made unlawful by the FMLA, filing an FMLA-related charge, or for giving information or testimony related to possible FMLA violations. See 29 U.S.C. § 2615. This action requires an analysis for employer’s motivation in taking an action against an employee.

Remedies

If an employee wishes to seek redress for violations of his or her FMLA rights, he or she may file an administrative complaint with the Department of Labor. The Secretary of Labor may file suit against employers who have violated the FMLA. See 29 U.S.C. § 2617(b).

An employee may also bring a lawsuit in federal or state court. See 29 U.S.C. § 2617(a)(2). The lawsuit must be filed within 2 years of the last event constituting the alleged violation, or within 3 years if the violation was willful. See 29 U.S.C. § 2617(c). There is no administrative exhaustion requirement for FMLA suits.⁹ See 29 U.S.C. 2617(a)(2); 29 C.F.R. 825.400.

If an employee prevails in a lawsuit against an employer for a violation of the FMLA, the employer may be liable for the employee’s lost wages, salary, benefits, or other monetary losses, plus interest. Additionally, the employer may be liable for an additional liquidated damages amount equal to the amount of the employee’s actual losses plus interest. The court may also issue appropriate equitable relief, such as reinstatement or promotion. See 29 U.S.C. § 2617(a)(1).

Punitive damages and damages for emotional distress are not available under the FMLA. See, e.g., Holpp v. Integrated Commc’ns Corp., No. Civ. 03-3383 (WGB), 2005 WL 3479682, at *7 n.7 (D.N.J. Dec. 20, 2005); Lloyd v. Wyoming Valley Health Care Sys., Inc., 994 F. Supp. 288, 293 (M.D. Pa. 1998); Settle v. S.W. Rodgers, Co., Inc., 998 F. Supp. 657, 666 (E.D. Va. 1998). The court “shall” award attorneys fees and costs to a prevailing plaintiff. See 29 U.S.C. § 2617(a)(3).

⁹ Accord Ogborn v. United Food & Commercial Workers, Local No. 881, 2000 WL 1409855, at *8 (N.D. Ill. Sept. 25, 2000); Shannon v. City of Philadelphia, 1999 WL 126097, at *4 (E. D. Pa. March 5, 1999); Johnson v. Runyon, 1999 WL 893841, at *4 n.3 (W.D. Mich. Apr. 22, 1999); Krohn v. Forsting, 11 F. Supp. 2d 1082, 1085 (E.D. Mo. 1998); Danfelt v. Board of County Comm'rs of Washington County, 998 F. Supp. 606, 609 (D. Md. 1998); Baber v. Runyon, 1998 WL 912065, at *8 (S.D.N.Y. Dec. 30, 1998); Spurlock v. NYNEX, 949 F. Supp. 1022, 1030 (W.D.N.Y. 1996).

Keep in mind also that most states, and some municipalities, have a family and medical leave law paralleling the federal FMLA. The state or local statute should always be consulted, as it may contain better protections for employees than the federal law.¹⁰

IV. Overlap Between the ADA and FMLA: Leave as a Reasonable Accommodation

¹⁰ Where a state or local family and medical leave statute offers different protections than the federal FMLA, the law that provides the greater family and medical leave rights to employees applies. See 29 U.S.C. § 2651(b).

The Family and Medical Leave Act has considerable overlap with the ADA, as both statutes require employers to modify their behavior in response to limitations arising from an employee's health. Similarities and differences between the two laws are summarized in a chart appended to this article.¹¹ A few noteworthy areas of concern for civil rights lawyers are discussed below.

Leave as an Accommodation

The FMLA is clear that an employee with a serious medical condition is entitled to take up to 12 weeks of unpaid leave within any given 12 month period. See 29 U.S.C. § 2612(a)(1). Leave may also be available as a reasonable accommodation for an employee whose serious medical condition qualifies as a disability under the ADA. See 29 C.F.R. § 1630 App., 1630.2(o) (noting that “accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment”); see also Humphrey, 239 F.3d at 1135-36; Cehrs, 155 F.3d at 783; Criado, 145 F.3d at 443; Rascon, 143 F.3d at 1333. At the outset, a civil rights attorney needs to know that the FMLA does not have an “undue hardship” defense. Rather, under the FMLA, an employer need not restore a “key” employee to her position once the leave ends. See 29 U.S.C. § 2614(b); 29 C.F.R. § 825.312. A “key” employee is one who is among the highest paid ten percent of all of the employer's employees within 75 miles of the worksite. 29 C.F.R. § 825.217(a). Thus, a civil rights attorney needs to make a preliminary assessment of his or her client's position in the company salary hierarchy before requesting leave under the FMLA.

