NAVIGATING THORNY ADA AND FMLA ISSUES: A CASE STUDY

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MEET BILL SMITH
ADDRESSING DISABILITIES DURING INTERVIEW PROCESS: “I LEFT FOR MEDICAL REASONS”

- Generally, the only permissible pre-employment medical inquiry is whether the applicant can perform essential job functions, with or without reasonable accommodation
  - Further inquiry violates ADA
  - If the employer inquires further, the applicant reveals a disability, and the employer does not hire the applicant, the applicant can allege that his/her disability was the reason for non-hire

- So, do not ask what the medical condition was
  - Move on to your next question

42 U.S.C. § 12112(d)(2)
ACCOMMODATING DISABILITIES IN THE INTERVIEW PROCESS

- Employers have an obligation to accommodate job applicants during the interview and hiring process
  - Example: Providing a sign-language interpreter for an applicant who is deaf
  - Example: Providing an extended interview period for an applicant with a speech impairment, or allowing the applicant to write out his/her answers to interview questions
  - Example: Interviewing a wheelchair-bound applicant in a wheelchair accessible location

42 U.S.C. § 12112(d)(2)
ACCOMMODATING DISABILITIES IN THE INTERVIEW PROCESS (CONT.)

- If the need for accommodation to complete the interview process is apparent during that process, or if the applicant requests an accommodation in order to complete the interview process, the employer may ask what accommodation the applicant requires for the interview process.

- If the need for accommodation to complete the interview process is not apparent during the process, the employer may tell the applicant what the hiring process involves (e.g. – job demonstration; time limitations on interview; timed test), and may ask whether the applicant needs a reasonable accommodation in the hiring process.
MEDICAL INQUIRIES DURING INTERVIEW PROCESS

- An employer may ask an applicant whether he or she will be able to perform the essential functions of the job, with or without reasonable accommodation.

- **General Rule:** An employer may not ask an applicant whether he/she needs a reasonable accommodation in order to perform the job.

- **Exception to the General Rule:** Where the disability is obvious (e.g. – applicant is in a wheelchair) or the applicant has voluntarily disclosed that he/she has a disability, and the employer reasonably believes that the applicant will need a reasonable accommodation to perform essential job functions.

- If the exception applies, the employer may ask the applicant what type of accommodation the applicant will need in order to perform essential job functions.
NON-DISCRIMINATION DURING HIRING PROCESS

- An employer may not refuse to hire a qualified individual with a disability, based on the individual's disability
  
  - CHTP therefore may not refuse to hire Bill based on the belief that a person with narcolepsy cannot safely operate a crane

- An employer may not refuse to hire a qualified individual with a disability if the refusal is based on the fact that the employer will need to implement an accommodation

- An employer may refuse to hire an applicant with a disability if the applicant, with reasonable accommodation, is less qualified than other applicants

- An employer may refuse to hire an applicant with a disability if the applicant, with reasonable accommodation, is not able to perform the essential functions of the job or would pose a direct threat to the health or safety of himself or others

42 U.S.C. § 12112(a)(b)
HE DID WHAT?
DISCIPLINE OR DISCHARGE OF EMPLOYEES FOR WORKPLACE CONDUCT RESULTING FROM DISABILITY

- Issue: Sleeping on the job is a dischargeable offense at CHTP. Bill was caught sleeping on the job. May CHTP discharge him?

- EEOC Enforcement Guidance on Reasonable Accommodation (Q. 35): “An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity”
  - “An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability”

- There is a significant risk of liability, however, where the employer disciplines or discharges an employee based on conduct that results directly from a disability (e.g. – narcoleptic employee falling asleep on job; epileptic employee who has seizure resulting in property damage)
COMMUNICATION OF INFORMATION REGARDING EMPLOYEE DISABILITIES

- Employer representatives should communicate medical information concerning employees only on a “need-to-know” basis
  - Supervisors and managers may be informed regarding restrictions on the work or duties of the employee, and accommodations that are needed for the employee
  - First aid and safety personnel may be informed, where appropriate, if the disability might require emergency treatment

DIRECT THREAT AS A BASIS FOR DISQUALIFYING EMPLOYEES

- An employee is not a “qualified individual with a disability” if the employee, because of disability, poses a direct threat to his/her health or safety, or to the health or safety of others.

