

Tale of two cases: How to avoid costly FMLA and ADA mistakes

Two recent cases exemplify how easy it is for an unaware and unprepared employer to run afoul of employment laws.

In one, an employer's handbook promised more benefits than the law required the company to provide. In another, the employer transferred a disabled employee apparently just to ease a supervisor's discomfort with dealing with a disabled staff member.

Both cases show employers must look at the big picture the same way a jury would.

Handbook no balm for Gilead

A 7th Circuit Court of Appeals case, *Peters v. Gilead Sciences*, decided in July involved an injured Indiana employee who took two short medical leaves in quick succession and was offered a different position when he returned to work. He declined and the company terminated him.

He filed suit under the FMLA, alleging he had been denied reinstatement to the same or equivalent position. His suit also included a claim of promissory estoppel under Indiana state law. Promissory estoppel is the legal concept that promises made to another person become a contract when that person relies on them to take action.

California-based Gilead Sciences was not covered by the FMLA because it did not have the requisite 50 employees within 75 miles of its Indiana location. Nevertheless, the employee handbook explained the company's FMLA leave policy in detail. Further, when the employee was on leave, the company sent a standard letter explaining its general FMLA policy. Both communications said the company's FMLA leave policy applied to "all employees" and promised 12 weeks of leave to anyone who had worked the requisite 12 months and 1,250 hours in the last year. Neither the policy nor the letter contained any reference to the 50/75 exception.

Gilead moved to have the case dismissed, arguing the FMLA did not cover

the situation. A federal district court agreed, and the employee appealed.

The appeals court didn't think the issue was clear. It felt a jury should decide whether the handbook promises established a binding contract. However, it said, even in the absence of such a contract, the plaintiff might be able to state a claim for leave and damages under state common law if he could show he reasonably relied on the company's promises to his detriment. The case will now go back to district court.

What employers should do

As this case illustrates, an employer with multiple work sites must make sure that references to the FMLA in handbooks and notices include the 50/75 exception. The handbook should reiterate that those working at work sites covered by the exception are not eligible for FMLA leave.

Pharmed out

In a 2nd Circuit Court of Appeals case, *Brady v. Wal-Mart Stores*, an employee with cerebral palsy sued Wal-Mart under the ADA and New York Human Rights law, asserting, among other things, a failure to reasonably accommodate.

The man walks with a limp, speaks slowly and has vision problems because of his condition. Despite these limitations, he worked in a pharmacy for two years with no problems. In fact, Wal-Mart was impressed enough with his record to hire him when he applied to work in the pharmacy of one of the retailer's New York locations.

But the head pharmacist did not share the company's enthusiasm for the young man. She refused to train him and immediately arranged a transfer to a position where the man collected garbage and swept the parking lot. She later testified he was too slow and had difficulty matching customers' names with prescriptions. The new position conflicted with his college schedule and he eventually quit.

He filed a discrimination complaint with the EEOC, which ultimately filed

suit against Wal-Mart. In court, the company claimed the employee never requested an accommodation, and that the employee had testified that he did not think he needed one. It argued that the district court should have granted judgment as a matter of law on his failure-to-accommodate claim. Generally, it is the disabled employee's responsibility to request an accommodation.

Relying on district court decisions, the 2nd Circuit found that employers have a duty under the ADA to reasonably accommodate an employee's obvious disability—even absent a request for accommodation.

The court stated, "that an employer has a duty reasonably to accommodate an employee's disability if the disability is obvious—which is to say, if the employer knew or reasonably should have known that the employee was disabled." In this case, the employee's disability manifested itself in his walking slowly with a limp, slower and quieter speech and an inability to look directly at people when talking to them.

Wal-Mart was already under an ADA settlement agreement to train its supervisors. Clearly, this supervisor wasn't trained.

Cost of failing to accommodate

The jury was incensed, awarding \$2.5 million in compensatory damages, \$5 million in punitive damages and \$9,114 in economic damages. The District Court reduced the compensatory damages to \$600,000 and the punitive damages to \$300,000, the maximum allowed by the ADA. The employer asked the court to eliminate the punitive damages, but the court saw its record of disability discrimination as a persistent pattern and refused.

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