Although entitlement to leave under the ADA is an analysis distinct from the question of FMLA entitlement, see 29 C.F.R. § 825.702(a) (stating that “the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA]”), the employer must provide leave under “whichever statutory provision provides the greater rights to employees,” id.

¹¹ The chart has been reprinted with permission of its author, Elizabeth Zuckerman of Zuckerman & Fisher (Princeton, New Jersey).

Numerous courts have held that a leave of absence may constitute a reasonable accommodation.¹² See Humphrey v. Mem'l Hosp. Ass'n, 239 F.3d 1128, 1135-36 (9th Cir. 2001) (“We have held that where a leave of absence would reasonably accommodate an employee’s disability and permit him, upon his return, to perform the essential functions of the job, that employee is otherwise qualified under the ADA.”); Cehrs v. Northeast Ohio Alzheimer’s Research Ctr., 155 F.3d 775, 783 (6th Cir. 1998) (concluding that “no presumption should exist that uninterrupted attendance is an essential job requirement” and holding that “a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances”); Criado v. IBM, 145 F.3d 437, 443 (1st Cir. 1998); Rascon v. US West Commc’ns, Inc., 143 F.3d 1324, 1333 (10th Cir. 1998). The use of leave as a reasonable accommodation is premised on the ability of the employee, upon treatment, recuperation, and return, to perform the essential functions of the position. See Humphrey, 239 F.3d at 1135-36; Stewart v. United States, No. C-99-4058 JCS, 2000 WL 1705657, at *6 (N.D. Cal. 2000); Powers v. Polygram Holding, Inc., 40 F. Supp. 2d 195, 199-200 (S.D.N.Y. 1999). Even then, the Ninth Circuit has held that “the ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation.” Humphrey, 239 F.3d at 1136. In Humphrey, the Ninth Circuit reversed summary judgment upon sufficient evidence from the plaintiff’s physician that the plaintiff’s condition was “treatable” and that she would need “some time off” to get “the symptoms better under control.” Id.

Whether leave is reasonable in a given case depends on an individualized assessment of its facts. Criado, 145 F.3d at 443; Shannon v. City of Phila., No. CIV.A. 98-5277, 1999 WL 1065210, at *6 (E.D. Pa. Nov. 23, 1999). Courts are more likely to view leave as a reasonable accommodation where the employee gives the employer a specific duration for the leave (as opposed to leaving the return to work indefinite), see Wood v. Green, 323 F.3d 1309, 1314 (11th Cir. 2003) (noting that the ADA only “covers people who can perform the essential functions of their jobs presently or in the immediate future”); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 650 (1st Cir. 2000) (collecting cases); Cousins v. Howell Corp., 113 F. Supp. 2d 262, 270-71 (D. Conn. 2000) (“[T]he courts have held that medical leave of indefinite duration is not a required reasonable accommodation.”), and where the absences will not be unscheduled or erratic, see, e.g., Garcia-Ayala, 212 F.3d at 650 (collecting cases); Powers, 40 F. Supp. 2d at 200

¹² This is consistent with the EEOC’s position that permitting the use of accrued paid leave, or unpaid leave, may be forms of reasonable accommodation. See 29 C.F.R. § 1630 App., 1630.2(o) (noting that “accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment”); see also Enforcement Guidance, at 13. An employee who needs leave is entitled to it “if there is no other effective accommodation and the leave will not cause an undue hardship.” Enforcement Guidance, at 16. An employer must allow an employee to exhaust accrued paid leave first and then, if that does not cover the entire period of leave, the employer should allow the employee to take unpaid leave. Id.

(same). Where an employer routinely provides medical leave to its employees, an employee will also be in a better position to argue that a leave of absence is reasonable, and to defeat an employer's argument that leave is an undue hardship. Cehrs, 155 F.3d at 783; Criado, 145 F.3d at 444; Rascon, 143 F.3d at 1333-34.

In terms of the period of leave, one year appears to be the outer limit beyond which courts conclude that an employee is incapable of performing the essential functions of the position, and leave is therefore unavailable as a reasonable accommodation. See Micari v. Trans World Airlines, Inc., 43 F. Supp. 2d 275, 281 (E.D.N.Y. 1999) (collecting cases); Powers, 40 F. Supp. 2d at 200 (same); see also Stephen F. Befort, "The Most Difficult ADA Reasonable Accommodation Issues: Reassignment And Leave of Absence," 37 Wake Forest L. Rev. 439, 462 (2002) (noting that courts "tend to view one year as a rational dividing line in determining the reasonableness of leave requests").