  - “Direct threat” means a “significant” risk to the health or safety of the individual or others that cannot be eliminated through reasonable accommodation.

42 U.S.C. §§ 12111(3), 12113(b)
LET'S TALK
DISCIPLINE OR DISCHARGE OF EMPLOYEES FOR FAILURE TO FOLLOW TREATMENT REGIMEN

- Employer has no obligation, under ADA, to monitor an employee's taking of medication
- Employer has no obligation, under ADA, to monitor an employee's medical treatment, to make sure that he/she is receiving appropriate treatment
- Employer may discipline or discharge a disabled employee for the employee's failure to follow a treatment regimen, if the failure to follow that regimen has caused a direct threat to the health or safety of the employee or co-workers
DISCIPLINE OR DISCHARGE OF EMPLOYEES FOR FAILURE TO FOLLOW TREATMENT REGIMEN (CONT.)

- Even in absence of a direct threat, an employer may remove an employee from a position due to his/her failure to follow a treatment regimen if
  - That failure to follow the treatment regimen renders the employee unable to perform the essential functions of the job
  - Provided that the employee’s medical condition cannot otherwise be accommodated

EEOC Enforcement Guidance on Reasonable Accommodation, Q. 37, 38
ASKING ABOUT PRESCRIPTION MEDICATIONS

- Generally, requiring all employees to disclose their use of prescription medications is impermissible, because the requirement is not job-related and consistent with business necessity.

- In limited circumstances, where the use or non-use of prescription medications may result in a direct threat to the health or safety of the employee or others, the employer may inquire as to the employee’s use of medications.

EEOC Enforcement Guidance on Disability-Related Inquiries, Q. 8
RIGHT TO REQUIRE MEDICAL EXAMINATIONS

- An employer may require an employee to submit to a medical examination only if the examination is job-related and consistent with business necessity.

- Under the ADA, an employer may require an employee to go to a health care professional of the employer’s choosing:
  1. To substantiate that the employee has a disability and that the employee needs a reasonable accommodation, if the employee’s treating physician provides insufficient documentation.
  2. If the employer reasonably believes that the employee poses a direct threat.
RIGHT TO REQUIRE MEDICAL EXAMINATIONS (CONT.)

- A medical examination must be limited to determining whether the employee can perform his/her job without posing a direct threat, with or without accommodation

- An employer must pay all costs associated with the examination

42 U.S.C. § 12112(d)(4)(A); EEOC Enforcement Guidance on Disability-Related Inquiries, Q. 11
HELP US HELP YOU
THE INTERACTIVE PROCESS

- The employer and employee should engage in an “informal process” to clarify what the employee needs and to identify appropriate reasonable accommodations

- Exact nature of dialogue will vary

- Where both the disability and the type of accommodation needed are obvious, there may be little or no need to engage in a discussion

- Where the disability and/or functional limitations are not obvious, the employer may need to ask the employee regarding the nature of the disability and the employee’s functional limitations, in order to identify an effective accommodation

EEOC Enforcement Guidance on Reasonable Accommodation, Q. 5
SELECTING THE FORM OF REASONABLE ACCOMMODATION

- An employer may choose the accommodation, as long as the chosen accommodation is effective

- An employer may select the easier, less expensive accommodation

EEOC Enforcement Guidance on Reasonable Accommodation, Q. 9
PLACEMENT IN ANOTHER JOB AS A FORM OF ACCOMMODATION

- Reassignment to a “vacant position” is a form of reasonable accommodation

- An employer is not required to remove an employee from his/her position, in order to assign a disabled employee to that position, as a form of accommodation

- In order to be entitled to reassignment to a vacant position as a form of accommodation, the employee must be “qualified” for the position
  1. The employee satisfies the skill, experience, and education requirements of the position
  2. The employee is able to perform the essential functions of the position, with or without reasonable accommodation
PLACEMENT IN ANOTHER JOB AS A FORM OF ACCOMMODATION (CONT.)

