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## Avoiding FMLA and ADA Mistakes

By: Louis P. DiLorenzo<sup>1</sup>

Two recent cases exemplify how easy it is for an unaware and unprepared employer to run afoul of employment laws. A case in the Seventh Circuit, *Peters v. Gilead Sciences*, 06 4290, decided July 14, 2008, involved an injured employee who took two short medical leaves in succession and was offered a different position when returning to work. He declined and his employment was terminated. He filed suit under the Family Medical Leave Act (FMLA), alleging he had been denied the right to reinstatement to the same or equivalent position, and a claim of promissory estoppel under state law. The employee was not statutorily eligible for FMLA coverage under the FMLA's 50/75 exception as plaintiff's worksite did not have the requisite 50 employees within 75 miles. However, when the employee was on leave, the company sent a standard letter explaining its general FMLA policy. The company handbook also explained the FMLA leave policy in detail. Both communications applied the FMLA leave policy to "all employees" and promised 12 weeks of leave to whomever had worked the requisite 12 months and 1,250 hours. Neither the policy nor the letter contained any reference to the 50/75 exception. It was unclear, according to the court, whether these promises established a binding contract. However, even in the absence of such a contract, under state common law, the plaintiff might be able to state a claim for leave and damages under the rubric of promissory estoppel, if he could show he reasonably relied on the company's promises to his detriment. Summary judgment for the employer was reversed and the case was remanded for further inquiry. As this case illustrates, an employer with multiple worksites must make sure that references to the FMLA in handbooks and notices include the 50/75 exception and reiterate that those working at such worksites covered by the exception are not eligible for FMLA leave.

In a Second Circuit case, *Brady v. Wal-Mart Stores, Inc.*, 06-5486, July 2, 2008, an employee with cerebral palsy sued his employer under the American with Disabilities Act (ADA) and New York Human Rights law, asserting, among other things, a failure to reasonably accommodate. After beginning a new position as pharmacy assistant, in which he stocked merchandise, lifting items up to and over 50 pounds, and dispensing prescriptions, the employee perceived his supervisor was unhappy with his performance. She was impatient with him and told him to speed it up; she later testified he was too slow and had difficulty matching customers' names with prescriptions. Soon afterwards, his supervisor refused to schedule his work hours and sent him to personnel. He was transferred to one less desirable job and then another which conflicted with his college schedule and eventually quit. The employer claimed because the plaintiff never requested an accommodation

and actually testified that he did not think he needed one that the district court should have granted judgment as a matter of law on his failure to accommodate claim. Generally, it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed. For the first time, the opportunity to consider the exception to this general rule was before the Second Circuit. Relying on district court decisions, the circuit court 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 shuffle and a limp, a slower and quieter speech and an inability to look directly at people when talking to them. This case shows the importance of management training and preparedness. An informed manager would have taken a proactive approach and, being aware of the legal issues, would have sought accommodation and training for the employee and counsel from human resources.

Be Careful Out There!

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