Requests for an extension of leave – such as leave taken under the FMLA – may also be reasonable accommodations. This is a critical point. The civil rights attorney must remember that while the FMLA limits leave to a maximum of twelve weeks, the ADA requires employers to provide reasonable accommodations to disabled employees. Thus, when an employee has exhausted FMLA leave, he or she should request additional leave, if necessary, as an accommodation if the employee can be considered disabled under the ADA (i.e., substantially limited in a major life activity). The EEOC has concluded that the employer "may consider the impact on its operations caused by the initial . . . absence, along with other undue hardship factors." See Enforcement Guidance at 16. See Bukta, 359 F. Supp. 2d at 668-70 (denying summary judgment where employee requested additional leave of one month after using at least five months of leave, and where employer had not replaced employee during her leave); Rogers v. New York Univ., 250 F. Supp. 2d 310, 317 (S.D.N.Y. 2002) (denying summary judgment to employer where employer denied plaintiff reasonable accommodation of extended leave and employer had not filled the position but used temporary workers); Shannon, No. CIV.A. 98-5277, 1999 WL 1065210, at *6 (denying summary judgment where employee requested additional three month leave after using twelve weeks of FMLA leave, where employee's physician was "hopeful" that employee would be able to return to work within three to six months, and employer had another employee assume duties in employee's absence). Thus, unless the employer can demonstrate that the additional leave would create an undue hardship, it should allow it as an accommodation under the ADA.

The Return to Work

Importantly, and differently than under the FMLA, an employee who is granted leave as a reasonable accommodation under the ADA is entitled to return to his/her same position – as opposed to the same or equivalent one, as under the FMLA – unless the employer can demonstrate that holding open the position would impose an undue hardship. Enforcement Guidance, at 14. If it is an undue hardship, then the employer must reassign the employee to a vacant, equivalent position for which the employee is qualified. Id. at 14, 16.

Moreover, if at the end of her leave the employee is unable to perform the essential functions of the position, she may be terminated without violating the FMLA. Id. at 16. Under the ADA, the employer must consider whether the employee can perform the essential functions of the position with reasonable accommodation. See 29 C.F.R. § 825.702(c)(4). Such accommodations may include reassignment to a different vacant position. Id.

An employee's return to work after suffering a medical problem may also occasion irrational discrimination by the employer, giving rise to claims under the ADA. For instance, it is not uncommon for employers to tell employees that they should not return to work until they are "100%" or "fully" recovered. This policy can give rise to an ADA claim for failure to accommodate. Numerous courts have held that a blanket "100% healed" rule is a *per se* violation of the ADA because it circumvents the required individualized assessment of whether the qualified individual is able to perform the essential functions of his or her job either with or without reasonable accommodation. See, e.g., McGregor v. National R.R. Passenger Corp., 187 F.3d 1113, 1116 (9th Cir. 1999); Warmesley v. New York City Transit Auth., 308 F. Supp. 2d 114, 122 (E.D.N.Y. 2004); Beveridge v. Northwest Airlines, Inc., 259 F. Supp. 2d 838, 848 (D. Minn. 2003); EEOC v. Yellow Freight Sys., Inc., No. 98 CIV. 2270 (THK), 2002 WL 31011859, at *20 (S.D.N.Y. Sept. 9, 2002); Allen v. Pacific Bell, 212 F. Supp. 2d 1180, 1196 (C.D. Cal. 2002).

Additionally, an employer facing the return of such an employee may harbor irrational doubts about the abilities of an employee to fully perform the job as he or she did prior to the serious medical condition. Although the employee may not actually be disabled, the employer may *perceive* the employee as permanently disabled. 42 U.S.C. § 12102(2)(C). If the employer takes adverse actions against the employee, such as terminating or demoting the employee, the employer will have a claim for intentional "perceived as" discrimination under the ADA. Id.

Moreover, if the employer refuses to provide accommodations, it may be held liable for failure to accommodate under the ADA. There is currently a circuit split on the issue of whether an employer will face liability for failing to provide reasonable accommodation to an employee it perceives as disabled. Compare D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005) (holding that an employer can be held liable for failing to accommodate an employee that it perceives as disabled); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775-76 (3d Cir. 2004); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 166-70 (E.D.N.Y. 2002) (holding that duty to engage in "interactive process is certainly triggered once the employer regards an employee who has requested an accommodation as disabled"); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996) (assuming without holding that ADA requires reasonable accommodation of employees perceives as disabled) with Kaplan v. N. Las Vegas, 323 F.3d 1226, 1233 (9th Cir. 2003) (concluding that the ADA does not require an employer to accommodate an employee that the employer perceives as disabled); Weber v. Strippit, Inc., 186 F.3d 907, 916-17 (8th Cir. 1999); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998).