- An employer is not required to train or otherwise assist the disabled employee to become qualified

42 U.S.C. § 12111(9)(B); EEOC Guidance on Reasonable Accommodation
MAY AN EMPLOYER REQUIRE AN EMPLOYEE TO TAKE FMLA LEAVE?

- An employer must offer FMLA leave to an FMLA-eligible employee who will be absent for an FMLA-qualifying reason.

- An employer may not require an employee to take a leave of absence, FMLA or otherwise, if the employee is able to perform the essential functions of the job, does not pose a direct threat, and does not wish to take leave.

- If the employee is unable to perform the essential functions of the job or poses a direct threat, and the employee cannot be reasonably accommodated by means other than a leave of absence, the employer generally must offer a leave of absence as an accommodation.
MAY AN EMPLOYER REQUIRE AN EMPLOYEE TO TAKE FMLA LEAVE? (CONT.)

- Exception: An “indefinite” leave of absence is not a reasonable accommodation that an employer needs to make.

- Under the ADA, an employer may not require a qualified individual with a disability to accept an accommodation that the employee does not want.

- Under the ADA, an employer therefore may not require an employee to take FMLA leave as a disability accommodation.

- If the employee refuses a leave of absence, and no other reasonable accommodation is available, the employer may require the employee to take the leave of absence or face discharge.
MAY AN EMPLOYER REQUIRE AN EMPLOYEE TO TAKE FMLA LEAVE? (CONT.)

- If the employee takes the leave of absence, the Company may treat the leave as FMLA leave.

EEOC Enforcement Guidance on Reasonable Accommodation, Q. 11.
PAPERWORK, PAPERWORK!
Certification of Health Care Provider for Employee's Serious Health Condition
(Family and Medical Leave Act)

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR, RETURN TO THE PATIENT

OMB Control Number: 1215-0003
Expires: 05/31/2018

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee’s health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.5, if the Genetic Information Nondiscrimination Act applies.

Employer name and contact: Clark Hill Toluene Products - Amy Thompson - HR Bldg.

Employee’s job title: OSHA Nurse Operator

Regular work schedule: 7:00 a.m. - 3:30 p.m., M-F

Employee’s essential job functions:

Check if job description is attached: ✓

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.315. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.303(b).

Your name:
First: Whilli M. Middle: A. Last: Smith

SECTION III: For the HEALTH PROVIDER

INSTRUCTIONS to the HEALTH PROVIDER: Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as “lifetime,” “unknown,” or “indeterminate” may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(d), genetic services, as defined in 29 C.F.R. § 1635.3(e), or the manifestation of disease or disorder in the employee’s family members, 29 C.F.R. § 1635.3(b). Please be sure to sign the form on the last page.

Provider’s name and business address: Med-Harry Clinic, 415 E. Tchoupitoulas, P.O.

Type of practice / Medical specialty: General

Telephone: (414) 399-2363 Fax: (414) 399-2357

Page 1 Form WH-380-E Revised May 2015
PART A: MEDICAL FACTS

1. Approximate date condition commenced: 2002
   
   Probable duration of condition: __________________________
   
   Mark below as applicable:
   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility? 
   □ No □ Yes. If so, dates of admission: __________________________
   
   Date(s) you treated the patient for condition: 1/1/16
   
   Will the patient need to have treatment visits at least twice per year due to the condition? □ No □ Yes.
   
   Was medication, other than over-the-counter medication, prescribed? □ No □ Yes.
   
   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)? □ No □ Yes. If so, state the nature of such treatments and expected duration of treatment: __________________________
   
   2. Is the medical condition pregnancy? □ No □ Yes. If so, expected delivery date: __________________________
   
   3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee’s essential functions or a job description, answer these questions based upon the employee’s own description of his/her job functions.
   
   Is the employee unable to perform any of his/her job functions due to the condition? □ No □ Yes.
   
   If so, identify the job functions the employee is unable to perform: __________________________
   
   4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):
   
   Mrs. Smith presents as a normally healthy 44-year-old male. He reports a history of monography, but reports that his condition is now under control. If allowed to return, he claims his current job would preclude him from being currently in the overnight service position.
PART B: AMOUNT OF LEAVE NEEDED
5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? Yes. 
   No. If so, estimate the beginning and ending dates for the period of incapacity:

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee’s medical condition? Yes. 
   No. If so, are the treatments or the reduced number of hours of work medically necessary? Yes. 
   No. Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? Yes. 
   No. Is it medically necessary for the employee to be absent from work during the flare-ups? Yes. 
   No. If so, explain:

Based upon the patient’s medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency: ___ times per ___ week(s) ___ month(s)
Duration: ___ hours or ___ day(s) per episode

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER:
FMLA CERTIFICATION FROM MEDICAL PROVIDER OTHER THAN TREATING PHYSICIAN

- Where leave is taken because of an employee’s own serious health condition, an employer may require the employee to obtain a medical certification “from a health care provider”

- An employee therefore may provide a certification from a health care provider other than the employee’s treating physician

- An employee’s providing a certification from a health care provider other than the employee’s treating physician may, under some circumstances, be a reason for doubting the validity of the certification

29 C.F.R. § 825.306(a)
COMPLETENESS OF FMLA CERTIFICATION

- A certification is considered incomplete if one or more of the applicable entries have not been completed.

- If a certification is incomplete and the employer wants a complete certification, the employer must inform the employee, in writing, regarding what additional information is necessary.

- The employer must provide the employee with seven calendar days to cure the deficiency.

- If the deficiency is not cured in a resubmitted certification, the employer may deny FMLA leave.

29 C.F.R. § 825.305(c)
SUFFICIENCY OF FMLA CERTIFICATION

- A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive.

- If a certification is insufficient and the employer wants a sufficient certification, the employer must inform the employee, in writing, regarding how the certification is insufficient.

- The employer must provide the employee with seven calendar days to cure the deficiency.

- If the deficiency is not cured within seven calendar days, the employer may deny FMLA leave.

29 C.F.R. § 825.305(c)
VALIDITY OF FMLA CERTIFICATION

- An employer that has reason to doubt the validity of an FMLA certification may require the employee to obtain a second medical opinion at the employer’s expense. 29 C.F.R. § 825.307(b)

- Potential reasons to doubt the validity of a certification
  - Observations regarding the employee that are inconsistent with certification
  - Statements by the employee that are inconsistent with certification
  - Pattern of conduct by the employee that is inconsistent with certification
VALIDITY OF FMLA CERTIFICATION (CONT.)

- Pending receipt of the second opinion, the employee is provisionally entitled to FMLA 29 C.F.R. § 825.307(b)

- If the certifications ultimately do not establish the employee’s entitlement to FMLA leave, the employer is not required to treat the leave as FMLA leave and may treat the employee’s absences as paid or unpaid leave under the employer’s established leave policies

- If the employer determines that the employee has misrepresented the reasons or need for leave, the employer may discipline the employee pursuant to the employer’s misconduct policies
OBLIGATION TO ALLOW EMPLOYEE TO RETURN TO WORK

- If the employee presents an FMLA certification or other medical documentation indicating that the employee is able to return to work, the employer generally is required to allow the employee to return to work
  - Exception: Where the employer has a good faith doubt regarding the employee’s ability to return to work, notwithstanding the medical release that the employee has provided
TIME’S UP
RETURN TO WORK PHYSICAL

- An employer may require an employee to submit to a return-to-work medical examination in order to return from FMLA leave, if the employer has a uniformly-applied policy or practice of requiring all similarly-situated employees who take leave for such conditions to submit to those examinations.

- Employees are similarly-situated if they occupy the same position or have the same serious health condition.

- The original FMLA designation must inform the employee that a fitness-for-duty certification may be required.
RETURN TO WORK PHYSICAL (CONT.)

- An employer may request a fitness-for-duty certification only with regard to the particular health condition that has caused the employee's need for FMLA leave.

- No second or third opinions on a fitness-for-duty certification may be required, under the FMLA.

- The employer is responsible for paying the cost of the fitness-for-duty examination and certification.

29 C.F.R. § 825.312
TERMINATION OF EMPLOYEE AT END OF FMLA LEAVE

- If the employee is able to return to work during or at the end of the 12-week FMLA period, the employer must reinstate the employee to either
  - The position that the employee held when FMLA leave commenced
  - An equivalent position, with equivalent pay, benefits, and other terms and conditions of employment

- An employer may discharge an employee while on FMLA leave if the employer would have discharged the employee even if he/she had not taken FMLA leave
TERMINATION OF EMPLOYEE AT END OF FMLA LEAVE (CONT.)

- Termination of an employee who is not able to return to work at the end of the employee’s FMLA entitlement does not violate the FMLA

29 U.S.C. §§ 2614(a)(1), 2614(a)(3)
POTENTIAL LEGAL CLAIMS ARISING FROM CHTP’S HANDLING OF BILL SMITH – SECOND MEDICAL OPINION FROM COMPANY DOCTOR

- The employer is entitled to designate the health care provider to furnish the second opinion

- The selected health care provider, however, may not be: (1) employed on a regular basis by the employer; or (2) a provider with whom the employer regularly contracts or whom the employer regularly utilizes, unless
  
  - The employer is located in an area in which access to health care is extremely limited (e.g., rural areas in which only one or two doctors practice in the relevant specialty)

29 C.F.R. § 825.307(b)
POTENTIAL LEGAL CLAIMS ARISING FROM CHTP’S HANDLING OF BILL SMITH – RETURN TO WORK PHYSICAL FROM COMPANY DOCTOR

- As a condition to restoring an employee to work from FMLA, an employer may require the employee to obtain and present a certification “from the employee’s health care provider” that the employee is able to return to work.

- An employee has the same obligation to participate and cooperate in the fitness-for-duty certification as in the initial certification process.
POTENTIAL LEGAL CLAIMS ARISING FROM CHTP’S HANDLING OF BILL SMITH – RETURN TO WORK PHYSICAL FROM COMPANY DOCTOR (CONT.)

- Under the ADA, however, an employer may require an employee to submit to a return-to-work physical examination by a healthcare provider of the employer’s choosing, if the employer has a reasonable belief that the employee is unable to perform essential job functions, or poses a direct threat, due to a medical condition.

29 C.F.R § 825.312; EEOC Guidance on Reasonable Accommodation, Q. 17
POTENTIAL LEGAL CLAIMS ARISING FROM CHTP’S HANDLING OF BILL SMITH – FAILURE TO ENGAGE IN INTERACTIVE PROCESS/FAILURE TO ACCOMMODATE AT END OF FMLA LEAVE

- An employer has an obligation to reasonably accommodate an employee who remains disabled at the end of FMLA leave.

- Reasonable accommodation may include extending the leave beyond 12-week FMLA entitlement.

- Reasonable accommodation may include any other accommodation that would allow the employee to perform the essential functions of the job (e.g. – removal of non-essential functions; assignment to vacant position).

- The employer should engage in the interactive process at the end of FMLA leave unless it is apparent that the employee is not disabled or that no accommodation is possible.
POTENTIAL LEGAL CLAIMS ARISING FROM CHTP’S HANDLING OF BILL SMITH – PERSONAL LIABILITY UNDER FMLA

• An individual may be liable under the FMLA if the individual is an “employer”
  
  “Employer” is defined as any person who acts, directly or indirectly, in the interest of an employer with respect to any of the employees of such employer 29 U.S.C. § 2611(4)(A)

• Management and supervisory employees, including HR Directors, may be personally liable under the FMLA if they control, in whole or in part, an employee’s rights under the FMLA Graziadio v. Culinary Institute of America, et al., No. 15-888-cv (2nd Cir. 2016)

• FMLA liability may include back pay, front pay, liquidated damages, and attorneys’ fees

  29 U.S.C. § 2617
THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.